IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/3/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.6619 of 2018

M/s. MSKG Engineering
Consultancy Services
Partnership Firm
rep. By its Partner - Mr.T.Mahendran
No.32 Krishna Flats, 59, 1st Avenue
100 Feet Road
Ashok Nagar
Chennai 600 083. ... Petitioner

Vs

State Bank of India
Stressed Assets Management Branch
"Red Cross Buildings"
32 Red Cross Road
Egmore
Chennai 600 008. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorarified mandamus to call for the records pertaining to letter dated 15/3/2008 by the respondent and quash the same as illegal, arbitrary and unlawful and consequently direct the respondent Bank to accept the balance of Rs.77.00 lakhs and issue a sale certificate pertaining to property being land comprised in Paimash No.11, Survey No.99, measuring an extent of 6160 sq.ft, bearing Plots No.2 and Plot No.3, situated in 154 Ram Nagar, South Madipakkam Village, the Registration District of Chengalpattu and Sub-Registration District of Velachery.

For petitioner ... Mr.K.N.Selvabharathi

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)

M/s. MSKG Engineering Consultancy Services, Chennai, has participated in the e-auction sale notice, dated 31/10/2017, issued by State Bank of India, Stressed Assets Management Branch, Chennai. Sale was effected for Item No.1 of the schedule property, for Rs.2,36,00,000/-. By letter, dated 29/11/2017, of the Bank, sale was confirmed and petitioner has remitted a sum of Rs.23,40,000/-, vide RTGS, dated 27/11/2017. Petitioner has been advised to remit Rs.35,60,000/-, immediately and the balance amount of Rs.1,77,00,000/-, within fifteen days, from the date of auction, i.e., on or before 13/12/2017, for transfer of the said property, in their favour. In the same letter, Bank has also brought to the notice of the auction purchaser/petitioner that on failure to remit the balance amount, within the specified period, i.e., on or before 13/12/2017, amount already remitted would be forfeited. Subsequently, writ petitioner, vide letter, dated 12/12/2017, has sought for extension of time, for 45 days, to make payment of remaining portion of the bid amount. Considering the said request, dated 12/12/2017, Bank as a special case, extended the time, for making payment of the balance amount of e-auction sale, till 29/12/2017. Accordingly, Bank, vide letter, dated 15/12/2017, requested the petitioner, to make payment of the balance amount of Rs.1.77 crores, by 29/12/2017, otherwise, the amount already remitted would be forfeited.

2. Thereafter, petitioner has sent an e-mail, dated 22/12/2017, requesting for extension of time by 30 days, to make payment of the remaining amount. Time has been extended by 29/1/2018. Accordingly, Bank has sent a letter, dated 3/1/2018, stating that no more extension of time will be granted and if the balance amount is not paid, on or before 29/1/2018, amount already paid i.e., Rs.59 lakhs would be forfeited.

3. Thereafter, once again, petitioner has sent a letter, dated 27/1/2018, requesting for extension of time, after 28/2/2018, for making payment of the remaining amount. Bank has accepted the said request. By letter, dated 31/1/2018, informed the petitioner, if the balance amount is not paid, on or before 26/2/2018, and not after 28/2/2018 and the amount already paid would be forfeited.

4. Contending inter alia that the petitioner's Banker has requested few clarifications, to sanction loan to the petitioner, to make payment of the balance amount to State Bank of India, and since sanction of loan from the petitioner's bank was delayed, for want of clarification, petitioner has sent a

letter, dated 23/2/2018, to the Deputy General Manager, Stressed Assets Management Branch, Chennai, respondent herein, for one month extension, till 26th March 2018, to make the remaining payment of Rs.77 lakhs. This is followed by an e-mail, dated 23/2/2018, to the respondent and also a letter, dated 23/2/2018, wherein the writ petitioner has stated that as the time granted, expired on 26/2/2018, a further period of 90 days, from the expiry of 15 days, from the date of initial deposit, with the respondent, was still available. In the letter, dated 23/2/2018, petitioner has stated that so far, they have paid Rs.159 lakhs, out of Rs.236 lakhs and balance of Rs.77 lakhs alone must be paid. Bank has sent an e-mail, dated 26/2/2018, stating that request for further extension of time of another 15 days, cannot be granted. Bank has reiterated that amount already remitted would be forfeited.

