* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **WRIT PETITON (CIVIL) NO. 2489/1996**

Reserved on: 27th February, 2012

% **Date of Decision:** 29th March, 2012

AVENUE REALITIES AND DEVELOPERS PRIVATE LIMITED ...Petitioner
Through Mr. Arun Khosla & Mr. Shreeanka Kakkar, Advocates.

VERSUS

APPROPRIATE AUTHORITY OF INCOME TAX DEPARTMENT .....Respondent
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

Avenue Realities and Developers Private Limited on 21st May, 1996 filed the present writ petition impugning the order dated 29th February, 1996 passed by the Appropriate Authority under Section 269 UD(1) of the Income Tax Act, 1961 (Act, for short) questioning and challenging acquisition/compulsory purchase by the Central Government of the immovable property bearing No. S-380, Panchsheel Park, New Delhi (the property, for short).

2. Arguments in the said writ petition were heard and judgment was reserved vide order dated 15th November, 2011. However, the matter was re-listed for further arguments on 3rd January, 2012, when the following order was passed:-

> " Judgment in this case was reserved on 15th November, 2011. On going through the file it is noticed that the Revenue had filed C.M.No.2208/1997 for vacation of stay. In this application, it is stated that the order under Section 269 UD (1) of the Income Tax Act, 1961 was passed on 29th February, 1996 and thereafter Rs.2,37,00,000/- was paid to the sellers, respondent Nos.3 and 4 on 22nd March, 1996. Petitioner, the intending purchaser, had received a payment of Rs.42,00,000/- on 17th March, 1996. The present writ petition was filed on 21st May, 1996, but was returned under office objection and was re-filed on 2nd July, 1996.
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> It appears that in the pleadings i.e. the writ petition and the rejoinder, it is not stated and averred that payment of Rs.2,37,00,000/- was made to the sellers and Rs.42,00,000/- was paid to the petitioner in March, 1996 and the same was accepted. In these circumstances, we have listed the matter for directions.
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> Learned counsel for the parties will address arguments on the said aspects.
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> Relist on 6th February, 2012."

3. The arguments were heard on the said aspects and thereafter judgment was reserved on 27th February, 2012. We

may note that on some dates adjournments were given as M
Arun Khosla, Advocate for the petitioner was unwell.

4. The petitioner had entered into an agreement of purchase of the property dated 19th November, 1995 with Lakshmi Rajagopal, Dr. Usha Rajagopal and Geetha Krishnan at a purchase price of Rs.2,79,00,000/- exclusive of conversion charges for obtaining freehold rights payable to Delhi Development Authority(DDA). The said charges were payable by the petitioner. Lakshmi Rajagopal, Dr. Usha Rajagopal and Geetha Krishnan are respondent Nos. 3 to 5 to the present writ petition but they have not been served by the petitioner and have not filed any counter affidavit.

5. Learned counsel for the petitioner has submitted that the impugned order dated 29th February, 1996 is vitiated and is contrary to law for several reasons, namely:

(1) Neither in the show cause notice nor in the impugned order there is an allegation of evasion of tax,, that the sale consideration was understated and there was payment of under hand money;

(2) The appropriate authority has not calculated the fair market value of the property as per law. Appropriate deductions on following counts have not been given:-

(i) The property was owned by three persons.

(ii) The property is not mutated in the names of the respondent Nos. 3 to 5 though they had a Letter of Administration in their favour.

(iii) The leasehold rights in the records of the DDA was in the name of late C.N. Rajagopal.

(iv) The property is located on 80 ft. main road facing the village adjoining Malviya Nagar.

(v) The property is sher mukha.

(vi) Inconvenience and the expenses involved for conversion of the property into freehold has not been considered.

(3) Appropriate Authority had granted permission under Chapter XXC of the Act for another property S-131, Panchsheel Park, New Delhi vide order dated 15th March, 1996 admeasuring 424.67 square meter. Apparent sale consideration in the said case was Rs.3,15,50,000/-.

(4) Appropriate Authority has wrongly computed per square meter fair market price of land by proportionately increasing the price of the comparable for the additional FAR.

