

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP-8367-2012

Reserved on: 26.07.2023

Date of Decision: 02.08.2023

Manoj Luthra

...Petitioner

Versus

New India Assurance Co. and Another

...Respondents

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present:- Mr. Sameer Sachdeva, Advocate for the petitioner

Mr. Ashwani Talwar, Advocate for the respondents

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking direction to the respondents to correctly fix pay of the petitioner by removing the anomaly on account of which petitioner remained underpaid despite appointed on the higher position.

2. The brief facts of the case which are necessary for adjudication of the present petition are that the petitioner through proper channel on 25.07.1990 entered into service of respondent as Assistant (Technical). On 07.10.1993, the petitioner was posted as Data Entry Operator. On 08.11.2000, the petitioner, on the basis of merit determined among Class-III employees, was chosen and thereafter posted as Development Officer (for short 'DO') on probation. The petitioner remained on probation from 15.11.2000 to 14.11.2001. The petitioner was confirmed as DO on 07.12.2001. The pay of the petitioner was

protected while appointing him as DO on probation. The petitioner was granted increment which accrued on 01.01.2001 as Clerk, however, he was not granted increment which would have accrued as Clerk on 01.01.2002. As a DO, increment accrued to the petitioner on 01.04.2002, however, he was not granted because he had not completed 12 months' service as DO. The grievance of the petitioner is that he was granted increment on 01.01.2001 but no increment was granted on 01.01.2002 because he was serving as DO at that point of time and he was not granted increment on 01.04.2002 because had not complete 12 months' as DO. Thus, petitioner on 01.01.2002 as well as 01.04.2002 did not get increment either as Clerk or as DO.

3. Mr. Sameer Sachdeva, learned counsel for the petitioner *inter alia* contends that petitioner was neither granted increment on 01.01.2002 nor on 01.04.2002 which has resulted into anomaly. The petitioner was appointed as DO which is a Grade-II post, whereas 'Clerk' falls in Class-III post. Appointment as DO was certainly a promotional post thus, object of seeking promotion stood defeated by not granting increment either as Clerk or DO.

4. In support of his contention, learned counsel for the petitioner relies upon a Division Bench judgment dated 12.10.1994 passed by this Court in ***Sunder Lal Jain and Others Versus State of Haryana and Others; CWP No.4176 of 1988*** and Single Bench judgment dated 19.08.2010 passed by this Court in ***Satish Kumar***

Versus The Haryana State Federation of Consumers Cooperative Wholesale Stores Ltd. and Others; CWP No.4980 of 2009.

5. Per contra, Mr. Talwar, learned counsel for the respondents submits that appointment of petitioner as DO was not a promotional post. It was mere conversion of clerical staff to development staff. The respondent-corporation vide letter dated 29.09.1998 had framed policy for conversion of clerical staff into development staff. As a DO, an employee gets number of emoluments/incentives which are not available to clerical staff. The question of remuneration on account of conversion from Clerical Cadre to Development Officer was duly addressed in Paragraph 6 of the communication dated 29.09.1998. The petitioner had accepted terms and conditions of communication dated 29.09.1998, thus, he cannot claim benefit of both streams i.e. Clerical as well as Development cadre. The petitioner was rightly denied benefit of increment on 01.04.2002 because he has not completed 12 months' period for getting increment. Paragraph 13 of notification dated 29.04.1976 as amended, issued by Ministry of Finance, Department of Economic Affairs clearly provides that Development Officers would be entitled to increment on 1st day of April of each other subject to completion of 12 months service.

6. I have heard the arguments of learned counsels for the parties and perused the record with their able assistance.

7. Before advertizing with the issue involved and arguments of both sides, it would be profitable to look at the provisions governing the

issue. The respondents vide order dated 29.09.1998 introduced scheme of conversion of clerical staff to DO. The relevant extracts of the order read as:-

“Re: Conversion of clerical staff to development staff.