5. Though the petitioner was all along requesting extension of time, to make the balance amount, in letter, dated 26/2/2018, by describing the letters of the Bank, to forfeit the amount already remitted as threat and alleging that the Bank was not co-operating, requested the bank, to refund the amount paid by them or otherwise part with the land proportionate to the amount paid. For brevity, letter, dated 26/2/2018, of the petitioner, addressed to the Authorised Officer, State Bank of India, Chennai, is reproduced hereunder:-

> "With reference to the above, we would like to inform you that the points raised by us by our letter dated 22/2/2018 has not been clarified by your branch resulting in the delayed sanction of loan by Indusind Bank to meet the balance played.
>
> Further, you have accepted a sum of Rs.135.4 after depositing 10% of the bid amount agreeing to extend the time. While it is so how you are threatening to forfeit the entire amount. I am advised to state that the right of forfeiture is in fined to the stage of depositing within days from the date of depositing 10% and not when time is extended beyond the period of 15 days and extended upto a period of three months.
>
> As we have reached a stage, where you are not willing to co-operate, we request to refund the amount paid by us, or otherwise part with the land proportion to the paid amount. If forfeiture is applicable that should have been done well before making 15% of payment.

Intentionally allowing two extensions and allowing to make payment of 159 lakhs then threatening with the forfeiture is not acceptable."

6. Responding to the letter, dated 26/2/2018, bank has sent an e-mail, dated 27/2/2018, denying the allegations and reiterated the stand already taken. Once again, the writ petitioner has sent a letter, dated 26/2/2018, to the Authorised Officer, State Bank of India, Chennai, stating that even though 90 days has crossed from the date of auction i.e., 29/11/2017, they would like to bring it to the Bank's attention that they were under the impression that after 15 days from the date of auction i.e., 13/12/2017, period of 90 days has to be computed and thus, the writ petitioner still had time to remit the amount, within three months, to be calculated from 13/12/2017. On the above grounds, petitioner has sought for extension of time, upto 15th March 2018.

7. Referring to the earlier letters, petitioner has sent letters dated 13/3/2018, 15/3/2018, and also enclosed a Demand Draft No.038732, dated 15/3/2018, drawn on Indus Ind Bank, for Rs.77 lakhs. Bank did not accept the payment made, beyond the period stated supra and vide letter, dated 15/3/2018, returned the draft of Rs.77 lakhs. For brevity, letter, dated 15/3/2018, of the Bank addressed to the petitioner is reproduced hereunder:-

"Further to the above mentioned letters, the balance amount of Rs.77 lakhs is payable for the sale consideration of the property sold through auction. We are enclosing a demand draft No.038732 dated 15/3/2018 drawn on Indus Ind Bank, in your favour for Rs.77 lakhs.

With this amount, we have paid the entire sale consideration, we request you to kindly accept the same and help us to get the sale certificate."

8. Being aggrieved by the said letter, dated 15/3/2018, petitioner/auction purchaser, has filed the instant writ petition, for the writ of certiorarified mandamus, to call for the records, pertaining to letter, dated 15/3/2008, by the respondent and quash the same as illegal, and consequently direct the respondent Bank, to accept the balance of Rs.77.00 lakhs and issue a sale certificate, pertaining to property being land comprised in Paimash No.11, Survey No.99, measuring an extent of 6160 sq.ft, bearing Plots No.2 and Plot No.3, situated in 154 Ram Nagar, South Madipakkam Village, the Registration District of Chengalpattu and Sub-Registration District of Velachery.

9. On the above facts, and inviting the attention of this Court to Rule 9 (4) of the Security Interest (Enforcement) Rules, 2002, Mr.K.N.Selvabharathi, learned counsel for the petitioner submitted that as per the said Rule, the balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period, as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

10. He further submitted that three months time has to be reckoned, after the expiry of the fifteenth day of confirmation of sale of the immovable property and if such computation is made, taking note of the payment of the entire sale amount, by 15/3/2018, petitioner has fulfilled the statutory obligation and that therefore, rejection of the request of the petitioner, for extension of time, contrary to the rule and therefore, impugned letter, dated 15/3/2018, has to be set aside and consequently, the respondent Bank should be directed to issue sale certificate, as prayed for. Learned counsel further submitted that the petitioner was under the bona fide impression that three months period should be computed only from the expiry of fifteen days, from the date of auction, which falls, on 13/12/2017 and thereafter, the extended period of three months, was available. Learned counsel for the petitioner has also expressed financial difficulty and no prejudice would be caused to the Bank, if the balance amount is received.

