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**(1994) 10 PAT CK 0007**

**In the Patna High Court**

**Case No :** Civil Writ Jurn. Case No. 8318 of 1990

Trident Tubes Limited

APPELLANT

Vs

The Government of Bihar and Others

RESPONDENT

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**Date of Decision :** 06-10-1994

**Acts Referred:**

**Citation :** (1994) 10 PAT CK 0007

**Final Decision :** Dismissed

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## **Judgement**

Asok Kumar Ganguly, J.—This writ petition has been filed by M/s. Trident Tubes Limited, a Company incorporated under the Companies Act, 1956 (hereinafter called the said Company) through its Director Sri Sudarshan Kumar Saboo for a commend upon the respondents concerned directing them to pay to the petitioner the outstanding sum of Rs. 15,06,597.33 P. together with interest thereon. According to the petitioner, the said amount is payable by the respondents, the Government of Bihar, on account of price for the materials supplied by the petitioner Company to the respondents pursuant to the orders issued by the Government of Bihar.

2. The case of the petitioner is that the said Company is engaged in manufacturing and producing plastic tubes and strainers of various ranges and specifications. The Engineering-Chief-cum-Special Secretary, Government of Bihar, Patna (respondent No. 2) invited tenders as usual for supply of materials such as UPVC Ribbed Strainer. The petitioner participated in those tenders, and ultimately the petitioner got orders for supply of certain materials to the State of Bihar vide several orders under the signature of respondent No. 2. This Court is not entering into factual details of this case for the reason stated hereinafter in this judgment.

3. The admitted case of the petitioner is that while giving delivery of the materials the petitioner relied on the representation of the respondents that the price of the materials supplied will be paid within 30 days and the petitioner changed and altered its position in various ways, namely, by increasing number

of their existing employees and officers and further generated funds by obtaining loan on interest from their Bankers and thereby undertook :a heavy financial burden. Further case of the petitioner is that instead of making the full payment, the respondents government gave part payment to the petitioner leaving the balance amount which is still due and according to the petitioner this action on the part of the respondent amounts to going back upon their unequivocal promise to make payment of price within a month from the date of receipt of the materials.

4. Mr. Tara Kant Jha, the learned Senior Counsel appearing for the petitioner, emphasises on clause 5 of the agreement dated 30th April, 1986 entered into between the petitioner Company and the Government of Bihar. The said Clause 5 is to the following effect:--

"100% payment of bill will be made by the Executive Engineer concerned within 30 days on receipt, of materials in good condition and specification along with the satisfactory inspection report note."

5. The learned Senior Counsel for the petitioner further urged that relying upon the aforesaid assurance, the petitioner Company supplied the materials in question but payment of the balance amount, as stated above, has remained due. It is further stated in the writ petition that having failed to secure the said payment, the said Company preferred an appeal on 31st May, 1988 before the Secretary, Small Scale Industries, Government of Bihar challenging therein, inter alia, the notification dated 3rd May, 1988 whereby it was stated that the Public Health Engineering Department have stopped making payment of all outstanding amount with effect from the date of the said notification and the said appeal was also directed against the said notification. An order was passed in the said appeal on 19th October, 1989 and it is further alleged that from the said order it appears that the appellate authority undertook to make payment of the balance amount within one month from the date of the order passed in the said appeal. It is further averred in paragraph 29 of the said writ petition that during the pendency of the said appeal about rupees fifteen lacs out of the payable amount were paid to the petitioner leaving the balance amount as aforesaid. It is the further case of the said Company that it has sustained a loss of more than rupees nine lacs by way of payment of interest towards financial Corporation as also the Bank and as a result of which the financial position of the said Company is very critical and has come to the stage of virtual collapse.

6. It is surprising that no body appeared on behalf of the respondents at the time of hearing of this writ petition even though the matter appeared under the heading hearing on two consecutive days before this Court. From the counter-affidavit filed on behalf of the respondents, it appears that they have disputed the very basis of the claim of the petitioner and also disputed the manner in which the tender has been floated. According to the counter-affidavit, the Engineer-in-Chief-cum-Special Secretary in collusion with the intending officer committed gross financial irregularities in the matter by floating and accepting of

tenders and the payment made to the said Company was also unauthorised.

7. It is, therefore, clear that the amount which the said Company is claiming is not admitted to be due by the respondents.

8. Now the question which falls for consideration in this case is whether the petitioner is entitled in a writ petition to enforce its claim for payment of money for goods sold and delivered to the Government of Bihar.

9. Confronted with this question, the learned Senior Counsel, appearing for; the petitioner relied upon various decisions and wanted to placed his case on the doctrine of promissory estoppel and urged that the State of Bihar is bound by its promise to make payment in terms of Clause 5 of the agreement entered into between the parties.

10. Various decisions have been cited by the learned. Senior Counsel for the petitioner in support of its case on promissory estoppel. But in none of the cases except the ones noted below, the relationship, of the parties are governed by the written terms of a concluded contract.

11. In the case of Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, , assurances and undertakings were given by the concerned Municipality to give concessions to the existing factories, of which the Central Spinning Mill was one, by exempting them from the payment of Octroi for a period of seven years. As before the expiry of that period, the Municipality sought to levy octroi duty and recover the same from the spinning mill, the writ petition was filed. In the background of these facts the doctrine of promissory estoppel was pressed Into service. There was no contract between the parties as in the present case.

12. Similarly in the case of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, , it appears that because of the mistaken opinion of the Law Department of the Government of India, the assessee did not claim the amount of tax on the freight component from the Central Government. As such the Court expressed the hope and trusted that the Government will not take its stand on technicalities and defeat the claim of the assessee for reimbursement of sales tax on the freight component. This has nothing to do with the factual aspect of the present case. Here there is no scope for any one to be misled. At the highest the case is one of breach of contractual obligations in a pure commercial transaction between the said Company and the State of Bihar.

