

# **DOCTRINE OF ESTOPPEL**

*Thesis submitted*

*By*

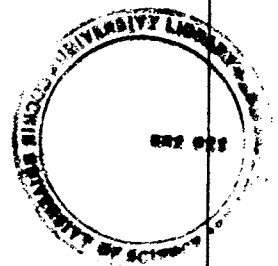
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## CERTIFICATE

This is to certify that the thesis entitled "Doctrine of Estoppel" submitted by Sri. K. P. Satheesan, for the Degree of Doctor of Philosophy is the record of bonafide research carried out under my guidance and supervision in the Department of Law, Cochin University of Science and Technology. To the best of my knowledge, this thesis or any part thereof, has not been submitted elsewhere for any other degree, diploma, associate-ship, fellowship or other similar titles or recognition.

*It is also certified that the candidate has thoroughly revised the thesis and has incorporated all the suggestions made by the examiners.*

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25<sup>th</sup> November 2002.

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Supervising Guide

## **CONTENTS**

PAGE NOS.

PREFACE

CHAPTER I	INTRODUCTION	1	-	27
CHAPTER II	ESTOPPEL BY RECORD	28	-	78
CHAPTER III	ESTOPPEL BY DEED	79	-	101
CHAPTER IV	ESTOPPEL BY REPRESENTATION	102	-	130
CHAPTER V	PROMISSORY ESTOPPEL	131	-	176
CHAPTER VI	PROMISSORY ESTOPPEL : FROM SHIELD TO SWORD	177	-	217
CHAPTER VII	CONCLUSION	218	-	234

TABLE OF CASES

BIBLIOGRAPHY

## **PREFACE**

This thesis is a study on the Doctrine of Estoppel. The principle has been widely used and followed by courts on various occasions. Now, It has assumed more importance, particularly in the field of Administrative Law by the development of the principle of promissory estoppel.

The method of study has been to analyse the relevant principles and leading decisions. It is hoped that the analysis and critical appreciation of the cases would be an accurate presentation of the law regarding estoppel in India.

It is divided into seven chapters under the captions, (1) Introduction, (2) Estoppel by Record, (3) Estoppel by Deed, (4) Estoppel by Representation, (5) Promissory Estoppel, (6) Promissory Estoppel – From Shield to Sword and (7) Conclusion.

The topic of promissory estoppel is considered more elaborately because of its increasing applicability in the field of Administrative Law. A suggestion for protecting private interest along with public interest is also made while applying the principle of promissory estoppel as against the government. Since the application of estoppel and more particularly the

promissory estoppel is on the increase it is hoped that this thesis will be a contribution to the study on estoppel.

I owe very much to my respectful guide Dr. V.D. Sebastian, Professor (Retd), Department of Law, Cochin University of Science and Technology (CUSAT), for all his help and guidance but for which I could not have completed this work.

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# CHAPTER I

## INTRODUCTION

"Justice is the first virtue of social institutions as truth is of systems of thought. A theory, however elegant and economical, must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged, must be reformed or abolished if they are unjust" \*1. The element of justice is the basic structure of the society. The reason for this is that its effects are so profound, pervasive and present from birth.

In a well ordered society, standards of justice are defined, but citizens taking interest in political affairs and those who are holding legislative, judicial and similar offices are constantly required to apply them. They often have to take up point of view of others for the purpose of striking reasonable balance between competing claims and for adjusting the various views of the ideals of morality of the system. Justice is primarily depending on the method in which the law is applied to a particular situation. It depends on the morality of the principles. The morality of principles take two forms, one corresponding to the love of

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\*1 John Rawls, *A Theory of Justice*, Revised Edition (Geford, 1990) P.30

mankind and pleasure and the other to reasonableness in the decision. Thus, the idea behind law and justice is fair procedure so that every one feels that he gets justice.

To ensure the smooth running of the society, it is necessary to formulate rules which would generally work well. However, cases in which some unforeseen state of facts arise, the general rules may some times result in injustice. In that situation, justice would require either an amendment of the rule or deviation from the rule to mitigate the rigour of strict rules. Developed systems of law have introduced the discretionary powers to do justice in any case where strict rules of law may cause hardship. Rules formulated for a particular situation may subsequently work unfairly as the society develops and situation changes. This body of rules developed from the strict law with variance is known as equity. Thus, it can be said that equity is the body of rules evolved to mitigate the rigour of strict laws\*<sup>1</sup> (i.e., of the common law so far as England is concerned).

Principles of justice and good conscience are the basis of equity jurisdiction. But it may not be taken that contrast between common law and equity is as between a system of rules and

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\*<sup>1</sup> H.G. Hanbury, *Modern equity* 1968 Edition Page 5.

broad discretion. Although equity intervenes to set right an injustice, it shall not be considered that every injustice is subject for equitable intervention. In reality, there is no certainty as to when equity would come into play. Sir William Blackstone's writing in the 18th century gave several instances where equity failed to abate the rigour of common law, the obvious injustice. That is why, it is said that equity is a historical accident. But the concept of equity was made applicable for the purpose of rendering justice when the application of common law results in injustice.

One of the main factors constituting justice is the equity among human beings. There are three levels where the concept of equity applies. The first is the administration of institutions as public system of rules. In this case, equity is essentially justice. It implies the impartial application and consistent interpretations of rules according to such precepts, as to treat similar cases similarly. Equity at this level uses controversial elements in the common sense idea of justice. The second and much more difficult application of equity is to the structure of institutions. Here the meaning of equity is specified by the principles of justice which require that equal basic right is to be assigned to all persons. Thirdly, equity in relation



to other living beings. Animals have some protection by certain law, but their status is not better than human beings. Human beings are distinguished by two features. Firstly, they are capable of having a sense of morality. Secondly the desire to apply and act on the principles of justice. Thus, equity and justice in common parlance mean one and the same thing, namely, justice\*<sup>1</sup>.

In the course of administration of justice, complex notions of political, economical and social aspects will come into play. All persons dealing with such situation should maintain sense of justice. Deviation from justice can be corrected or held within tolerable limits by the forces within the system. Moral sentiments are necessary to ensure the basic structure with respect of justice. In order to attain the goal of justice, deviations from the common law may sometimes become necessary. In the history of law, there are various circumstances under which deviation from rigid law becomes necessary to do justice. The development of equitable principles in England different from common law remedy is such an instance where the claims of justice were recognised\*<sup>2</sup>.

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\*<sup>1</sup> Handbury's *Laws of England* 4th Edition Volume 16, page 1008 to 1105.

\*<sup>2</sup> Phipps on *Evidence* 14th Edition 1990 Page 96 to 109.

The applicability of equity for the purpose of rendering justice could be traced in the English Legal System even to the time of Norman Conquest. The period from Norman Conquest to the reign of Henry III witnessed the rapid growth of common law in England. Although common law continued to develop, certain factors prevented it from developing fast enough to do justice in different kinds of individual cases. Moreover, even during 18th century, a plaintiff was unable to obtain a remedy in the common law courts because of the power of defendants, who defied the court order and intimidated the jury. Either a deficiency of remedy or failure in the administration of common law led the citizens for filing petitions to the King in Council to exercise his extraordinary powers. Thus, a custom of referring certain classes of petitions to the Chancellor developed. This custom was confirmed by the order of Edward III in 1349. At first the Chancellor started acting in the name of King in Council. But in 1474 a decree was made on his own authority and this practice continued whereby a court of Chancery came into existence, which was an institution independent of the King in Council.

During the medieval period, the Chancellor was the most important person in the country, next to the King. He was described as "the King's Prime Minister", "the King's Secretary of State", for all departments. The major function of the Chancellor was to issue the Royal Writs. This writ jurisdiction developed as a prerogative remedy, different from common law remedy. Thus, Chancellor influenced the development of law during the medieval period by issuing various writs or evolving new ones\*1.

During the 13th century, the available writ jurisdiction was very narrow. The King in Council retained discretionary powers to do justice and the plaintiff would petition to the King for remedy where the petitioner felt that his case was beyond the ordinary mechanism of common law. If the ordinary mechanism appears to work unfairly, where juries were misled, corrupt or intimidated, the petitioner should seek some other remedy. To approach the Chancellor was simple and without any formality. Thus, the petitioners used to obtain reliefs in cases where common law was inflexible and incapable of providing remedy. The common law developed into a comprehensive system, but an injured plaintiff

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\*1 Maitland Law of Equity Development 8th Edition 1930.

would sue only at common law if his complaint falls within the scope of an existing writ. The application to Chancellor was just like a request for getting justice. Thus, two parallel systems developed for rendering justice.

During the 14th century, the Chancellor regarded himself as administering a new body of law. But Chancellor could give or withhold relief not on the basis of common law or according to any precedent, but according to the effect produced upon his own individual sense of right or wrong by the merits of the particulars before him. The Chancellor's jurisdiction was undefined. His powers were wide but vague and co-existent with the common law. He started exercising his powers for the convenience of rendering justice but gradually the power of the Chancellor has been reduced and ultimately his power to give common law remedies was lost. At the same time, expansion of Chancellor's jurisdiction took place in several directions, as for example, the separate property of married women, rule against perpetuities, rules of equitable waste etc.\*1.

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\*1 Snells on *Law of Equity* 6th Edition 1962.

Lord Ellesmere (1596-1617) began to apply the principles followed by the Chancellor in all cases instead of following his conscience. But Lord Nottingham (1617-1682) who is known as the "father of modern equity", applied convenience as basis of his decisions. Thus, during the 17th and 18th centuries, reliefs were granted on the basis of equity. Petitioners used to approach the courts for getting equitable relief rather than common law remedy. The remedy under equity was simple and without formalities. Courts began to give reliefs on the basis of equity which could not be secured in common law courts.

After the period of Lord Nottingham, a transformation took place in the field of equity. He himself suffered much to weld together, consolidate and stiffen the whole system. During this period, the development of equitable remedies like, specific performance, injunctions, declarations, cancellation, ratification, redemption etc. underwent great change. He declared that every legal system must, at times, find peculiar hard case that cries aloud for relief, the case which no judge could decide according to the rule, without an intolerable strain on his conscience. It is in order to prevent the collapse of certainty in law by the reason of conflicting instances of precedents and conscience in the judicial mind, equity was introduced.

Thus, 17th and 18th centuries accepted the principle of granting equitable reliefs different from the relief that could be granted by the common law\*<sup>1</sup>.

19th century was a period of development of equity jurisdiction by courts. Enormous industrial, commercial and international expansion of business during the 19th century necessitated the development of equity to deal with the use of new problems. The accumulation of business ventures required rules of administration for companies and partnerships. Change in emphasis from land wealth to stock and shares etc. necessitated the development of new concept. Old organisations of Chancellor's Court could not deal with those mass of business. Thereupon, Chancery officials also started handling these matters. Thus, two parallel systems came into existence, not as rivals, but as partners in the administration justice\*<sup>2</sup>.

A time arose for the fusion of these two jurisdictions and ultimately Judicature Acts of 1873 and 1875 came into existence. These Acts abolished the old separate courts of Queen's Bench, the Exchequer, Chancery Court, Probate Court, Divorce Court and

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\*<sup>1</sup> H.G.Handbury, *Modern Equity - Principles of Equity*

\*<sup>2</sup> Snells *Equity Development and Application*

the Court of Admiralty. Supreme Court of Judicature was created with the High Court divided into divisions known as Queen's Bench Division, Chancery Division and Admiralty Division. Each division exercised both legal and equitable jurisdiction. Thus, any issue could be adjudicated in any Division and any point of law or equity could be raised and determined in any Division\*<sup>1</sup>. These courts became not a court of law or a court of equity but a court of complete jurisdiction. Thus, the relief granted on the common law system was given by equity also. By this method, equity entered in the realm of public law\*<sup>2</sup>.

Grant of relief by applying the principles of equity different from common law was thus recognised. As a result, equitable relief became more popular because of its simplicity and dependence on good conscience and morale. Therefore, the relief which could not be obtained by a petitioner in common law could be obtained on the basis of equity. The main object of equity was the administration of justice even deviating from common law. Therefore, under various circumstances, reliefs were granted on the basis of equity, even though the same was not permissible under the common law.

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\*<sup>1</sup>. Elliot & Phipson *Manual of Law of Evidence* 4th Edition 1987 P. 310-316

\*<sup>2</sup>. H.G. Handbury *Modern Equity - Principles of Equity* 1962 Edition

One of the early cases in which the scope for applying an equitable principle presented itself in relation to mortgage was the case of "Dutchess of Kingstons"\*1. In this case, a property was mortgaged in favour of the plaintiff by the real owner. Subsequently, the same property was mortgaged by the same owner in favour of the defendant for a higher amount. The first mortgagee was aware of the second mortgage, but he did not object to the same. At the same time the second mortgagee was not at all aware of the first mortgage and he bonafidely entered into the mortgage with the real owner. A suit for recovery of possession from the second mortgagee was instituted by the first mortgagee. The suit was dismissed stating that by the conduct of the first mortgagee, he allowed the second mortgagee to alter his position to his detriment. In such a circumstance, it would be unfair to put the second mortgagee in difficulties and first mortgagee could not insist on his rights. This relief was granted in favour of the second mortgagee by applying equity for rendering justice. As per the common law, the first mortgagee has the right to recover possession of the property. First charge in the property is created

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\*1 Smith *Leading Cases* 11th Edition at 731.



in favour of the 1st mortgagee and he should not be denied of the said valuable right acquired by him because of the fraud committed by the real owner. Here relief was granted in favour of the second mortgagee solely because the first mortgagee by his act or omission allowed the second mortgage even though he was aware of it. The 1st mortgagee having known of the second mortgage should have prevented it. That apart, the second mortgagee acted in good faith and without knowledge of the 1st mortgage. The first mortgagee did not prevent the second mortgage and thereby the second mortgagee was induced to alter his position to his detriment. Therefore, the common law principle should not be permitted to deny the right of the second mortgagee. This relief was granted based on equitable consideration of rendering justice. This is a typical example of a case where the common law principles were ignored for rendering justice based on equity.

Immediately thereafter in 1782, another case came up for consideration namely, *Nevelli Vs. Wilkingson*\*1. In this case the question was whether a person who had deliberately omitted the debt due to him from a list of debts which was prepared in order

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\*1 *Court of Exchequer* Volume 52 1782

to permit a marriage, could claim it after the marriage took place? It was held that he could not go against his previous representation and seek to recover the debt. It may be seen here that though common law would have entitled him to press for the recovery, equity preferred to deny his claim in the interest of justice. Wilkingson was made to suppress his liability as instructed by his principal. Therefore the suppression of the said liability could not be considered as a fault committed by Wilkingson. Since he was liable to comply with the directions of his principal. However, these aspects were not considered in the said judgment. The facts of the case were:- Mr. Nevelli was in treaty for the marriage with the daughter of a very rich person, named Robinson. The father of the young lady was anxious about the property owned by Mr. Nevelli, the intended husband, knowing that he was a young man of expensive habits and that he has involved in considerable debts. Mr. Nevelli, in order to quite Robinson's mind, induced Wilkingson, the defendant, who was his principal agent to make out a schedule of the debts to which Mr. Nevelli was liable. Mr. Wilkingson did so and he represented that a sum of 18000 Pounds was the amount of Mr. Nevelli's debt, concealing at the instance of Nevelli from Robinson the fact that besides 18000 Pounds Mr. Nevelli was

indebted to Mr. Wilkingson amounts for a further sum of nearly 8000 pounds. Upon that representation, the marriage took place and provision was made for payment of 18000 Pounds and Mr. Robinson was under the belief that his daughter was marrying a person who was free from any debt. Afterwards Mr. Wilkingson sought to enforce his own claim of 8000 pounds. This claim of Wilkingson was defeated by applying the principles of equity. By this judgment Wilkingson was restrained from seeking remedy under civil law as well. Even if a promise was made regarding the liability, it did not preclude him from enforcing his right by invoking common law. It is pertinent to note that Wilkingson did not make any assurance either to Robinson or to Nevelli. Under these circumstances, Wilkingson was made ineligible for the claim due to him either in equity or in common law.

Another case in which the court deviated from the common law was that of *Pickard Vs. Sears*\*1. Pickard was the mortgagee of certain machinery and articles. The owner of the machinery and articles, who had the possession, made agreement for the sale of the same with Sears. On coming to know of the proposed transaction, Pickard came to the premises, but did not give any notice

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\*1 6 A&E 469, 1837

regarding his claim. Instead, Pickard consulted the lawyer of Sears regarding the course to be adopted. Pickard, however, never mentioned the mortgage or claim to the goods as his own. The defendants purchased the goods bonafide and was not aware of the fact that Pickard had an interest over the same. The suit was decreed in favour of Sears on the ground that Pickard had virtually no interest over the same on the basis of his mortgage in the peculiar circumstances of the claim. This judgment was rendered by Denman, Chief Justice, deviating from the established common law. As per the common law, Pickard did not give any consent for sale and hence the property could not be transferred to Sears. Further Pickard was having valid mortgage in his favour and he got a valid right to get the property as his own. Any transfer without his consent would be null and void. The owner was also well aware of the mortgage and the owner continued the possession only for managing the business. Therefore, the transfer made by the owner in favour of Sears was invalid and Pickard was entitled to get a judgment for the recovery of the machinery and articles from Sears. This was the relief that could be claimed under the common law. But the court pronounced the judgment saying that where one, by his acts, words or conduct willfully causes

another to believe the existence of certain state of things and induced him to act on that belief so as to alter his own previous position, the former is concluded in averring against the latter a different state of things as existing at the same time. The conduct of Pickard in standing by and giving sanction to the proceeding was sufficient to get a judgment in favour of Sears. Thus, it could be seen that valuable right conferred on Pickard on the basis of mortgage as per common law was negatived for the purpose of rendering justice to Sears by invoking equity.

A different situation came in *Povell Vs. Thomas*\*1. In this case, the plaintiff wrote to the defendant proposing to build a railway over his land and that of others purporting to act under compulsory powers. He offered to pay compensation at a fair valuation. The defendant did not reply to the letter. The plaintiff took the defendant's silence as consent and he had no difficulty in coming to the terms with other land owners and thereupon constructed the railway. Later, defendant brought an action for ejectment. The court negatived the claim stating that the defendant, by his conduct, permitted the

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\*1 1848 (6) HL 300

plaintiff to construct the railway. Defendant had ample opportunity for objecting while it was in the process of completion and he did not avail himself of it. This case is an illustration of a wider principle deviated from the common law. While rendering the judgment, it was observed that the relief was declined to the defendant because his silence would amount to a licence granted to the defendant for construction. Therefore, the plaintiff was allowed to use the railway line. He was directed to pay a reasonable price as compensation to the defendant.

