IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

WP (C) No.639/2022

Reserved on 20.12.2022
Pronounced on: 01.03.2023

Inhabitants of Sheva Shirshu Doda …Petitioner(s)/Appellant(s)

Through: Mr. F.S. Bhat, Advocate

Vs.

UT of J&K and others ...Respondent(s)

Through: Ms. Monika Kohli, Sr. AAG, for R6 & R8
Mr. Ravinder Gupta, AAG for respondent Nos.3,4 and 7
Mr. Dewarkar Sharma, Dy. AG for R5
Mr. Sunil Sethi, Sr. Advocate with
Mr. Paras Gupta, Advocate for R11

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

PRIMARY FACTS:-

1. The petitioners who are the inhabitants of Village Sheva, Shirshu, Brana Gulmuna and Barhdrana, Tehsil Mohalla Disrict Doda, have filed the present writ petition in the representative capacity. The petitioners through the medium of the present writ petition have called in question the *vires* of the Standing Order (SO) dated 23.02.2021 issued by the Department of Geology and Mining, Government of Jammu and Kashmir, which according to the petitioners is in violation of the directions issued by the Division Bench of this Court in PIL No.794/2009 titled ***Mohammad Maqbool Lone versus State & others.*** Learned counsel appearing on behalf of petitioners further submits that S.O. 60 of 2021 is contrary to the various provisions of Environmental Laws.

2. The case of the petitioner is that the respondent No.11 is in the process of installation of Stone crusher near village Shirshu and the said Stone crusher as per the petitioner is being installed without obtaining the requisite 'No Objection Certificates (NOC's)' from the concerned departments including J&K Pollution Control Board, Educational Institutions, Irrigation and Flood Control Department, Fisheries and Forest departments.

SUBMISSION OF THE PARTIES

3. **SUBMISSION OF THE PETITIONERS**

A. Learned counsel appearing for the petitioners, with a view to advance his arguments, has submitted that the said Stone crusher, supra is being installed within 100 meters from the Government Middle School Sheva (Bhag), Zone Gundana, Tehsil Mohalla of District Doda. Learned counsel further submits that a resolution dated 18th February 2022 has been passed by people of the Village Shirshu, Brana, Gulmuna and Barhdrana and the same has been submitted to concerned Tehsildar and Deputy Commissioner Doda wherein, it is stated that the said Stone crusher is being installed very near to the main school of the village, Madrasa and is in the middle of the villages Shirshu, Brana, Gulmuna and Barhdrana. With a view to substantiate his claim, learned counsel has referred to the communication issued by the Head Master Government Middle School, Sheva (Bhag), Tehsil Mohalla, District Doda and Zonal Education Officer Gundana Zone regarding illegal

installation/operation and setting up the Stone crusher by the respondent No.11.

B. Learned counsel has further submitted that the Stone crusher is being installed at environmentally sensitive area, which is completely in violation of J&K State Pollution Control Board norms and learned counsel further submits that the Stone crusher is being installed by the respondent No.11 against the mandate and spirit of judgment passed by Hon'ble Supreme Court in case titled ***M.C. Mehta Versus Union of India (1992 SCC 256)*** and same is also against the provisions of Water Resources (Regulation & Management) Act 2010 and Water Resources (Regulation & Management) Rules 2011.

C. Learned counsel has further submitted that on the directions of the Division Bench of this Court in PIL No.794/2009 titled ***Mohammad Maqbool Lone versus State and others***, the then Government of Jammu and Kashmir, Industries and Commerce department has issued an order vide No.104 Ind of 2015 dated 14-07-2015, in which it was stated that:-

"whereas the new draft Minor mineral Concession Rules under submission to the competent authority in the State Government which have been prepared in the light of the Hon'ble Supreme Court directions the guidelines issued by the Ministry of Environment Government of India" which was later followed by the SRO 302 of 2017 dated 19-07-2017 called (mines and minerals development and regulation) Act 1957, Minor Mineral

Exploitation and Processing Rules, 2017), issued by the Department of Industries and Commerce Government of Jammu and Kashmir, in which a detail guideline was issued in light of Directions issued by the Hon'ble Supreme Court and Division Bench of Jammu and Kashmir High Court with regard to policy for extraction of Minor Minerals and setting of Stone crushers.