11. On the aspect as to whether the petitioner had received the demand draft for Rs.77 lakhs, stated to have been sent along with letter, dated 15/3/2018, by the Bank, he has no direct answer.

12. Heard the learned counsel for the petitioner and perused the materials available on record.

13. Rule 9 of the Security Interest (Enforcement) Rules, 2002, deals with "Time of sale, issue of sale certificate and delivery of possession, etc."

14. As per sub-Rule 3 of Rule 9 of the said Rules, on every sale of immovable property, the purchaser shall immediately, i.e., on the same day or not later than next working day, as the case may be, pay a deposit of twenty-five percent, of the amount of the sale price, which is inclusive of earnest money deposited, if any, to be authorised officer conducting the sale and in default of such deposit, the property shall be sold again.

15. As per Rule 4 of Rule 9 of the said Rules, the balance

amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period, as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

16. As stated supra, sale has been conducted, on 29/11/2017. On the same day, sale confirmation has been issued by the respondent Bank, acknowledging the remittance of Rs.23,40,000/-, vide RTGS, dated 27/11/2017. Writ petitioner has been advised to remit Rs.35,60,000/-, immediately and the balance amount of Rs.1,77,00,000/-, within fifteen days, from the date of auction, i.e., on or before 13/12/2017, for transfer of property, in favour of the petitioner.

17. Bank has also informed the writ petitioner that failure to remit the balance amount, within the specified period, i.e., on or before 13/12/2017, the amount already remitted would be forfeited. Thereafter, vide letters, exchanged between the parties, extension of time has been granted till 26/2/2018 and in all the correspondence, Bank has categorically stated that if the balance amount is not remitted, within the extended period, the amount already remitted by the petitioner would be forfeited.

18. As stated supra, at one stage, writ petitioner, vide, letter, dated 26/2/2018, has sought for refund of the amount paid by them or otherwise, part with the land proportionate to the amount paid. Petitioner has also contended that forfeiture if at all can be done before making 15% of the payment and the same cannot be done later. Thus, it could be seen on one hand, the petitioner wanted refund of the amount paid by them and on the other hand, sought for extension of time, for making the balance payment. Action of the petitioner falls within the doctrine of approbate and reprobate. Reference can be made to few decisions.

19. In New Bihar Biri Leaves Co. Vs. State of Bihar, reported in 1981 (1) SCC 537, at paragraphs 48 and 49, the Hon'ble Supreme Court held as follows:-

> "48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobat (one who approbates cannot reprobate). This principle, though

originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co., reported in 1921 2 KB 608 Douglas Menzies v. Umphelby, reported in 1908 AC 224, 232 see also stroud's judicial dictionary, Vol. I, p. 169, 3rd Edn.).

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

20. In R.N.Gosain Vs. Yashpal Dhir, reported in 1992 (4) SCC 683, at paragraph 10, the Hon'ble Supreme Court held as follows:-

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, reported in 1921 (2) KB 608, 612 (CA) 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)

21. In I.T. Commissioner Vs. Firm Muar, reported in AIR 1965 SC 1216, at paragraph 13, the Supreme Court held as follows:-

> ".........The doctrine of "approbate and reprobate" is only a species of estoppel; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute."

22. In Prashant Ramachandra Deshpande Vs. Maruti Balaram Haibatti, reported in 1995 Supp (2) 539, the principle of "approbate and reprobate" has been explained. At Paragraph 2, it is held,

> "2. ....Similarly, on the principle that a person may not approbate and reprobate, "a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent". Vide Halsbury's Laws of England, 4th Edn., Vol. 16, para 1507."

23. In Cauvery Coffee Traders, Mangalore, Vs. Hornor Resources (International) Company Limited., reported in 2011 (10) SCC 420, the Supreme Court at paragraphs 33 to 35, held as follows:-

> 33. In R.N. Gosain v. Yashpal Dhir, reported in 1992 (4) SCC 683 = 2011 (1) SCC (Civ) 451, this Court has observed as under: (SCC pp.687-88, para 10)
>
> "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'."