In *Jordan Vs. Mony*\*1, the equitable principle was applied to resist a claim for repayment of money. There was a claim to recover a certain sum advanced by a lady to a young person for certain speculative business. The lady had given an impression that she is giving up her claim in return for such a benefit received by her from the young person's father. The lady also indicated that if the young person contracts a particular marriage, she would not insist on repayment. The marriage was accordingly contracted, but ultimately, the question of recovery of money came up before the court. Lord Chancellor observed

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\*1 *All English Reporter* 1854 (1) 868

that in business without any written contract the recovery of money cannot be denied. But Mony married in the belief that he was free from his liability, a belief occasioned by the continued representation of Miss Marnell. Lord Chancellor concluded that there were two grounds upon which the petitioner had lost her rights to claim money. They are; (a) prior to Mony's marriage, Marnell represented that the amount had been abandoned by her and upon the faith of that representation, marriage was contracted; (b) upon a principle well known in law founded upon good will and equity, if a person makes a false representation to another and the other acts upon that false representation, the person who had made such representation shall not afterwards be allowed to set up what he had said as false and to assert the real truth in the place of falsehood which misled the other. Thus, the person who made a false representation was held to make his representation good. This is also a case where the court deviated from the common law on the basis of equity for the purpose of rendering justice. The relief was declined to the plaintiff relying on equity. Miss Marnell had repeatedly assured the defendant that the amount will not be claimed and on that representation, he contracted for the marriage. But whether the requisites for a valid contract so as to bind the parties were observed or not were

not at all considered. Whether a mere verbal representations without complying with any of the formalities could have a binding force was also not considered. Miss Marnell, by her conduct, allowed the defendant to believe that she might not claim refund of the money. Such conduct or representation could not take away the legal entitlement of getting refund of money. If oral submissions were treated as binding, legal requirements of other formalities for a binding contract would become a nullity. The defendant was also fully aware of the fact that he owed money to the plaintiff. There was no specific assurances or binding contract by which the plaintiff abandoned the money. But the promise made by the plaintiff that she might not claim for the refund of money had been taken as a ground for defeating her claim. From this judgment, it can be concluded that when person is acting on the basis of a promise made by another, the latter is precluded from withdrawing from the promise. This is against the accepted principles of common law. As far as common law is concerned, a promise without consideration will remain only as a promise and will not have any binding effect.



In the instant case, the claim of the plaintiff was repudiated solely because the defendant relied upon the representation made by the plaintiff at the time of his marriage. But except the representation, no other legal requirements were complied with so as to enforce it as a contract. However, the court declined the claim of the plaintiff on the basis of equity and rejected the contentions raised by the plaintiff based on common law. Lord Chancellor, by rendering the judgment, observed that administration of justice is the paramount consideration whether through common law or through equity. If the application of common law resulted in injustice, the same could be waived and relief can be granted on the basis of equity.

A similar principle was followed in *Ramsden Vs. Dyson*\*1. The owner of an estate permitted a lessee and his mortgagee to occupy certain land in the estate and to build on it spending money without formal lease, which was required by law, but in accordance with the practice prevailing there. The lessee and the mortgagee later approached the court claiming long term

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\*1. *English & Irish Appeals* Vol. 1 1865 Page 129

lease and rights not to be evicted without payment of amount spent by them. The court allowed the petition on the principle of equity. The appeal against the judgment was allowed by which the verdict of the lower court was reversed. The appeal court held that the evidence adduced by the petitioners failed to establish any contract, express or implied. The custom was called in to prove the right and the appellate court held that the claim was not proved by any evidence. Further, the right of a tenant and of a lessee are entirely different. A person can occupy land as a tenant on payment of a nominal rent but for a lease more amount is to be paid and proper documentation is necessary. In the instant case no such document was executed and only the name was entered in the tenants' roll. This entry in the tenants' roll neither confirmed on Thornton the right to claim lease nor to claim compensation for the building erected by him. In these circumstances, no relief should be granted to Thornton for specific performance. Actually this is the correct view based on the common law. But the court deviated from common law and granted equitable relief stating that the owner cannot assume inconsistent stand. Even though the judgment was reversed in appeal the following principles were established by the said judgment:

(a) If a stranger begins to build on a land supposing it to be his own and real owner perceiving the other's mistake abstains from setting his right and allows him to proceed with his error, equity will not afterwards allow the real owner to assert his title to the land.

(b) If a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land with the benefit of all the expenditure upon it.

Whether equitable principles can be applied in written contracts came up for consideration in *Knights Vs. Wiffen*\*1. In this case, the defendant having a quantity of barley in sacks lying in a granery, adjoining the railway station, sold 80 quarters of it to M. No particular sacks were appropriated to M. But barley remained at the granery subject to his orders. M sold 60 quarters of it to the plaintiff, who paid him for it and received from him a delivery order addressed to the Station Master, as was usual in such cases. The plaintiff sent this order in a letter to the Station Master saying "please confirm this transfer". The Station Master showed the

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\*1. *Law Reporter* 5 QB 1870 P. 660

plaintiff's letter to the defendant, who said, "all right, when you get the forwarding note, I will put the barley on the line". M became bankrupt and the defendant, as unpaid vendor, refused to deliver the barley, when the forwarding note was presented to him by the Station Master, acting for the plaintiff. It was held that the defendant could not withdraw his assurance to the Station Master. The defendant had already made the statement that the property and goods had passed to the plaintiff. The general rule of law was that whatever a man's real intention may be, if he manifested an intention to another party so as to induce the latter to act upon it, he would not be permitted from saying that the intention he manifested was not his real intention. The relief was granted to the plaintiff on equitable consideration, but the aspect that the goods were not actually delivered was not at all considered. There was only an assurance of the defendant to keep the goods till he received delivery note. Receipt of delivery note presupposes a condition for payment of money. That apart, once the contract was concluded, it should be performed mutually. But these common law principles were totally ignored and the relief was granted to the plaintiff based on equity.

In *Hughes Vs. Metropolitan Railway Company*<sup>01</sup>, relief was granted based on equity deviating from common law. In this case, A, a lessor of building, gave B, his lessee, notice to repair. B made a counter stating that A accepted the surrender of his lease for 3000 pounds. A protested regarding the quantum of money suggested. Six months later, B wrote that no agreement on the surrender had been reached and he would do the repairs. A replied that the negotiations were already over and the surrender had taken effect and the repairs could have been executed on an earlier date. On the expiration of nine days' notice to repair A brought an action for ejectment and obtained a verdict in his favour based on common law. But, House of Lords held that the plaintiff was entitled for stay of execution.

A similar view was taken in *Birmingham Land Company Vs. L&NW Railway Company*<sup>02</sup>. In that case, 'A' occupied the land of 'B' under a building agreement. The agreement was terminable in case the buildings were not completed by November 30, 1885.

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<sup>01</sup> *Appeal Cases* 1877 (2) P. 439

<sup>02</sup> *CHD Decision* 1880 (40) P. 268

During 1880, 'A' heard of a case by 'C' company, which would affect the land. B's agent told A to suspend the construction of building until the fate of the case was known, but the time was left vague. C company obtained their verdict in 1883. In the same year, C company bought from B the land it required subject to the building agreement with A. On September 16, 1884, C company gave a notice to A to treat the agreement as terminated. A made no claim. In January 1886, C company took possession without making any deposit or giving any bond as required by Land Clauses Act, 1845. C company insisted that A had no interest on the land, but A sought maintenance of his interest by intention and declaration that the building agreement was still subsisting. The court of appeal held that C company took the land subject to the same equity which would have prevented B from ejecting A until he had a reasonable time to construct the buildings. By this judgment, a third party was restrained from enforcing his right in a contractual matter. Equity was applied to render justice to third parties and not between the contracting parties alone.

Thus, there are various cases in which courts deviated from strict rules of common law for the purpose of rendering justice. The above referred cases belong to the category where courts deviated from the common law based on the personal conduct of the parties and various circumstances contributed for taking up such a stand.

It is well known that the method of law in the administration of justice is to recognise legal personality and to confer rights and impose duties on such persons. Rights and duties may be conferred either by prescription of law or by acts of persons, unilaterally or bilaterally. Various rights and duties result from bilateral acts. For the purpose of legal regulation, bilateral acts will have to be taken note of by law. To further the policy of law in the areas of final aspects of justice, each act may not be taken note of as it happens. The impact of a person's act on others either in terms of their understanding or in terms of general consequences of policy of law would exert a controlling effect. The law may, therefore, prevent a person from repudiating previous conduct to suit his convenience. This attitude of law inspired by equity has emerged as a separate principle called "estoppel".

The word "**estoppel**" originated from French "**estoupe**" which means 'stop' that is, a 'punch' or 'cork' which stops something from coming out. It is called *estoppel* or *conclusion* because a man's own act or acceptance stops or closes his move. It debars a person to allege or plead against a statement which has earlier made\*1.

The essence of the principle of *estoppel*, its scope, circumstance and application are not finally settled. This study is an analysis of the above said principle. Appearing initially as a negative aspect in the field of evidence, the principle has extended its scope. The related principles known as *estoppel* by record, *estoppel* by deed, *estoppel* by representation, promissory *estoppel*, *estoppel* against public authority are also considered.

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\*1 Bigelow *Treaty on Law of Estoppel* · 6th Edition 1913 page 9.



## CHAPTER II

## Estoppel by record

While administering of justice, courts may some times have to deviate from the rigor of common law when it is manifest that implementation of common law will result in injustice rather than promoting justice. Equitable relief will have to be granted to the aggrieved persons under such circumstances. One such equitable relief thus granted has resulted in the "Estoppel by record" which is principally evolved by the courts basing on the final judgment of a competent court. It arises from earlier judgments and is mainly concerned with admissibility in evidence of any matter concluded by such earlier judgments. "Estoppel by record" as known in English Law is substantially the same as *res judicata* in Indian Law.

The development of Estoppel by record can be traced from 19th century. *Lockyer Vs. Ferryman* \*<sup>1</sup> was a leading case in 1876. In that case a suit for declaration of marriage was brought against a lady in 1841, but after trial, it was dismissed in 1846. In 1875, after the death of the lady, a second suit was brought for the declaration of the same marriage as valid. In 1876, the second suit was dismissed on the plea of *res judicata* and the House of Lords confirmed this decision, on appeal. While delivering the judgment, different reasons were stated by Their Lordships as under:

**Lord Chancellor :** "Appellant has not alleged any new matter so as to entitle him to get rid of the former proceedings. The former decision is binding on him and a subsequent suit in respect of the same matter is not maintainable."

**Lord Hatherli :-** "I do not apprehend that we need go further to say that this gentleman, who had the opportunity of having his case fairly heard 30 years ago cannot now, after the death of the person principally concerned, be in a position to ask that the principles of *res judicata* shall not be pressed to its fullest and furtherest results."

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\*<sup>1</sup> *Appeal Cases* (1876) 2 Page 519

**Lord Selbourne** :- "When there is *res judicata*, the original cause of action, if permitted to be raised again, would be destructive of all certainties in the administration of law. In the status of families and the enjoyment of the rights, it is incumbent on any one to get rid of solemn judgment to show that he comes forward within reasonable promptitude and diligence".

**Lord Blackburne**:- "The rule of *res judicata* is always be on two grounds:

- (a) Public policy that there should be an end to litigation; and
- (b) Hardship to the individual. He should not be vexed twice for the same cause".

**Lord Cardon** :- "It would not be maintainable under the Law of Scotland with reference to Marriage for a person to come forward again after a lapse of 30 years and ask for a new trial with reference to matters which must have been within his knowledge when the cause of action was earlier tried."

The above reasons are given by Their Lordships upholding the object behind the principle of *res judicata* i.e. the preventing of repetition of a cause which has already been settled between the same parties by a competent court having jurisdiction. This view is the basis of estoppel by record, the principle being that when there has been a judicial determination of a cause adjudicated between the real parties upon which real interest has been settled, the decision operates as a bar to re-litigation of the same matter. This principle was followed in *Workington Harbor and Dock Board Vs. Trade Indemnity Company Limited* \*1. In this case a firm of contractors agreed to construct a new and enlarged dock. The Defendant Company gave the Dock Board a sum of 50,000 pounds as guarantee for the purpose of the contract. The contractors defaulted and the Dock Board brought an action against the Defendant Company. They relied upon engineers' certificate showing that the contractors owed them 78,000 pounds, which they had failed to pay. The said action was dismissed. The Dock Board then started a second action, claiming damages caused by the delay, owing to the contractors not having proceeded with due

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\*1 *All English Reporter* (1938) 2 Page 101

diligence and expedition. The second action was also dismissed because the basis of the second action was precisely the same breaches as those in the first action. The claim for damages supported by different evidence was barred by *res judicata*. Plaintiffs were prevented from re-adjudicating the matter since the earlier decision was binding on them. But this decision does not contemplate a situation where the earlier decision, if patently illegal, will preclude the party from raising the correct proposition. Further, the loss sustained by the party was not decided in the earlier judgment. Under these circumstances, the dismissal of the second suit will cause great injustice to the plaintiff, as the relevant aspect for the second suit was entirely different from the matters considered in the earlier proceedings. Therefore, this judgment could not be considered as precedent. However, the second suit was dismissed on technicalities instead of considering the contentions of the parties. But the plaintiff did not choose to proceed with the matter further may be for his own reasons.

The same principle was followed in *Megovern Vs. State of Victoria*\*1 . In this case the owner of a fishing boat was convicted by a Magistrate for an offence under Fisheries Act, 1968 and eventually an order was passed in the County Court that the said boat was to be forfeited to the Crown. However, in between the two proceedings, the original owner sold the boat and the boat changed hands prior to its seizure. At the time the appellant bought the boat, he was unaware of the order and accordingly brought proceedings for declaration that the boat was his property, an injunction restraining the respondent from disposing of it, for delivery of the boat to him and for damages. But the court basing on estoppel by record did not allow his claim. This was because, the forfeiture order already passed operated as an order in rem and hence the appellant could not contend that he was not bound by the order of forfeiture. Thus the claim was defeated relying on the earlier judgment.

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\*1 *All English Reporter* (1984) Page 570

The principle behind *estoppel by record* is that when there has been a judicial determination of a case adjudicated between real parties upon which real interest has been settled, the decision operates as a bar to re-litigation of the same matter. The effect is that matters settled in record by the judiciary or legislature cannot be subsequently unsettled. The difference between *res judicata* and *estoppel* is mainly depending on their applicability. *Res judicata* prohibits a re-litigation of the same subject matter between the same parties, while *Estoppel by record* does not prohibit re-litigation. It prohibits only a departure or deviation from the earlier decision. A judgment made earlier shall be binding on the parties and the parties may not be permitted to deviate or depart from the earlier decisions. The finality in respect of a particular matter is necessary to prevent miscarriage of justice. That is why, *res judicata* stands on the same footing as that of *estoppel by record*.

### **Basis of doctrine**

The basis of *estoppel by record* is the conclusiveness of judgment. This not only prevents a new decision, but also a new inquiry in order to avoid harassment of the same person again and again. Thus, *estoppel by record* prevents the courts being troubled by their having to decide the same matter again that has already been decided otherwise than by way of appeal. But, in order to operate the doctrine of *estoppel*, the question in issue in subsequent proceedings must be precisely the same as the question in issue in the earlier proceedings. This was made clear by the decision of the House of Lords as early as in 1938 in *New Brunswick Railway Company Vs. British and French Trust Corporation Limited* <sup>\*1</sup>. In this case, a Canadian Corporation registered at New Brunswick issued on August 1, 1884, 6000 first mortgage gold bonds of like amount, tenor and date. The bonds were secured by a registered trust deed and all became due on 1<sup>st</sup> August 1934. It was stated that the bearer or registered holder thereof would get 100 Sterling gold coins of Great Britain of present

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<sup>\*1</sup> All English Reporter (1938) 4 Page 747



standard weight and fineness at his agency in London with interest thereon at 5% per annum payable in London or at the holders option at defendant's office at New Brunswick. The interest coupon stated that the company would pay the bearer 2.10 sterling at its agency in London or at its office in Brunswick on August 1, 1934. The plaintiffs who were the holders of 992 bonds claimed in respect of each bond the sum in sterling calculated as on August 1, 1934. The Defendant Company contended that they were bound to pay only 100% sterling on each bond and interest upon the same basis.

In an earlier action between the same parties upon another set of bonds, the plaintiff obtained judgment on November 7, 1934 upon the gold basis as a new claim. In that action the defendant did not put any defence. On January 16, 1936, judgment was given in the present action in favour of the defendants. Plaintiffs filed an appeal. But before the appeal could be heard, the legislature of New Brunswick, on April 2, 1937, and that of Canada on April 10, 1937, passed legislation affecting "gold clause obligations". The appeal was heard subsequently and decided as follows:

- (a) The bonds were not contract for payment in gold coin as a commodity but were contract for money, the amount of which was to be measured by the value in sterling at due date of 100 gold coins of Great Britain of the standard weight and fineness existing at the date of the bond.
- (b) The above construction was however inapplicable to the interest payments because the words "with interest thereon @ 5% sterling per annum" contain no express reference to the gold clause obligation in the bonds.
- (c) Although the court in the earlier action had construed a contract in identical term and between the same parties, the defendants were not estopped from raising any arguments about the construction of words relating to the interest payment. The payment of interest was decided in the earlier action, in which a default judgment was obtained against the defendants. A judgment by default is also estoppel in respect of matters decided.

- (d) The Canadian Act of 1937 was inapplicable to the present case as it did not affect the rights of English creditors suing in England. It was necessary to look into the circumstances which gave rise to the question of estoppel. On August 20, 1934, plaintiffs commenced an action in Kings Bench Division of the High Court of Justice for the purpose of enforcing payment of the principal money and interest secured by a bond bearing No. 3300. Notice was served on the defendants. But they did not enter appearance in the action. Defendants did not care to file any statement repudiating the claims made by the plaintiffs. It was this default judgment which was set up by the plaintiffs as estoppel preventing the appellants from questioning the construction of 992 bonds as regards principal or interest. Plaintiffs relied on the earlier judgment for getting relief in respect of 992 bonds.

The question was whether estoppel could be invoked for claiming such a relief, particularly when earlier judgment was a default judgment?