D. Learned counsel further submits that vide SRO 302 of 2017 dated 19.07.2017, issued by Industries and Commerce Department, the Jammu and Kashmir Minor Mineral Exploitation and Processing Rules, 2017 have been issued. Learned counsel further submits that as per the mandate of aforesaid rules, no license to operate Stone crusher/Hot and Wet mixing plant, shall be granted to the licensing authority unless it possesses NOC from the concerned Deputy Commissioner, consent of J&K State Pollution Control Board and NOCs from Fisheries and Irrigation and Flood Control Department.

E. Learned counsel has referred to Rule 3 and 4 of the aforesaid rules which have since been repealed by virtue of another S.O. known as S.O. 60 of 2021 dated 23.02.2021 which has been issued by the department of Mining in exercise of powers conferred by Section 15 and Section 23C of the Mines and Minerals (Development and Regulation) Act, 1957 and have promulgated the following rules namely "Jammu and Kashmir Stone crushers/Hot and Wet Mixing Plants Regulations Rules, 2021."

F. Learned counsel through the medium of present writ petition is calling in question the aforesaid S.O. 60 of 2021 dated 23.02.2021 on the ground that the same is contemptuous to the order passed by the Division Bench of this Court and he further submits that in case, the aforesaid S.O is allowed to be operated, it will defeat the purpose of environmental laws as well as the guidelines which have been framed by the Hon'ble Supreme Court of India and the Division Bench of this Court.

G. Learned counsel appearing on behalf of the petitioner has referred to Rule 3 (II) of the aforesaid S.O in which, he argued that for establishing the Stone crusher, No Objection Certificate from Deputy Commissioner concerned regarding the title verification of land and its usage was required. Insofar as the title verification of the land is concerned, the same is in dispute and with a view to substantiate his claim, learned counsel has submitted that he has already filed an application bearing CM No.4171/2022 and has referred to the order passed by the Civil Court, wherein *status quo* has been ordered and, as on date, the learned counsel further submitted that there is no title verification required under Rule 3 (II) of the aforesaid S.O and thus, the respondent No.11 cannot be allowed to operate his Stone crusher.

H. The learned counsel further referred to Rule 11 of the aforesaid S.O which deals with the Repeal and Savings Clause, by virtue of which, the Jammu and Kashmir Minor Mineral Exploitation and

Processing Rules, 2017 issued vide Notification SRO 302 of 2017 dated 19.07.2017 stands repealed.

I. Learned counsel further referred to the directions passed by this Court on 25.03.2022, by virtue of which it has been directed that the respondents shall ensure that no Stone crusher or Hot Mixing Plant is installed by respondent No.11 on the proposed site without first complying with the requirements of S.O. 60 dated 23.02.2021 and the interim order passed by this Court continues to be operative as on date.

J. The learned counsel with a view to substantiate his claim has referred to reply filed by official respondent No.6 and 8, wherein respondents have admitted that the owner of the Stone crusher has failed to provide necessary documents which are prerequisite for grant of permission as per the provisions of S.O.60 and yet in spite of the admission on part of official respondents in Para 8 of the reply, the case of respondent No.11, is being proposed for running the Stone crusher and respondent authorities have failed to initiate any action for such violation and non-compliance of EIA notification against respondent No.11.