6. We may, at this stage, only record that the Appropriate Authority in the impugned order has referred to the sale instance of another property, namely, S-179, Panchsheel Park, New Delhi,

which was sold under memorandum of understanding dated 2 October, 1995. The apparent sale consideration for the said property admeasuring 500 square yards was Rs.2.60 crores. The construction permissible thereon was FAR of 140, whereas the property in question- admeasuring 513 square yards with permissible FAR of 190- was subject matter of agreement to sell dated 19th November, 1995. The Appropriate Authority came to the conclusion that the land rate had to be computed on the basis of the FAR and adjustment of +35.71% was made on account of the said additional FAR. Another adjustment of +5% on account of the park on the back side was also made. The value of land was therefore computed as Rs.3.75 crores. The depreciated value of the structure was worked out at Rs.3,44,416/-. The fair market value of the property was thus held to be more than Rs.3.81 crores.

7. As we perceive, we need not examine various aspects raised by the petitioner on merits in view of what is recorded in our order dated 3rd January, 2012. The present writ petition deserves to be dismissed for reasons, which we have set out and explained below.

8. The present writ petition filed on 21st May, 1996 was returned under office objections and was refilled on 2nd July,

1996. It came up for hearing on 4th July, 1996 and notice was issued and time was granted to the respondents to file reply. By order dated 4th July, 1996, the respondent Nos. 1 and 2 were restrained from auctioning the property. The said stay order has continued to remain in operation. It appears that thereafter this writ petition was listed along with other connected matters in which similar legal issues on merits were raised. One such matter, namely, ***Mrs. Kailash Suneja and Ors. versus Appropriate Authority and Ors.***, was decided by a Division Bench of this Court on 17th December, 1997 reported in [1998] 231 ITR 318, but this decision was made subject matter of challenge before the Supreme Court. Order sheet dated 4th February, 1998 records that this writ petition had been adjourned form time to time to await the decision of the Supreme Court in the case of ***Mrs. Kailash Suneja*** (supra).

9. In the present case, after the order of acquisition dated 29th February, 1996 was passed, the Central Government paid an amount of Rs.42 lacs to the petitioner on 17th March, 1996 and Rs.2.37 crores to the respondent Nos. 3 and 4 on 22nd March, 1996. The petitioners have not stated the aforesaid factum and have concealed the said payments in the writ petition. As noticed above, the writ petition was filed nearly 2 ½ months after the

payments were made. This fact that the payment was receive and even accepted has not been stated and adverted to. The respondents nos. 1 and 2, in their application for vacation of stay CM No. 2208/1997 and in the reply to the application for stay, namely, CM No. 4368/1996 have averred and stated this fact. In view of the said payment, it is alleged that the petitioner cannot claim any interim relief as the parties had received the full apparent sale consideration. Surprisingly, however, this plea is not taken in the counter affidavit. As noticed above, we have recorded that the respondent Nos. 3 to 5, the sellers, who had received payment of Rs.2.37 crores, have not been served.

10. The factual position, which therefore emerges, is this that the petitioner received payment of Rs.42 lacs on 17th March, 1996 and the sellers, namely, respondent Nos. 3 to 5 had received payment of Rs.2.37 crores on 22nd March, 1996. They have retained, used and utilized the said money. The petitioner herein while filing the writ petition concealed and did not state the fact that the petitioner and the respondent Nos. 3 to 5 have received the full apparent consideration from the Central Government. The petitioner did not file any reply to the application for vacation of stay CM No. 2208 or rejoinder to the reply to CM No. 2489/1996. Rejoinder was filed to the counter

affidavit. Even in the rejoinder to the counter affidavit, the petitioner has not averred or stated that the petitioner and the respondent Nos. 3 to 5 have received the full sale consideration from the Central Government.