Even though in this judgment it was held that the principle of estoppel cannot be invoked based on a default judgment, this view seems to be not correct. This is because, a default judgment is as much binding on the parties as a contested and decided judgment. Both the parties are bound by the judgment unless it is reversed or varied by appropriate proceedings. Therefore, as long as the judgment subsists, the same is binding on the parties. Another view can be that the appellants were not estopped by the judgment in the first action upon the ground that each of the bonds was a separate contract and gave a distinct cause of action to each bearer. But it could be noted that the respondents as regards their defence, which might be based upon the Canadian Legislation, which was subsequent to the date of the default judgment, could not file the plea of estoppel. The basic principle is that the doctrine of estoppel is one founded on consideration of justice and good conscience. If any issue has been distinctly raised and decided in an action in which both the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them. But the doctrine cannot be

made to extend to presumptions or probabilities as to issues in a second action which may be ascertained beyond all possible doubts to be identical with those raised in the previous action. It is true that the defendants can be estopped from setting up in the same action a defence, which he might have pleaded but has chosen to let the proper time to go by. But can anybody make a defendant being precluded from setting up a defence in a second action because he did not avail himself the opportunity of setting it up in the first action? Two principles in such a situation would seem to be that the defendant is estopped from setting up in a subsequent action a different case which was necessary and with complete precision, decided by the previous judgments. If that be the principle, the appellants are not estopped from raising any contention they think fit in an action on the 992 bonds. Normally, if a decision is arrived by any court of competent jurisdiction, a party to it is estopped from questioning the same in a subsequent proceeding. But the principle is also applicable as regards a particular point which was fundamental to the decision. But whether such

a principle can be extended in the case of a default judgment requires consideration. It is too artificial to treat the party in default bound by every such matter as if by an admission. All necessary effect should be given to default judgment by treating the same as conclusive as if it was decided in a contested case. Any further effect in the way of estoppel is an illegitimate extension of the doctrine and the same is not permissible. In the instant case the default judgment expressly declared that the plaintiff was entitled to half yearly interest on the basis of the gold clause. There was no issue before the court as to any or all of the 992 bonds now sued on. Construction of each and all of these bonds was not a traversible issue in the previous action. Therefore, it can be said that the issue of estoppel does not arise in the present case.

It may also be possible, if a writ is issued for a small claim, the defendant may well think it better to let the judgment go by default rather than incurring the trouble and expenses of contesting it. But when the default judgment in respect of one bond is used as governing the construction of 992 bonds, even if identical in tenure, it would be a great hardship if the defendants were precluded from contesting the latter action.

In such circumstances, the plea of estoppel should fail. If, in an action, the question of construction of a particular document has been decided, each party to the action is estopped from subsequently litigating the same construction of that particular document. However, he is not estopped from subsequently litigating the question of construction of another document, even though the second one is substantially identical in words, if the documents are distinct documents and the question on their construction are two distinct questions.

A default judgment is resulted due to the non-appearance of one of the parties or when one of the parties failed to prosecute the case properly. In such a case the decision may not be based on all relevant factors which might have been brought to the court for coming to a conclusion. However, the default judgment is equally binding on the parties like any other judgment.

In the case under reference, the court concluded that the default judgment should not operate as estoppel. This was because the judgment of the earlier suit was concerning a single bond whereas the latter suit was concerning 992 bonds involving substantially higher amount. Thus, in order to invoke the principle of estoppel by record the following conditions must be satisfied.

- (a) The court which decided the earlier issue should be competent to decide the issue in the subsequent proceeding.
- (b) The matter in issue in the former suit should be directly and substantially the same as in the latter suit.
- (c) Both the suits should be between the same parties or parties under whom they claim title.

When an earlier decision is that of a court of record, the resulting estoppel can be called estoppel by record. When the earlier decision is that of any Tribunal, either constituted by agreement of parties or otherwise, the estoppel is said to be a quasi of record.



However, there can be no estoppel by record if there is no judgment or decree \*1.

Estoppel by record is not confined to judgment, but extends to all facts involved in it as necessary grounds upon which it must have been founded. A judgment operates by way of estoppel in a subject proceeding as regards all the findings in the earlier judgment. In the absence of a judgment or decree passed in the former suit, the admitted facts cannot take the place of estoppel by record. In other words, estoppel by record rests not on the admission of the party but on the formal finding of the court.

The doctrine of estoppel by record applies to all matters which existed at the time of the judgment and in which the party had an opportunity of proving the same before the court. However, if there is fresh matter subsequently known and which could not be brought before the court at the time when the earlier judgment was passed, the party is not estopped from raising it. The question as to who will take advantage of the estoppel is governed by the rule that estoppels are to be

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\*1 *Pritam Singh Vs. State of Punjab* AIR 1956 SC 415

mutual. The only persons who may take advantage of estoppel by record are those who are bound by it, that is to say, in case of judgment in person, the parties and their privies. It follows that the only persons who may take advantage of an estoppel are those who claim or defend in the latter proceedings in the same manner as they claim or defend earlier.

### **APPLICABILITY OF THE DOCTRINE**

In order to determine the applicability of doctrine of *estoppel by record*, the effect of the earlier judgment has to be considered with reference to the issues involved and decided. It is important that the judgment of the court must be final by which the rights of the parties are settled. Thus an interlocutory order does not give rise to an estoppel. Similarly, the judgment must have been given by a competent court. Thus a judgment irregularly obtained or obtained by fraud could not operate as an estoppel. Judgment can be broadly classified into two, namely, judgment in *rem* and judgment in *personam*.

(a) **Judgment in rem** :- Judgment in rem is described as judgment of a court of competent jurisdiction determining the status of a person or thing as against the whole world and distinguished from determining the particular interest of the parties to the litigation. The significance of judgment in rem is that they are regarded as operating against the whole world.

(b) **Judgment in personam** :- All judgments, which are not judgment in rem, are referred to as judgment in personam. The effect of the judgments in personam is to raise an estoppel between the parties and those who are in privy with them to an action. The personal rights are determined by analysing conflicting claims. But conclusions arrived at on that basis have the effects of binding on the parties and their privys. In other words, the parties are prohibited from rearguing the decision which have already been taken. Thus, judgment in personam decides rights between the parties only and is not applicable as against the whole world.

Judgment in personam can create two types of estoppels namely, cause of action estoppel and issue estoppel. Cause of action estoppel is relating to the issue in the case and once it is decided relitigation of the same matter is barred. This is the principle of *res judicata* as stated in common law. Cause of action estoppel prohibits further litigation on the same subject matter since it has already been decided in an earlier proceeding. Even if a subsequent litigation is filed on the same cause of action, the earlier decision can be applied for determining the same. It amounts to precedence in legal parlance. The earlier decision is binding on both the parties and hence the decision can be used in subsequent suits. Therefore, the restriction is not in respect of a subsequent suit but only restriction in departure from the earlier decision. This is the difference between *res judicata* and cause of action estoppel. A judicial determination directly involving an issue of fact or of law decided once for all, cannot afterwards be raised between the same parties or their privies. This is called, *issue estoppel*. Two important aspects are involved

in the consideration of any issue estoppel namely, the identification of the parties and the identification of the issues. There will be little difficulty in identifying the parties between whom estoppel will arise or the capacity in which they have acted. But the difficulty arises regarding the identification of the issues. To illustrate, in *Marginson Vs. Black Burn Borough Council* \*1, the identification of issue came up for consideration. In that case a mini bus belonging to the Black Burn Borough Council collided with Marginson's car while his wife was driving the car. In the accident, Marginson's wife died and he sustained injuries and two houses were damaged. The owners of the houses sued for damages against Marginson as well as the Council. Both the drivers were found negligent and Marginson's wife and the driver of the mini bus were held equally responsible. Subsequently Marginson claimed damages from the defendants. Claim was raised on the basis of personal injuries sustained by him. The Court of Appeal held that Marginson was estopped from denying his wife's contributory negligence in relation to his claim in respect of his personal injuries; but was not estopped in relation to his

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\*1 All English Reporter (1952) Page 512

other claims. The reason given by the court was that in the second action, the claims were brought by him in his capacity as his wife's personal representative. Therefore he is estopped from raising the said contention since in the earlier judgment contributory negligence was attributed on the part of his wife.

The identification of issue came up for consideration in *Jackson Vs. Gold Smith*\*1. Facts of the case were as follows:

White brought an action for damages for personal injury against Jackson arising out of a collision between Jackson's motor cycle and Gold Smith's car. White was a passenger of Jackson's motor cycle. Gold Smith filed a suit against Jackson for damages to his car. Jackson filed a suit against Gold Smith stating that the accident occurred due to his negligence. The suit filed by Gold Smith was dismissed and the suit filed by Jackson was decided in his favour.

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\*1 *All English Reporter* (1950) Page 446.

The court held in Jackson's case that the decision in Gold Smith's case did not determine whether there had been any breach of duty owed to White by Jackson and therefore, that decision did not estop Jackson from alleging Gold Smith guilty of breach of duty. In this judgment, it was held that where issue estoppel is pleaded, any relevant material, particularly the reasons given by the judgment, must be considered for the purpose of determining what issues were, in fact, raised and decided between the parties.

The definition given by Spencer Bower and Truner on res judicata is relevant. "Where a finding of judicial decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties and the subject matter of the litigation, any party or his privy to such litigation, as against the other party or his privy in the case of a decision in rem, any person whatsoever, as against any person, is estopped in any subsequent litigation from disputing or proceeding on the same issue which had been raised in the earlier decision. Such decision on the

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\*1 *Premnath Das Vs. State of Assam* AIR 1969 Assam 61

merit, whether it be used as the foundation by any action or re-litigation as bar to any claim, indictment or complaint or to any affirmative defence, case or allegation, becomes conclusive, unless the party interested raises the point of estoppel at the proper time and in the proper manner". Thus the doctrine of estoppel by record applies to all matters which existed at the time of giving the judgment and in which the party had an opportunity of representing before the court.

### **JURISDICTION OF THE COURT**

In order to raise an estoppel by record, the competency of the court which passed the earlier judgment is to be considered. This is because a judgment pronounced by a court without jurisdiction will have no binding effect. Hence the lack of jurisdiction of the court deprives the judgment of any effect, whether by way of estoppel or otherwise. Therefore, the main question that arises is, what is meant by jurisdiction ?



Jurisdiction may be defined as the power and authority of a court to pronounce the sentence of the law or to award a relief as provided by law, upon a set of facts, proved or admitted, or referred to as subject of investigation of action by that court and in favour of or against the persons who present themselves or who are brought before the court in the same manner sanctioned by law as proper and sufficient \*1.

When a plea of estoppel is founded on general principles of law, what is necessary to establish is that the court which heard and decided the former case was a court of competent jurisdiction. Even a foreign judgment can operate as an estoppel against a party who submitted or may be deemed to have submitted to the jurisdiction of that foreign court. Thus, foreign court has jurisdiction only over persons who have voluntarily submitted to its jurisdiction. Persons who do not fall in that category can ignore the writ as well as the decree and treat them as non-est \*2.

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\*1 *Dwaraka Prasad Malwari Vs. Kaidarshan* (AIR 1922 Patna 322)

\*2 *Arun Kumar Vs. Union of India* (AIR 1964 Patna 338)

If the objection is in relation to the jurisdiction of the court, a party cannot be estopped from using it if the court had really no jurisdiction. Neither the rule of *res judicata* nor that of estoppel will apply in matters relating to jurisdiction \*<sup>1</sup>. Estoppel cannot give jurisdiction over the matter if the Act says that the court does not have jurisdiction. If a court has no jurisdiction to try a suit, the consent or waiver can never give the jurisdiction to that court. The decision of such a court is faulty and it can be challenged at any stage of proceeding. A party can raise objection against jurisdiction even at the appellate stage \*<sup>3</sup>.

However, it is settled principle that objection regarding jurisdiction should be taken in the earliest possible opportunity or, at any rate, at the early stage of the proceedings. For example, in *Nadia District Bus Owners' Association Vs. District Magistrate Nadia* \*<sup>3</sup> the petitioner surrendered to the jurisdiction of the District Magistrate and pressed repeatedly for time for shifting of the bus stand from the present site. Time was granted successively. Thereafter, the petitioners were not permitted to challenge the jurisdiction of

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\*<sup>1</sup> *Mathura Prasad Vs. Dossi Bhai* 1970 (4) SCC 613

\*<sup>2</sup> *P. Dasamuni Reddy Vs. P. Appa Rao* AIR (1974) SC 2089

\*<sup>3</sup> AIR 1969 Calcutta 458

the Magistrate to decide the question of shifting of the bus stand. The petitioner's remedy, if any, was clearly barred by estoppel. Similarly, in *Janak Singh Vs. Raji*, \*1 the respondent filed an application for dissolution of her marriage in the sub-court. Janak Singh did not appear in answer to summons issued to him and an ex-parte decree was passed for dissolution of the marriage. Against the ex-parte decree, Janak Singh filed an appeal before the District Court, which set aside the ex-parte decree and remanded the case for fresh disposal. On remand, Janak Singh filed his objections raising various contentions regarding the merits of the application and also took an objection in respect of territorial jurisdiction of the court. The trial court came to the conclusion that the objection with regard to the jurisdiction of the court cannot be raised since in the Memorandum of Appeal filed by Janak Singh against ex-parte decree, such a contention was not raised. But the High Court held that the objection regarding jurisdiction can be raised at any stage of proceeding. Want of jurisdiction cannot be cured by acquiescence.

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\*1 AIR 1970 Jammu & Kashmir 19

But the above view cannot be considered as correct because the party, who is raising objection regarding jurisdiction, should raise it at the earliest opportunity. Or else, the entire proceedings will become a futile exercise. It will lead to waste of money, waste of time and also result in unnecessary harassment. That is why, the question of jurisdiction should be raised at the initial point. When a party has participated in the proceedings without raising an objection as to jurisdiction, cannot be subsequently allowed to raise such a contention, either at the appellate stage or thereafter. This will lead to a situation where every litigant will make an attempt in the initial stage to get a judgment in his favour. If the judgment is against his interest, he may raise the question of jurisdiction at the appellate stage so as to make the earlier judgment a nullity. Therefore, the view taken by the court in the earlier judgment does not appear to be correct.

**CORRECTNESS OF THE JUDGMENT - WHETHER MATERIAL?**

Estoppel by record can be invoked under various circumstances, but the same can be applied only if the earlier judgment is relevant to the issue in the subsequent suit and is binding on the parties. For applying this principle, the correctness of the earlier judgment is not material. By the production of the previous judgment, it is not the correctness of the previous decision, but only the fact and its existence are established. There cannot be a presumption that the prior judgment is a correct adjudication. The law only says that you cannot go against the earlier judgment in a certain case on the ground of public policy. It is a principle of convenience and not of absolute justice. It does not compel the court trying the latter suit to hold that the previous decision is correct, but merely stop the parties from bringing out that previous decision is wrong. In essence this is the rule of estoppel.

A judgment under appeal is only provisional and not definite and cannot operate as estoppel during the intervening proceeding of the court\*<sup>1</sup>. A plea of estoppel was allowed

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\*<sup>1</sup> *Balakrishna Vs. Kishan* ILR 11 Allahabad 148

to be raised in the High Court for the first time in appeal when the judgment of the High Court sought to be pleaded as a bar. Ordinarily a plea of estoppel is not permissible in the appeal court. But when the final finding on which plea rests is a decision of the High Court, it may be permissible to consider the correctness of the judgment even at the appellate stage \*1.

Whether a decision in a previous suit deciding a mixed up fact and law will be binding as estoppel in a subsequent suit requires consideration. For example, whether by custom, the right to receive offering on a shrine is allowable or not, is a mixed question of law and fact. When the existence of certain facts and legal effect of such facts are both to be found before a question is answered, it is a mixed question of law and fact. Similarly, whether a tenancy is a permanent one or not is a mixed question of law and fact. It is settled that a finding on a mixed question of law and fact stands on the same footing as a decision on a question of fact and operates as estoppel\*2. The decision as to whether an

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\*1 *Porthuri Rengayya Vs Vallabhaneni Ramayya* AIR 1941 Madras 815

\*2 *Narayanan Roy Vs Jogesh Chander Dey* AIR 1924 Calcutta 600.

issue is barred by estoppel or not, the decision on a question of limitation, whether there has been an eviction of the tenant by land lord, interpretation of the terms of a will, whether a document is a partition deed or not etc. are mixed questions of law and fact and attract the principle of estoppel in subsequent suit between the parties.

As to whether a decision will operate as estoppel; there is difference of opinion among various High Courts. The Patna High Court has taken the view that an erroneous decision on a point of law will constitute estoppel as much as a correct decision on a question of law or fact or even a mixed question of law and fact \*<sup>1</sup>. The above view upholds that any erroneous decision on point of law will constitute estoppel just as a correct decision. But Madras High Court has taken the view that a decision on a question of law erroneously taken cannot be allowed to operate as estoppel \*<sup>2</sup>. But this view is not agreed by the Supreme Court in *Mohanlal Goyanka Vs Binoy Krishna Mukherjee* \*<sup>3</sup>. In the said judgment the Supreme Court upheld the view taken by Patna

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\*<sup>1</sup> *T.C. Bhattacharjee Vs. K.M. Haldar* AIR 1928 Patna 777.

\*<sup>2</sup> *S.M. Narayan Iyengar Vs. Subramanyan Chettiyar* AIR 1937 Madras 254.

\*<sup>3</sup> AIR 1953 SC 65.

High Court solely on the basis that the earlier decision is liable to be followed even if it was erroneously taken. This opinion was given by the Supreme Court due to the fact that when there was an apparent error on a question of law, the same could be rectified by appropriate proceeding before the same court. Hence once a decision has become final, even if it is erroneous, that has to be looked into for applying the principle of estoppel. Bombay High Court went to the extent that a decision on an issue on law operates as estoppel if the cause of action in the subsequent suit is the same as in the previous suit. Therefore, whenever a question arises as to whether a decision passed on a question of law operates as estoppel, the court must consider the following tests:-

Is it on a question of law which is disassociated from and unconnected with the right claimed or denied as between the parties to the litigation ?



If it is disassociated or unconnected, then the question of law does not constitute a decision which operates as estoppel. If on the other hand the question directly connected or associated with the rights claimed or denied then the question of law would operate as estoppel.

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Fraud is an extrinsic collateral act which vitiates the courts' proceedings. A judgment obtained by fraud or collusion is normally treated as nullity. An exception to the general principle may be regarding a purchaser of property in good faith relying on a judgment in rem even if it might have been obtained by fraud. In order to avoid being estopped, a party to a judgment obtained by fraud should get it set aside. Similarly, where the truth appears in the same record as is relied on has given rise to estoppel, the question of estoppel can hardly arise. A party is not estopped from alleging that a particular fact is inconsistent with the records. It is really another way of saying that a judgment is conclusive only as to the point decided and not as to matters which were neither in issue nor admitted on the pleadings.

