

(1983) 01 MAD CK 0046

In the Madras High Court

Case No : Writ Petition No's. 1917 and 1928 of 1980

S. Ananda and Others

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 18-01-1983

Acts Referred:

Contract Act, 1872 — Section 14(5), 20, 22

Tamil Nadu Pension Rules, 1978 — Rule 44

Tamil Nadu State and Subordinate Services Rules, 1955 — Rule 9

Citation : (1983) 2 LLJ 277

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Judgement

1. Since the point involved in these two writ petitions is the same, they are dealt with together.

2. The petitioners in these two writ petitions who are 118 in number had originally joined the Department of Industries and Commerce in various

capacities such as Typist, Junior Assistant, Junior Assistant Store-keeper, Assistant, Assistant Store-keeper, Time-keeper, Draughtsman, etc. after

having been recruited for the concerned posts by the Tamil Nadu Public Service Commission. The details of the above said posts are however not

necessary for the purpose of consideration of the point involved in these writ petitions.

3. The Industries and Commerce Department set up units in various centers in the state of Tamil Nadu to demonstrate and disseminate the

technique of modern manufacturing in various sectors during the 2nd, 3rd and 5th Plan periods. In or about February, 1960, the Government of

India recommended the formation of an autonomous Corporation for the management of Industrial Estates and for taking up of Programme of

Commercial nature like production scheme, establishment of marketing, raw material depot etc. In view of those recommendations, the

Government of Tamil Nadu had set up a state-owned Corporation known as Tamil Nadu Small Industries Corporation or taking over from the

Government the production servicing small scale industrial units with assets and liabilities of the Government. The initial subscribed share capital

was paid by the government to be transferred to such Corporation. The said Corporation set up by the Government started functioning with effect

from 1st December, 1965. The officers and staff like the petitioners who were then working in the Small Scale Industries Section and units of the

Industries and Commerce Department under terms and conditions contained in G.O.Ms. No. 5600, Industries dated 30th November, 1965. The

benefit of rule 9 of the General Rules for the Madras State Subordinate Service was given to all the deputationists who were deputed irrespective

of the fact whether they held regular appointment in the Industries Department or not. Further, the said Government Order also provided that the

staff who were sent on deputation would be on foreign service till their permanent absorption in the service of the Corporation.

4. By a further order in G.O.Ms. No. 1571, Industries (Special) dated 16th December, 1969, the Government evolved the following procedure as

the basis for the exercise of option by the Government servants on deputation to the Corporation. (a) The personnel of the Industries and

Commerce Department on other duty in the Corporation who hold only temporary appointment or those who hold, membership rights only in the

posts were transferred to the Corporation have no option to exercise and they deemed to have been transferred to the Corporation once and for

all. (b) Only those who have membership rights in the posts which continue in the Industries Department will be continued to be allowed the option

to be absorbed in the Corporation or to be returned to the Department, However, the said Government order G.O. Ms. No. 157. Industries

(Special) dated 16th December, 1969 was however superseded by G.O.Ms. No. 162, Industries, dated 21st January, 1971 which again laid

down certain basis for the exercise of the option by the personnel of the Industries Department on deputation to the Corporation. However neither

G.O.Ms. No. 1571, Industries dated 16th December, 1969 nor G.O.Ms. No. 162, Industries dated 21st January, 1971 evoked any response

from the deputationists and none of them exercised their option to serve in the Corporation. Finding that there was no response from the deputationists, the Government issued G.O.Ms. No. 803, Industries (Special) dated 18th May, 1973 with a view to give a further chance to the deputationists to exercise their option. This G.O. also evoked no response, and therefore, the Government issued a further Government order, namely, G.O. Ms. No. 731, Industries (Special) dated 21st May, 1974 which provided benefits like commuted/monthly pension, gratuity, provident fund, earned leave and computation of leave to those Government servants who opted to the service of the Corporation. In view of the various benefits assured in the said Government order, all the petitioners herein exercised their options pursuant to the three Government order referred to supra. After the petitioners had exercised their option and had become the servants of the Corporation, the Government has issued G.O. Ms. No. 284, Finance dated 31st March, 1980 suspending the earlier G.O. Ms. No. 731, Industries (Special) dated 21st May, 1974. The validity of the said G.O. Ms. No. 284, Finance (CFC) Department dated 31st March, 1980 has been challenged by the petitioners in these writ petitions.

