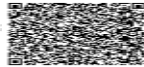


2024:PHHC:074661-DB



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP-11800-2023 (O&M)
Reserved on 16.05.2024
Pronounced on: 24.05.2024

HARISH KUMAR

...Petitioner

Versus

STATE OF HARYANA & ORS

...Respondents

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present:- Mr. Suman Jain, Advocate for petitioner.

Mr. Surender Singh Pannu, Addl., A.G., Haryana,
For respondent Nos. 1 to 3.

None for respondent No.4.

Mr. H.P.S. Ishar, Advocate for respondent No.5.

SUDHIR SINGH, J.

By way of the present writ petition under Article 226/227 of the Constitution of India, the petitioner seeks a writ of Certiorari for quashing the proceedings dated 11.05.2023 (Annexure P-2), whereby No Confidence Motion was passed against the petitioner, who was the Vice President in Municipal Committee, Uklana. A further prayer has been made for staying operation of the impugned proceedings and the proceedings for holding fresh election for the post of Vice President in Municipal Committee, Uklana.

2. The facts, as would emerge from the writ petition are that in the year 2021, the elections of Municipal Committee,

Uklana for Municipal Councilors from different wards were held. In the said elections, the petitioner was elected as a Municipal Councilor from Ward No.7. The Municipal Committee, Uklana consists of total 13 Wards and as such there are total 13 elected Municipal Councilors. It is the case of the petitioner that after the aforesaid elections, the petitioner was elected as Vice President on 19.03.2021, unanimously and, accordingly, he took oath of the office. On 28.03.2023, a resolution was passed for calling a special meeting of the Municipal Committee regarding No Confidence Motion against the petitioner, which was handed over to respondent No.2-Deputy Commissioner, Hisar. Pursuant to the aforesaid resolution, respondent No.2 had appointed respondent No.3 i.e, Sub Divisional Officer (C), Barwala as Returning Officer to preside over the said special meeting. On 21.04.2023, a notice was issued by respondent No.3 for calling the aforesaid special meeting regarding No Confidence Motion for 11.05.2023. Accordingly, the said special meeting was held on 11.05.2023 and No Confidence Motion was passed. It is the case of the petitioner that the very moving of the aforesaid No Confidence Motion was wrong, illegal, discriminatory, arbitrary and ultra-vires the Haryana Municipal Act, 1973 (hereinafter referred as 'the Act') and also the Constitution of India. It is stated by the petitioner that in the aforesaid No Confidence Motion, respondent No.3 had explained the method as to how to vote and, thus, he had directly influenced the said procedure, which was in clear violation to the provisions of the Act, whereas as per notification dated 11.12.2020, the Returning Officer was

to read the motion for no confidence and declare it to be open for discussion and he was not required to speak on the merits of motion. It is alleged that even the videography of the No Confidence Motion proceedings was tampered with by the respondent No.3. It was further stated that the President and the other Councilors were allowed to take mobiles inside the House and through the said electronic gadgets, they had influenced the entire proceedings of the No Confidence Motion, which is against the provisions of Section 73 of the Act. While referring to the videography clips (Annexure P-4), it is stated that respondent No.5- Satwant Singh had asked the members to click their photos at the time of casting their votes, which was in blatant violation of Section 52 of the Act. It is further the case of the petitioner that respondent No.3 himself counted the votes and did not show the same to any of the Municipal Councilors present in the meeting as to how many votes were cast in favour or against the No Confidence Motion.

3. Learned counsel for the petitioner has vehemently contended that the No Confidence Motion conducted by respondent No.3 was totally in violation to Sections 53 and 73 of the Act. It is further contended that said proceedings were initiated against the petitioner in a premeditated manner and respondent No.3 had acted arbitrarily and illegally so as to remove the petitioner from the post of Vice President. It is further contended that the irregularities committed during the No Confidence Motion were captured in the videography, but respondent No.3 had edited the said video clips in order to give

undue advantage to respondent No.5. In support of his arguments learned counsel for the petitioner relies upon the judgment of the Hon'ble Apex Court in Kuldeep Kumar Vs. U.T., Chandigarh, (2024)3 SCC 526.