As you are aware there has been practically no recruitment in Development Officers cadre during the last 4-5 years. There have also been some pockets of surplus clerical staff. Moreover, representations were also received from Class III employees for conversion as Development Officer. Taking all these into account, it was considered reasonable to convert surplus clerical staff having marketing flair to development side whom we can optimally use for tapping the insurance business. The matter was also discussed with the CMD's in ICCC as well as in GMs(P) meetings and our proposal based on the views of the companies, to convert Class III employees in clerical cadre to development staff was placed before the Board at its meeting held on 2.9.1998.

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(5) Lien:

Selected employees will have no lien on service. However, those who fail to meet the premium targets and are found to be unsuitable for any reason such as not meeting the requirements of the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Scheme, 1976 as amended from time to time, will be reverted back to clerical side on the expiry of the initial probation period/extended probation period.

Selected employees will be initially placed on probation for a period of one year which may be extended by another year maximum and the minimum stipulated premium targets

should be met by them during the probation/extended probation period.

After confirmation on the Development side the employees shall be governed by the Rules and Regulations applicable, from time to time, to the development staff.

(6) Remuneration during the period probation:

During the period of probation the employee may continue to receive the same emoluments he was receiving in the clerical cadre from the date of his transfer to development side. However, the normal grade increment falling due during the probationary period can be allowed; but revision in Dearness Allowance falling due in the clerical cadres should not be allowed. Other allowance like Conveyance Allowances as applicable to other probationary Development Officers Grade II may be paid. Initial appointment at the time of conversion would be as Development Officer, Grade II. Hence, such employees who are already drawing more basic salary than the maximum of Development Officer Grade II's scale may be paid the difference between their salary in Class III scale applicable as explained above and the maximum applicable in the scale of Development Officer Grade II as a Personal Allowance."

8. The question of increment of DOs is governed by General Insurance (Rationalisation of Pay Scales and Other Conditions of Service of Development Staff) Scheme, 1976 (for short the '**1976 Scheme**'). Paragraph 13 of the 1976 Scheme provides for increments which is reproduced as below:-

"13. Increments:

- (1) *A Development Officer who was in services on the 1st day of April and had completed 12 months of continuous service in the month of April, 1990 or earlier shall be granted an increment in the scale of pay from 1st day of April, 1990.*
- (2) *A Development Officer with effect from the 1st day of April, 1991 shall be granted on the appraisal date an increment provided that he has completed twelve months of continuous service from the date of his appointment or from the last appraisal date as the case may be, provided that no increment shall be granted to a development officer who is liable to decrement from the relevant appraisal date in terms of paragraph 11.*

Explanation: For the purpose of this paragraph “twelve months of continuous service means a period of duty equal to twelve months excluding the period of extraordinary leave”. ”

9. From the perusal of aforesaid order dated 29.09.1998, it comes out that respondent has framed policy of converting clerical staff into DO staff. A DO is entitled to different set of emoluments than a clerk. DO is governed by 1976 Scheme. It is a case of opting a stream out of two available streams. It is not a case of vertical movement from one post to another post i.e. promotional post. It is actually a case of shifting from one stream to another stream. Anyone who opts one stream leaving behind other is bound to enjoy its merits as well as face demerits.

Once an employee or an assessee/dealer under any system opts for one particular scheme, he cannot claim benefit of another scheme because he

cannot claim benefits of both the schemes unless and until scheme itself is hybrid. If there are two specific options and a person opts for one particular option, he cannot be permitted to deny demerits arising out of opted option and he cannot claim benefit of option which he has left.