5. The petitioners' case is that though in G.O. Ms. No. 731, Industries (Special) dated 21.5.1974, certain terminal benefits were given to persons like the petitioners and they were entitled to those benefits on their permanent absorption in the Corporation, those benefits have been withdrawn in G.O. Ms. No. 284, Finance (CFC) dated 31.3.1980 after the petitioners have given their options and the said options have been accepted by the Government and they have become employees of the Corporation. According to the petitioners the persons who opt and get permanently absorbed with the Corporation would be entitled to as per the said order in addition to their pay in the Corporation, pension and gratuity earned by them in Government service prior to such absorption which shall be made over to such optee in a lumpsum immediately on their absorption in the Corporation by the Government, and the optee will also have the option to commute the full pension and receive a lumpsum payment in lieu of pension worked out with reference to commutation tables obtaining on the date from which the pension will be admissible and payable under the

option orders and the crucial date for calculating the aforesaid terminal benefits in respect of the Corporation was to be date of absorption of the

optee. The petitioners' present complaint is that having given an inducement to the petitioners for getting their option to opt to the Corporation, the

Government cannot withdraw the terminal benefits given to them under the earlier Government order after they had in fact exercised their option

and became the servants of the Corporation.

6. In support of the said submission the learned counsel for the petitioners refers to the decision of the Supreme Court in *Bhim Singh and Others*

Vs. State of Haryana and Others, . In that case the State of Haryana held out certain specific promises as inducement for its employees to move

into a newly created department. The concerned employees having believed the representations of the State Government acted in pursuance

thereof and became the employees of the said newly created department. Subsequently the Government withheld the benefits promised to them.

The action of the Government denying the benefits promised to the concerned employees was challenged and the matter ultimately went before the

Supreme Court. The Supreme Court had expressed the view that on the facts and circumstances of that case the doctrine of promissory estoppel

will squarely apply and the State Government cannot withhold the benefits promised to the concerned employees after they have expressed their

option and became the employees of the newly created department.

7. In this case the respondents in their counter affidavit have not denied that certain terminal benefits were given to those who exercised their option

to become the employees of the Corporation, by G.O. Ms. No. 731, Industries (Special) dated 21.5.1974. It is also not in dispute that on the

basis of the terms offered in the said Government order the petitioners exercised their option to become employees of the Corporation and their

option was accepted by the Government and the petitioners were transferred permanently to the service of the corporation by G.O.Ms. No. 575,

Industries, dated 4.5.1976. However, the respondents contend that the Government had to reconsider the whole question of the terminal benefits

consequent on certain reference received from the Accountant General, that no benefits accrued to the petitioners unless and until the question of

terminal benefits is finally and fully decided and that the reconsideration of

terminal benefits has to be done taking into account all the aspects of the problems and not only the interest of the employees transferred to the Corporation and that after a re-examination of the whole question, G.O.Ms.

No. 284 Finance (CFC) dated 31.3.1980 was passed. No doubt, this order altered the position in regard to settlement of terminal benefits only in respect of the following three matters.

- (1) The date of absorption of the employees in the Corporation.
- (2) The date from which the pension, if eligible, is payable to the employee.
- (3) The portion of pension which the employee is eligible to commute.