### **COMPROMISE DECREE - APPLICABILITY**

Whether estoppel by record can be applied to compromise decree is a matter to be considered. In the eye of law, compromise decree stands independently of any order of the court passed thereon. It is settled law that a compromise decree is not a decision of the court as such. When a judgment has been given in a particular case, then the cause of action merges in the judgment and no further action can be brought on that cause except an appeal on that judgment or unless the judgment is set aside due to collusion or otherwise. What has been decided by that judgment is final and binding on the parties. In this view of the matter, estoppel is applicable even in compromise decrees. If a finding is necessary for sustaining the judgment in a particular case, such finding may operate as an estoppel in the subsequent suit. A compromise decree creates an estoppel by judgment and a judgment by consent is as effective an estoppel between the parties as any other judgment where the court exercised its mind in a contested case.

In *Sailendarai Narayan Vs. State of Orissa* \*1 the Supreme Court held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. In 1936, the predecessor in title of the plaintiff brought a suit against the Secretary of State for India in Council, praying for a declaration that the plaintiff had a good and indefeasible title to the beds of certain rivers, by express or implied grant from the East India Company. This issue was found against the plaintiff and the suit was dismissed by the trial court. In appeal to the Patna High Court, a compromise decree was passed. The compromise consisted of reciprocal concessions, those made by the party being the consideration for those made by the other. Subsequent suit was filed in 1952 by the plaintiff claiming as the Raja and owner of the river bed. Held on the facts and circumstances of the case that the compromise decree in the previous suit operates as estoppel and the plaintiff is precluded from asserting his title to the property in question. While delivering this judgment Supreme

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\*1 AIR 1956 SC 346

Court observed that "a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case". The principle behind this is that, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. It will be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action.

Circumstances may arise where a compromise may be filed in a court representing a group or community. Whether such a compromise could operate as an estoppel against all the members of the community even though they were not parties to the compromise? This was considered in *Gulam Abbas Vs. Haji Kayum Ali*\*1. In this case a compromise was filed under section 107 of the Code of Criminal Procedure. The signatory has

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\*1 AIR 1973 SC 554

declared that "there is no apprehension of breach of peace, as we, Hindus and Muslims, have amicably settled the matter, normally there will not occur any breach of peace in future. So we, both parties, having settled the matter amicably, submit this petition and pray that the case be disposed of in terms of the compromise". It was signed by a number of persons but there was no statement that they represent two communities. In this case, the court decided that the persons who signed the compromise were important persons of the community and it may be true that both the communities were going according to the compromise made by these important persons. But, in law, it does not debar the parties asserting their civil rights in courts. In this judgment, even though estoppel is not made applicable in respect of persons who were not signatories of the compromise, the court failed to consider the aspect that the signatories of the compromise were important persons belonging to and who could represent their respective communities. It may not be possible for each and every person belonging to the community becoming signatories to the

compromise. In such circumstances, the court could have adopted the course of establishing estoppel even against the non-signatories to the compromise. This decision is actually preventing the representatives of any community to enter into a compromise on behalf of the community. Once the respectable persons of the community enter into a solemn understanding on behalf of the community, the same should be respected by all the members of the community unless the signatories are proved themselves as not representing the community or acting against its interests.

In *Radhakrishna Bhaktha Vs. Ramanna Chetty* \*1, a compromise agreement was executed between the parties in a suit. Nearly 3 months after the execution of the agreement, the defendants filed a written statement contesting the suit on merits. There was no whisper about the compromise in the written statement. Both the parties led oral and documentary evidence in support of their respective contentions and invited the court to give a decision on merits without requesting the court to record the compromise and to pass a decree in terms thereof. The Court, after considering the

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\*1 AIR 1972 Mysore 327

entire evidence, made a decree in favour of the plaintiff, nearly 2 1/2 years after execution of the compromise. That decree was challenged by the defendant in appeal. Nearly 6 months after filing of the appeal, an application was made for the first time by the defendant requesting the appellate court to record the compromise and to pass a decree in terms thereof. But the court declined to record the compromise. This is in view of the conduct of the defendant by which he was precluded by the principle of estoppel from inviting the court to record the alleged compromise, after contesting the suit on merits. Thus, whether a compromise decree could operate as estoppel depends on the facts and circumstances of each case. But it is to be noted that a compromise decree is also equally binding on the parties as it is in a contested case. But in such circumstances, the rights of the parties are mutually agreed upon by the respective parties and not decided by the courts by applying the principles of law. Hence, the compromise decree in the strict sense cannot be made use of for applying the principles of estoppel.

Subsequently he obtained stay of sale on the plea that he would satisfy the decree and also paid a part of the debt and thus obtained the consent of the decree holder for adjournment of the sale. It was found that he was estopped to say subsequently that the decree was not capable of execution against him.

It is well settled that an admission in a proceeding in ignorance of legal rights of a party creates no estoppel. There is no estoppel against the legality or legal unforeseenability. (Enforcement Directorate Vs. Sarojkumar Bothika\*<sup>1</sup>).

A person cannot be heard in two courts having jurisdiction to contend in one court that that court alone had requisite jurisdiction and to contend precisely the opposite effect in the other court. If the parties have taken a particular position before the court at one stage of the litigation, it is not open to them to approbate and reprobate and to resile from that position. The rule of approbation and reprobation will apply only when there is estoppel in one form or the other. For example,

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\*<sup>1</sup> AIR 1978 Calcutta 65



in *Ruthuram Vs. Thansingh*\*<sup>1</sup>, the plaintiff filed a suit against a defendant for declaration that they were owners of the land in dispute by adverse possession. These suits were contested by the defendants. They raised the plea that the plaintiffs were tenants and there was no question of becoming the owners by adverse possession. The suit failed. Subsequently, defendants filed a suit for possession of the land on the ground that the original plaintiffs were trespassers and not entitled to hold the land. In this suit, the former plaintiffs raised the plea that they were the tenants of the land in dispute. The court held that they are not eligible to raise such a contention because in the earlier litigation they took up a clear stand that they were the owners of the land. Thus, the former plaintiffs were estopped from raising such a contention. Thus, it is evident that estoppel could be raised even at the stage of execution proceedings. The principle is made applicable during the course of any proceeding. Even if a decree is made, the same principle of estoppel can be raised at the stage of execution.

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\*<sup>1</sup>AIR 1967 Punjab 328

## ESTOPPEL IN CRIMINAL PROCEEDINGS

Estoppel is concerned with the judicial exposition of a proposition of law or fact between the parties. It depends upon the principle which prohibits relitigation of issues which are already settled in prior litigation. The doctrine is applicable in criminal proceedings as much as in civil proceedings. *Sambasivan Vs. Public Prosecutor*\*<sup>1</sup>. The rule of issue estoppel in criminal cases is that where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, that finding will constitute an estoppel against the prosecution. The principle of issue estoppel has been invoked in criminal cases in order to cover cases where a plea of double jeopardy will not be available because the crime with which the accused is charged in the latter proceedings may not be the same crime of which he was acquitted earlier. *Premnathdas Vs State of Assam*\*<sup>2</sup>.

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\*<sup>1</sup>AIR 1950 Appeal Cases 458

\*<sup>2</sup>AIR 1969 Assam 61

The prosecution is estopped from making a subsequent trial against the same person in respect of the same offence. In other words, the earlier decision has become final and will operate as a bar for any subsequent proceedings in respect of the same cause of action. This is equally applicable to an accused as well. An accused, who has taken a stand in a particular criminal proceeding is prevented from taking a diametrically opposite stand in a subsequent proceeding. Even if the subsequent proceeding is based on a different cause of action, the accused will be estopped from taking a different stand from what he has already taken in the earlier proceedings.

For the issue estoppel to arise, the same issue must have been distinctly and inevitably decided in the earlier proceedings between the same parties. Thus, any issue between the State and one of the accused persons in a litigation cannot operate as a bar upon the State with regard to the other accused. The rule has no application where parties are not the same as in the previous

case. *Mohan Vs. State* \*<sup>1</sup>. Thus, in order to invoke the issue estoppel the facts in issue proved or not in the earlier trial must be identical as what is sought to be reagitated in the subsequent trial and the parties in both the proceedings are the same. The rule of issue estoppel does not prohibit that evidence given at one trial against the accused cannot be given in another trial for another offence. Thus where the acquittal order of a Magistrate on a minor offence was set aside and the accused committed for trial on a major offence, the principle of issue estoppel will not apply. *Ramekbal Vs Madan Mohan*\*<sup>2</sup>. Thus, an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel. This is not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the receipt of evidence to disturb that finding of a fact when the accused is tried subsequently even for a

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\*<sup>1</sup>AIR 1968 SC 1281.

\*<sup>2</sup> AIR 1967 SC 1156

different offence which might be permitted by law. It does not introduce any variation in the matter of investigation, inquiry or trial under the Code of Criminal Procedure. It is only related to the admissibility of evidence. It is designed for not to upset a finding of fact reached by a competent court at a trial.

### **ESTOPPEL AND RESJUDICATA**

There are differences between resjudicata and estoppel. Resjudicata ousts the jurisdiction of the court while estoppel shuts the mouth of a party to say one thing at one time and opposite of it at another time. The difference between the plea of resjudicata and estoppel is that while the former prohibits a court entering into inquiry as to a matter already adjudicated, the latter prohibits a party, after the inquiry has already been entered upon, from raising anything contradictory to his previous declaration or acts to the prejudice of another party, who has relied upon those declarations or acts and has altered his position. In other words,

resjudicate prohibits an inquiry in limine, while estoppel comes only after initiating an inquiry. The doctrine of resjudicata differs from estoppel mainly in not rescinding of an act of a party but from a decision of a court. The plea of resjudicata is not merely a plea of estoppel. It amounts to assertion that the legal rights of the parties have been determined by the competent court and no other court should proceed to determine that matter again. The matter once decided becomes conclusive. What is delivered in judgment must be taken as established facts. It cannot be reopened by any other court having the same jurisdiction. But in estoppel the proceedings will be initiated and only contradictory stands are prohibited.

Plea of resjudicate proceeds upon grounds of public policy while estoppel is simply an application of equitable principle between man and man. court. The plea of resjudicata is not merely a plea of estoppel. It amounts to assertion that the legal rights of the parties have been determined by the competent court and no other court should proceed to determine that matter again. The matter once decided becomes conclusive. What is delivered

in judgment must be taken as established. It cannot be reopened by any other court having the same jurisdiction. But in estoppel the proceedings will be initiated and only contradictory stands are prohibited. Plea of resjudicata proceeds upon grounds of public policy while estoppel is simply an application of equitable principle between man and man.

Earlier the terms like resjudicata, issue estoppel, cause of action estoppel, estoppel by record, were used loosely and distinctions between them were not clear. The modern tendency is to use resjudicata comprehensively to all those estoppel. Cause of action estoppel is confined to cases where the parties are the same for the second suit as they are in the first suit. In all cases where the cause of action is really the same and has been determined on merits and not on some ground which ceased to operate when the second action is brought, the plea of resjudicata should succeed. The doctrine applies to all matters which existed at the time of giving the judgment and which the party had an opportunity of bringing before the court. If, however, there is a matter which cannot be brought before the court, the party is not estopped from raising it.

Issue estoppel may arise where a plea of resjudicata could not be established because the cause of action is not the same. Even if the object of the former and latter actions are different, the finding on a matter which came directly on an issue in the former action is conclusive between the same parties and their privys. Where a cause of action is held not to fall within the scope of issue estoppel it may nevertheless be struck out as vexatious or frivolous. To relitigate a question which in substance has already been determined is an abuse of process.

#### LIMITATIONS OF THE DOCTRINE

There are limitations in the operation of estoppel by record. The plea of estoppel is to be raised at the appropriate time and not at the belated stage in the proceedings. The defendant participated in a case where all the witnesses were examined on his side. The plaintiff cross examined the witnesses and the suit reached the stage of arguments. At this stage, the defendant put an application for dismissal of the suit on the basis of estoppel. The same was rightly rejected by the court since the



defendant's request was at a belated stage. *Allahabux Pindok Vs Musserwanji & Co.*\*1. As regards a question of law that could be raised at any stage of the proceedings including the appellate stage.

Estoppel by record operates as an estoppel to the whole right. The same cannot operate against a part of the right. The crux of the doctrine is that a party should not be allowed to litigate for a second time what has already been decided between himself and the other party. This is in the interest of the successful party and also the public.

The earlier decision should be on a specific point. Where several grounds have been put forward by a plaintiff, in the alternative for claiming a particular relief and defendants attempt that the relief claimed by the plaintiff may be granted without saying anything more, it becomes defective

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\*1 AIR 1936 Sind 99.

to come to the firm conclusion as to the finding that the defendant intended to attempt while giving consent that the relief prayed be granted. The test for estoppel to be applied in such cases is that the court could not have passed the judgment without determining that particular point against the party who is raising that point again. Thus, estoppel by record cannot be applied for all facts and circumstances. It depends on the decision as well as the conduct of the parties.

CHAPTER III  
ESTOPPEL BY DEED

Estoppel by deed is that a party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated. Where there is a statement of fact in a deed made between the parties and the same is accepted by them, an estoppel results and it is called "estoppel by deed". It is based on the principle that when a person has entered into a solemn agreement by deed as to certain facts, he will not be permitted to deny any matter which he has so asserted. It is a rule of evidence according to which certain evidence is to be taken high and conclusive in nature so as to admit no contrary proof. The averment relied upon to work as an estoppel must be certain to every intent and without any ambiguity. That is, a party is estopped from denying any specific fact contained in a deed provided the recital is certain and unambiguous. Where the truth appears in the same instrument, there can be no estoppel unless a clear intention is expressed in the deed to disregard the truth. Similarly, a person who knows the truth of the circumstances under which a document has been executed, cannot later set up an estoppel in his favour.

In *Johnstone Vs. Gopalsingh*\*<sup>1</sup> a widow pleaded in a suit to enforce a mortgage against her contending that the mortgage was concocted by her to defeat the claim of her heirs. But this argument was not accepted by the court and the court observed that there is nothing to prevent the defendants from proving the truth of the transaction. In this judgment the court did not rely on the contention raised by the plaintiff in spite of the fact that there was a mortgage. As per the common law, the mortgage has to be enforced. But in this case, the deed was not accepted by the court and allowed the defendants to produce evidence to show the truth of the transaction. This is a deviation from the common law by the court so as to render justice rejecting the contention of the widow. This decision was rendered by applying the principle of equity for rendering justice.

In *Mohammed Khalil Khan Vs. Mehaboob Ali Mian*\*<sup>2</sup>.

The court observed that there will be monstrous injustice if a party having suggested one construction of a deed in a previous suit and succeeded on that footing was allowed to turn round in a subsequent suit upon a diametrically opposite construction of

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\* AIR 1931 Lahor 419

\* AIR 1942 Allahabad 122

the same deed. It will be playing fast and loose with justice if the court allows it. It is not permissible for a party to approbate and reprobate or to blow hot and cold. Similarly when an action is brought by a person, who is not a party to the deed, there cannot be an estoppel between the party to the deed and the third party. This is because, estoppel by deed can arise only between the parties *Lachemanlal Vs. Munshi Mahtyn* \*1. Thus estoppel by deed affects only parties to the deed containing the representation relied upon (including their privies) and does not affect the rights of strangers to the deed. For these reasons, it can be said that estoppel by deed should be mutual or reciprocal.

In certain cases the deed itself may be void on the ground that it was obtained by fraud, force or other foul practice or forgery. In such cases, no estoppel could arise since the deed itself is void. If there is anything false in the contents of a deed, the person who made the false representation may, in certain circumstance, be estopped between himself and a person who innocently acted upon the faith of that representation to contend that the actual facts were otherwise. But a difficult

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\*1 AIR 1938 Patna 708

situation may arise in connection with the deeds, which are illegal or made for illegal purpose. In such circumstances, whether the statement in deed can be relied upon for raising estoppel is a matter depending on the nature of each case. Thus, the deed may be set aside and the estoppel arising therefrom will be open for challenge. More over, when a statement made in a deed is for the purpose of sealing an illegal contract, the whole matter can be opened on the ground that no one can be estopped by law from disclosing the true position. Similarly, a mistake in a deed, which would give grounds for a rectification or on account of which no one has acted to his detriment or has altered his position will not create an estoppel provided the mistake is genuine.

The scope of estoppel by deed is limited due to various reasons.

- (a) It can arise only in litigation on the deed itself.
- (b) It will apply only to the parties themselves and those claiming through them.
- (c) It will not operate if the validity of the deed can be impeached on the ground that it has been procured by fraud, undue influence etc.
- (d) The statement relied upon to found the estoppel must be clear, unambiguous and material to the transaction.

The modern trend is that a person will be estopped from construing a deed to the prejudice of the other person, only if the latter has been held to change his status on the faith of the averments contained in the deed. Thus, alteration of position by the person who pleads estoppel is essential. In *Rajna Rai Bose Vs. Universal Life Assurance Co.*\*<sup>1</sup> a suit for demolition of a building unlawfully erected on the land belonging to the plaintiff was filed. The defence stand was that the plaintiff acquiesced in the construction. The court held that it must be shown that the plaintiff knowing that the defendant was under the mistaken belief that the land upon which he built was his own, purposely remained quiet until the building was complete. Thereafter the suit for demolition was dismissed. That apart, a person will be estopped from contradicting a deed to the prejudice of the other person, only if the latter has changed his position on the faith of the averments contained in the deed. Thus, alteration of position by the person claiming estoppel is essential.

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\*<sup>1</sup> ILR 7 Calcutta 594

## BASIS OF THE DOCTRINE

Estoppel by deed can be described as "estoppel by matter in writing" which rests on the principle that written evidence is more conclusive than oral evidence. The truth of a transaction can be more clearly established when the parties have bound themselves by solemn documentation, affixing of seal etc. Accordingly, contract under seal is considered as concluded between the parties, seal being a recognised symptom of proof. If a distinct statement of a particular fact is made in the recital of a contract, then the party cannot subsequently deny that fact. In this view, estoppel by deed is nothing more than estoppel by representation. In order to ascertain whether estoppel arises, it is necessary to look at the general effect of the instrument and see what precisely are the recitals. It must also be examined whether the said recitals had also been acted upon. Thus, estoppel by deed can be established on the basis of recitals, the effect of instrument, and the conduct of the parties thereupon. In short, the following conditions have to be satisfied for invoking estoppel by deed.