11. Writ jurisdiction is discretionary. It is an equitable jurisdiction meant to do justice to the parties and remedy to injustice suffered by the petitioner at the hands of the Government/State. Concealment of material facts can disentitle a petitioner from seeking relief under a discretionary remedy. The petitioner must come to the Court with clean hands and state truly and correctly the material facts. The present case is clearly one where the petitioner has failed and has not stated the material fact that they, i.e., the petitioner and the respondent Nos. 3 and 4 had received the full apparent sale consideration. The petitioner had paid Rs.42 lacs to the respondent Nos. 3 and 4 for entering into sale transaction under agreement dated 19th November, 1995. The said payment has been refunded to the petitioner vide cheque, which was issued by the Central Government on or about 17th March, 1996. It is not disputed or denied that the said cheque has been encashed and the money has remained with the petitioner and utilized by him. Similarly, respondent Nos. 3 to 5 received amount of Rs.2.37 crores on 22nd March, 1996 and

have retained and have utilized the said amount. In all possibility, respondent Nos. 3 to 5 must have declared the said amount in their returns for taxation purposes and have either paid tax or claimed exemption on the basis of purchase of another immovable property, bond, etc. Thus, the factual position is that the Central Government has been out of pocket of Rs.2.79 crores since March, 1996 and has not been able to use and utilize the property or even sell or transfer the same.

12. Concealment of the aforesaid material fact is important and relevant. Firstly, the petitioner wanted and was able to secure the restraint order dated 4th July, 1996 by which the respondents no. 1 and 2 were restrained from auctioning the property. In case the factum that payment of Rs.2.79 crores was mentioned, the position may have been different and the parties may have been directed to deposit the said amount in the Court. Respondent Nos. 3 to 5 had received substantial payment of Rs.2.37 crores. They may have protested or questioned the petitioner's challenge to the acquisition. The respondent Nos. 3 to 5 may have required/wanted the money and in such circumstances the petitioner could have been asked to pay/deposit the said amount in the Court. It is significant that the respondent Nos. 3 to 5 have not filed any writ petition or challenged the action of the central

government to acquire the property. In this connection, we may note the contention of the counsel for the respondents no. 1 and 2 relying upon clause 8 of the agreement to sell dated 19th November, 1995. The said clause reads as under:-

> "8. The Vendors and Vendee hereto agree to file Form No. 37-I as required under Section 269 UC of the Income Tax Act 1961 in pursuance of this Agreement and if the Appropriate Authority exercises its pre-emptive right to purchase the said property then and in that event the Earnest Money Deposit of Rs.42,00,000/- (Rupees Forty Two Lakhs Only) shall be payable by the Appropriate Authority to the Vendee and balance will be payable to the vendors and upon such payment the Vendee shall have no right against the Vendors and if for any reason the purchase by the Appropriate Authority is not ordered or not completed or fructified then and in that event this Agreement shall be binding upon the parties."

13. It is the contention of the respondent nos. 1 and 2 that as per the said clause if the property was acquired by the Central Government, the vendee, i.e., the petitioner, can claim no rights against the vendors, i.e., the sellers. It is further stipulated that the earnest money of Rs.42 lacs paid by the petitioner would be directly paid by the Central Government to him.

14. We may note that the petitioner has not alleged or stated that the payment of Rs.42 lacs or Rs.2.37 cores by respondent

Nos. 3 to 5 was under protest and without prejudice. During the course of hearing before us, counsel for the petitioner had submitted that the payment received was under protest and without prejudice. He wanted to file some letters in the Court, but on being questioned, admitted that the petitioner did not have any proof of delivery/dispatch of the said letters. Original files were also shown to the counsel for the petitioner and he could not locate the said letters. It was submitted that the files show that some correspondence was exchanged between the petitioner and the Appropriate Authority and, therefore, the letters should be presumed to have been written/served. We are not inclined to accept the said submission, which is purely based on surmises and conjectures.

15. Failure to mention material facts has been frowned up and has resulted in adverse decisions in several cases. In ***K.D. Sharma v. Steel Authority of India Ltd.,*** (2008) 12 SCC 481**,** it has been held:-

> “**34.** The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and

seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.

35. The underlying object has been succinctly stated by Scrutton, L.J., in the leading case of *R.* v. *Kensington Income Tax Commrs* in the following words: (KB p. 514)

> "… it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—it says facts, not law. He must not misstate the law if he can help it—*the court is supposed to know the law. But it knows nothing about the facts*, and the applicant must state fully and fairly the facts; and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement."
> (emphasis supplied)

36. A prerogative remedy is not a matter of course. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating, "*We will not listen to your application because of what you have done.*" The rule has been evolved in the larger public interest to deter unscrupulous litigants from abusing the process of court by deceiving it.