According to the respondents the date of absorption has been specifically fixed as the date from which the employee is continuously working in the

Corporation or the date of incorporation of the Corporation, mainly to protect the interest of the transferred employees like the petitioners. The

date from which the pension is payable to the employee was taken as the date of retirement of the employee from the service of the Corporation

and not the date of their absorption in the Corporation. The respondents contend as the earlier Government order gave them unintended benefits

which were not available to a Government servant normally retiring from service, that a retired Government servant's pension is suspended during

the period he is re-employed, that the intention behind the earlier Government order was only to treat the Government employee absorbed in a

Corporation as a retired Government servant, that allowing pension to the petitioners is addition to the salary which they would receive from the

Corporation would be against the basic principles of which pension is paid and that since the employees prospects in the Corporation's service are

far better than what it would have been in their parent department they cannot expect the Government to pay them pension also. Therefore the said

anomaly was set right in G.O.Ms. No. 384, Finance (CFC) dated 31.3.1980 by postponing the payment of pension to the date of retirement from

the Corporation, thus suspending the payment of pension till then. As far as commutation of pension is concerned, the retired Government servants

are entitled to commute only one-third of their pension, that once a Government Servant wants to treat the employee absorbed in a public sector

undertaking as a retired Government servant he is entitled only to the benefits that are normally allowed to a retired Government servant and

therefore the revised order stipulating that the absorbed employee could commute only one-third of pension after he was taken to the Corporation is valid. It is also pointed out in their counter affidavit that G.O.Ms. No. 284, Finance dated 31.3.1980 has given the option to the employee to revert back to their parent department if they do not want to get themselves absorbed in the Corporation and, therefore, nothing prevents the petitioners from reversion back to the Government service if they so desire even now. The respondents also contend that the revised Government order in G.O.Ms. No. 284, Finance, dated 31.3.1980 has not deprived the petitioners or the other employees transferred to the various undertakings any of their legitimate rights and they are still entitled to pension, gratuity and commutation of pension according to the rules normally applicable to any Government servant, and that pension is only postponed to the date of retirement in the Corporation instead of the date of absorption and commutation is restricted to 1/3rd of pension as in the case of Government pensioners. The respondents have also taken up the plea that the terms and conditions contained in G.O.Ms. No. 731, Industries, dated 21.5.1974 is void and unenforceable as per Section 20 of the Indian Contract Act, 1872 because it has been passed by a mistake and is not based on free consent, as per section 14(5) of the said Act for since the terminal benefits offered in the said G.O. can normally be claimed only after the employee's retirement from the Corporation, the G.O. providing for terminal benefits on the date of absorption is clearly a mistake and the parties to the agreement as per the said G.O. were under a mistake as to a matter of fact essential to the agreement and that, therefore even if the petitioners have exercised their option and have become the employees of the Corporation when the agreement itself is void the acceptance of the option is not valid and the petitioners cannot be taken to have become validly the employees of the Corporation. It has been further pointed out that the mistake lies in the fact that the said earlier G.O. more liberal terminal benefits were found which was not the intention of the Government, that while it is necessary to give adequate incentives for the Government servants who opt for service under the Corporation, it is necessary at the same time to ensure that these benefits are not to liberal to make the normal service under Govt., unattractive or make the foreign service more attractive which is prohibited under note 2(3) to

Fundamental Rule 114, and that unintended benefits are not conferred on the optees. Finally it is stated in the counter affidavit that the award of

terminal benefits as per the earlier G.O. to the petitioners would be against the larger interests of the state and also against the statutory rules

relating to payment of pension and, therefore, the petitioners are not governed in the earlier Government order.

8. In the light of the above rival contentions it has to be seen how the impugned Government order G.O. Ms. No. 284, Finance dated 31.3.1980

has affected the petitioners' rights if any acquired under the earlier G.O. Ms. No. 731 Industries, dated 21.5.1974.

9. As already stated, there were three earlier Government orders Nos. 1571, Industries dated 16.12.1969, 162, Industries dated 21.1.1971 and

803, Industries (Special) dated 15.5.1973 all of which laid down certain basis for the exercise of the option by the personnel of the Industries

Department who were on deputation to the Corporation. Since there was no response from the deputationists and they did not exercise their

option to become employees of the Corporation, the Government passed G.O.Ms. No. 731 Industries (Special) dated 21.5.1974 which offered

the following five terminal benefits for those who will become employees of the Corporation.