- a) Generally the instrument is to be construed on the assumption that it binds the parties. At the same time the formality of the document should also be considered.
- b) Estoppel must be made out clearly so that those who relied upon such document must be able to establish their claims on the basis of the said document.
- c) The presence or absence of consideration is a matter for proof. It cannot affect the principle of estoppel by deed if the document is otherwise acted upon.
- d) The effect to be attached to the recitals in a document must depend upon the intention of the party.
- e) The construction of the document should be done on the basis of surrounding circumstances as well.
- f) A casual recital does not work as an estoppel. But recital should be on matters agreed upon by both the parties and the same should be clear and unambiguous in the document.

Estoppel by deed can arise in various transactions. Following are some such cases:-

(a) ESTOPPEL IN FAMILY ARRANGEMENT

Estoppel by matter in writing is not always to be in the form of recitals in contracts. Even if there is no recital in contract or instrument, estoppel can arise. For example, estoppel can arise in family arrangements even without any written document. Family arrangement is an agreement between the members of the family intended to be generally and reasonably for the benefit of the family either for compromising a dispute or for preserving the family property for peace and security of the family by avoiding litigation or saving its honour. A family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who has taken advantage under the agreement from revoking or challenging the same. Even if a family arrangement which required registration was not registered, it would operate as an estoppel against the parties who have taken advantage of the same.

In *Damodaran Kavirajan and others Vs. T.D.Rajappan*\*<sup>1</sup> a gift deed in favour of a legal heir was executed to settle the dispute between the members of a family on condition that the said legal heir will not claim any share from other properties. The gift deed was accepted and acted upon as a family arrangement. Subsequently, the legal heir claimed share in other properties of the family. The said claim of the legal heir was declined by the court stating that he had already accepted and acted upon the earlier family arrangement. Therefore, as he has taken advantage under the arrangement, he cannot revoke or challenge the same. This relief was made on the equitable ground of estoppel but as per common law a person's share cannot be divested simply by making an agreement among the members of the family. This is because the share in the family property is an inherited right. Such a right cannot be repudiated on the basis of the arrangement made between the members of the family. This aspect was totally ignored while denying the claim of the legal heir.

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\*<sup>1</sup> AIR 1992 Kerala 397

In another case, a mother settled her properties by way of gift in favour of a son for settling dispute between the other members of the family. The consideration for the gift was that the son should relinquish his right to future share in the properties left by her. Subsequently, the legal heir claimed share of the remaining properties. His claim was declined on the ground that the son gave up his right of inheritance for consideration, namely, the immediate retaining of certain properties towards his share. Actually, the relief was declined on the basis that he is prevented from departing from his earlier conduct. But the earlier act was done by him only to settle the dispute among the family members. It cannot be taken as a ground for denying his rights which were inherited by him in respect of other properties. This aspect was not considered by the court while rendering the above judgment.\*<sup>1</sup>

Thus relinquishment of future possible rights of inheritance by a heir, for consideration, may debar him from setting up his right when it actually comes in existence. The binding force in such a renouncement depends upon the

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\*<sup>1</sup> *Gulam Abbas Vs. Haji Kayyam Ali and others* (AIR 1973 SC 554)

attending circumstances and the whole course of conduct. If the accepted heir received consideration and so conducts himself as to mislead an owner to not making dispossession of his property, the accepted heir can be debarred from setting up his right when it unquestionably vested in him. It is the principle of estoppel which operates in such cases. A similar situation was considered in *Kunhikannan Vs. Kalyani*\*<sup>1</sup>. In this case, it has been held that family arrangements are generally entered into for the purpose of the wellbeing and harmony in the family, thereby disputes are avoided, the honour of the family is safeguarded and the obligations binding on the members of the family are protected. The factual existence of a dispute is not sine-qua-non for the validity of a family arrangement and it justifies its existence in view of the beneficial nature and effect of such arrangement. The avoidance of family dispute is only one of the many grounds for validating a family arrangement. Any arrangement which is for the benefit of the family in general or that it tends to the preservation of peace and harmony in the family is sufficient to make a family arrangement valid and binding on the

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\*<sup>1</sup> AIR 1990 Kerala 26

members. When there is a family arrangement among the parties thereto, it would operate as an estoppel by preventing the parties, after having taken advantage of the arrangement.

A slightly different view was taken in another case wherein properties were purchased by a father in the name of minor sons. Even though the purchase was in the name of minors, the property was found to be acquired by the father himself and he was holding the same as sole owner. On the death of the father, the property devolved upon the legal heirs. A subsequent admission of wife and sons in an alleged partition cannot change the legal position.\*<sup>1</sup>

Similarly, on exclusive ownership of a passage was given to a person by one of the joint owners under a registered deed. The other joint owners objected to the same. The other owners were not allowed to object to the same since the registered deed had been acted upon and the possession of the passage had been given to him for a pretty long time. But it is to be noted that the

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\*<sup>1</sup> *Chanderwati Vs. Laxmichand and others* (AIR 1988 Delhi 13)

deed was executed only by one of the joint owners. Whether one person by executing a document can give up the rights of the other persons, who are also standing on the same footing, was not at all considered in this judgment.\*<sup>1</sup> Thus, estoppel can be pleaded in family arrangements. The basic principle is that when an arrangement is made between the members of the family, all of them are equally bound to honour the same. It is not necessary that the arrangement should always be made for settling any dispute. Even without any dispute, family arrangement can be made and the same will very well operate as estoppel among the members of the family.

(b) ESTOPPEL IN ARBITRATION PROCEEDINGS

Estoppel by deed can arise in arbitration proceedings. If the contract or agreement between the parties are well defined in the documents, the court will enforce the same. A contract declared as valid by a competent court is conclusive upon the matters in issue and as between the parties.

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\*<sup>1</sup> *Shyamberi Works Pvt. Ltd. Vs. Forest Corporation* (AIR 1990 All)

A person who participated in an arbitration proceeding without any protest cannot challenge the award if it goes against him on the ground of lack of jurisdiction. He is estopped from challenging the validity of such an award. Mere appearance of the party and participation in the proceedings cannot take away the right to challenge the jurisdiction of the arbitrator. Further, mere appearance does not mean that he is conceding to the jurisdiction of the arbitrator, but it is settled that a party to a contract taking proceeding before the arbitrator cannot challenge the validity of the award if the party has not raised any objection as to the jurisdiction of the arbitrator at the beginning of the proceedings. Thus, if a party has allowed an arbitrator to proceed with the proceedings, then his jurisdiction or competency cannot subsequently be raised for the award to be set aside on that ground.\*<sup>1</sup>

Once a party has accepted a payment as per the award, he is estopped from challenging the award subsequently. He cannot turn round and question the validity of the award. But

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\*<sup>1</sup> *New India Assurance Co. Vs. Dalmiya Iron & Steel Co. Ltd.* (AIR 1965 SC 42)



when the amount was accepted under protest, whether estoppel can be pleaded for challenging the award depends upon the facts of the case. Similarly, even after accepting the compensation amount, protest raised within 3 months of payment and proceeded before the forum, such a claim cannot be rejected on the ground of estoppel.\*<sup>1</sup>

When a party agreed to submit to an arbitration proceeding without prejudice to his right to contend to the contrary, there is no question of estoppel from contending that the arbitrator has no jurisdiction to entertain the dispute. In a suit for damages, a special referee was appointed with the consent of both the parties to give a report, the application by one party (the Food Controller of India) to set aside that report was rejected and no appeal was filed against that order. In such circumstances, in the appeal filed against the order enhancing the damages, the Food Corporation of India was prevented from attacking the entire report of the referee. This is because the Food Corporation of India did not challenge the report of the referee. Further, the referee was appointed with the consent of both the parties. The

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\*<sup>1</sup> *Duby Vs. Arbitrator, Hirakud Land Organisation* (AIR 1976 Orissa 118)

petition for setting aside the report was rejected and hence the Food Corporation was prevented from attacking the report. But the question whether the party can waive his right when there is a patent error was not considered in that case\*<sup>1</sup>.

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Similarly, it was held that an arbitrator has no jurisdiction to make an award after the fixed time and if any award is passed beyond the period, the same is invalid. The parties are not estopped by the conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period. The statutory right of appeal vested in a party cannot be forfeited by the mere fact that the second arbitrator passed an award in compliance with the order against which the appeal was filed. There cannot be any estoppel against a statutory appeal. \*<sup>2</sup>

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<sup>1</sup>*Food Corporation of India & another Vs. Mohammed Yunus* (AIR 1987 Kerala 231)

<sup>2</sup>*Sultan Ama Vs. Saiyed Bohra Bibi* (AIR 1990 Kerala 42)

(c) ESTOPPEL IN MORTGAGES

There are different views regarding applicability of estoppel by deed in mortgages. It has been held that a mortgager executing a mortgage at a time when he has no title to the property must make good the other party out of any interest he subsequently acquires. The mortgager is estopped from saying that he had no interest at the time of mortgage. Another view is that a mortgager can transfer only the rights which he has at the time of mortgage and as regards future interest, he can raise the plea of estoppel. The former view seems to be more reasonable since the mortgager himself had no interest in the property at the time of executing the mortgage and at the same time he induced the other party to enter into mortgage believing that the mortgager had valid title. In such a contingency, the mortgager cannot wriggle out of his responsibility after actually acquiring title over the property. The principle is that one who has permitted another to act upon the belief that he possesses a specific title or interest shall not later say that he had no such interest and therefore the title acquired thereafter should naturally go to the benefit of the grantee.

(d) ESTOPPEL IN NEGOTIABLE INSTRUMENTS

Estoppel by deed is applicable to negotiable instruments as well. Under Section 32 of the Negotiable Instrument Act, maker of a promissory note and acceptor of a bill of exchange are bound to pay the amount thereof on maturity according to the terms of the note or bill. By Section 37, the maker of a promissory note or cheque or drawer of a bill of exchange is liable thereon as principal debtors. Section 41 of the Act says that an acceptor of a bill of exchange, who has already endorsed it is not relieved from liability by reason of such an endorsement when he accepted the bill. By Section 88 the acceptor or endorser of negotiable instrument is bound by its acceptance or endorsement. Section 120 says that no acceptor of bill of exchange can be permitted to deny the validity of the instrument. Section 121 says that no acceptor of a bill of exchange can deny the payee's acceptance. No endorser of a negotiable instrument can be permitted to deny the signature. Thus, estoppel in the case of negotiable instrument are instances of estoppel by agreement or contract, i.e. estoppel by deed.

When signature is put on negotiable instrument, it implies certain representations. The commercial law attributes to those who put their names to negotiable instrument imputes certain representations from their conduct in doing so. Every holder in good faith of such instrument is deemed to have given faith to the signatories of the instrument when he took it. Each of the previous signatories of the instrument is estopped from denying the truth of those representations.

In the same way, the principles of estoppel by negligence has been frequently applied in negotiable instrument. The conduct of a person who leaves a cheque signed in blank in an unlocked drawer from where it was stolen by a thief who filled it up or handed over the cheque in blank after entering the payees name to an agent who adds words in the blank space which altered the effect of the cheque does not estop him from setting up the facts. Thus, giving a blank note for safe custody pending instruction and with no intention to issue it to an agent who issues it without having received such instructions, does not render the maker liable by operation of estoppel. A fortiori, a person whose

signature is obtained on a fraudulent statement that he is signing for some different parties to a document which is in fact the promissory note, is not estopped as against a holder in due course from proving the true circumstance. A person who takes what is due on a negotiable instrument owes a duty to the public to obtain it or hold up or to see that it is cancelled and if after payment, he leaves it in the hands of the holder he will be estopped as against the subsequent holder in good faith from saying that it has been paid. Thus, if the drawee accepts a document and signs as acceptance on the bill, the drawee clearly makes a representation of his acceptance not only by signing the bill but also by his conduct in accepting the document and taking delivery of the goods and would therefore be estopped from denying the acceptance after having taken advantage of the document.\*<sup>1</sup>

In the earlier paragraphs, the applicability of estoppel by deed in relation to family arrangements, arbitration proceedings, mortgages, negotiable instruments etc. are discussed. In all these cases, one thing in common is that a party, who executes a document, is not permitted to deny the said document. But there will

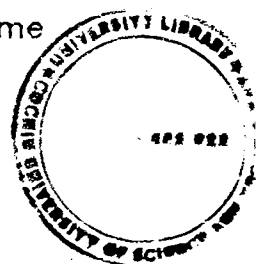
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\*<sup>1</sup> Jallandar Improvement Trust Vs. Kuldip Singh (AIR 1984 Punjab & Hariyana 184)

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be circumstances where the deed itself may be obtained by coercion, undue influence etc. In such cases, if the validity of the document itself is under dispute, it will be unfair to invoke principle of estoppel to prevent the party from averring the truth. Everything in writing need not be always voluntary and with full knowledge of the consequences. A casual statement incorporated in a deed cannot be permitted to act as detrimental to the party who made it. Similarly, when a party who is signatory to a deed disputes the contents of the deed, cannot be restrained by estoppel. Therefore, it is clear that every thing in writing need not be taken as truth as against the writer. The acceptance of the document and the validity of the contents always depend on the conduct of the parties. There can be circumstances where a party, who actually executed the deed, may deny the existence of the same. In such cases, principle of estoppel may be invoked to refrain him from taking inconsistent stand. But if the existence of the deed itself is under dispute or if the contents of the deed are in dispute, estoppel cannot be invoked. Thus, it is evident that estoppel by deed has limited application and the same is circumscribed by various other factors.

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However, estoppel by deed is applied by courts in order to prevent a party from taking inconsistent stand. This is more so because written evidence is considered as more valid than oral evidence. In estoppel by deed, the document is always relied upon. It is the presumption of law that every document is genuine and binding on the parties on a proper understanding until otherwise proved. Therefore, estoppel by deed cannot be taken as a basic concept to prevent a person from making an averment without certain limitations. These limitations can be enumerated as follows:

- (a) If the existence of the deed itself is in dispute, estoppel by deed cannot be applied.
- (b) If the contents of the deed is in dispute, the principle cannot be applied.
- (c) If the signature of the document is in dispute the principle is not applicable.
- (d) If the contents are not clear, or ambiguous, the principle cannot be applied.



Thus, estoppel by deed can be applied only subject to various limitations. Even though, these limitations are accepted by law, this principle is used for rendering justice. The common law procedure may not redress the grievances of the affected parties. Under such circumstances, in order to do justice and to redress the grievances of the affected person the court may apply the principles of estoppel by deed.

## CHAPTER IV

### ESTOPPEL BY REPRESENTATION

Where 'A' by words or conduct instigates 'B' in believing that certain state of facts exist and 'B' has acted upon such a belief to his prejudice, can 'A' be permitted to contend that a different state of fact existed at that time ? Representation made by a person has induced another to act to his detriment. In such a case, is it legally permissible to allow the former to deviate from his representation ? These questions came up for consideration before the courts of Law on various occasions and the Courts have decided that the representer shall not be permitted to deviate from his representation. Even though, there is no rules to that effect in the common law, the relief was granted by the courts based on equitable principles. The relief was granted for rendering justice, even though, common law does not prescribe such a remedy. The reasoning given by the courts was that no person can be permitted to deviate from his representation if the same has already been accepted and acted upon by other party. But this relief does not conform the standards prescribed by the common law. Mere representations unsupported by any consideration

cannot have a binding effect as per the common law. No person can be compelled to stick to his representation even if the same is not supported by legal formalities. However, the courts granted reliefs relying on the representations, even deviating from the common law, for the purpose of rendering justice. Accordingly, estoppel by representation came into existence.

"Where one person (representer) has made a representation to another person (representee) by acts or by conduct or by silence or by any action, with the intention and with the result of inducing the representee on the faith of such representation to alter his position to his detriment the representer in any litigation which may afterwards take place between him and the representee, is estopped as against the representee from making or attempting to establish by evidence any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto". (Law relating to estoppel by representation)\*<sup>1</sup>

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\*<sup>1</sup> *Spencer Bower and Turner* - IIIrd Edition 1977 page 5.

"If a man, either in express terms or by conduct, makes a representation to another of the existence of certain facts which he intends to be acted upon in a certain way, and he acted upon in the belief of the existence of such state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts\*1 ".

The basic principle adopted by the court is to prevent unjust departure by one person from an assumption adopted by another on the basis of some act or omission which unless the assumption being adhered to would operate to the others detriment. The logic is that the representation in whatever form it might have been made, makes the person to whom it is made to believe in the state of facts asserted or suggested to him and to act on the faith of it so as to change his position. Motive or knowledge of the matter is not at all relevant for applying this principle. It is not essential that the intention of the representater should have been fraudulent or he should have been acting on

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\*1 *Madanama Vs Chandramma* AIR 1965 SC 1812

the full knowledge of the circumstances and not under any mistake or misrepresentation. The basis of the principle is that where one person by words or conduct wilfully causes another to believe the existence of a certain thing and induces the other to act on that belief or to alter his position, the former is concluded from averring against the latter that a different state of things existed at that time \*1. In simple terms it can be stated that a person who, by his act or declaration or omission caused another person to believe a thing to be true and acted upon shall not be allowed to deny the truth of that thing subsequently.\*2

The relief was granted by the courts solely because other party has acted to his prejudice relying on the representation. But whether the representation is supported by any consideration, whether the representation is in respect of the true facts, whether the representation will be relied upon by other party etc. are to be examined. There may be circumstances where representations are made without any intention of inducing the other party

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\*1 *Superintendent of Taxes Vs. Omkarmal Mathemal Trust* (AIR 1975 SC 2065)

\*2 *Mangelson Vs. Kanchidinil* (AIR 1981 SC 1726)

to act. The other party may rely upon the representation depending on various facts. Therefore, a common relief based on the representation solely because other party has relied and acted upon may not be proper. That is why the common law does not give any right for claiming a relief on the basis of a representation. But equitable relief was extended in such circumstances because the representee has acted to his detriment relying on such representation. It is to be noted that representation must relate to existing fact, not to promise *defuturo* or intention. Unless a person is found guilty either by doing an act or omission which is likely to induce the other side, there can be no estoppel by representation. \*1

#### **REQUIREMENT OF ESTOPPEL BY REPRESENTATION**

The earlier view was that an estoppel by representation can arise only if three conditions are satisfied. They are :-

- (1) There must be a representation of an existing fact made by one party to the other;
- (2) The other party believing the same must have been induced to act on faith of it; and
- (3) The other must have so acted to his detriment.

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\*1 *Ranidat Vs. Chattak* (AIR 1928 Orissa 23)

But these conditions actually restrict the applicability of this doctrine under various circumstances. Courts become incapable of rendering justice based on the above restrictions. At the same time, a liberal view may lead to disastrous consequences while considering a balance between the competing claims. Therefore some more essentials are now framed by the courts for following the doctrine. They are :- \*

1. There must be a representation by a person or his authorised agent in any form, declaration, act or omission;
2. The representation must have been regarding the existence of a fact and not of promise defuturo or intention;
3. The representation must have been meant to be relied upon;
4. There must have been belief on the part of the other party in its truth;
5. There must have been action on the faith of the declaration, act or omission, that is, the declaration, act or omission must have actually caused another to act on the faith of it so as to alter his position to his prejudice or detriment;
6. The representation or conduct or omission must have been the proximate cause leading to other party to act to his prejudice;

7. The person claiming the benefit must show that he was not aware of the true state of things; and
8. Only the person to whom the representation was made or to whom it was designed can avail of its benefit.

