
(1980) 09 RAJ CK 0020

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 66 of 1980

Associated Cement Companies Ltd.

APPELLANT

Vs

The State of Rajasthan and Another

RESPONDENT

Date of Decision : 25-09-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Constitution of India, 1950 — Article 40
Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 115
Rajasthan Municipalities Act, 1959 — Section 4, 4(1)(8)
Specific Relief Act, 1963 — Section 41, 42

Citation : AIR 1981 Raj 133 : (1980) RLW 611

Hon'ble Judges : N.M. Kasliwal, J;M.L. Shrimal, J

Bench : Division Bench

**Advocate : T.R. Audhyanijina, H.D. Patit and M.D. Agarwal, for the Appellant;
S.K. Tiwari and G.G. Sharma, for the Respondent**

Final Decision : Dismissed

Judgement

Shrimal, J.—This appeal is directed against the order dated January 11, 1980, of learned District Judge, Jaipur City, Jaipur, whereby he dismissed the injunction application, filed under Order 39 Rules I and 2 read with Section 151, Code of Civil Procedure, 1908, in civil original suit No. 16 of 1979.

2. Shorn of unnecessary details, the brief facts, for the decision of this appeal are that the appellant is a public limited company, registered under the Indian Companies Act, 1913. The predecessor-in-interest of the Company obtained a mining lease on December 1, 1913, for a period of 30 years in the erstwhile State of Bundi with a provision for further renewal. It established a factory and commenced production of cement in the year 1917. The predecessor-in-title transferred its right, title and interest to the appellant in the year 1937. The lease was renewed for a period of 30 years on August 1, 1943. On March 17, 1969, the Controller of Mines and Leases modified the terms of the lease,

whereby the lease-area was reduced from 101 sq. Miles to 20.5 Sq. Miles and thereafter the lease was renewed for a further period of 20 years from August 1, 1973 to July 31. 1993.

3. After the establishment of the factory the Company developed the factory area by providing other civic amenities, which would normally have been provided by local authorities or municipalities.

4. After the formation of the State of Raiasthan the Government issued a Notification, dated December 5, 1951, fixing the limits of the Lakheri Municipal Board. The limits so fixed included area of the mining lease as well as the factory owned by the appellant. The appellant made certain representations and the State Government agreed to exclude the factory area as well as the area included by mines from Lakheri Municipal limits. A bilateral agreement (Ex. 5) was executed on January 24, 1957, between the Governor of Rajasthan and the appellant. The relevant terms and conditions read as under :--

"1. The excluded areas shall not be included in and shall be kept excluded from (if already so included), in the limits of the Lakheri Municipality or any other Municipality or Village Panchayat or a like body set up or to be set up by the Government, for the unexpired period of the said lease.

2. The Government recognise the rights of way of the Company over the roadway or Railway siding leading to the factory from the Lakheri Railway Station hitherto enjoyed by the Company as access to the factory site from the Railway Station and from the Railway Station to the factory and the right of the Company to use the roadway and Railway siding will not be disturbed nor be subject to any taxation.

3. In consideration of the above, the Company agree and undertake to pay to the Lakheri Municipality a sum of Rupees 10,000/- every year during the subsistence of the said Lease hereinabove recited or any renewal thereof."

A supplementary agreement, dated March 14, 1958, was also executed between the parties, whereby the respondent No. 1 agreed to exclude certain areas, which had not been excluded by its previous Notification dated August 2, 1957.

5. The Government of Raiasthan vide Notification No. F. 5 (125) LSG/63/31156-65, dated May 20, 1975, published in Rajasthan Gazette dated June 5, 1975, declared its intention to include the area mentioned therein in Lakheri Municipality and also invited objections to the said proposal. In spite of the objections submitted by the appellant, the respondent No. 1 issued a declaration, dated December 17, 1975, u/s 4(1) of the Rajasthan Municipalities Act, 1959 (hereinafter to be called as "the Act"), in the Rajasthan Gazette dated December 25, 1975, fixing the limits of the Lakheri Municipal Board, which included the factory area of the Company. After the publication of the said Notification, respondent No. 2 levied and recovered octroi on the goods brought within the municipal limits by the appellant Company. Various regulations and