(1) Pension earned in Government service either monthly pension or lumpsum amount in lieu of pension worked out with reference to commutation

tables. (In respect of those with the qualifying service under Government of less than 10 years, service gratuity in lieu of pension) :

(2) Death-cum-retirement gratuity earned in Government service :

(3) Subscription together with interest standing in the provident fund accounts of Government servant to be transferred to the new Provident Fund

Account under the Corporation if the Corporation operates a Provident Fund and if the employees and the Corporation agree to the transfer,

otherwise the amount to be refunded to the subscribers :

(4) Cash equivalent of 50% of the quantum of earned leave at the credit of the employees as on date of absorption subject to a maximum of two

months' leave to be paid to the employee and the balance credit to be transferred to the accounts of the Corporation with full leave liability thereof

being paid to the Corporation by Government to meet the leave salary to the

employees and

(5) The liability towards unearned leave on private affairs and on medical certificates availed by the employees will be borne by the Government

and the Corporation on a proportionate service basis (as and when such leave is taken). Taking note of the terminal benefits offered in the said

G.O. the petitioners have exercised their option to become employees of the Corporation and that option has been accepted by the Government in

G.O. Ms. No. 575, Industries, dated 4.5.1976. Paragraph 3 of the said G.O. is as follows :

Government have carefully examined the proposal of the Director of Industries and Commerce and hereby accept the option exercised by the 637

employees of the Department of the Industries and Commerce, mentioned in the Annexure "A" and "B" to this order, to remain in Tamil Nadu

Small Industries Corporation and direct that they be absorbed in Tamil Nadu Small Industries Corporation permanently severing all their

connections in their parent department viz., the Department of Industries and Commerce. They are eligible for the benefits contained in the

Government order 4th read above.

10. Thus it is seen that the Government have accepted the option of as many as 637 employees of the Department of Industries and Commerce

and directed their absorption in the Corporation permanently severing all their connections viz., the Department of Industries and Commerce and

they are also eligible for the benefits contained in G.O. Ms. No. 731 Industries (Special) dated 21.5.1974, as per G.O. Ms. No. 575, Industries

dated 4.5.1976. The petitioners herein have become entitled to the terminal benefits referred to in the earlier order, G.O. Ms. No. 731, Industries

(Special) dated 21.5.1974 by virtue of their having exercised their option and having actually become employees of the Corporation. The

Government have subsequently passed the impugned G.O. Ms. No. 284, Finance dated 31.3.1980 revising the terminal benefits payable to the

petitioners in supersession of the terminal benefits given in G.O. Ms. No. 731, Industries dated 21.5.1974 as follows :

G.P.F. : Transfer of G.P.F. accumulation to the P.F. account of the person under the Corporation.

GRATUITY : Immediate cash payment of gratuity.

PENSION : Pension will be calculated at the time of transfer it is payable by the State Government only on retirement of the employer from the

Corporation the payment of pension has to be suspended during his employment in the Corporation. The employees will also be eligible on

retirement from Corporation to commute upto one third of the value of pension like Government employees who retire from Government service.

The pension and commuted value of pension, if any, will be paid by the Government direct to the Corporation. The pension may be notionally

calculated and noted at the time of finalising the option and entered in the service register, indicating that it is payable after retirement from the

service of the Corporation.

FAMILY PENSION : Since the optee for permanent absorption in the Corporation will cease to be a Government servant, the Government's

liability for family pension will cease.

EARNED LEAVE : The employee will be paid by Government cash equivalent to 50 per cent of the quantum of earned leave at his credit as on

the date of absorption. The balance of credit will be transferred to the account of the individual under the Corporation.

The said G.O. also directed that fresh option will be obtained from Government servants working in various Corporations on the basis of the

terminal benefits offered in G.O. Ms. No. 731, Industries, dated 21.5.1974. The question is whether the Government can withdraw the terminal

benefits offered in the 1974 G.O. which has been acted upon by both parties.