Some times, estoppel by representation can arise even if all the above said conditions are not fulfilled depending on the facts and circumstances of the case. The first and foremost thing to constitute an estoppel by representation is that there should be a representation. Therefore, the question, what representation means, arises.

### **DEFINITION OF REPRESENTATION**

A representation is said to mean "a statement made by or on behalf of one person to another with the intention that it will come to the notice of the other person, which relates, by way of affirmation, denial, description or otherwise to a matter of fact\*<sup>1</sup>.

A matter of fact means, either an existing fact or a thing or a past event. Thus, every representation should contain two distinguishing factors, namely;

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\*<sup>1</sup> *Turner (Law relating to estoppel by representation)* IIIrd Edition 1977 page 30.



- (a) communication among two or more persons; and
- (b) relating to a fact, present or past.

Therefore, the first requirement to constitute a representation is the communication. Communication can be done only among two or more persons. The same thing will not be a communication as against a stranger. For example, a statement which is over heard by another cannot be considered as a communication to him. Similarly, a statement contained in a private document which is over looked by another is not a communication. Thus, a representation can come into existence only when a communication is made by a representer to a representee and not to anybody else. Second requirement is that the statement must be one of existing fact. Even though, a past event cannot be said to be an existing fact, a statement as to a past event can become a representation. Thus, any statement which purports to affirm, deny, describe or otherwise relates to any existing fact, circumstance or thing or any past event amounts to a representation. It is the substance rather than the form that is to be considered to determine whether a statement amounts to a representation or not.

But the above definition of representation will not suit under following circumstances.

(a) If a man, by his word or conduct, willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and the second believes in such a state of things and acts upon his belief, the person who knowingly made the false statement cannot be permitted to aver afterwards, that what he represented were not the details. This can be called as fraudulent misrepresentation by declaration or act.

(b) If a person in express terms or by conduct makes a representation to another of the existence of certain state of facts which he intends to be acted upon in a certain way and if it be acted upon in the belief of the existence of such a state of facts, to the damage to him who so believes and acts, the former will be prevented from denying the existence of such a state of facts.

This refers to representation by conduct without fraud, and without belief either way as to truth, but intended to be acted upon. Here the representation is innocent and not intentional.

(c) If a man, whatever is his real intention may be, so conducts himself that a reasonable man to take his conduct to mean certain representation of facts and that it was a true representation, and the latter was intended to be acted upon it in a broad way, and he, with such belief, does act in a certain way to his damage, the first person cannot be prevented from denying that the facts are not as represented. This refers to representation by conduct or acquiescence giving rise to belief leading to infer the existence of a certain state of facts. Here the representation is by misleading conduct.

(d) If in the transaction itself, which is in dispute, one had let another into the belief of a certain state of fact by act or by omission calculated to have that results, and such an act or omission had been the proximate cause leading to other party to act upon such belief, to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to does not exist. (This refers to representation by conduct or by equitable negligence. Such a negligence being the proximate cause of mistaken belief. Before there could be estoppel from negligent conduct there must be a duty to use proper care).

The other factor is that the representation must be relating to some state of fact which are actually in existence at that time and no promise defuturo. In other words there must be a state of facts and not a promise to do something in future. The representation should be made either by statement or by conduct. Conduct includes negligence as well as silence. Certain general propositions are, however, applicable in whatever manner the representation is to be made. Thus, it is evident that the representation must be regarding an existing fact not of a mere intention or not of a mere belief. It is true that a state of a person's mind is a fact and that since a person who makes a statement as to his present intention makes a statement of an existing fact. The representation of an existing state of thing as being of a continuous nature is more than a statement of intention and the person who makes the representation cannot afterwards deny the existence of that state of things to the prejudice of another who has acted on the representation.

The representation may be a representation of fact even though it may involve and include a matter of law. Thus, Directors of a company, by drawing a bill in the Company's name, may represent that there is a private Act of Parliament giving the company the requisite powers. A true statement of facts, accompanied by erroneous inference of law will estop the person who made it from afterwards denying the correctness of that inference. A person who has by a fraudulent statement as to the legal effect of an instrument obtained some advantage will not be allowed to retain it although it would appear that a mere representation of a matter of legal inference from facts which are known to both the parties is not a ground of estoppel. It should be remembered that the representation must be clear and unambiguous. It need not necessarily be possible of only one interpretation but such things will be reasonably understood by the person to whom it is made in the sense contained and for this purpose the whole of the representation must be looked at. A statement so far as gives one idea is not to be taken to mean more what it says. A party cannot by representation raise against him an estoppel so as to create a state of thing he is legally

unable from creating. Thus, a corporate or a statutory body cannot be estopped from denying that it has entered into a contract which was ultravires for it to make. No corporate body can be bound by estoppel to do something beyond its powers or to refrain from doing what it is duty bound to do. No person by his conduct or otherwise can waive or renounce his rights to perform a public duty or estop himself from insisting that it is his right to do so.

To form an estoppel, it is not necessary that the representation relied on should be brought to the knowledge of the representee provided the representer acts in such a way that a reasonable man will take the representation to be true and believe that he is intending to act on it. In Dr. Anand Kumar Misra's case the petitioner and some others had applied for admission to the post graduate medical course on the basis of the representation contained in the notice and prospectus that selection of candidate will be done by the selection board on the basis of merit determined by the marks obtained by them at the competitive test. No reservation was done for SC and ST at

that time. When the final selection was to be made, the Government, by issuing an order, changed the basis of selection so as to give reservation to SC and ST. The petitioners challenged the action of the Government and their claim was upheld by the court since the claim of the petitioner was founded on equity which arose in their favour as a result of the representation made in the notice and prospectus as also the action taken by the petitioners acting upon the said representation under the belief that the authority should carry out the representation made by them on their behalf. In this case the relief was granted to the petitioner on the basis of equity. This judgment shows that the Government is also bound to carry out the representations made by it\*<sup>1</sup>. But this judgment did not consider the necessity of the Government to deviate from the representation so as to give reservation to the Scheduled Caste and Scheduled Tribe. Reservation to Scheduled Caste and Scheduled Tribe is a mandate as per the Constitution and whether such a mandate could be surpassed by making a representation was not at all considered in this judgment. This judgment

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\*<sup>1</sup> *Dr. Anand Kumar Misra Vs. State of Bihar* (1981 Patna 164)

requires reconsideration since the constitutional mandates are to be observed.

Similarly, a statement of opinion cannot be considered as a representation. This is because a statement of opinion made by the representer may be believed as true by him and may or may not be believed in principle by others. At any rate it is only an opinion and the same cannot be taken as a ground for preventing him from making any other statement. A statement of fact accompanied by an inference or proposition also, where such inference or proposition is not severable from the statement of fact is wholesome for all purposes of representation. But the statement of a rule, principle or proposition of law accompanied by a statement of fact, if severable, that will not become a representation and it is only a statement just like a statement of opinion. Thus, a statement of opinion on a fact of a situation as a matter of fact is a representation but a statement of fact as an opinion is not a representation. To illustrate, a statement that certain right of way has been extinguished, a statement of a land lord that the



tenancy is one to which the Rent Control Act applies, a statement by the Secretary of a Company that the Company has powers to issue debentures, a statement of an employer to a workman as to the legal effect of a clause in the Industrial Dispute Act etc. are not representation.

Any party raising an estoppel must be able to prove that there was a representation made to him by a person. If that person challenges the same, the question is whether the alleged statement is a representation or not, the burden is on the former to establish the same\*. But, this is subject to one exception which is known as "*estoppel by convention*". This form of estoppel is not found on a representation of fact made by the representor to a representee, but an agreed statement of fact, the truth of which is known to both the parties and becomes the basis of a transaction. When the party has acted in another transaction upon the agreed assumption that the statement of fact accepted between them as true, then as regards that transaction, each will be estopped against the other from questioning the truth of the said statement of fact. For example, a lessee who has accepted a new lease after expressly surrendering the earlier one is estopped from claiming the benefit on the basis of the lease already surrendered.

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\* *Sulakha Beevi Vs K.C. Mathew* (1971 (1) KLT 69)

## FORM OF REPRESENTATION

It is not necessary that a representation should be made in any particular form. It can be made by any means available for the expression and communication of thoughts. The most common form of making representation is either oral or written. It may also be implied from conduct. At certain circumstance, silence or communication constitute a representation as much as a positive thing or conduct for the purpose of estoppel. Oral or written representation can be considered as direct or express representation. A nod or wink or a shake of the head or a smile may equally serve the purpose. Gestures and demeanour have the same effect as thing and in certain circumstance it can also become the media of making representations. There are occasions under which a person is expected to speak or act. If under such circumstance he keeps silent or does not act the way he is expected, the same will amount to representation. Once a representation has been made with the object of inducing the representee it is deemed to continue until so acted upon unless it is withdrawn or modified. Therefore, if the situation is changed in the interim period there is a duty on the presenter to communicate the same to the representee.

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\* *Union of India Vs. Poduval* (1982 KLT 985)

No general rule can be formulated as to when silence will operate as representation. The presence of the silent party when the transaction takes place, makes a more clear case of representation. A man is bound to speak in certain case and his silence becomes as expressing as if he has openly consented what he said and has done and he has become a party to the transaction. A duty to speak arises whenever a person knows that the other is acting on an erroneous assumption of some authority given or liability undertaken by the former or is dealing or occurring an interest in property in ignorance of his title to it.

In order to make representation as a ground for estoppel the alleged representation should be clear and unambiguous. Those who rely upon a document must clearly establish its meaning. If there is any ambiguity for a proper construction, the surrounding circumstances should be looked into. To justify a prudent man in acting on a representation, the same must be plain, not doubtful or a matter for questionable inference\*<sup>1</sup>.

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\*<sup>1</sup> *LW Rivett Karnad Vs. New Mofussil Co.* (ILR 26 Bombay 54)

A representation must also be free, voluntary and without artifice. It is possible that some representation can have more than one interpretation. That by itself will not make a representation bad. The interpretation which is appropriate in the context and circumstance should be adopted. Even if the representation does not mention of a person or thing there is no ambiguity if the person or thing can be otherwise identified and if the doubts or difficulties can be removed by satisfactory evidence. But if the representer has resorted to ambiguous thing for the purpose of enabling himself to fall back afterwards, the representer will then be estopped. A representer cannot take advantage of such an ambiguity which is his own creation. Thus, whatever a man's real intention may be, if he so conducts himself that a reasonable man who takes the representation to be true and believes that it meant that, he should act upon it as true, the party making the representation would be equally precluded from contesting it as not true. For example, a retiring partner omitting to inform the customers of that fact, in the usual mode, is bound by all contracts made by them with third persons on the faith of their being so authorised.

## PARTIES TO THE REPRESENTATION

In every representation there shall be a representer and a representee. A representee means a person who personally makes a representation and also any person on whose express or implied authority the representation is made. The persons include not only natural persons but also artificial persons. The principal or partner of the actual representer, or other persons on whose express or implied authority a representation is purported to be made is deemed as a representer and is liable to be estopped. Similarly, the parties setting up a case of representation must show that he is the person to whom the representation is made, i.e. he is the representee. The representee includes not only the persons to whom the representation is directly made but also any person for whose notice the representation is intended for and given. Thus representee includes four categories of persons, namely;

- (a) Any person to whom a representation is made physically and directly.
- (b) Any agent of a person.
- (c) Any person to whom the representation is intended to reach and in fact reached.
- (d) Any member of the public.

If the representee is an unsound man or a minor when the representation is made to him, his guardian can maintain estoppel as long as his incapacity of unsound mind or minority continues. When the incapacity ceases, he himself can assert the said rights. Only the person to whom the representation is made can assert the said right and only the person to whom the representation is made or to whom it is directed can avail of estoppel. A person who receives a statement second hand, not intended for him, has no right to act upon it. Indeed, it is equally clear that a mere bystander who has overheard a statement made to or for another has no better right to act upon it than if it has been communicated without authority to him. However, if the declaration is intended to be general, then, it seems that one who did not hear it, to whom it was made not directly afterwards or within the time allowed to be acted upon may act upon it. A person is entitled to plead estoppel in his individual character and not as a representative of his assignee\*<sup>1</sup>.

A representation made by an agent is as effective for the purpose of estoppel as if it has been made by his principal.

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\* *Satish Bhushan Vs. Corporation* (AIR 1949 Calcutta 20)

Thus a company may be estopped by representation made by its officer in his ordinary course of business. It is equally clear, however, that no estoppel can arise from the representation of an agent unless it is made within his actual or ostensible authority. The agent's knowledge is that of his principal, so that the principal cannot be heard to say that in making a representation or pursuing a course of conduct relied on, he did so in ignorance of facts known to the agent.

#### RELIANCE ON THE REPRESENTATION

Another factor is that the representee should have relied upon the representation and acted accordingly. That is, the representee should be able to establish that the representation was made to him by the representer and on the faith of the representation he acted in a manner which he would not have otherwise done. Reliance includes the faith which one deposes on the representation. If the representee does not believe the representation as true, he cannot say that he was induced by it. When both the parties are equally conversant with the true state of facts the representee cannot invoke estoppel\*<sup>1</sup>.

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\*<sup>1</sup> *Kishorilal Vs. Challibai* (AIR 1959 SC 504)

In cases where the representer seems to have intended that his representation should induce the representee it will not entail the representee to set up an estoppel unless he can show that he was in fact induced to act upon the faith of the representation. There must have been an intention on the part of the representer to induce, the particular representee to act upon the representation and as a matter of fact, the representee did act upon it. The representee in reliance of the representation must act in a manner prejudicially affecting his interest. A representation does not by reason of being acted upon become irrevocable. There is nothing to prevent the party who made it from withdrawing it and requiring the other for the future to act as if it had not been made. A representation must have been acted upon in such a manner as a reasonable person would do supposing that it was meant to be acted upon. It is not necessary to establish by representation that in acting upon the representation the party to whom it was made should have altered his position to his prejudice. It is sufficient alteration of position if he is induced by the representation to take no steps to protect himself or retrieve his position or for other reason. When prejudice or damage is made the other circumstance being such as to create an estoppel, its consequences are not necessarily to be measured by the amount of prejudice or damage sustained.



**DETRIMENT - IS IT ESSENTIAL ?**

In order to invoke estoppel by representation, it is necessary that in acting upon it the party to whom it was made, has altered his position to his prejudice. It may be that, when prejudice or damage is made out and other circumstances suggest to create an estoppel, it is not necessary to measure the quantum or extent of the prejudice or damage\*<sup>1</sup>. The alteration of position must involve a change in the practice of business affairs or conditions of representee. The damage, loss or prejudice must be some loss of money or moneys worth which is capable of quantification and assessment even if it is too small. The representee is deemed to have altered his position not only when he has adopted a course of action, which he would not have adopted but for the representation, but also when he has abstained from doing something. The representee claiming the benefit must show that he has acted to his detriment on the faith of the representation made to him. The detriment resulted on the representee should be due to alteration of his position on the faith of the representation. Such alteration may not be limited to direct or instantaneous act following the

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\*<sup>1</sup>*Kalidas Bhamji Dhir Vs. State of Bombay* (AIR 1955 SC 62)

representation but also includes those acts in which the detriment is gradual or approximate. A contractual liability to deliver property to a third person at a future date, supply of goods on credit which otherwise should not have been given, incurring responsibility as a member of a mutual society to other members, drawing cheques on the faith of a supposed balance etc. are some of the instances of alteration of position which may result in detriment. But it is to be noted that the detriment that the representee must have shown to have suffered is judged only at the moment when the representer proposes to resign from the representation. In order to measure the detriment the position of the representee before and after acting upon the representation, believing that the representation is true should be compared. The representee must have so acted or abstained from acting upon the footing on the state of affairs assuming that he would suffer detriment if the opposite party were allowed to set up rights against him inconsistent with the assumption. Thus the party asserting estoppel by representation must prove that he has been induced to act to his detriment or harm against which law aims to give protection which would flow from the change of position.

So long as the assumption of truth of the representation is adhered to the party who alters position upon the faith of it cannot complain. His complaint can only arise when other party makes a different state of affairs which if allowed, will operate to his detriment. The onus of proof of actual detriment always rests with the representee but in case like forgery etc. the burden may shift to the representer to disprove the actual detriment. Thus it can be either on the representer or on the representee depending on the nature and circumstances of the case.

#### **OPPOSITE VIEW**

Even if all the necessary elements are established in a particular case, the same may not by themselves be sufficient to constitute estoppel by representation. The representer can defend the same on some other grounds. For example;

(a) If the representee knows the real facts and he is fully aware of the fact that what is stated in the representation is different, he cannot avail estoppel by representation. If the representer is able to prove that the representee has knowledge or belief of the real facts as distinguished from the facts represented, the representee's plea of estoppel can be resisted.

(b) The burden of proof and inducement on the faith of representation is always with the representee. Therefore, if the representee has actually believed or has knowledge that the representation is not true, his plea of estoppel can be easily defeated by the representer. Knowledge in this context means, not only actual or personal knowledge of the representee but also constructive knowledge. For example, knowledge of an agent is considered as knowledge of the principal. Thus, if the representee's agent knew or believed that the representation was not in accordance with the real facts, plea of estoppel can be defeated.

(c) The plea of estoppel by representation can also be defeated by the representer on the ground of revocation. Most of the representations on which estoppel is founded are made and acted upon once for all. But there are cases where the representations are neither made nor acted upon once for all, but are continued from day to day and acted upon day to day. Such representations, like a continuing offer in the case of a contract may be withdrawn or modified at any time before it is acted upon as the case may be. If the representation has been effectively revoked, it cannot be said

that the representee is induced thereafter by the representation. The revocation should be done before it is acted upon and the same should be made known to the representee in a reasonable manner.

(d) The representer can also easily defeat a claim of estoppel against him if he can prove that the representation is obtained by fraud or coercion. Representation must have been made by the voluntary will of the representer. If the representer is able to prove that the representation made by him is on the basis of a fraud committed by the representee, the claim of the representee can be defeated. Similarly, if the representer can prove that coercion was exercised for making such a representation, the claim of the representee can be defeated.

(e) A claim of estoppel by representation can also be defeated by representer if he can show that the application of estoppel will result in illegality.

