

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE**

WPO/254/2018

**BALARAM DUTTA
VERSUS
THE KOLKATA MUNICIPAL CORPORATION & ORS.**

Present:

The Hon'ble Justice SHAMPA DUTT (PAUL)

For the Petitioner : Mr. Arindam Banerjee, Sr. Adv.
Ms. Arpita Saha,
Ms. Kriti Keshri.

For the KMC : Mr. Alak Kumar Ghosh,
Ms. Tanushree Dasgupta.

Hearing concluded on : 06.02.2025

Judgment on : 06.03.2025

Shampa Dutt (Paul), J. :

1. The present writ application has been preferred against the order dated 17th January 2018 passed by the learned Municipal Building Tribunal, Kolkata Municipal Corporation in B.T. Appeal No.24 of 2024 and the order **dated 10th January 2014** passed by the respondent No.3 in Demolition Case No.46-D/B-III/2013-14,

Borough III respect of premises No.B/104/H/1, Narkel Danga North Road, Kolkata – 700 013.

2. The petitioner's case is that in a proceeding being Demolition Case No.46-D/B-III/13-14 under Section 400(1) of the Kolkata Municipal Corporation Act, 1980 (hereinafter referred to as the 'said Act'), the order dated 10th January 2014 passed by the respondent No.3 in Demolition Case No.46-D/B-III/13-14, the petitioner was, inter alia, directed to demolish the entire first floor allegedly unauthorisedly constructed and as shown in précis and D. Sketch Plan No. 46-D/B-III/13-14 within fifteen date from the date of communication of the order.
3. **An appeal was preferred against the said order to the extent of demolition of part of the structures** forming the subject matter of the said proceeding was directed therein under Section 400(3) of the said Act before the Municipal Building Tribunal, Kolkata Municipal Corporation. The said appeal was registered as B.T. Appeal No.24 of 2014.
4. By an order dated 17th January 2018, the learned Tribunal was pleased to dismiss the appeal on contest and affirm the order challenged. Hence, this writ application.
5. Parties have filed their respective Written Notes along with the judgments relied upon. The petitioner has relied upon the following judgments:-

- i. ***Shree Shew Sakti Oil Mills Ltd. Vs Judge, 2nd Industrial Tribunal & Ors., 1960 SCC OnLine Cal 194.***
 - ii. ***PS Group Reality Ltd. & Anr. Vs The Kolkata Municipal Corporation & Ors., 2012 SCC OnLine Cal 3885.***
 - iii. ***Susama Saha vs The Kolkata Municipal Corporation & Ors., 2015 SCC OnLine Cal 6198.***
- 6. On the other hand, the Kolkata Municipal Corporation by filing their Written Notes has relied upon the following judgments:-
 - i. ***Md. Ayub & Anr. Vs The Municipal Commissioner, KMC & Ors., in C.O. 3722 of 2015, dated 02.03.2016, Calcutta High Court.***
 - ii. ***Mrs. Sarada Devi vs The Municipal Commissioner, KMC & Anr., in C.O. 1541 of 2018, dated June 14, 2018, Calcutta High Court.***
- 7. In the present case, considering the materials on record, the following is evident:-
 - i. The petitioner herein was present before the Special Officer for the hearing without raising any question as to the jurisdiction of the Special Officer, thus submitting to the adjudication proceeding which concluded on 10th January, 2015, thus prior to the judgment relied upon (***Susama Saha vs The Kolkata Municipal Corporation & Ors. (Supra)***) delivered on December 2, 2015 that is subsequent to the order of the special officer herein.

- ii. The order dated 10th January, 2015 then merged with the order in appeal **dated 17th January, 2018.** The judgment in **Susama Saha vs The Kolkata Municipal Corporation & Ors. (Supra) dated December 2, 2015 was not relied upon by the petitioner herein in appeal.**
- iii. **The petitioner admittedly accepted the part of the order which granted regularization of the unauthorised construction and also acted upon that part of the order by paying the requisite fees for regularization.**
- iv. **After having accepted part of the order which was in his favour, the petitioner chose to challenge the part of the order which was not in his favour.** The KMC has raised the point that the principle of approbate and reprobate was attracted in the case and the same was not permissible in the eye of law in view of the decision reported in 1962 SCR (1) 358, Law which does not permit a person to both approbate and reprobate.
- v. The KMC has further argued that 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 around and say it is void for the purpose of securing some other

advantage. The Learned Tribunal also relied on another case of the Hon'ble Supreme Court reported in AIR 2013 SC 1241 where the Hon'ble Supreme Court made an observation that a party cannot be permitted to blow hot and cold, or approbate and reprobate.