4. SUBMISSIONS ON BEHALF OF RESPONDENT NO.11 (PRIVATE RESPONDENT)

A. Learned counsel on behalf of respondent No.11 has raised preliminary objection about the maintainability of the writ petition. It has been contended that the issue had already been discussed with the Panchayat, wherein, none of the petitioners have raised

any objection and now, they cannot be allowed to raise the same at this belated stage. The respondent has further contended that the Court should not interfere with the functioning of the Government and the decision-making process of the government. The learned counsel has further submitted that with respect to the environmental matters, NGT (National Green Tribunal) has jurisdiction and therefore, this Court has no jurisdiction to deal with the same as petitioners have directly approached this Court.

B. It is submitted by respondent No.11 that he has complied with all the relevant provisions of SRO 302, by obtaining NOCs from all the concerned departments and has also obtained the mandatory environmental clearance/consent to establish from Pollution Control Board vide consent order dated 28.10.2020 which was valid till October 2021. Pursuant thereto, the J&K Pollution Control Committee has again issued necessary clearance in favour of respondent No.11 vide consent order dated 26.04.2022.

C. Learned Senior arguing Counsel, Mr. Sunil Sethi, assisted by Mr. Paras Gupta, appearing on behalf of respondent No.11 draws distinction between SO 60 dated 23.02.2021 and SRO 302 dated 19.07.2017. He further submits that the S.O. 60 of 2021 has been framed in exercise of powers conferred by Section 15 and Section 23C of the Mines and Minerals (Development and Regulation) Act, 1957 and the rules have been framed by the name called Jammu and Kashmir Stone crushers/Hot and Wet Mixing Plants

Regulations Rules, 2021 which deals with the stone crusher unit/hot and wet mixing plants.

D. Learned counsel appearing on behalf of respondent No.11 submitted that he has complied with all the relevant provisions of SRO 302 of 2017 dated 19.07.217 (J&K Minor Mineral Exploitation and Processing) Rules, 2017 which has been issued by the Government in exercise of its powers conferred by Section 15 and Section 23C of Mines and Minerals (Development and Regulation) Act, 1957 and the rules have been framed by the name (J&K Minor Mineral Exploitation and Processing Rules, 2017). The learned counsel further submits that the present writ petition has been filed by the petitioners on misconceived, false and frivolous claim by relying upon the provisions of SRO 302 of 2017 which have since been repealed with the coming in force of S.O. 60 of 2021 dated 23.02.2021.

E. Learned counsel further referred to Rule 11 of S.O. 60 which deals with the Repeal and Savings clause, in which it has been provided that the J&K Minor Mineral Exploitation and Processing Rules, 2017 issued vide notification SRO 302 of 2017 dated 19-07-2017 stands repealed and, notwithstanding such repeal, it has been observed that noting in these rules shall affect validity, effect of consequence of anything done or suffer to be done under the said law, rule or order before the date on which these rules come into force meaning thereby any action done inn pursuance to SRO 302 has been protected.

F. Learned counsel appearing on behalf of respondent no.11 has vehemently argued that Rule 3 of S.O. 60 deals with Stone crushers/Hot and Wet Mixing Plant which can be established/operated only on securing by:-

> ***I.*** ***"Consent to establish/operate from the Jammu and Kashmir Pollution control Board issued as per the procedure/guidelines and sitting criteria prescribed by the Jammu and Kashmir Pollution Control Board.***
>
> ***II.*** ***No objection Certificate from Deputy Commissioner concerned regarding title verification of land and its usage; and***
>
> ***III.*** ***Registration with the District Industries Centre (DIC) if the unit holder intends to avail any incentives available in the Industrial Policy."***

G. Learned counsel further clarified that it is not a mining unit but a processor of minerals obtained from a source with a valid mineral concession.

H. Learned counsel with a view to advance his arguments has referred to reply filed by respondent No.6 and 8, with particular reference to "Annexure R-10", in which the concerned Deputy Commissioner has issued No Objection Certificate with regard to the title verification as envisaged under Rule 3 (iii) of the aforesaid rules and hence, as per the learned counsel, there is no legal impediment as on date which comes in the way of respondent No.11 in installing/running the Stone crusher which according to the learned counsel will be in conformity with the interim direction passed by this Court in the present petition referred by the petitioner.