10. Hon'ble Supreme Court in ***CCE v. Venus Castings (P) Ltd., (2000) 4 SCC 206*** had occasion to deal with vires of Section 3A of the Central Excise Act, 1944 and Rule 96ZO made thereunder. The Hon'ble Supreme Court has also considered consequences of availing option of payment of duty under compounded levy scheme. The Hon'ble Supreme Court upheld validity of the provision and further held that once option to pay compounded duty is availed, an assessee cannot ask to determine duty on actual basis. An assessee cannot ask for hybrid system. The court has held:

“10. The schemes contained in Section 3-A(4) of the Act and Rule 96-ZO(3) or Rule 96-ZP(3) of the Excise Rules are two alternative procedures to be adopted at the option of the assessee. Thus the two procedures do not clash with each other. If the assessee opts for the procedure under Rule 96-ZO(1) he may opt out of the procedure under Rule 96-ZO(3) for a subsequent period and seek the determination of the annual capacity of production. An assessee cannot have a hybrid procedure of combining (sic) the procedure under Rule 96-ZO(1) to which Section 3-A(4) of the Act is attracted. The claim by the respondents is a hybrid procedure of taking advantage of the payment of lump sum on the basis of the total furnace capacity and not on the basis of the actual capacity of production. Such a procedure cannot be adopted at all, for the two procedures are alternative schemes of payment of tax.

11. The learned counsel for the respondent contended that Rule 96-ZO(3) is contrary to Section 3-A(4) of the Act and, therefore, should be held to be ultra vires or the relevant rules should be read in such a manner so as to allow the procedure prescribed under the provisions of Section 3-A(4) to be followed. Section 3-A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3-A provides a special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a licence fee and not on the production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax. (See *State of Kerala v. Builders Assn. of India* [(1997) 2 SCC 183]). In this context, the learned counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the section is clearly on production of goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96-ZO(3) at their option, cannot claim the

benefit of determination of production capacity under Section 3-A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh High Court in Sathavahana Steels & Alloys (P) Ltd. v. Govt. of India [(1999) 114 ELT 787 (AP)] and a similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 Jalan Castings (P) Ltd. v. CCE [CMWP No. 1127 of 1999 (All)] disposed of on 28-2-2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd. v. CCE [(2000) 36 RLT 239 (All)] ”

11. A Division Bench of Andhra Pradesh High Court in ***S. Chalapathi v. Vice Chairman-cum-Managing Director, APSIDCL, 2002 SCC OnLine AP 1061*** adverted with question of permission to withdraw option of VRS. The Court rejecting claim of the petitioners has held that once an option of VRS is availed and acted upon, an employee cannot take somersault. The court noticed its precedent and held:

“10. In similar circumstances a Division Bench of this Court in W.A. No. 912/1999 dated 14.7.1999, held at paragraph No. 4 as under:—

.... once the voluntary retirement has been accepted and the appellants by their own act and conduct ratified the same up to 2.3.1999 the appellants cannot be permitted to reprobate and resile from their offer. Since funds have not been released the appellants have not yet been relieved from service. They have not suffered any prejudice either. Thus, in the totality of the facts and circumstances of the case, the State is directed to release the funds within two months to the Corporation. On receipt of funds from the Government the retiral benefits be given to the appellants and in terms of the offer for voluntary retirement, the

Corporation will be at liberty to relieve the appellants from service.

11. Similar view was expressed by an earlier Division Bench of this Court in W.A. No. 243/1999 dated 24.2.1999 and following the same my learned brother Justice Bilal Nazki disposed of WP No. 11085/1999 dated 11-6-1999 in the same terms.

12. In view of the above, we do not find any merit in the writ petitions and the same are accordingly dismissed. No costs.”

12. The petitioner consciously opted for DO stream from clerical stream. The petitioner has availed benefits attached to the post of development officer. The petitioner as per terms and conditions of appointment to the post of DO was entitled to increment on completion of 12 months. The petitioner on 01.04.2002 had not completed 12 months as DO, thus, he was not entitled to increment. The petitioner has ignored the benefits accruing from the post of DO, however, is claiming benefit of increment on the sole ground that clerical staff has availed increment on 01.01.2002 whereas he has not been granted increment either as clerk or as DO which is anomaly and should be removed. The petitioner cannot claim benefit of previous stream i.e. clerical as well as new stream i.e. DO. Claim of the petitioner is contrary to ‘principle of estoppel’ as well as ‘approbate and reprobate’. The petitioner cannot be permitted to avail benefits of both the cadres. The judgments cited by the petitioner are applicable where a person is promoted in vertical stream whereas present case is of opting one out of two streams.