4. On the other hand, learned Addl., A.G, Haryana appearing for the official respondents No.1 to 3 argues that there was no illegality in conducting the No Confidence Motion and the same was conducted as per the due procedure provided under the Act. It is further argued that subsequent to the No Confidence Motion, respondent No.3 had issued a notification/circular on 06.07.2023 for election to the vacant post of Vice President of the Municipal Committee, Uklana. He further submits that the petitioner did not challenge the said notification and as a matter of fact the election was conducted on 12.07.2023 and the petitioner himself had contested the said election. It is, thus, contended that having never challenged the elections held on 12.07.2023, and having contested the same, the petitioner is estopped by his act and conduct to dispute the No Confidence Motion through which he was removed from the post.

5. Learned counsel for the respondent No.5 has toed the line of arguments raised by the learned State counsel.

6. We have heard learned counsel for the parties and have also gone through the file.

7. The questions that require adjudication by this Court are as follows:-

“1. Whether having contested the election to the post of Vice President, the petitioner has waived off his right to challenge the ‘No confidence Motion’ dated 11.05.2023?

2. If the answer to question No.1 is in affirmative, then whether the petitioner is now estopped from challenging the No Confidence Motion in the light of his having contested the election for the post of Vice President subsequently held on 12.07.2023?”

8. It may be noticed that the writ petition was filed on 25.05.2023. It came for hearing for the first time on 29.05.2023 when it was simply adjourned to 20.07.2023. In the meantime, respondent No.3 had issued a notification/circular dated 06.07.2023, in respect of the election for the vacant post of Vice President in Municipal Committee, Uklana. The petitioner moved CM-10838-CWP-2023; CM-10844-CWP-2023 and CM-10845-CWP-2023. The said applications came for hearing before a Coordinate Bench of this court on 12.07.2023, when the following order as passed:-

“CM-10838-CWP-2023
CM-10844-CWP-2023
CM-10845-CWP-2023 in
CWP-11800-2023 (O&M)

Present: Mr. Suman Jain, Advocate
for the applicant/petitioner.

CM-10838-CWP-2023

This is an application for placing on record letter dated 06.07.2023 vide which special meeting is scheduled to be fixed for today for fresh election to the post of Vice President in Municipal Committee, Uklana.

In the main case, notice of motion has not been issued but the case is fixed for 20.07.2023.

Notice in the civil miscellaneous applications bearing CM Nos.10844-CWP of 2023 and 10845-CWP of 2023 be issued for 20.07.2023.

On the asking of the Court, Mr. Manish Dadwal, AAG, Haryana puts in appearance and accepts notice on behalf of respondents No.1 to 3-State.

It appears that vide order dated 06.07.2023, the Sub Divisional Officer (C), Barwala has fixed 12.07.2023 as the date for election for the vacant post of Vice President in Municipal Committee, Uklana.

Let the election be held but the result thereof be not declared till the next date of hearing.”

This Court issued notice of motion to the respondent only on 29.01.2024. It may be noticed that by the same order, this Court had allowed the application No. CM-27835-CWP-2023 filed by Mr. Satwant Singh and he was ordered to be impleaded as respondent No.5 in the writ petition.

9. Considering the aforesaid factual position, let us examine question No.1. It assumes significance as to whether the order dated 12.07.2023 passed by the Coordinate Bench in CM Nos.10844-CWP-2-023 and 10845-CWP-2023, comes to the rescue of the petitioner. A perusal of the said order would clearly show that the Division Bench had only directed a restraint on the declaration of the result and not on the election itself. The petitioner, if so advised, could have challenged the election to the post of Vice President scheduled to be conducted on 12.07.2023, and sought a restraint order therein, but he chose not to do so.

10. Waiver is not an intentional abandonment of a right. Rather, it emerges from one's subsequent acquiescing to the

position that he has disputed being wrong or illegal at a prior point of time. This relinquishment does involve his informed and conscious choice that had he not waived off such right, he would have enjoyed the same. In other words, by submitting him to the later circumstances, he ceases to agitate the issue complained against at an earlier point of time.