37. In *Kensington Income Tax Commrs.* Viscount Reading, C.J. observed: (KB pp. 495-96)

> "… Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. *But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit*." (emphasis supplied)"

16. Earlier in ***Prestige Lights Ltd. v. State Bank of India,*** (2007) 8 SCC 449**,** it was observed**:**

> **"20.** But, there is an additional factor also as to why we should not exercise discretionary and equitable jurisdiction in favour of the appellant. It is contended by the learned counsel for the respondent Bank that having obtained interim order and benefit thereunder from this Court, the appellant Company has not paid even a pie. The appellant is thus in contempt of the said order. The Company has never challenged the condition as to payment of amount as directed by this Court. Thus, on the one hand, it had taken benefit of the order of interim

relief and on the other hand, did not comply with it and failed to pay instalments as directed. Neither it raised any grievance against the condition as to payment of instalments nor made any application to the Court for modification of the condition. It continued to enjoy the benefit of stay ignoring and defying the term as to payment of money. The Company is thus in contempt of the order of this Court, has impeded the course of justice and has no right of hearing till it has purged itself of the contempt.

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33. It is thus clear that though the appellant Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a court of law is also a court of equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the writ court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

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35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the court, the court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing

> the process of court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible.
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> **36.** In the case on hand, several facts had been suppressed by the appellant Company. Collusive action has been taken with a view to deprive the respondent Bank from realising legal and legitimate dues to which it was otherwise entitled. The Company had never disclosed that it had created third-party interests in the property mortgaged with the Bank. It had also shifted machinery and materials without informing the respondent Bank prejudicially affecting the interest of the Bank. It has created tenancy or third-party right over the property mortgaged with the Bank. All these allegations are relevant when such petitioner comes before the court and prays for discretionary and equitable relief. In our judgment, the submission of the respondent Bank is well founded that the appellant is not entitled to ask for an extraordinary remedy under Article 226 of the Constitution from the High Court as also equitable remedy from this Court under Article 136 of the Constitution. A party, whose hands are soiled, cannot hold the writ of the court. We, therefore, hold that the High Court was not in error in refusing relief to the appellant Company."

17. In the present case, the petitioner and the respondent Nos. 3 to 5 initially by conduct have accepted the decision of the Appropriate Authority. Payments made were received by them in the month of March, 1996. The present writ petition was filed by the purchaser in end of May, 1996, more than two months after the cheques were received and encashed. Thus, on the one

hand, the petitioner has accepted the order and appropriated th payment but contends and submits that the order of pre-emptive purchase is bad in law. This should not be permitted and allowed. The petitioner cannot take advantage and benefit under the order and retain the money and at the same time contest and contend that the order is bad and illegal. We are not strictly invoking the principle of estoppel but are making a comment on the conduct of the petitioner. The question is of an equity, fairness and justice. In this regard we refer to the decision of Supreme Court in ***Punjab & Sind Bank v. S. Ranveer Singh Bawa, (2004) 4 SCC 484***, wherein it has been stated**:**

> "**5.** In the case of *Bank of India* v. *O.P. Swarnakar*[1] this Court observed that estoppel is based upon the acceptance and retention of benefits, by one having knowledge or notice of the benefits from a contract or a transaction. The doctrine of estoppel is a branch of the rule against assumption of inconsistent positions. One who knowingly accepts the benefit of a contract is estopped from denying the binding effect on him of such contract. This rule has to be applied to do equity. It was accordingly held that those optees who knowingly received the payments and utilized them were not entitled to withdraw from VRS. In the case of *Punjab National Bank* v. *Virender Kumar Goel*[2] the applicant Bank submitted that some of the optees having accepted the benefits under VRS cannot be permitted to withdraw therefrom. In that matter, several review petitions were filed and in some of those review petitions, it was found that the

[1] (2003) 2 SCC 721

[2] (2004) 2 SCC 193

optees were aware of the credits in their accounts and they had even withdrawn the amounts deposited and had utilized the same and consequently in such cases, this Court did not permit the optees to withdraw from VRS. To the same effect is the order passed by this Court in the case of *Bank of India* v. *Pale Ram Dhania*[3]. In the light of the above judgments, we have to consider the facts of the present case."