34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao, reported in AIR 1956 SC 593, CIT v. V.MR.P. Firm Muar, reported in AIR 1965 SC 1216, Maharashtra SRTC v. Balwant Regular Motor Service, reported in AIR 1969 SC 329, .R. Deshpande v. Maruti Balaram Haibatti, reported in 1998 (6) SCC 507 = AIR 1998 SC 2979, Babu Ram v. Indra Pal Singh, reported in 1998 (6) SCC 358 = AIR 1998 SC 3021, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, reported in 2004 (2) SCC 663 = AIR 2004 SC 1330, Ramesh Chandra Sankla v. Vikram Cement and Pradeep Oil Corpn. v. MCD. reported in 2008 (14) SCC 58 = 2009 (1) SCC (L&S) 706 = AIR 2009 SC 713.

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, 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.

24. In Joint Action Committee of Air Line Pilots' Association of India (ALPAI) Vs. Director General of Civil Aviation, reported in 2011 (5) SCC 435, the Hon'ble Supreme Court, at paragraph 12, held as follows:-

"12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, 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. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. [Vide Babu Ram v. Indra Pal Singh, reported in 1998 (6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, reported in 1998 (6) SCC 507, and Mumbai International Airport (P) Ltd. v. Golden Chariot Airport [2010 (10) SCC 422 = 2010 (4) SCC (Civ) 195]."

25. Contention of the writ petitioner that computation of three months should be made only after the expiry of 15 days, from the date of confirmation of sale of immovable property i.e., 13/12/2017 (auction date 29/11/2017), cannot be countenanced, for the reason that as per sub-Rule 4 of Rule 9, balance amount of purchase price payable shall be paid by the purchaser to the Authorised Officer on or before 15^{th} day from the date of confirmation of sale of the immovable property or such extended period, as may be agreed upon, in writing between the purchaser and the secured creditor, in any case, not exceeding three months.

26. Firstly, sub-Rule 4 of Rule 9 of the Security Interest (Enforcement) Rules, 2002, does not mandate the Bank to agree for any extension. Sub-Rule 4 of Rule 9 of the said Rule, makes it only obligatory, as may be agreed upon between the purchaser and the secured creditor, in extending the period, beyond 15 days from the date of confirmation. As per Rule 9 (4), the balance amount should be paid on or before 15^{th} day of confirmation of sale and at best, it can be extended to three months from the date of confirmation. Rule 9 (4) of the Security Interest (Enforcement) Rules, 2002, cannot be read that only after the expiry of 15 days, three months time has to be computed. In the case on hand, auction was conducted on 29/11/2017 and confirmation was made on the same day. Bank in the confirmation letter dated 29/11/2017, requested the petitioner to make the balance amount of Rs.1.77 crores, on or before 13/12/2017, i.e., 15 days from the date of confirmation and on request, periodically extended the time for payment upto 23/2/2018. Three months time has to be computed from the date of confirmation of sale and the same expired in February 2018.

27. Period prescribed in sub-Rule 4 of Rule 9 of the Security Interest (Enforcement) Rules, 2002, for any extension of time for making payment of the balance amount of the purchase price is not mandatory and more so, when the expression, "may be agreed upon in writing between the purchaser and the secured creditor", is employed in the sub-Rule.

28. Contention of the learned counsel for the petitioner that extended period, ought to have been computed, in the manner

as suggested, cannot be accepted, for the reason that a bare reading of sub-Rule 4 of Rule 9 of the said Rule makes it clear that, in any case, the period prescribed for payment of the balance of purchase price shall not exceed three months, from the date of confirmation.

29. As per Rule 5 of Rule 9 in default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit to the secured credit of claim to the property or to any part of the sum to which it could be subsequently sold.

30. Bank in their letters, has specifically stated that amount remitted would be forfeited. As such, we do not find any letter of the Bank forfeiting the amount, but indicated that the same would be forfeited.

31. In the light of the above discussion and decisions, we do not find any material irregularity in the communication, dated 15/3/2018 of the Bank, impugned in this writ petition. Accordingly, writ petition is dismissed. It is open to the petitioner to seek for the refund amount already paid and if any such request is made, State Bank of India, Chennai, is directed to consider and pass appropriate orders. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mvs.

To

State Bank of India
Stressed Assets Management Branch
"Red Cross Buildings"
32 Red Cross Road, Egmore ,Chennai 600 008.

+1cc to Mr.K.N.Selvabharathi, Advocate, S.R.No.21811

W.P.No.6619 of 2018

NRK(CO)
CS/06/04/18