restrictions provided under the Act were also imposed. It is alleged that the appellant continued paying octroi duty up to December 6, 1978, and thereafter served a notice u/s 80, Code of Civil Procedure, on defendant No. 1 and filed a suit on February 13, 1979, whereby it claimed declaration that the respondent No. 1 had no right to extend the limits of Lakheri Municipality or include the area occupied by the appellant within any other Municipality or Panchayat or like body. It also claimed that the declaration, dated December 17, 1975, made u/s 4 (1) of the Act be held as void. It has also been prayed that respondent No. 2 be restrained from demanding and collecting, from the appellant Company, any taxes, cesses, fees and other impost by reason of the extension of the municipal limits of defendant No. 2 and inclusion of the area occupied by the appellant Company. It further claimed a refund of an amount of Rs. 19,92,966/-.

6. Along with the plaint an application under Order 39, Rules 1 and 2, read with Section 151, Code of Civil Procedure, was filed claiming the following reliefs:--

(i) that the defendant-respondents be restrained from acting upon the said Notification, dated December 17, 1975, in so far as it extends the limits of respondent No. 2 over the area occupied by the plaintiff-appellant Company;

(ii) pending the disposal of the suit, the defendant-respondents be restrained by order and injunction of the Court from demanding and collecting taxes payable by reason of the extension of the municipal limits of the defendant-respondent No. 2.

7. The respondents resisted the claims of the plaintiff-appellant.

8. The learned District Judge, after considering the arguments advanced by both the parties, dismissed the application for grant of temporary injunction ; vide his order, dated January 11, 1980. Hence this appeal.

9. We have considered the arguments of learned counsel for the parties.

10. In order to enable a party to obtain a temporary injunction he has to satisfy the following three conditions-

(i) first, that there is a prima facie case in favour of the plaintiff i.e., there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief asked for by him;

(ii) secondly, that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal rights can be established on trial, and

(iii) thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it.

Besides the above three conditions, it should also be kept in mind that Section 41(h) of the Specific Relief Act, 1963, lays down that an injunction which is a

discretionary equitable relief, cannot be granted when an equally efficacious relief is obtainable in any other usual mode or proceeding except in cases of breach of trust.

11. Learned counsel appearing on behalf of the appellant urged that octroi duty is an obligatory tax provided u/s 104 of the Act and the defendants failed to point out any Notification published u/s 104 of the Act, whereby it could be said that Municipal Board, Lakheri, was entitled to recover octroi duty. Believing this statement, the learned District Judge held that because no Gazette Notification was placed before him, it could be said that recovery of octroi duty by the Municipal Board, Lakheri, was prima facie not according to law.

12. In this connection we are constrained to observe that proper facts were not placed before the learned District Judge. In the Rajasthan Gazette Extraordinary, dated June 10, 1968. a Notification u/s 104 (2) of the Act, had been published, wherein different rates of octroi recoverable on different items by Lakheri Municipal Board had been mentioned in detail. It had been issued in the name of the Governor of Rajasthan and had been authenticated by the concerned Deputy Secretary. It is an admitted case of the plaintiff that the area covered by the factory and the mining lease had been included within the Municipal limits of Lakheri Municipal Board after taking due steps and publishing requisite Notification (Ex. 9) in the Rajasthan Gazette, dated December 25. 1975.

13. Faced with this inconvenient situation, learned counsel for the appellant laid great stress on the point that no Notification imposing octroi duty on the newly included area had been published after December 25, 1975 and as such the respondent No. 2 is not entitled to recover this amount. In support of the above contention he has placed reliance on *The Atlas Cycle Industries Ltd. Vs. State of Haryana and Another*, The ratio decidendi of the case noted above has no applicability to the facts of the present case. Section 4 of the Act was amended and Sub-section (8) was inserted by Section 2 of the Rajasthan Municipalities (Second Amendment) Act, 1974 (Rajasthan Act No. 22 of 1974), published in the Rajasthan Gazette Extraordinary Part IV A, dated September 21, 1974. The relevant portion of the amended provision reads as under: --

"4. Delimitation of Municipalities-

(8) Upon the exclusion of any area of Panchayat circle and its inclusion in a municipality or upon its declaration as a municipality, under Sub-section (1),--

(d) until new rules, notifications, orders and bye-laws are made or issued Under this Act, the rules, notifications, orders and bye-laws, applicable to the municipality in which any such area is included, shall continue to apply to the area so included: ..."