18. In ***Shyam Telelink Limited v. Union of India, (2010) 10 SCC 165***, it has been held **:**

> "**22.** Although the appellant had sought waiver of the liquidated damages yet upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the migration package. Allowing the appellant at this stage to question the demand raised under the migration package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate.
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> **23.** The maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is firmly embodied in common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an

[3] (2004) 9 SCC 36

instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

24. In *Ambu Nair* v. *Kelu Nair*[4] the doctrine was explained thus: (IA p. 271)

> "Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, Their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well-accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honyman, J. in *Smith* v. *Baker*[5] LR at p. 357:
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> > '… at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage.' "

25. The view taken in the above decision has been reiterated by this Court in *City Montessori School* v. *State of U.P.*[6] To the same effect is the decision of this Court in *New Bihar Biri Leaves Co.* v. *State of Bihar*[7] where this Court said: (*New Bihar case*, SCC p. 558, para 48)

> "*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

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[4] AIR 1933 PC 167

[5] 1873 LR 8 CP 350

[6] (2009) 14 SCC 253

[7] (1981) 1 SCC 537

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. Ltd.*[8]; …).”

26. The decision of this Court in *R.N. Gosain* v. *Yashpal Dhir*[9] brings in the doctrine of election in support of the very same conclusion in the following words: (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.’

(See *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.* KB at p. 612, Scrutton, L.J.) According to *Halsbury's Laws of England*, 4th Edn., Vol. 16:

“1508. *Examples of the common law principle of election.*—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.' ”

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[8] (1921) 2 KB 608

[9] (1992) 4 SCC 683

> **27.** In America estoppel by acceptance of benefits is one of the recognised situations that would prevent a party from taking up inconsistent positions qua a contract or transaction under which it has benefited. *American Jurisprudence*, 2nd Edn., Vol. 28, pp. 677-80 discusses "estoppel by acceptance of benefits" in the following passage:
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> > "*Estoppel by the acceptance of benefits.*— Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.
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> > As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.
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> > This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience.""

19. In the case of ***Joint Action Committee of Air Line Pilots' Association of India (ALPAI) v. Director General of Civil Aviation,*** (2011) 5 SCC 435**,** the Supreme Court has noticed as under:

> **"11.** In *R.N. Gosain* v. *Yashpal Dhir*[10] this Court observed as under: (SCC pp. 687-88, para 10)
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> > "*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

[10] 1992) 4 SCC 683

> 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'."

> **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*[11], *P.R. Deshpande* v. *Maruti Balaram Haibatti*[12] and *Mumbai International Airport (P) Ltd.* v. *Golden Chariot Airport*[13].]

20. In ***Manish Kumar Shahi v. State of Bihar,*** (2010) 12 SCC 576, the Supreme court made reference to **Madan Lal v. State of J&K**, (1995) 3 SCC 486, wherein it has been held as under**:**

> "5. ….in *Madan Lal* v. *State of J&K* and held:
> "In the light of the aforesaid legal position, it has to be held and we do hold that the petitioner by his conduct has disentitled himself to any relief in the high prerogative jurisdiction of this Court. He was well aware when he applied to appear in the 26th Judicial Competitive Examination, 2005 that out of combined written test and viva voce test of total

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[11] (1998) 6 SCC 358
[12] (1998) 6 SCC 507
[13] (2010) 10 SCC 422