I. Learned counsel further submitted that present litigation has been preferred by the petitioners at the behest of some persons to wreck vengeance and to extract money from the respondent as it has been admitted by the petitioners in Paragraph No.1 that other Stone crushers are also operating in the area.

J. Learned counsel further submitted that there is no foundation in the writ petition with regard to the challenge to the *vires* of the S.O. 60 of 2021 dated 23.02.2021 and in absence of any strong foundation; the present writ petition is not maintainable, as there is no violation of any of the constitutional provisions and accordingly, he prays for the dismissal of writ petition.

5. <u>SUBMISSIONS OF THE RESPONDENT NO.6 AND 8</u>

A. Ms. Monika Kohli, learned Senior Additional Advocate General, appearing on behalf of respondent No.6 and 8 has referred to Paragraph No.4, whereby she has submitted that after getting the requisite reports from the concerned agencies, No Objection Certificates (NOCs) have been issued by the respondent-department in favour of respondent No.11 strictly under rules and she further submits that she adopts the reply/objections already filed by respondent No.11.

B. Learned counsel further submitted that "No Objection Certificate" has been issued in favour of respondent No.11 by Deputy Commissioner on 22.06.2020 for installation/establishment of Stone crusher/Hot Mix Plant in proprietary land measuring 05 kanals 06 Marlas of village Mohalla (Sheva) of Tehsil and District

Doda under Khasra No.117 min Khewat No.27/14 and Khata No.95/116 in order to fulfill burning demand of raw material for domestic as well as for departmental purpose subject to certain conditions.

6. SUBMISSIONS OF THE RESPONDENT NO.3, 4 AND 7

A. Mr. Ravinder Gupta, learned Additional Advocate General appearing for respondent No.3, 4 and 7 has submitted that the extraction of mines and minerals are different from the mixing process insofar as extraction is concerned and the same is to be regulated under the J&K Minor Mineral Concession, Storage, Transportation of Minerals and Prevention of illegal Mining Rules, 2016 issued vide SRO 105 of 2016 dated 31.03.2016 and insofar as processing is concerned, same is regulated by S.O. 60 of 2021 dated 23rd February 2021.

B. Learned counsel further submits that the grievance of the petitioners as projected in the writ petition is with regard to alleged installation of Stone Crusher by respondent No.11 after issuance of "No Objection Certificate" by the concerned authorities for such installation.

C. Learned counsel, further, submitted that as per the norms and procedures as were prevalent in terms of SRO 302 of 2017 and even as per the S.O. 60 of 2021 it is only within the domain of revenue authorities to look into the grant or otherwise issuance of "No Objections Certificate" in respect of any land purposed for installation of Stone crusher as well as authorities of the J&K

Pollution Control Board after ascertaining "No Objections Certificate" of different departments as per their existing criteria before issuing consent to the unit.

D. The learned counsel further submitted that the Hon'ble Apex Court in case titled ***Deepak Kumar versus State of Haryana and others*** decided on 27th February, 2012, has directed all the State Governments and Union Territories to frame rules in light of the guidelines issued/passed in the aforesaid judgment, wherein, the grant of mineral concession to all the units concerned with extraction of mines and minerals was made as a pre-condition. Learned counsel referred to Section 23C of the Mines and Minerals (Development and Regulation) Act, 1957 which empowers the State Government to frame the rules by virtue of the erstwhile State Government has issued the J&K Minor Mineral Concession, Storage, Transportation of Minerals and prevention of Illegal Mining Rules, 2016 issued vide SRO 105 of 2016 dated 31.03.2016. Subsequently the Government of Jammu and Kashmir has promulgated the Jammu and Kashmir Minor Mineral Exploitation and Processing Rules, 2017 notified vide SRO 302 dated 19.07.2017 in order to streamline the Minor Mineral based industries, wherein, it was made mandatory for all the existing/fresh units to obtain the license for their operations under aforesaid SRO from the Department of Geology and Mining after obtaining clearances from other departments like No Objection Certificates from concerned Deputy Commissioner, consent to

operate from J&K Pollution Control Board, No Objection Certificates from Fisheries and Irrigation & Flood Control Department, consent from minor mineral lessee, Registration from District Industrial Centre and some other mandatory restricted zones.