11. Accepting the terminal benefits offered in G.O. Ms. 731, Industries, dated 21.5.1974 the petitioners have exercised their option and the

Government also have accepted their option and had granted the terminal benefits by their subsequent G.O. dated 4.5.1976. The Government

have now chosen to supersede the 1974 G.O. by the impugned G.O. of the year 1980. I am of the view that on the facts of this case the decision

of the Supreme Court in Bhim Singh and Others Vs. State of Haryana and Others, squarely applies, and therefore, the respondents are bound by

the doctrine of promissory estoppel and as such cannot withdraw the terminal benefits already granted to the petitioners.

12. The learned counsel for the respondents would, however, state that the doctrine of promissory estoppel cannot be applied against the

Government to prevent the Government from action in accordance with the statutory rules. In substance what the learned Government Pleader contends is that there cannot be any estoppel against the statute and that on the basis of the principle of promissory estoppel the Government cannot be prohibited from doing its legislative, sovereign and executive functions. Reliance is placed by the learned Government Pleader in support of that submission on the decision of the Supreme Court in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, . In that case there was sale of certain plots in a market by the Municipal Committee. The Municipal Committee decided that the purchasers of plots for sale would not be required to pay octroi duty on goods imported within the market and the plots were sold on the basis of the said decision. The State Government also accepted the decision of the Municipal Committee giving immunity to the purchasers of plots from payment of the octroi duty. Later, the Municipal Committee changed its mind and resolved to levy octroi duty on the goods imported into the said market. But the said decision was annulled by the Punjab Government under S. 236 of the Punjab Municipal Act. In the meantime the examiner of the Local Funds Accounts insisted on the levy of octroi duty on the goods imported to the market. However, the Municipal Committee cancelled its earlier resolution not to levy octroi duty and started charging octroi duty on the goods imported to the market. At that stage the shopkeepers who had purchased the plots and put up shops thereon questioned the action of the Municipal Committee levying octroi duty invoking the doctrine of promissory estoppel. On these facts it was held by the Supreme Court that the plea of estoppel is not available against Government which has to levy the octroi duty as per the statutory provisions. The Supreme Court on that case had distinguished its decision in an earlier case in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, wherein the Supreme Court explained the scope of the doctrine of promissory estoppel and applied the same to prevent a Government action of levying sales tax on vanaspathi which they had promised to waive earlier. It is true, there cannot be an estoppel against a statute and when the Government is exercising its functions under a statute the principle of promissory estoppel cannot come into

play to prevent the State from enforcing the statute. But however, the Supreme Court in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar*

Pradesh and Others, has stated that the doctrine of promissory estoppel need not be inhibited by the same limitation as estoppel in the strict sense

of the term as such doctrine is an equitable principle evolved by the courts for doing justice and there is no reason in logic or principle why it should

be given only a limited application by way of defence and why promissory estoppel should also not be available as a cause of action, if necessary

to satisfy the equity. According to the Supreme Court, promissory estoppel is neither in the realm of contract nor in the realm of estoppel and the

true principle of promissory estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal

promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted

upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party

making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have

taken place between parties. The doctrine of promissory estoppel has also been applied in that case against the Government and the defence

based on executive necessity has been categorically negated and where the Government makes a promise knowing or intending that it would be

acted on by the promisee and, in fact, the promisee acting in reliance on it, alters his position, the Government would be enforceable against the

Government at the instance of the promisee. The following observations of the Supreme Court in that case are pertinent :

It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Every one is subject to the law as

fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the

Government stands on the same footing as a private individual so far as the obligation of the law is concerned. The former is equally bound as the

latter. The Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on

the ground that such promise may fetter its future executive action to be hampered or restricted, the Government need not make a promise

knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government

makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be

compelled to make good such promise like any other private individual.

13. Notwithstanding the conflict between the decisions in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, and Jit

Ram Shiv Kumar and Others Vs. State of Haryana and Others, as there is a direct decision of the Supreme Court on the question for

consideration in Bhim Singh and Others Vs. State of Haryana and Others, , where the facts are more or less identical to the facts of this case, I am

bound to follow the same.