> marks of 1050, 200 marks have been provided for viva voce test. The petitioner had no grievance about the criteria when he applied nor he had any grievance when he appeared in the written test and the viva voce test. Had he been successful, he would have no grievance at all about the provision of maximum 200 marks for interview. Had he secured higher marks in the viva voce test, he would have been happy with the provision made in the Rules. It is only after the entire selection process has been over and he remained unsuccessful that he thought of raising grievance about unreasonableness of maximum 200 marks fixed for viva voce test. He approached the Court much after the entire selection process was over. BPSC had recommended the names of 318 candidates for selection and the Personnel and Administrative Reforms Department, Government of Bihar appointed the selected candidates. The entire selection process has been over. In our view, the same cannot be undone or upturned at the instance of the petitioner who approached the Court only after he remained unsuccessful in the examination on the plea that the provision of 200 marks for viva voce test out of total marks 1050 was unreasonable. If out of 318 candidates who were recommended by BPSC to the State Government for appointment, any candidate did not join, that vacancy has to be carried forward to the next year. There is no challenge to the circular issued by the Personnel and Administrative Reforms Department way back in the year 1977 that any vacancy having remained unfilled due to non-joining of the selected candidates will be carried forward to the next year."

21. Thereafter, in ***Manish Kumar Shahi*** (supra) it has been observed:

> "**16.** We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in *Madan Lal* v. *State of J&K*, *Marripati Nagaraja* v. *Govt. of A.P.*[14], *Dhananjay Malik* v. *State of Uttaranchal*[15], *Amlan Jyoti Borooah* v. *State of Assam*[16] and *K.A. Nagamani* v. *Indian Airlines*[17]."

22. During the course of hearing before us, learned counsel for the petitioner had submitted that principle of estoppel is not applicable as the said principle has not been invoked by the respondent Nos. 1 and 2 and there is no pleading to the said effect. Learned counsel for the petitioner had relied upon ***Jado Singh and another versus Bishnunath Lal Kanedia Marwari and Another,*** AIR 1942 Patna 71, ***Pappammal versus Alamelu Ammal and Another***, AIR 1929 Madras 467, ***M/s Motilal Padampat Sugar Mills Company Limited versus the State of***

[14] (2007) 11 SCC 522
[15] (2008) 4 SCC 171
[16] (2009) 3 SCC 227
[17] (2009) 5 SCC 515

Uttar Pradesh and Others, AIR 1979 SC 621, ***Mahindra Mahindra Limited versus Union of India,*** AIR 1979 SC 798, ***Anjuman Islamia of Bareilly versus Radhey Lal,*** AIR 1939 Allahabad 194, ***Goparanjan Dube and Others versus Arbitrator, Hirakud Land Organisation, Sambalpur and Others,*** AIR 1976 Orissa 118, ***Karnail Singh and Another versus State of Punjab and Another,*** AIR 1983 Punjab and Haryana 160, ***Gian Chand Dhawan and Another versus Union of India and Others,*** AIR 1976 Delhi 83.

23. The aforesaid decisions do not help the petitioner. Decision in ***Jado Singh*** (supra) pertains to an appeal arising out of a civil suit. Before the appellate court, plea of estoppel was raised. It was observed that the plea must be raised at the trial. The present proceedings are writ proceedings and the plea that the payment was made and received has been made in the application for vacation of stay and in the reply to the application for stay. The decision of Madras High Court in the case of ***Pappammal*** (supra) is again distinguishable on the same ground. In the said case, the plea was raised in the appeal for the first time and the plea was not taken in the original suit and set up in the pleadings. No issue was framed. In ***Motilal Padampat Sugar Mills Company Limited*** (supra) this plea was raised

before the Supreme Court. It was observed that no plea f waiver could be allowed or raised, unless it was pleaded and the factual foundations were made. No attempt was made to amend and it was observed that in the absence of pleadings, the opposite party stands denied an opportunity to meet the allegation. It was held that for waiver to apply, the person should have full information as to his right and with full knowledge of such right. It should be shown that he had intentionally abandoned his right. The aforesaid ratio is not applicable to the facts of the present case. Factual assertion has been made by the respondent nos. 1 and 2 in the application for vacation of stay and in the reply to the application for stay. The petitioner has not filed reply or responded to the same. The legal proceedings are still at the first/original stage. The aforesaid factums were brought to the notice of the petitioner vide order dated 3rd January, 2012 and the matter was fixed for rehearing. Thereafter, the judgment was reserved on 27th February, 2012. During the interregnum, the petitioner did not file any additional affidavit etc. Similarly, the decision in the case of ***Mahindra and Mahindra Limited*** (supra) is distinguishable. The Supreme Court in the said case rejected the plea of acquiescence. It was observed that appeal may not have been preferred but the party