E. Learned counsel further submitted that the Government of Jammu and Kashmir issued notification vide S.O. 60 dated 23.02.2021, wherein the Jammu and Kashmir Minor Mineral Exploitation and Processing Rules, 2017 issued vide notification SRO 302 of 2017 stands repealed.

7. <u>SUBMISSIONS OF THE RESPONDENT NO.5</u>

A. Mr. Dewakar Sharma, learned Deputy Advocate General, appearing for the J&K Pollution Control Board-respondent No.5 while addressing the arguments has referred to the Rule 6 of S.O. 60 which depicts that every stone crusher/Hot and Wet Mixing Unit established under these Rules shall strictly comply with the provisions of the Environment (Protection) Act, 1986, the Water (Prevention and Control of Pollution) Act, 1974, The Air (Prevention and Control of Pollution) Act, 1981, guidelines of the Pollution Control Board and Ministry of Environment, Forest, and Climate change issued from time to time and other relevant laws/rules. He further submitted that the scope through the medium of S.O. 60 has been widened by incorporating Rule 6 in the said S.O. He further referred to Paragraph No.2 of his objections by virtue of which he has taken a specific stand that consent to establish the Unit

has been obtained from the Pollution Control Board by the respondent No.11 after fulfilling the requisite formalities by the Pollution Control Board. Lastly, he has submitted that since the NOC(s) have been issued in compliance with the provisions of S.O. 60 and there is no specific challenge in the writ petition by the petitioner to that extent. In absence of any specific challenge thereto, the writ petition which is any devoid of merit deserves to be dismissed. Learned counsel further submitted that "No Objection Certificate" was issued by the Deputy Commissioner way back on 22nd June 2020 when SRO 302 was in vogue. Learned counsel further submitted that the stipulation as envisaged in the aforesaid SRO was complied with and the requisite No Objection Certificates were issued in favour of respondent No.11 and he further submitted that the fresh NOC has been issued in favour of respondent No.11 strictly in conformity with S.O. 60 of 2021 dated 23.02.2021.

8. <u>Legal Analysis/Discussion:</u>

A. Heard learned counsel for the parties and considered the matter in light of the latest development coupled with the record produced.

B. Admit with the consent of learned for the parties, the case is taken up for final disposal.

C. Since the position has drastically changed after promulgation of S.O. 60 dated 23.02.2021, whereby the Jammu and Kashmir Stone crushers/Hot and Wet Mixing Plants Regulation have been promulgated vide SO 60 of 2021 and the aforesaid S.O. in a way has simplified the things. The respondents have liberalized the

mining regime and have issued Jammu and Kashmir Stone crushers/Hot and Wet Mixing Plant Regulation 2021 vide S.O. 60 of 2021 and SRO 302 of 2017 dated 17.07.2017 which mandates a license for establishing Stone crusher Unit/ Hot and Wet Mixing Plants and impose other obligations have been superseded by the aforesaid rules.