The above noted amendment makes it crystal clear that the octroi duty, leviable under the Notification, published in the year 1968, automatically becomes leviable from persons bringing the goods within the limits of factory area of the

Company, which has become part of Lakheri Municipality. Thus, the main plank of the plaintiff's suit, on which the entire edifice has been built, falls to the ground.

14. The other limb of the same argument is that the agreement Ex. 5, made between the appellant and the respondent No. 1, is not enforceable in a Court of law, because the State Government is not competent to fetter its future executive or legislative action.

15. A contract opposed to public policy of the State is unlawful. Neither the State Government, nor the subject can lawfully be allowed to do that which has tendency to be injurious to the public or against the public good. No doubt, there cannot be any comprehensive formula or classification of work relating to public policy. Rules of public policy have verily to be moulded to suit new conditions of changing world and the use of judicial precedence is very helpful in this regard (Per Lord Wright, "Legal Essays and Addresses". (iii) 76-78).

16. In *Rederiaktiebolaget Amphitrite v. The King* (1921) 3 KB 500, Rowlatt, J. observed as under :--

"My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."

17. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time. The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated. Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decision on the opinions of men of the world, as distinguished from opinion based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality.

18. It can safely be said that the State Government does not possess power of depriving the residents of a particular locality of their right to be governed by a local body, such as, municipality or gram panchayat and participate in its affairs and get persons elected to various posts in the local bodies. Growth of local self-government is a necessary part of democratic decentralisation. It provides an opportunity to advance and promote the political and popular education of the people and to induce the most intelligent men to come forward and take a share in the management of their local affairs. Its importance has been recognised by our founding fathers. Article 40 read with Seventh Schedule List II (5) of the Constitution of India provides that the State shall take steps to organise Village

Panchayats. Municipal Corporations and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. Thus, condition No. 1 of Ex. 5 is contrary to the law of the land.

19. When statutory provision lays down a rule of public policy, neither party to an agreement can contract out of it. In *Equitable Life Assurance Society of the United States v. Reed*, 1914 AC 587 in an appeal from the Court of Appeal of New Zealand a question arose before their Lordships of the Privy Council whether a term of the policy which was contrary to Section 64 of the Life Insurance Act, 1908 of New Zealand could be enforced. The answer made by their Lordships has been aptly described in the Head Note, which reads as under;--

"that Section 64 was intended to lay down a rule of public policy and that it was not competent for an assurer or an assured to contract himself out of or to waive its provisions"

20. In *Maharaia Shree Umaid Mills Ltd. v. Union of India*, AIR 1960 Rai 92 a Division Bench of this Court held as under:--

"Even if the United State of Rajasthan had affirmed it the agreement would not be binding on the State of Rajasthan or the Union of India as it fetters future executive and legislative action of sovereign bodies."

In view of the above observations of their Lordships made in the Division Bench case it can safely be said that prima facie the agreement Ex. 5, which forms the basis of the suit is neither enforceable against the State Government nor is it so against the Municipal Board, Lakheri.

21. Lastly, it was urged by the learned counsel for the appellant that the State Government was bound to abide by the terms of Ex. 5 under the law of promissory estoppel, A perusal of the application, dated February 13, 1979, filed by the appellant under Order 39, Rules 1 and 2, Code of Civil Procedure, reveals that the plea of promissory estoppel was not raised in the application. The plea of promissory estoppel is a mixed question of fact and law. For obtaining relief under such a plea, foundation is required to be laid down in the pleadings. Nowhere in the application it has been mentioned as to what particular acts were performed by the appellant Company after the execution of Ex. 5 or after the renewal of the lease in the year 1973. In order to raise the plea of promissory estoppel it was for the petitioner-appellant to have specifically mentioned that placing reliance on the terms of the agreement Ex. 5 it acted upon it and made certain constructions for the benefit of the residents of the newly included area. The learned District Judge was correct in observing as under:-- (Matter in Hindi omitted --Ed.)

22. In the course of arguments learned counsel for the appellant was unable to show, relying on the representation of the Government after 1973 that the Company had altered its position by investing monies and thus no factual foundation for establishing plea of promissory estoppel has been laid down and

as such it would be unfair to the respondents to allow the appellant to base its claim on the plea which has not been raised in the pleadings. Apart from that, as the point regarding promissory estoppel has been argued at length, we will like to express our opinion on this question also.