concerned had taken recourse to alternative and perhaps mo effective remedy. It was observed that the party had not altered their position because of the said plea. In ***Anjuman Islamia of Bareilly*** (supra), it was held that no case for estoppel was made in the written statement, no issue was framed and, therefore the said plea should not be permitted to be raised. Decision of the Orissa High Court in the case of ***Goparanjan Dube*** (supra) relates to Land Acquisition Act, 1894 and deals with the question whether the compensation amount was accepted with or without protest. The court observed that the plea of limitation raised by the State was uncalled for. The principle of estoppel was not applicable as it was only after the payment was calculated by the Land Acquisition Collector that the parties would know the amount they would be entitled to. Decision of Punjab and Haryana High Court in ***Karnail Singh*** (supra) relies upon decision of this Court in ***Gian Chand Dhawan*** (supra). These cases are again under the Land Acquisition Act, 1894. It was observed that for filing objections under Section 18 of the said Act not only the conduct of the parties at the time of receipt of payment but the antecedent thereto has to be taken into consideration.

24. The petitioner has also relied upon judgments in ***Kamalp (Assam) Tea Estate Private Limited and Another versus Superintendent of Taxes, Jorhat and Others***, (1989)175 ITR 142 (Gau.), ***Commissioner of Sales Tax, U.P. versus Lord Krishna Sugar Mills Limited***, 1964 Sales Tax Cases 335, ***Union of India and Another versus Dr. A.K. Garg and Others***, (2002) 256 ITR 660 (SC), ***Chand V. Raheja and Another versus Union of India and others***, (1996) 7 SCC 175, ***Smt. Shantaben Ratilal and Others versus Appropriate Authority and Another***, (1995) 212 ITR 95 (Guj.) and ***The Sales Tax Officer, Banaras and Others versus Kanhaiya Lal Mukund Lal Saraf***, AIR 1959 SC 135. Some of these judgments pertain to Article 265 of the Constitution of India and the said aspect/ issue is not relevant to the question raised.

25. It was further submitted by the petitioner that in the present case there is violation of Section 269 UG and UH. It was submitted that the full value of the apparent consideration was not paid to the petitioner and the respondent Nos. 3 to 5. The said contention has to be rejected for number of reasons. Firstly, the petitioner has not pleaded and relied upon Section 269 UH. It is not stated that full value of consideration was not paid by the Central Government within the stipulated time. Secondly, as per

application filed in form No. 37-I the apparent consideratio mentioned in column No. 5 was Rs.2.79 crores. The said amount has been paid. Thirdly, even the written submissions filed on 26th September, 2011 no such plea or contention has been raised. Lastly, the above plea has been raised on the basis of the recordings/notings made in the files of the Appropriate Authority, who had entered into correspondence with DDA. DDA had informed that they had received payment of Rs.5,07,150/- as conversion charges from leasehold to freehold from respondent Nos. 3 to 5. DDA had also claimed an amount of more than Rs.1.33 crores provisionally as an unearned increase. We fail to understand why and on what account further payment was required to be made to the petitioner. This payment of conversion charges of Rs.5,07,150/- has not been mentioned in the agreement to sell. The agreement to sell records that the conversion charges will be paid by the vendee, i.e., the petitioner. The petitioner had not incurred any such expenses after the agreement to sell dated 19th November, 1995. Form No. 37-I was filed on very next day, i.e., 20th November, 1995. It was mandatory for the Central Government to make payment. This was made. The petitioner and respondent Nos. 3 to 5 have retained and utilized Rs.2.70 crores since 1996. This fact,

deliberate failure to mention and state that cheques we encashed and the conduct, disentitles the petitioner from claiming and asserting right to relief.

26. In view of the aforesaid position, we dismissed the present writ petition without any order as to costs.

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SANJIV KHANNA, J.

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R.V. EASWAR, J.

MARCH 29, 2012
VKR