14. Apart from this I am of the view that the decision in Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, cannot be applied to

the facts of this case where the promissory estoppel is not invoked in this case preventing the Government from doing any statutory function or

from acting against any statute. It is said that grant of pension to the petitioners taking the date of absorption as the basis while they are still working

and getting their pay from the Corporation will be contrary to Rule 44 of the Tamil Nadu Pension Rules and if the petitioners were to invoke the

principle of promissory estoppel, the Government will be forced to act contrary to the said Rule 44. But a perusal of the said rule indicates that it

regulates the pay in case of re-employed Government pensioner or of a retired employee from a local fund. The rule does not deal with the case of

a retired Government servant who opted to serve the Corporation, that is persons who retired from Government service and reemployed by the

Corporation.

15. The learned Government pleader also submits that any payment of pension taking the date of absorption as the basis will be contrary to note

2(B)(i) of Fundamental Rule 114. I do not see how note 2(3) of the Fundamental Rules will apply to the facts of this case. Fundamental Rule 114

is as follows :

A Government servant in foreign service shall draw pay from the foreign employer from the date on which he relinquishes charge of his post in

Government service. The amount of his pay, the amount of joining time

admissible to him and his pay during such joining time shall be fixed in consultation with the foreign employer.

Note 2(3) is set out below :

The following two general principles must be observed in sanctioning the conditions of transfer -

(a) The terms granted to Government servant must not be such as to impose an unnecessarily heavy burden on the foreign employer who employs him.

(b) The terms granted must not be so greatly in excess of the remuneration, which the Government servant would receive in Government service, as to render foreign service appreciably more attractive than Government service.

16. It is no doubt true that note 2(3)(b) says that the terms granted must not be so greatly in excess of the remuneration, which the Government

servant would receive in Government service, as to render foreign service appreciably more attractive than Government service. As per the terms

and conditions of absorption set out in the earlier G.O. of the year 1974 the petitioners are likely to get pension from the date of absorption in

addition to their pay from the Corporation. If according to the Government the pay plus pension that may be granted to the petitioners make the

service under the Corporation more attractive than Government service, then the Government should not have offered such an attractive terms in

the earlier G.O. Notwithstanding the said note the Government has chosen to offer some attractive terms. When the plea of promissory estoppel is

invoked, it is not open to the Government now to say that the petitioners cannot be granted the terms the Government had earlier ordered as

condition of exercising the option. Even at the time when the attractive terms were given to the petitioner, the fundamental rules were there. With a

view to induce the petitioners the Government had chosen to give such attractive terms and after the petitioners have acted upon the offer and

exercised their option the Government now cannot go behind their offer as if the offer will not bind them.

17. Coming to the last contention urged by the learned Government pleader that the earlier G.O. of the year 1974 is void as it is not based on free

consent as per Section 14(5) of the Contract Act, it is seen that the mistake pleaded is unilateral and not mutual. I do not see how it could be said

that there is no free consent in this case. S. 14 says that consent is said to be free when it is not caused by mistake but that is subject to the provisions in Sub-Sections 20, 21 and 22. It is not claimed here that the Government was forced to pass the said order of the year 1974 by coercion, undue influence, fraud, misrepresentation or mistake on the part of the petitioners. S. 20 says that an agreement will be void where both the parties were under a mistake as a contract is not voidable because it was caused by a mistake as to any law in force in India. Section 22 says that a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. In this case the Government alone can be said to be under a mistake when they passed the earlier order of the year 1974. Therefore, this case will squarely come under S. 22 of the Contract Act as the Government Order of the year 1974 is claimed to have been passed by the Government under a mistake as to a matter of fact. It is not possible therefore to hold that the G.O. of the year 1974 is either void or voidable at the instance of the Government.

18. Thus all the contentions put forward by the learned Government pleader as not tenable and, therefore, following the decision rendered by the Supreme Court in Bhim Singh and Others Vs. State of Haryana and Others, these writ petitions are allowed in so far as the impugned G.O. modifies the terminal benefits offered in the earlier G.O. of the year 1974 to the prejudice of the petitioner. There will be no order as to costs.