D. The primary issue which has been raised by the petitioners in the instant writ petition is that S.O. 60 of 2021 dated 23.02.2021 which has been issued by the department of Geology and Mining by the erstwhile Government of Jammu and Kashmir is in flagrant violation of the directions issued by the Division Bench in PIL No.794/2019 and is also contrary to the provisions of environmental laws. Learned counsel appearing on behalf of petitioners was put to a specific query by the Court as to whether he is seeking reliance on S.O. 60 of 2021 or else, he is challenging the same. When confronted with the said position that on the one hand he is relying on S.O. 60 of 2021, whereby, he has projected that the respondent No.11 has not complied with the stipulation as envisaged in S.O. 60 and in the same breath, he is challenging the *vires* of the aforesaid SRO in the present petition, the learned counsel submits that he is withdrawing the relief insofar as challenge to SO 60 of 2021 dated 23.02.2021 is concerned and he made a specific statement in this regard that he is not pressing the relief insofar as challenge to

the *vires* of SO 60 is concerned. His statement to that effect was taken on record.

E. The writ petition has been primarily filed by the petitioners, relying on the basis of SRO 302 dated 19.07.2017, which has since been repealed with the coming in force S.O. 60 of 2021 dated 23.02.2021, wherein the requirement of obtaining NOCs from different departments have been waived off for the purpose of establishing stone crushers. Though the position has changed considerably after framing of new policy vide SO 60 of 2021, which is mainly aimed at simplifying the process of establishment of stone crushers. Thus in light of the developments that have taken place after liberalization of the mining by the issuance of Rules of 2021, it was mandatory on part of respondent No.11 to have obtained No Objections Certificate from Deputy Commissioner regarding title verification of the land and its usage, besides obtaining consent to establish/operate from the Jammu and Kashmir Pollution Control Board as per the procedures and guidelines and registration with the District Industries Centre, if the unit holder intends to avail any incentive available in the industrial policy besides complying with the environmental laws. The Government has liberalized the policy of dealing with the Stone crushers/Hot and Wet Mixing Plants by promulgating the rules vide SO 60 of 2021 dated 23.02.2021 and the relevant features of the aforesaid policy is as under:-

> "***A stone crusher/Hot and Wet Mixing Plant is not a mining unit but a processor of minerals obtained from a source with a valid mineral concession. Such units shall be***

regulated by laws, rules and other provisions applicable to industrial units.

No permission/license would be needed by a Stone crusher/Hot and Wet Mixing plant from the Mining Department except where it also engages in mining, which activity shall be regulated by laws/rules applicable to mining.

Every Stone crusher/Hot and Wet Mixing Plant established/operating under these rules shall procure minor minerals, for storage and processing in the Unit/Plant/Crusher for conversion to finished goods and sale, from a valid mining concessionaire only under the relevant provisions of Jammu and Kashmir Minor Mineral Storage, Transportation of Minerals and prevention of Illegal Mining Rules 2016.

The provisions of the Jammu and Kashmir Minor Mineral Storage, Transportation of Minerals and prevention of Illegal Mining Rules, 2016 shall apply to seizure of Minor Minerals and tools and associated penalties for their illegal procurement, transportation and storage in any Stone crusher/Hot and Wet Mixing Plant.

Notwithstanding anything contained in these rules, the processor shall abide by the applicable Acts and rules or any modification/amendments made under such Acts and rules from time to time, any guidelines of Jammu and Kashmir Pollution Control Board and the Central Pollution Control Board."

F. Therefore, the main contention raised by the petitioners pertains to the rules promulgated in 2017, by the official respondents which have since been repealed and replaced by new Rules vide S.O.60 of 2021 which are applicable to the case of respondent No.11. Even, the respondent No.11 has complied with the provisions of the rules, which were prevalent in 2017 by obtaining NOC from all the departments and from the perusal of record, it reveals that the respondent No.11 has obtained the mandatory environmental clearance/consent to establish from the Pollution Control Board, besides obtaining the requisite NOC from Deputy Commissioner concerned regarding title verification of the land and thus, fully filled the criterion as per the new rules promulgated vide SO 60 of

2021 and thus, there is no legal impediment which comes in the way of the respondent No.11 as on date to run the stone crusher.