13. Hon'ble Supreme Court in ***Union of India v. N. Murugesan; (2022) 2 SCC 25*** has explained concept and principle of approbate and reprobate. The relevant extracts read as:

“Approbate and reprobate

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally.

27. We would like to quote the following judgments for better appreciation and understanding of the said principle:

27.1. Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451]:

“23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in OS. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in OS. No. 100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate. It is immaterial that the present appellants were not parties thereto, and the decision in Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd. [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , and in particular, the observations of Scrutton, LJ., at p. 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J. : (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , KB p. 611)

‘... Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as

a misdelivery. To do so would be to approbate and reprobate the same act.'

The observations of Scrutton, L.J. on which the appellants rely are as follows : (Verschures Creameries Ltd. case [Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608 (CA)] , KB pp. 611-12)

'... A plaintiff is not permitted to "approbate and reprobate". The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument : Ker v. Wauchope [Ker v. Wauchope, (1819) 1 Bligh PC 1 at p. 21 : 4 ER 1 at p. 8] : Douglas-Menzies v. Umphelby [Douglas-Menzies v. Umphelby, 1908 AC 224 at p. 232 (PC)].

The doctrine of election is not however confined to instruments. 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. That is to approbate and reprobate the transaction.'

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate" is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Vol. XIII, p. 464, para 512:

'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, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it.'

27.2. *State of Punjab v. Dhanjit Singh Sandhu [State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144]:*

“22. The doctrine of “approbate and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216] .)

23. It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329] .) In R.N. Gosain v. Yashpal Dhir [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under : (R.N. Gosain case [R.N. Gosain v. Yashpal Dhir, (1992) 4 SCC 683] , 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'.

25. The Supreme Court in Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd. [Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approve 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.

26. It is evident that the doctrine of election is based on the rule of estoppel, the principle that one cannot approve and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when he has to speak, from asserting a right which he would have otherwise had."

27.3. *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.* [*Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.*, (2013) 5 SCC 470].

“I. Approbate and reprobate

15. *A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [Nagubai Ammal v. B. Shama Rao, 1956 SCR 451], CIT v. V. MR. P. Firm Muar [CIT v. MR. P. Firm Muar, AIR 1965 SC 1216], Ramesh Chandra Sankla v. Vikram Cement [Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58] , Pradeep Oil Corpn. v. MCD [Pradeep Oil Corpn. v. MCD, (2011) 5 SCC 270], Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420] and V. Chandrasekaran v. Administrative Officer [V. Chandrasekaran v. Administrative Officer, (2012) 12 SCC 133]*

16. *Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among*

the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.”

14. Applying the principles laid down by afore-cited judgments to the facts of the present case, inescapable conclusion comes out that claim of the petitioner is not sustainable. The petitioner without completing 12 months as Development Officer could not claim increment after joining as Development Officer. The petitioner opted for the post of Development Officer and left clerical cadre. Till the completion of probation period, he was entitled to emoluments accruing to clerk, however, as soon as probation period expired and he was confirmed as Development Officer, he was bound to accept emoluments available to Development Officer. He could not claim emoluments accruing to a clerk simply on the ground that there is anomaly in the emoluments available to a clerk and a Development Officer.

15. In view of above discussions and findings, this Court is of the considered opinion that present petition is devoid of merit and deserves to be dismissed. Accordingly dismissed.

(JAGMOHAN BANSAL)
JUDGE

02.08.2023

Mohit Kumar

Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*