8. **The petitioner preferred an appeal against the said order only to the extent of the order relating to the part of demolition.**
9. **Admittedly in appeal only the part of the order of the special officer regarding demolition was challenged. The part as to regularization was not challenged, thus the appeal filed in substance did not challenge the jurisdiction and authority of the special officer (building) to hear and dispose such proceedings.**
10. In *Union of India vs N Murugesan, in Civil Appeal Nos. 2491-2492 of 2021, decided on 7 October, 2021*, the Supreme Court held:-

“APPROBATE AND REPROBATE:

26.*These phrases are borrowed from the Scott's 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.”

11. In ***Mumtaz Yarud Dowla Wakf vs M/s Badam Balakrishna Hotel Pvt. Ltd., in Civil Appeal No. of 2023 (arising out of SLP (C) No. 997 of 2022), decided on 20 October, 2023,*** the Supreme Court held:-

“15. The conduct of a party assumes significance. If a party is likely to have an undue advantage, despite the availability of an opportunity to raise a plea of lack of jurisdiction at an earlier point of time, it should not be permitted to do so during the execution proceedings. In other words, a plaintiff shall not be made to suffer by the passive act of the defendant in submitting to the jurisdiction. One has to see the consequence while taking note of the huge pendency of the cases before various Courts in the country. There is no gainsaying that but for the adverse decree suffered, a judgment-debtor would not have ventured to raise such a plea. It is clearly a case of an afterthought to suit his convenience. He cannot be allowed to approbate and reprobate. Though we are conscious about the earlier precedents dealing with the stage at which such a plea can be raised, much water has flown under the bridge in terms of the ground reality. Union of India and Others v. N. Murugesan and Others, (2022) 2 SCC 25, “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 : AIR 1956 SC 593] : (AIR pp. 601-02, para 23) “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.* [(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 [(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 [(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 [(1819) 1 Bligh PC 1 at p. 21 : 4 ER 1 at p. 8] : 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 [(2014) 15 SCC 144] : (SCC pp. 153-54, paras 22-23 & 25-26) “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 [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 [AIR 1969 SC 329]). In R.N. Gosain v. Yashpal Dhir [(1992) 4 SCC 683] this Court has observed as under : (R.N. Gosain case [(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. [(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 “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.

26. 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 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.* [(2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] : (SCC pp. 480-81, paras 15-16) “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* [1956 SCR 451 :

AIR 1956 SC 593] , *CIT v. V. MR. P. Firm Muar* [*AIR 1965 SC 1216]* , *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706] , *Pradeep Oil Corpn. v. MCD* [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712] , *Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.* [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and *V. Chandrasekaran v. Administrative Officer* [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : (2013) 4 SCC (Cri) 587 : (2013) 3 SCC (L&S) 416].

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.” (emphasis supplied)”

- 12.** It is the principle of law that an order if irregular or passed without jurisdiction, is to be considered as a whole.

13. If the powers of the Special Officer and the authority is challenged in respect of the part of the order which did not favour the petitioner, the said conduct is against the principles of natural justice and the petitioner should not be indulged in that respect.
14. **Thus, in view of the judgments in *Mrs. Sarada Devi vs The Municipal Commissioner, KMC & Anr. (Supra)*, *Md. Ayub & Anr. Vs The Municipal Commissioner, KMC & Ors. (Supra)*, *Union of India vs N Murugesan (Supra)* and *Mumtaz Yarud Dowla Wakf vs M/s Badam Balakrishna Hotel Pvt. Ltd (Supra)*, the writ petition having no merit stands dismissed.**
15. All connected applications, if any, stand disposed of.
16. Interim order, if any, stands vacated.
17. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

[SHAMPA DUTT (PAUL) J.]