G. The learned counsel appearing on behalf of petitioners, on one hand is challenging the *vires* of said rules and at the same time, has also placed reliance on same rules and by doing so, the learned counsel is **blowing hot and cold in the same breath which is not permissible under law**. The law does not allow anyone to both **approbate and reprobate**. A person cannot be allowed to have the benefit of an instrument while questioning the same. I am supported by the Judgment passed by Hon'ble Supreme Court in case titled ***Nagubai Ammal v. B. Shama Rao, 1956 SCR 451***:

> ***"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 and Netherlands Steamship Company Ltd. [(1921) 2 KB 608], and in particular, the observations of Scrutton, LJ, at page 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.:***
>
> ***"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, LJ 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 Bli 1, 21] : Douglas-Menzies v. Umphelby [(1908) AC 224, 232] . 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".

H. In the case at hand, I am also fortified by the judgment passed in case titled ***Union of India versus N Murugesan (2022) 2 SCC 25***. Para Nos.26 and 27 of the said judgment are necessary to be reproduced hereunder:-

"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:

- ***Nagubai Ammal v. B. Shama Rao, 1956 SCR 451:***

"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 and Netherlands Steamship Company Ltd. [(1921) 2 KB 608], and in particular, the observations of Scrutton, LJ, at page 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.:

"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, LJ 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 Bli 1, 21] : Douglas-Menzies v. Umphelby [(1908) AC 224, 232] . 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".

• 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. V. MR. P. Firm Muar [CIT v. 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. 13 Gosain v. Yashpal Dhir, (1992) 4 SCC 683] this Court has observed as under: (SCC pp. 687-88, para 10)

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

25. <u>The Supreme Court in Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd. [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153]</u> , 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."

- ***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 [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 : AIR 2009 SC 713] , Pradeep Oil 14 Corpn. v. MCD [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869] , 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 : JT (2012) 9 SC 260] .]

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."

I. Thus, in the light of the aforesaid judgment, it is emphatically clear that the petitioners cannot blow hot and cold in the same breath. Even otherwise, it is settled proposition of law that the policy decision of the State is not disturbed unless they are found to be grossly arbitrarily or irrational. In the present case, the respondents have promulgated the aforesaid standing order S.O 60 of 2021 with a view to promote ease by simplifying the things with a view to encourage entrepreneurs to set up these plants to operate their stone crusher units by obtaining only two documents/clearances from Deputy Commissioner and the Pollution Control Board. In this

context, the Supreme Court in the case of "***Federation of Railways Officers Association & Ors. Versus Union of India" 2003 (4) SCC 289*** has held as follows:-

> ***"In examining a question of this nature where a policy is evolved by the Government judicial review, thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion.***
>
> ***i. On matters affecting policy and requiring technical expertise the Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the Court will not interfere with such matters"***
>
> ***ii. I am also fortified by the view of the Hon'ble Supreme Court in case titled <u>Directorate of Film Festivals & Ors. Versus Gaurav Ashwin Jain & Ors. (2007) 4 SCC 737</u>, where the Court held as follows:***
>
> ***iii. The scope of judicial review of government policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitably and appropriateness of a policy nor are courts Advisors to the executive on matters of policy which the executive is entitled to formulate.***
>
> ***iv. This view has been reiterated by the Apex Court in Parisons Agrotech Private Limited & Anr Versus Union of India & Ors; (2015) 9 SCC, the Supreme Court observed as under:***
>
> ***v. No Doubt, the Writ Court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution of India, power of judicial Review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives.***
>
> ***vi. Supreme Court while allowing the Civil Appeal No.5133 of 2019 (arising out of SLP (C) No.30090 of 2018) titled Vasavi Engineering College Parents Association Versus State of Telangana & Ors, held that:***
>
> ***vii. Judicial Review, as is well known, lies against the decision making process and not the merits of the decision itself. If the decision making process is flawed inter alia by violation of the basic principles of natural justice, is ultravires the power of the decision maker, takes into consideration irrelevant materials or excludes relevant materials, admit materials behind the back of the person to be affected or is such that no reasonable person would have taken such a decision in the circumstances, the Court may step into correct the error by setting aside such decision and requiring the decision maker to take a fresh decision in accordance with law.***