(f) Similarly, estoppel can be invoked even against the representee where representation relied upon by the representee to estop the representer is founded on or is the outcome of the previous representation made by the representee to the representer, the representee will be estopped. The representee is thus estopped by his own representation from setting up that representer is estopped by his representation. This is known as "estoppel against estoppel".

Thus, it can be seen that estoppel by representation cannot be taken as a rigid principle but this principle is applied by courts for the purpose of rendering justice even deviating from the common law principles. But how far the same can be adopted for the purpose of rendering justice depends on the facts and circumstances of each case.

## CHAPTER V

### **PROMISSORY ESTOPPEL**

The courts in England as well as in India have developed a new concept for the purpose of rendering justice even deviating from common law. The main object is to avoid injustice. This concept which is of recent origin is now recognized by the courts and is popularly known as "promissory estoppel". The full implication of this concept is yet to be spelt out.

Promissory estoppel is not rigid rule, but an elastic one, the object of which is to render justice between parties in the form of equitable relief. The doctrine of promissory estoppel can be invoked to protect a promisee, who acts on the faith of a promise or representation made by a promisor and alters his position even if there is no consideration for the promise and is not in the form of a formal contract.

Anything and everything done by the promisee on the faith of the representation does not necessarily amount to altering his position so as to preclude the promisor from retracting from his representation. Thus altering the position should mean an alteration of the position of the promisee so as to satisfy the court that he will suffer injustice if the promiser is allowed to withdraw from the promise. The doctrine should not be reduced to rule of thumb. If equity demands the promiser can be allowed to be resile provided the promisee is compensated properly. If, however, equity demands, in the light of the things done by the promisee on the faith of the representation that a promiser should be precluded from retracting from his promise and that he should be held fast to his representation, that should be done.

This principle is also known as equitable estoppel, quasi estoppel, new estoppel etc. In simple form, it is a principle evolved by equity to avoid injustice. It is neither



in the realm of contract nor in the realm of estoppel. Though it is evolved by the courts for doing justice, now it is recognized as affording a cause of action as well. The concept can be stated as that where one party by his words or conduct made to the other a clear and unequivocal promise which is intended to create relations or affect the legal relationship in the future, knowingly or unknowingly, that it would be acted upon by the other party to whom the promise is made and in fact was acted upon by the other party, the promise should be binding on the party who made it and he will not be allowed to go back from it, if it is inequitable in view of the dealings which had taken place between the parties. This should be irrespective of there be an existing relationship between the parties or not. Since it is an equitable relief deviated from common law the same has to be used to suit particular situation. Therefore, this is not a hard and fast rule but an elastic one. By applying this principle the promise in respect of future actions are made legally enforceable even if the promise is not supported by consideration. This is against the concept of the common law that a

promise without consideration will remain only as a bare promise and will have no binding effect. But by applying the principle of equity the promisor is compelled to perform the promise even if the promise is not supported by any consideration. The promisor can be an individual or a body corporate or a sovereign authority. As regards private parties, the principle was applied by the English Courts as early as in 1877 in *Hughes Vs Metropolitan Railway Company*\*1. In that case a claim to forfeit the lease on default to comply with the six months notice to repair came up for consideration. The defence was that negotiations took place between the parties after notice and it precluded the lesser from contending that the notice became effective on the expiry of six months. In upholding the lessee's claim the court observed that it is a first principle upon which all courts of equity proceeds, that if parties have entered into definite and distinct promises involving legal rights and afterwards by their own act or their consent enter upon by negotiations which has the effect of giving one of the parties to suppose that the rights arising in the contract will not be in force or will be kept in suspension or held in

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\*1 1877 (2) Appeal Cases 439

abeyance, a person who otherwise might have enforced his rights will not be allowed to enforce them, where it shall be inequitable having regard to the dealings which have taken place between the parties. Subsequently in *Foaks Vs Beer*\*<sup>1</sup> the question that came up for consideration was whether acceptance of a smaller amount in discharge of the liability to pay a larger amount will remain only as a bare promise or will have any binding force. In this particular case the court held that acceptance of a smaller sum can be considered as full satisfaction of discharging the entire liability. In *Birmingham and District Land Company Vs. London North Western Railway Company*\*<sup>2</sup> it was held that if a person having contractual rights against others, was made to believe by the conduct of the other party that such rights will either be not enforced or will be kept in suspense or abeyance for sometime, those rights will not be allowed by a court of equity to enforce until such time has elapsed.

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\*<sup>1</sup> 1889 (40) Ch-D 268

\*<sup>2</sup> 1884 (9) Appeal Cases 605

The above decisions though made as early as in 1880's were not followed by the English Courts for a considerable period. Later, the principle was applied by Lord Justice Denning in the year 1947 in the *High Trees Case*\*<sup>1</sup>. In this case, Central London Property Trust Limited let to the High Trees Limited a block of flats for a term of 99 years from 29th September 1937 at a ground rent of 2500 Pounds per year. In the earlier part of 1940, due to the war conditions then prevailing, only a few of the flats in the block were let to the defendants and the High Trees Ltd. became unable to pay the rent. Discussions took place between the Directors of the two companies and as a result the rent of the premises was reduced from 2500 pounds to 1250 pounds. Thereafter, the lessee paid reduced rent. By the beginning of 1945 all blocks were let out; but the lessee continued to pay the reduced rent. In September 1945, the lessor claimed original rate of rent. The claim of the land owner was refused because the representation was made not about the existing facts but as to what is to be done in future.<sup>2</sup> The claim for the future period was allowed stating that a promise to pay a smaller sum in

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\**Central London Property Trust Ltd. Vs. High Trees House Ltd.* 1947 Kings Bench 130

satisfaction of the liability to pay a larger sum can be allowed. But the plaintiff's claim to recover the arrears of rent was declined by invoking promissory estoppel. While rendering judgment in the above case Lord Justice Denning observed that when a person makes a promise intended to be acted upon by the other and if the other had already acted upon it, it is the duty of the court to say that the promise must be honoured. The court did not find that the promise gave a cause of action in damage on such future promise, but refused to allow the party making the promise to act inconsistently. It is in that view only, such a promise gives rise to an estoppel. The decision is the natural result of the fusion of law and equity. Based on this judgment it is commonly said that promissory estoppel cannot create any new rights not existed before. Further, in the said judgment certain restrictions were also suggested, viz. (a) the promisee should have altered his position, (b) the promiser can resile from his promise on giving reasonable notice (c) the promise becomes final and irrevocable only if the promisee cannot resume his original position.

The above decision was rendered by the courts where the dispute was between private persons. But whether the principle in that decision is applicable against the Government came up for consideration in *Robertson Vs. Minister of Pension*\*1 . In that case Col. Robertson, who sustained injury during war in 1939 addressed a letter to the Director of Personnel Service at the War Office informing about the injury suffered by him during the war (during War service). He requested that disability may be considered as arisen from the said injury and that he be granted pension. The Director, Personnel Service at the War Office by letter dated 8th April 1941 informed Robertson that his case was duly considered and that his disability has been accepted as attributable to military service. Subsequently the Minister of Pension, the authority competent to decide such matters, found that the injury of Robertson was not attributable to military service and hence not entitled to pension. Lord Justice Denning applying the principle of promissory estoppel as held in the High Trees Case declared that though there was no representation by

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\*1 1949 (1) Kings Bench 227

a letter written by war office to Robertson, Robertson acted upon the statement contained in that letter. Relying on the letter Robertson did forebear from obtaining a separate medical opinion as regards his disability. The War Office accepted that his disability was due to injury suffered during the war which entitle him to get pension. As to the question whether the assurance given by the war office was binding on the Crown, Justice Denning observed "the Crown cannot escape by saying that estoppel did not bind the crown, for that a doctrine has not been explored nor can the crown escape by taking any advantage of the doctrine of executive necessity, that is, the doctrine that the crown cannot bind itself so as to fetter its future executive action". According to this decision the Government's right for future executive action was also curtailed.

This view of Justice Denning was followed in *Falmouth Boat Construction Company Vs Howell*\*<sup>1</sup>. In this case the plaintiffs who were established repairers claimed from the

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\*<sup>1</sup> 1950 (2) Kings Bench 16

defendant a sum of money for alterations done to a ship as per the order of the defendant. The defendant resiled from the claim on the ground that the alterations were done in contravention of the provisions of a statute. The essence of the arguments by the defendant was that a written license was necessary and no oral permission would take its place, nor could any of the terms or conditions be waived<sup>\*</sup> by any oral disposition. Justice Denning negated this contention and assuming that the original order postulated a writing nevertheless it could be varied without any paucity or formality. The principle is that whenever government officers, in their dealings with the subject, take on themselves to assume authority on a matter with which he is concerned, the subject is entitled to rely on their having authority as they assume and he should not suffer if they exceed it.

In *Combe Vs. Combe*<sup>\*1</sup> the matter was regarding a maintenance petition where the wife relied upon the promise given by her husband for maintenance at the rate of 100 pounds per year. The court directed to pay the maintenance as claimed based on the principle of promissory estoppel. While

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<sup>\*1</sup>1951 All English Reporter 767



delivering the judgment, Lord Justice Denning pointed out that it is important that the principle should not be stretched too far lest it should be endangered. The principle does not create any new cause of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce it having regard to the dealings which have taken place between the parties. Thereafter the same principle was followed in *Rhyl UDC Vs Anusomeuts* \*<sup>1</sup> and in *South-End-On-Corporation Vs. Hedgeson*\*<sup>2</sup>. In these judgments it was held that once it was established that promissory estoppel will apply without a representation, whether on fact or not, present or future, which is intended to be binding and intended to induce a person to act on it and he acted accordingly, then the promiser cannot resile from the promise. An opposite view was taken in *Wells Vs. Minister of Housing*\*<sup>3</sup>. In this case, the builder relied on a letter of a Corporation Engineer that no planning permission was required for constructing a building in a

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\*<sup>1</sup> 1959 (1) *All English Reporter* 257

\*<sup>2</sup> 1962 (1) *Queens Bench* 416

\*<sup>3</sup> 1967 (2) *All English Reporter* 1041

particular plot and accordingly purchased the land and started construction without any permission. The planning authority however, took a contrary view and prevented the construction. In this case the court upheld the view of the authority on the ground that a statutory discretion conferred on the authority to act against unauthorised construction cannot be fettered by estoppel resulting from an Engineer's letter.

Later, the principle of promissory estoppel was applied by English Courts even where the promise was made by a private party in *Evenden Vs Guildford City Association Football Club Ltd.*\*1. Evenden entered into employment in the Football Club on the faith of a representation that his past services would not be prejudiced and his employment would be regarded as continuous. Acting on this promise he lost all his rights from the original club. Subsequently the new club did not consider the promise that the services will be treated as a continuous one. It was held that the club would not be allowed to go back from the promise

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\*1 1975 (3) All English Reporter 269

given to Evenden and his employment is to be treated as continuous one. In this case it is to be noted that a promise made by a private party is directed to be honoured even though the promise was not supported with a consideration. As per common law a mere promise without consideration will remain only as a promise and does not have any binding effect. But the private party was directed to honour the promise by applying the principle of promissory estoppel even deviating from common law. A similar question was considered in *Maharaj Vs Chand*\*1. In this case a house was acquired by the defendant for the declared purpose of providing a permanent residence to his wife. She shifted thereto with her children leaving her own flat. Subsequently he demanded vacant possession of the premises. The claim of the petitioner was denied by the court on the principle of promissory estoppel. Their Lordship held that the defendant (wife) had such a personal right against the plaintiff because at the time of acquisition of land and the building, he had represented to her that it would be a permanent home for her and the children and she could be treated as living there as his wife; she had acted to her detriment on a reasonable reliance on that representation by giving up her own

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\*1 1986 (3) All English Reporter 107.

flat, she had supported the application of the Housing Authority, she had used her earnings to pay for the household needs and she had looked after the children as mother and wife. The court declined the petition stating that the promise made by him to his wife must be honoured. The question of consideration of the promise and other compelling elements as would be applicable to common law was not at all considered. The promise was directed to be honoured for the sole purpose of rendering justice relying on the promise ignoring the technicalities.

In *AG of Hongkong Vs Humphrey's Estate Limited*<sup>\*1</sup>, an agreement was entered into by the Government with a group of companies under which the group was to transfer their flats to the government in exchange of government land. In the agreement it was stated that the same would not be binding until necessary documents were executed and registered. The group walked out of that agreement. Their Lordship held that although the Government had acted on the agreement, to its detriment in making some expenditure, it would not be

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<sup>\*1</sup> 1987 (2) All English Reporter 387

unfair or unjust to the group to withdraw from the transaction. The main argument advanced by the government was that the group is estopped from withdrawing from the transaction. This argument was negated stating that mere negotiations may not have the effect of making a party from leaving out of the negotiations even if the agreement to make a formal agreement has taken some shape. In *Janred Properties Limited Vs. Enit*\*<sup>1</sup> a party acquired lease interest in some business premises. The Minister's approval which was necessary, was refused. The buyer made the deposits and let the vendor to believe that the purchase should be completed. It was held that in the circumstances the defendant's action had led the plaintiff to believe that the defendant regarded himself as bound by the contract and intended to complete it as soon as the administrative difficulties were overcome, there was sufficient representation and sufficient detriment to the plaintiff for the defendant to be estopped from denying that he was bound by the agreement.

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\*<sup>1</sup> 1989 (2) All English Reporter 444

From the various judgments discussed above it can be seen that the principle of promissory estoppel was developed by courts to avoid injustice. The relief is granted basing on equitable principles. Equity has always stepped in to mitigate rigour of common law. But the full implications of promissory estoppel are yet to be settled. The modern development shows that promissory estoppel can be used not only as a shield but also as a sword. It is enough if the promisee alters his position on the faith of the representation. The desire to do justice through equitable possibility is so strong that old traditional concept of private law is crumbling down giving rise to promissory estoppel.

#### EVALUATION IN INDIAN LAW

The principle of promissory estoppel (though not expressly so named) was applied in India for the purpose of granting relief as early as in 1880 in *Ganges Manufacturing Co. Vs. Souraj Mull*\*<sup>1</sup>. Cohan & Brothers entered into a contract with Souraj Mull to buy 1,80,300 gunny bags for cash on delivery. Subsequently Souraj Mull directed Cohan to pay Rs. 15,000/- as advance against 87,500 bags. Cohan did not make the payment. The goods

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\*<sup>1</sup> 1880 ILR (5) Calcutta 669

were retained by Souraj Mull. At the same time Cohan gave delivery notes to Ganges Manufacturing Co. to take delivery of the gunny bags from the agent of Souraj Mull. On the basis of the said delivery notes 50,000 bags were delivered to Ganges Manufacturing Company. When they claimed the balance 37,500 bags, Suraj Mull refused to deliver on the ground that Cohan did not make the payment. Trial Court held that plaintiff is entitled to get the balance gunny bags invoking the principle of estoppel since the defendant Souraj Mull by their conduct made the plaintiff to believe that Cohan has already complied with the terms of the contract.

In *Ahmediyar Khan Vs. Secretary of State for India*, the predecessor of Ahmediyar Khan privately constructed Hijrah Canal of Satlej River spending more than Rs. 9 lakhs. The canal was to pass through private land as well as government land. The government permitted the canal to pass through the government land on satisfying itself that considerable area of land would be rendered cultivable if the canal was allowed to pass and there was every hope of increase in the government revenue. Thereafter, a

large extent of land including the land through which the canal was made was given by way of inam to the predecessor of Ahmediyar Khan in recognition of their loyalty and good service to the government more particularly in taking the Hijrah Canal. One of the terms of the grant was that the government should take over the management of the canal for a temporary period for better management in the interest of the public. Thereafter the Government passed order permanently taking over the management of the canal. Privy Council decided against the government. Privy Council observed that the government must have entertained Khan to construct the canal which in fact led them to accept the government land required for the canal and the same was made over to them in proprietary rights. Therefore, taking over the land by the government subsequent to the construction of the canal was declared as void. The court declared that the government was estopped from taking over the canal.



A similar view was taken in *Municipal Corporation of Bombay Vs. Secretary of State*\*1. The Government of Bombay decided to construct a country road in the city of Bombay and requested the Municipal Commissioner to remove the fish and vegetable market from backside. By a resolution dated 9/12/1865, the government granted lease of the property to the municipality for establishing the fish and vegetable market on a monthly rent. The municipality took over possession of the land and spent lot of money on the land. Government, later, enhanced the rent and subsequently filed a suit for eviction. On principle of equity, the municipality disputed the claim of the enhancement. The said claim was upheld.

The facts established that the promise made by the government was only that the municipality's enjoyment of the land which would continue until expiration of six months notice or suitable amount being paid by the government. The representation should not have induced the municipality to believe that it would continue possession of the land at the stipulated rent permanently. It was held that the municipality have acted on the promise made by the government and they could be evicted only

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\*1 1905 ILR 29 Bombay 480

after six months notice and after providing them suitable land. This decision approved the doctrine of promissory estoppel in the form of defence.

Even though the principle of promissory estoppel was applied during the 19th century, the same was not followed in India for a long period. Only in 1951 the principle was again applied in *Collector of Bombay Vs. Municipal Corporation of State of Bombay*\*1. The Government of Bombay called upon the respondent to shift an old market from a certain area. At the request of the Municipal Commissioner, government passed resolution giving alternative site for construction of the market. The municipality took possession of the said site and constructed building of their own. In 1940, the Collector of Bombay assessed the new site under the provisions of State Land Revenue Act, 1876. The Municipal Corporation, there upon, filed a suit for declaration that the order of assessment was ultra vires and it was entitled to hold the land in possession for ever without payment of any tax. The High Court of Bombay held that the government had lost its right to assess the land in question by reasonable equity

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\*1 AIR 1951 SC 469

arising from the fact of the case in favour of the municipal corporation and there was limitation of the rights of the government to assess under the said Act. On appeal, the Supreme Court held that the municipality had taken possession of the land in furtherance of the resolution and was in possession of the land uninterruptedly for several years and it acquired absolute title by the conduct of the Government and so the Government is estopped from assessing the tax.

The modern approach to promissory estoppel is found in *Anglo Afgan Agency case*\*<sup>1</sup>. On October 10, 1962, the Textile Commissioner published the export promotion scheme providing for incentives to exporters of woollen goods. This was extended to those who export goods to Afganastan. Under the scheme, exporters of woollen goods were entitled to import materials 100% of the FOB value of the exports. The respondent exported woollen goods for Rs. 50,34,071/-. The Textile Commissioner issued import entitlement certificate only for Rs. 1,99,459/-. When the exporter claimed import entitlement certificate equal to the full value of the export, authorities refused the same. The Supreme Court held that the exporter was entitled to a certificate of the full value.