In P. Dasa Muni Reddy Vs. P. Appa Rao, (1974) 2 SCC 725, while considering the Doctrine of Waiver, it was held by the Hon'ble Supreme Court as under:-

“13. Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the appellant has waived the right to evict the respondent. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the

circumstances show that what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent."

In State of Punjab v. Davinder Pal Singh Bhullar, (2011) 14 SCC 770 41, while elaborating the act of a waiver by a party, it was held by the Hon'ble Apex Court as under:-

"41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (Vide *Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha* [(1934-35) 62 IA 100 : AIR 1935 PC 79] , *Basheshar Nath v. CIT* [AIR 1959 SC 149], *Mademsetty Satyanarayana v. G. Yelloji Rao* [AIR 1965 SC 1405] , *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh* [AIR 1968 SC 933], *Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corpn.* [1992 Supp (1) SCC 5] , *Sikkim Subba Associates v. State of Sikkim* [(2001) 5 SCC 629 : AIR 2001 SC 2062] and *Krishna Bahadur v. Purna Theatre* [(2004) 8 SCC 229 : 2004 SCC (L&S) 1086 : AIR 2004 SC 4282] .)

42. This Court in *Municipal Corpn. of Greater Bombay v. Dr Hakimwadi Tenants' Assn.* AIR 1988 SC 233, considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:-

"14. In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and

must necessarily be determined on the facts of each case. ...

15. There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition.”

In Supdt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766, while referring to the earlier judicial pronouncements, it was held by the Hon’ble Apex Court as under:-

“24. In *Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha* [AIR 1935 PC 79 : 62 IA 100 : 155 IC 1] the distinction between estoppel and waiver was explained by stating that estoppel is not a cause of action, but waiver is contractual and may constitute a cause of action. The reason stated there is that waiver is an agreement to release or not to assert a right. There is no such thing “as estoppel by waiver”.

In Kanchan Udyog Ltd. v. United Spirits Ltd., (2017) 8 SCC 237, it was held by the Hon’ble Apex Court as under:-

“22. Waiver and acquiescence may be express or implied. Much will again depend on the nature of the contract, and the facts of each case. Waiver involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same. The principle is to be found in Section 63 of the Act. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to

waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s VEC, for a period of nearly one year, and continuing to do so even after it wrote to the respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive concentrates from the respondent, undoubtedly amounts to waiver by conduct and acquiescence by it to the new arrangement. The plea that it was done under compulsion, and not voluntarily, is devoid of any material, substance and evidence. It is unacceptable and merits no consideration. Alternatively, if it was an assignment under Clause 5 of the agreement, there had been no termination of the contract by the respondent.

xx xx xx

24. Waiver could also be deduced from acquiescence, was considered in Waman Shriniwas Kini v. Ratilal Bhagwandas & Co. Waman Shriniwas Kini v. Ratilal Bhagwandas & Co., 1959 Supp (2) SCR 217 : AIR 1959 SC 689] observing as follows:-

“13. ... Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be implied.”

11. A perusal of the head note of the writ petition would show that one of the prayers made by the petitioner was regarding grant of stay against holding fresh election to the post of Vice President. However, no such stay order was granted by this Court and rather vide order dated 12.07.2023 passed in CM Nos.10844-CWP-2023 and 10845-CWP-2023, only declaration of the result was stayed. It appears that the petitioner was happy and satisfied with the said order which is why he did not

challenge the said order. On the face of these facts, it can safely be concluded that the petitioner by not challenging the election to the post of Vice President held on 12.07.2023 and having contested the same as one of the candidates for the Vice President's post, has waived off his right. Question No.1 is, accordingly, answered in affirmative.