J. Reference may be made to ***State of NCT of Delhi and another Vs. Sanjeev Alias Bitoo reported in (2005) 5 SCC page 181***, The Apex Court in para 16 has held as under: -

> ***16. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is `illegality' the second `irrationality', and the third `procedural impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All. ER. 935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Income-tax v. Mahindra and Mahindra Ltd., AIR (1984) SC 1182. The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book ``Applications for Judicial Review, Law and Practice'' thus:***
>
> ***"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil***

service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

9. CONCLUSION:-

A. Thus, in the light of the aforesaid settled legal position, it can safely be concluded that the policy framed by the Government vide S.O. 60 is a valid piece of legislation and cannot be interfered, which has in a way liberalized the establishment of stone crusher units. It goes without saying that the growth of the country and infrastructural development, the stone crusher industry plays a pivotal role and without operating the same, the development of the country will come to a standstill, thus the challenge of the petitoenr to the standing order (S.O. 60 dated 23.02.2021, falls flat and in absence of any legal foundation/basis to challenge the vires of the said S.O., the writ petiton deserves dismissal.

B. From the record, it is apparent that the mandatory environmental clearance/consent to establish from the J&K Pollution Control Board which has been issued vide consent order dated 28.10.2020 in favour of respondent No.11 was valid upto October 2021. It is apparent from the record that J&K Pollution Control Board has again issued necessary environmental clearance/consent to establish in favour of respondent NO.11 vide consent order dated 26.04.2022. It is relevant to mention that for the growth of the country and infrastructural development the stone crusher industry pays a pivotal role and without operating the same the development of the country will come to stand still and since the government has framed the aforesaid policy based upon the opinion of experts in the field vide S.O. 60, the same cannot be faulted and

interfered. The writ petition has been primarily based upon by the petitioner by relying upon the provisions of SRO 302 of 2017 which has already been repealed by coming into force SO 60 of 2021, wherein, the requirement of obtaining "No Objections Certificate" from different departments as well as the requirement with respect to the having minimum distances has been waived off for the purposes of establishing stone crusher by simplifying the procedure.

C. The respondent No.11 till date has not established and operationalized the stone crusher, therefore, the allegation of the petitioner with regard to the question of dumping of waste in the stream seems to be factually incorrect. The allegations leveled in the petition with a view to have minimum distance has been done away by promulgation of new S.O. 60 of 2021 and even under the provisions of SRO 302 of 2017 in which there was a requirement of minimum distance, the respondent No.11 was given NOCs by all the concerned departments. Insofar as mandatory requirement of obtaining "No Objection Certificate" from the Deputy Commissioner regarding title verification of the land and its usage as per Rule 3 of S.O. 60 is concerned, the same has been granted by the Deputy Commissioner vide order dated 22.06.2022 and the consent to establish/operate has also been issued by Pollution Control Board thus, there is no legal impediment which should come in the way of respondent No.11 to establish/operate his stone crusher as envisaged under rule 3 of S.O. 60.

D. Thus in light of afore mentioned settled legal position coupled with the policy framed by the Government vide S.O. 60 of 2021, the challenge

in the present writ petition fails and the writ petition, as such is dismissed, as respondent No.11 have duly complied with all the requisite formalities for establishment of stone crusher in accordance with rules in vogue as promulgated vide S.O. 60 of 2021 and, thus, there is no legal impediment which should come in the way of respondent No.11 to establish and operate his unit of Stone crusher.

E. The writ petition is devoid of any merit and as such, is dismissed for the reasons stated hereinabove along-with all connected applications.

F. Interim direction, if any, shall stand vacated.

(WASIM SADIQ NARGAL)
JUDGE

JAMMU
01.03.2023
Shameem H.

Whether the order is reportable? **Yes**