22A. There is divergence of opinion in various decisions of the Supreme Court regarding the law of promissory estoppel against the State Government. In one set of cases it has been held that promissory estoppel can be the basis of a cause of action against the State. The first in the series of cases supporting this view is *Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others*, followed by *The Union of India v. Anglo Afghan Agencies* AIR 1968 SC 718, *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, *Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd.*, and *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*. In all these cases it was held that the public bodies or the State Government were as much bound as private individuals were to carry out obligations incurred by them, because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities.

23. A contrary view explaining the *Anglo Afghan Agencies* case AIR 1963 SC 718 (supra), was taken by a Constitutional Bench of the Supreme Court in *M. Ramanatha Pillai Vs. The State of Kerala and Another*, wherein their Lordships held:--

"As a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity. An exception however arises where it is necessary to prevent fraud or manifest injustice."

In *Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others*, it was held :--

"there can be no question of estoppel against the Government in exercise of its legislative, sovereign or executive powers."

24. In spite of the above divergent opinion, there is unanimity in all the decisions delivered by the Supreme Court and other Courts on the point that where the Government owes a duty to the public to act differently, promissory estoppel cannot be invoked to prevent the Government from doing so. The doctrine of promissory estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The doctrine of promissory estoppel cannot be applied in teeth of an obligation or liability imposed by law. It may also be noted here that promissory estoppel cannot be invoked to compel the Government or even a private party to do an act prohibited by law. There can also be no promissory estoppel against the exercise of legislative powers. The legislature can never be precluded from exercising its legislative functions by resort to the doctrine of promissory estoppel. It is one of the obligatory duties of the State Government to provide an opportunity to its citizens to be governed by

the local self-government. As such, it cannot be said that the State Government was or is precluded from extending the limits of Lakheri Municipality.

25. The net result of the above discussion is that the plaintiff-appellant has in entirety failed to prove that a prima facie case exists in its favour.

26. Section 10 of the Specific Relief Act provides that except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Before granting a temporary injunction it would always be beneficial to examine Sections 10 41 and 42 of the Specific Relief Act. On the facts and circumstances of the case it cannot be said that the learned District Judge was wrong in holding that the balance of convenience lies in not granting the injunction in favour of the plaintiff, because by non-grant of injunction the plaintiff was not going to suffer irreparable loss. It should also not be forgotten that the appellant has challenged the validity of the Notification, dated December 17, 1975, in the year 1979 i.e., after the expiry of three years and two months. The plaintiff, claiming equitable relief, is bound to prosecute his claim without undue delay. While considering an equitable relief, the Court can refuse its discretion to a person, who has been sleeping over his rights and who has made a stale demand. The learned District Judge placing reliance on Bhagalpur Rolling Mills Vs. Bhagalpur Electric Supply Co. Ltd., held that keeping in view the delay on the part of the plaintiff, it would not be in the interest of justice to grant him any discretionary relief.

27. We find no mistake in the above observation. Each and every Municipality is required to discharge primary and secondary functions of the Board as mentioned in Chapter VI of the Act of the Act of 1959. The members of the Municipalities are elected representatives of the people. They know the peculiar need of each Municipality and the paying capacity of the residents of that area. They are also conscious of the fact that they will have to face the electorates after the expiry of three years. The Municipalities or the Municipal Corporations while finding out the source of income to meet the total expenses likely to be incurred by them, always keep and are expected to keep in view, the benefit of the people whom they represent. The rate of octroi duty is fixed at the request of the Municipality by the State Government. The octroi duty is charged only on persons who import particular articles for sale, consumption and use within particular area constituting municipal limits. While fixing the sale-price of a particular manufactured article the person selling the goods or the State Government fixing the price takes into consideration the expenses incurred by the manufacturer, which includes the octroi duty paid by a particular concern on the articles consumed for manufacturing another article. Thus the appellant is not required to pay anything from its own pocket and the withholding of the injunction will not put the appellant to any irreparable loss, while the granting of

injunction is likely to create comparative mischief and inconvenience to the respondent, which would be greater than that which is likely to arise from not granting injunction.

28. The net result of the above discussion is that the appeal is dismissed. In the circumstances of the case, the parties are ordered to bear their own costs.