12. Coming to question No.2, it may be noticed that the petitioner was in the knowledge of the election to the post of Vice President to be conducted on 12.07.2023. However, he had not only participated in the said election and contested it as one of the candidates but also failed to challenge the said process. The petitioner cannot be allowed to plead that since his writ petition challenging the No Confidence Motion was pending, the same would cover any subsequent action taken by the respondents and if the very No Confidence Motion is found to be illegal, then all the subsequent proceedings will follow the suit. The situation had been entirely different had the petitioner abstained himself from the election proceedings. Having not done so and rather having participated as one of the contesting candidates in the election, he is now estopped from maintaining his challenge to the No Confidence Motion.

In State of Punjab Vs. Dhanjit Singh Sandhu, (2014) SCC 144, it was held that the doctrine of election is based on the rule of estoppels, the principle that one cannot be approbate and reprobate is inherent in it. It was held as under:-

“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.

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. In *R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683, this Court has observed as under:-

“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’.”

xx xx xx

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 it is his duty to speak, from asserting a right which he would have otherwise had.”

In Union of India Vs. N. Murugesan, (2022) 2 SCC

25, while discussing in detail the concept of approbate and reprobate, the Hon’ble Apex Court as held as under:-

“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* 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. v. Hull & Netherlands Steamship Co. Ltd.*, (1921) 2 KB 608 (CA).

‘... 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 :

‘... 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; *Douglas-Menzies v. Umphelby*, 1908 AC:- . 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 approve and reprobate the transaction.'

It is clear from the above observations that the maxim that a person cannot "approve 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 approve 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.'

....."

13. Admittedly, the writ petition challenging No Confidence Motion was filed at prior point of time. However, as noticed above, the notice of motion in the writ petition was issued only on 29.01.2024 and the orders obtained in the interregnum by the petitioner in CM-10844-CWP-2023 and CM-10845-CWP-2023 were to the effect that the election will continue, but result be not declared. The petitioner should have stuck to his claims. He cannot be allowed to blow hot and cold in the same breath. On the one hand, he was challenging the No Confidence Motion being illegal, arbitrary and in violation of

the provisions of the Act, but on the other, he himself subsequently had contested the election held for the post of Vice President on 12.07.2023.

14. The election held on 12.07.2023 emanated from the No Confidence Motion, whereby the petitioner was removed from the post of Vice President. Thus, when the petitioner himself was disputing his removal, it is beyond common understanding as to what compelled him to participate in the election subsequently held and contest the same as one of the candidates. The conduct of the petitioner clearly shows that while contesting the election held on 12.07.2023, he had implicitly expressed his faith in the system. Therefore, we are of the considered view that the subsequent events have, thus, taken away the right of the petitioner to challenge the No Confidence Motion. Accordingly, question No.(ii) is decided in affirmative.

15. Even otherwise, the Coordinate Bench vide order dated 29.01.2024 passed in CM-10844 and 10845-CWP of 2023, had directed that the election be held, but the result be not declared. The direction with regard to the continuity of the election was not challenged by the petitioner. This, thus, means that the directions of the Coordinate Bench, have attained finality. In other words, the election had been conducted under the directions of this Court.

16. In our considered view, once the petitioner had participated in the subsequent election held for the post of Vice President, which post became vacant after his removal through No Confidence Motion, the writ petition for all the purposes

would be treated to have become infructuous. The reliance of the learned counsel for the petitioner upon the judgment of the Hon'ble Apex Court in Kuldeep Kumar's case (supra), is of no help to the petitioner as the facts of the said case are entirely different. In the said case, the petitioner therein had disputed the elections of Mayor of Chandigarh Municipal Corporation, on the ground of impropriety/misconduct on the part of the Returning Officer. However, in the present case, as noticed above, the petitioner after challenging the No Confidence motion, through which he was removed, had himself contested the elections. Thus, the said judgment is not applicable to the facts of the present case.

16-A. No other point has been urged.

17. In view of the above, finding no merit in the present petition, the same is hereby dismissed.

18. Pending application(s), if any, shall also stand disposed of.

[SUDHIR SINGH]
JUDGE

[HARSH BUNGER]
JUDGE

24.05.2024
Himanshu

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No