13. The said decision of Hindusthan Sugar Mills Vs. State of Rajasthan and Others, was reviewed, subsequently by the Supreme Court and the Review judgment is reported in Hindustan Sugar Mills Vs. State of Rajasthan and Others, . In the review judgment the Supreme Court came to the finding that there is a clause in the contract between the parties for reimbursement of sales tax to the Sugar Mill. As such the Supreme Court expressed a desire that the Central Government instead of directing the Sugar Mill to file a suit, would

reimburse the amount of the sales tax to the claimant.

14. This decision does not apply to the facts of the case because of the following grounds. Firstly a claim of reimbursement of sales tax is an ascertainable amount and there is no dispute about the same. Here not only the quantum but the very basis of the petitioner's claim is disputed.

15. Secondly a claim of reimbursement and refund where money has been paid on a mistake of law stand on a different footing in the sense that in a case of refund or reimbursement the amount is paid admittedly on a mistaken view. The claimant is, therefore, entitled in law to get a refund. His entitlement is based on law. But in the case of an original money claim for goods sold and delivered, the claimant seeks to recover what it considers to be due to it, In such a case the claim is obviously based on various questions of fact which are to be ascertained before a properly constituted forum.

16. Therefore, the writ Court's power to direct payment of money is more or less confined to cases of refund or reimbursement where taxes have been illegally collected. The said position has been very succinctly stated by the Supreme Court in the case of *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, of which is set out below:--

"The High Court in the instant case after analysing the various decisions came to the conclusion that where a petitioner approached the High Court with the sole prayer of claiming refund of money by writ of mandamus, the same was normally not granted but where the refund was prayed for as a consequential relief the same was normally entertained if there was no obstruction or if there was no triable issue like that of limitation. We agree that normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of, the Constitution, the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party."

17. It is no body's case that the amount claimed is by way of refund of an amount of tax collected by the State on a mistaken view of law. On the ratio of the above judgment, I hold that the petitioner is not entitled to press his monetary claim on the basis of that writ petition.

18. The only other decision of some relevance which has been cited by the learned Senior Counsel of the petitioner is the well known decision of the *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, .

19. The said case is clearly distinguishable on facts. In that case the Court enforced the promise of the Financial Corporation solely because of the reason that the said Corporation entered into the agreement with the hotel to grant loan "in performance of the statutory duty cast on the Corporation by the Statute

under which it was created and set up." (Paragraph 8, page 851)

20. Therefore, the Court by enforcing the agreement was directing the said Corporation to do its statutory duty. This is clear from the penultimate paragraph of the said judgment. Paragraph 12 is set out below:--

"Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory Corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12."

21. Here it has not been, as it obviously cannot be, argued by the learned Senior Counsel for the petitioner that the clause 5 of the agreement in question was entered into by respondent in exercise of its statutory duty. It is a purely commercial and business transaction between the parties to the contract. As such the aforesaid decision has no application.

22. In case of a concluded commercial contract between the private party on the one hand and the State on the other hand, the principles of promissory estoppel which are in the domain of legitimate expectation have no application. Here nothing is left to imagination or expectation. Everything is reduced to writing and a breach of the clause may give rise to a cause of action. But that has to be thrashed out in a different forum.

23. In a recent decision of the Supreme Court in the case of Assistant Excise Commissioner and Others Vs. Issac Peter and Others, it has been observed 2635 of AIR SC

"Learned counsel for the respondents sought to invoke the rule of promissory estoppel and estoppel by conduct. The attempt is a weak one for the said rules cannot be invoked to alter or amend specific terms of contract nor can they avail against statutory provisions. Here all the terms and conditions of contract, being contained in the statutory rules prevail."

24. This principle has been further elaborated in paragraph 26 ( Assistant Excise Commissioner and Others Vs. Issac Peter and Others, )):

"In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract.

25. My view is further supported by a Full Bench judgment of this Court in the case of Shakti Tubes Ltd. and Another Vs. State of Bihar and Others . In the said judgment at paragraph 12, page 222 the learned Judges of the Full Bench have been pleased to observe that "A writ of mandamus will not issue to enforce a contract against the Government which has not been made in exercise of

statutory power."

26. However, in the said judgment in paragraph 12, the learned Judges of the Full Bench have held that the relief by way of writ of mandamus for disbursal of the amounts said to be due either as per the contract or by application of the principle of promissory estoppel cannot be given. The learned Judges were pleased to observe that sitting under Article 226 of the Constitution of India, the Court cannot be a substitute for the normal remedy available by way of a civil suit. As has been held in that case, here also admittedly the liability, if any, of the State is only a civil liability and normally a civil suit is the remedy in such a situation. In this connection, I merely quote the observation made by the Full Bench in paragraph 12 of the said judgment;

"The purpose of Article 226 of the Constitution is not to supersede the normal remedy available under law by way of a suit. It may be that in such a suit, the State will be in a position to substantiate, by oral and documentary evidence, the various defences which may absolve itself from the obligation or substantiate the reason for the delay or postponement. That opportunity cannot be fore-closed."

27. Having regard to the aforesaid clear enunciation of law, I am unable to hold that the petitioner Company is entitled to succeed in this writ petition, inasmuch as the same is not "maintainable under Article 226 of the Constitution of India.

28. However, I make it clear that it is open to the writ petitioner to seek remedy in accordance with law from the Civil Courts of competent jurisdiction. I further make it clear that I have not made any observation about the merit or otherwise of the claim canvassed by the petitioner in this case. With these observations, the writ petition is accordingly dismissed as being not maintainable.

29. There will be no order as to costs.