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\*<sup>1</sup> *Union of India Vs. Anglo Afgan Agencies* (AIR 1968 SC 718)

Justice Shah by applying the principle of promissory estoppel rejected the contention of the government based on executive necessity. Their Lordship observed "under our jurisdiction government is not exempted from its liability to carry out the representation made by it as to its future conduct and Government cannot on some indefinite and undisclosed ground of executive necessity fail to carry out the promise made by it". Thus, the doctrine of promissory estoppel was applied against the government and the defence of the government based on the executive necessity was negated. This case proved that if at all the government was vested with power to change the promise in view of the public interest, mandamus can be issued against the government and in favour of those persons who had acted on a representation made by the government and altered their position. When the government makes a promise, knowingly or unknowingly, it would be acted upon by the promisee and in fact, the promisee acting in reliance of the promise alters his position, government would be held by the promise and the promise would be enforced against the government at the instance of the promisee. It is an elementary rule that in a Republic governed by rule of law, Government or anyone howsoever high or low, is not above the law. Everyone is subject to the law as fully and completely and government is

not an exception. It is indeed a pride that in a constitutional democracy, government stands on the same footing as a private individual so far as application of law is concerned and the former is equally bound as the latter.

This principle was again applied by the Supreme Court in *Century Spinning & Manufacturing Co. Vs. Ulhasnagar Municipality*\*1. The Ulhasnagar municipality did not give any assurance to the appellant regarding levy of octroi. Government advised the municipality to honour the undertaking to exempt from payment of Octroi. Subsequently government altered the position by including the area in the access of the municipality within the territorial limits. Though the Government was not directly involved, it was on the basis of the assurance of the Government that municipality had suitably expanded its activities. The alternative position, if any, had happened relying on the promise made by the government. Therefore the company was entitled for exemption from levy of octroi. Even though in the above case the principle of estoppel was applied for rendering justice, courts refrained to follow the said principles in subsequent cases. The earlier decisions were distinguished

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\*1 AIR 1978 SC 1021

and the dictum were declared as not acceptable at all. Thus, in subsequent cases the court refused to apply this principle. *G. Sankaranarayanan Vs. State of Kerala*\*<sup>1</sup>, *State of Tamil Nadu Vs. S.K. Krishnamurthy*\*<sup>2</sup>, *Ramanatha Pilla Vs. State of Kerala*\*<sup>3</sup>, *State of Kerala Vs. Gwalior Rayons Silk Manufacturing Co.*\*<sup>4</sup>, are some of the cases where the court refused to apply this doctrine.

It was Justice Bhagawati, who resurrected the doctrine in 1979 in *MP Suger Mills Vs. State of Uttar Pradesh*\*<sup>5</sup>. A promise was made by the Chief Secretary to Government that all new industrial units set up in the state of Uttar Pradesh would be exempted from payment of sales tax. The appellant established a hydrogen plant for the manufacture of Vanaspati. Later, the government went back on its promise and held that the tax exemption was not applicable to the appellant. This view of the government was rejected by the Supreme Court. In his judgment, Justice Bhagawati observed "it is indeed difficult to say on what principle can a government be exempted from the rule of law, claim immunity from

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\*<sup>1</sup> AIR 1971 SC 199  
\*<sup>2</sup> AIR 1972 SC 1126  
\*<sup>3</sup> AIR 1973 SC 2641  
\*<sup>4</sup> AIR 1973 SC 2734  
\*<sup>5</sup> AIR 1979 SC 621

the doctrine of estoppel? Can the government say that it has no obligation to act in a matter of such affairs and contend that it is not bound by consideration of equity and good will?

This approach of Justice Bhagwati was reversed by the Supreme Court in a subsequent case namely, *Jitram Sivakumar Vs. State of Hariyana*\*1. The municipality of Bahadurgarh by the approval of the Government of Hariyana represented that octroi should not be payable by persons who purchase land in the Mandi area. Later approving the resolution of the municipal committee Government directed the municipality to levy octroi. Supreme Court rejected the contention of the petitioner and held that the government has acted strictly in conformity with the powers conferred on it u/s 17 (2) (c) of the Punjab Municipality Act, 1911. from payment of octroi due for a particular period and ultimately withdrew exemption. Supreme Court observed that the action of the government cannot be questioned as the same was done in its legislative or statutory functions. The above decision shows that the concept of promissory estoppel can be invoked against the government only under certain circumstances. When

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\*1 AIR 1980 SC 1285

government can show that compelling circumstance exists, that the promise cannot be carried out, the court should not insist on the application on this principle against the Government.

Later, Justice Bhagawati reiterated the principle of promissory estoppel in *Union of India Vs. Godfrey Philips India Ltd.\*1*. The fact of the case shows that a letter addressed to Cigarette Manufacturers Association stated that corrugated fibre board would not be included in the value of the goods for assessing the excise duty. The government later sought to include the value of the corrugated fibre board for the purpose of excise duty. Justice Bhagavati applied the principle of promissory estoppel against the government and held that the value of the corrugated fibre board cannot be included for the purpose of excise duty.

This judgment did not declare the correct law. This is against the facts of the case which shows that there was no promise and no detriment and it was only announced as a policy decision. If that cannot be changed later, the future of this

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\*1 AIR 1986 SC 606



doctrine is a matter to be considered in India particularly when the government have to make the law and also to change the same according to circumstance. Therefore, if judgment is allowed to stand, the Government may become powerless and will not be in a position to change the policy because somebody might have changed his affairs relying on the said policy. Similarly, the principle is not intended to curtail the powers of the government, particularly in the realm of taxation. More over, government is at liberty to withdraw the tax exemption in the interest of revenue. It is not desirable to find legal claim on the ground that the manufacturers expected that tax exemption would prevail for ever. It is to be remembered that the doctrine is based on equity and therefore the careful application of the same alone can foster justice.

#### APPLICABILITY OF THE DOCTRINE

Even though the concept of promissory estoppel was originated in cases in which private parties were involved the same was subsequently extended against the government as well. But the applicability of promissory estoppel against the Government revolves upon the balance of equity and public interest. In cases where there is supervening public interest, the government would

be allowed to change its stand. It would then be able to withdraw the representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of the withdrawal. Once a public interest is accepted as superior as can over-ride individual claims, the aforesaid position should be applicable even in cases where a party has acted on the faith of the promise. This is because promissory estoppel cannot stand on a higher footing than a contract entered into between a citizen and a public authority. It is settled that no public authority entrusted with discretionary power to be exercised for public good can bind itself on a contract not to exercise that discretion, when the public interest so demands.

The concept of public law estoppel is a developed one and its contours are not well defined. It may be applied in cases where public authority comes purely in exercise of executive or administrative discretion. With the ever widening field of judicial review of administrative actions and executive decision of the State and in the light of the extended applicability of promissory estoppel, it is now too late to contend that citizens have no right against

the government on whose representations they changed their position. It will be too broad a principle to lay down that no executive action of the State confers any right on any individual. The object is to determine whether the government should be exempted from the liability of promise or representation. Moreover, government is competent to resile from a promise even if there is no manifest public interest involved, provided no one is put in any adverse situation which cannot be rectified. Even when there is no such over-riding public interest it may still be within the competence of the government to resile. There is no hard and fast rule as to when the principle of promissory estoppel can be applied. In *Postal Co-operative Housing Construction Society Limited Vs. Secretary to Government of Bihar*\*<sup>1</sup> land was allotted to the Housing Society and they were directed to deposit the price. But they did not make any deposit. So there was no agreement or concluded contract between the society and the government. As such, the principle of promissory estoppel could not be invoked for challenging the action of the

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\*<sup>1</sup> AIR 1984 Patna 133

the government in using the land for some other purpose. Similarly, in *Sukhadevsingh Gill Vs. State of Punjab*\*<sup>1</sup>, a lay out plan was prepared, two plots were marked as reserved for school and a community centre. Later they were given for setting up a church and a convent which are religious institutions. Court found that in such circumstance, the Director, Housing & Urban Development, had power to decide user of the sites and the rule of promissory estoppel could not be invoked. In this decision the conduct of the government authorities was considered and the principle evolved was that unless there is a concluded contract or agreement, government cannot be bound to honour its promise. But this view is contrary to the settled principle of promissory estoppel. However, Justice Bhagawati found that promise is binding on the government if the other party has relied upon the promise and acted to his detriment. In *S.C.Goel Vs. Secretary, Delhi Development Authority*, a person's land was acquired. He was allotted a plot in some other development scheme where he constructed a building. Under that peculiar circumstance, the court held that subsequent allotment cannot be cancelled relying on the principle of promissory estoppel.

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\*<sup>1</sup> AIR 1986 Punjab and Hariyana 167

In *Pine Chemicals Ltd. Vs. Assessing Authority*\*<sup>1</sup>, a similar question came up for consideration. In that case, whether exemption to new industries for a specified period from payment of tax could be withdrawn before the expiry of the period came up for consideration. Supreme Court held that the industry is entitled for the benefit of exemption for the entire period specified in the exemption order, even though the exemption was withdrawn before the expiry of that period. This relief was granted by the court invoking the principle of promissory estoppel. But in *State of Tamil Nadu Vs. A. Guruswamy*\*<sup>2</sup>, the Supreme Court refused to apply the principle of promissory estoppel against the cancellation of the wrong SC & ST certificate. In that case, the court observed that the person concerned is not entitled to plead estoppel merely on the ground that he enjoyed the status under such a certificate for a long period of 26 years. A person, who played fraud and obtained a false certificate cannot plead estoppel against the cancellation thereof. The principle of estoppel arose only when lawful promise is made and acted upon by the promisee to his detriment. In the instant case, the principle of estoppel is

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\*<sup>1</sup> 1992 (2) SCC 683

\*<sup>2</sup> AIR 1979 SC 1199

inapplicable because there is no promise made by the State that the State will protect perpetration of fraud defeating the constitutional objective. No promise is made that the false certificate will be respected and accepted by the State. The courts will not lend assistance to perpetrate fraud on the constitution and one cannot be allowed to get the benefit of fraudulent certificate obtained from the authorities.

The plea of promissory estoppel is not available against the government in the exercise of its legislative, sovereign, executive or statutory functions. The doctrine cannot be invoked for preventing the government from discharging its function under the law. Further, when an officer of the government or public authority acts outside the scope of its authority, the plea of promissory estoppel is not available. Moreover, the constitution has enacted Article 299 so as to save the government's liability arising out of all unauthorised contracts not duly executed. The doctrine of ultra vires will come into operation and the government will not be bound by the unauthorised contracts made by its officers. A person dealing with the agent of the government must be held to have noticed the limitation of his authority. It would open to plead and prove that

there were special considerations which necessitated his not being able to comply with the obligations in public interest, such as difficult foreign exchange position or other matters which has a bearing on general interest of the State.

However, when the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a citizen acting on that representation puts himself in a disadvantageous position, the court is entitled to require the officer to act according to the scheme and the agreement or representation. The officer cannot arbitrarily act on his mere whim and ignore his promise on some indefinite or undisclosed grounds and insist or change conditions to the prejudice of the person who acted upon such a representation and who puts himself into a disadvantageous position. But, it is to be kept in mind the distinction between the administrative act and an act under a statute. Where the matter is not governed by law the executive can act in its executive capacity since the executive power of the State extends to matters with respect to the legislation and power to

make laws. Where the field is occupied by an enactment, the executive has to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no rule for any administrative action or for doing the thing obtained by the statute otherwise than in accordance therewith. If it is found that the act done by the government is invalid and ineffective for non-compliance with the mandatory requirement, it cannot be held that notwithstanding such non compliance it constitutes a promise or a representation for the purpose of invoking rule of promissory estoppel. Accepting such a plea would lead to multiplying the mandatory requirement of law besides providing licence to the government or other bodies to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment as meaningless and superfluous.

In *Jawaharlal Vs. State of Utter Pradesh*\*1, a notification was issued by the government changing the strength of the country liquor so as to affect the existing licensees. Declaration on strength was made by the government in exercise of its legislative function. The court declined to apply the principle of promissory

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\*1 AIR 1981 Allahabad 292



estoppel since the act of the government was in exercise of its legislative function. Thus, it is settled that promissory estoppel cannot be invoked against the legislative functions of the government. In *S.C. Conda Reddy Vs. Union of India*<sup>\*1</sup>, completion of a contract work for the railways was delayed due to the reason attributable to the railways. The contractor's claim for additional damages due to rise in the cost occasioned by the delay was later withdrawn when final payment was made. The final payment was only in discharge of the contractual liability. Subsequently the contract demanded escalation cost. That demand was denied by invoking the principle of estoppel. But it was also held that the contractor had right to claim damages by referring to arbitration.

When promissory estoppel is invoked, what the court should examine is, whether the communication coming from the government is legislative or executive in character. If the communication is legislative, the doctrine of promissory estoppel cannot be invoked. In the exercise of its statutory powers the government cannot fetter itself the freedom of its future action.

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\*1 AIR 1982 Karnataka 53

A public authority created to exercise statutory powers vested in it in public interest cannot act inconsistently or incompatibly with the purpose for which the statutory powers have been granted. Promissory estoppel would necessarily create fetters on the exercise of statutory functions. If the communication is executive in character, the doctrine of promissory estoppel can be pressed against the public authorities\*<sup>1</sup>. In *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*\*<sup>2</sup>, an agreement to advance a loan was entered into by a corporation constituted under the statute. On its solemn promise, respondent incurred expenditure, suffered liabilities to set up a hotel acting on the promise. The respondent suffered further liabilities for implementing and executing the project. In the backdrop of this uncontravertible fact situation the principle of promissory estoppel would come into play.

But this view was reversed in *D.R.Kohli Vs. Atul Products Ltd.*\*<sup>3</sup>. It was held that promissory estoppel cannot be pleaded against the statutory function of the government. The respondents have not done anything prejudicial to their interest relying upon

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\*<sup>1</sup> *Bensal Exports Pvt. Ltd. Vs. Union of India* (AIR 1983 Delhi 445)

\*<sup>2</sup> AIR 1983 SC 848

\*<sup>3</sup> AIR 1985 SC 537

any representation made on behalf of the government. It is not the case of the respondent that he would have never manufactured dyes but for the advice given by the department. On the other hand it was obvious that the respondent had before the exemption notification, started their manufacturing process. The department was also not bound to tender any legal advice to the respondent. Similarly in *Deepak Vs. State of Bihar*\*<sup>1</sup>, original prospectus that was issued for admission to the post graduate medical course did not contain any provision of reservation for Scheduled Caste and Scheduled Tribe candidates. After the publication of the results, the State created reservation for the members of SC & ST. It was held that the State was not prevented from creating reservation for members of SC and ST. That right of the state cannot be denied by invoking the principle of promissory estoppel.

Dealing with the freedom of the State to enter into contract with others, Supreme Court pointed out that State cannot be equated in all such matters just like a citizen and that there are certain limitations on its discretion. If this is so, in contractual matters, it must equally be so in the face of promise falling

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\*<sup>1</sup> AIR 1982 Patna 126

short of enforceable contract. It is trite law that statutory obligations prevailed over contractual and similar obligations.

The applicability of promissory estoppel to the government was considered in detail in *Express News Papers Pvt. Ltd. Vs. Union of India*\*<sup>1</sup>. In that case the then Minister for works and Housing acting within the scope of his authority granted permission to the lessee to construct a new express building with an increased Floor Area Ratio with double basement for installation of a printing press under the rules of business. With the concurrence of the Vice Chairman, Delhi Development Authority, on the amalgamation of plots 9 and 10, directed the lessee to forward a master plan. Accordingly, a master plan was forwarded but subsequently the government declined to grant permission and revoked the earlier sanction order already granted by the then Minister. The court held that the government is precluded by the doctrine of promissory estoppel from questioning the authority of the then Minister in granting permission. In that view, the successor government is clearly bound by the decision taken by the Minister when it has been acted upon.

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\*<sup>1</sup> AIR 1986 SC 872

Similarly granting of sales tax concession to new industries cannot be withdrawn by the government and the principle of promissory estoppel will come into operation unless the government satisfies the court about the reason for withdrawal of concession like misuse or undue advantage taken of the concession etc\*<sup>1</sup>.

Later, the Supreme Court declared that the alteration of the position alone is sufficient to invoke promissory estoppel against the government. It was held that consequent detriment, damage or prejudice to the promisee need not be proved. Where several representations made by different agencies of the government and relying or acting upon the same, the promisee alters his position, the doctrine would be attracted irrespective of whether such representation was wholly or partly responsible for such alterations in the position. But the representation must be clear, certain and unambiguous and must not be contrary to law or beyond the power or authority of the promisor. The representation is to be taken as a whole for invoking the doctrine of promissory estoppel. What is required is that the party asserting the estoppel must have acted

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\*<sup>1</sup> *Assistant Commissioner, Commercial Taxes, Dharawar Vs. Dharmendra Trading Co.* (AIR 1988 SC 1247)

upon the assurance given to him or must have relied upon the representation made to him. It means, the party should have changed or altered his position by relying on the assurance or representation. The alteration of position of the party is the only indispensable requirement of the doctrine. It is not necessary to further prove any damage, detriment or prejudice to the party asserting the estoppel. The concept of detriment is that when it appears unjust, unreasonable or unequitable, the promisor should be allowed to resile from his assurance or representation, having regard to what the promisee had done or refrained from doing anything relying on the assurance or representation. The entire doctrine proceeds on the promise and the reliance thereon and nothing more. The court will compel the representer to adhere to the representation on which the representee acted upon or abstained from acting. However, the doctrine of promissory estoppel cannot be used to compel the public authorities or the government to carry out the representation or promise which is contrary to law or which is

outside their authority or power. Secondly, the concept of estoppel stems from equitable doctrine. It, therefore, requires that he who seeks equity must do equity. The doctrine, therefore, cannot be invoked if it is found to be inequitable or unjust in its enforcement. Lastly, for the purpose of finding whether estoppel arises acting on the representation, it is necessary to look into the whole of the representation. In other words, the representation must be taken into consideration in toto for the applicability of promissory estoppel.

In *Vijresence Pvt. Ltd. Vs. State of Jammu & Kashmir*<sup>\*1</sup>, on the basis of representation made by the government, a private party set up industries in the state by making substantial investment. But later, an Act came into force providing for State monopoly of industries obliterating rights of private parties and enabling the State to get out of its commitments. In this case court found that the doctrine of promissory estoppel will not be operated against the Act and it will apply only against the government.

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<sup>\*1</sup> AIR 1989 SC 1629

In *Admis AD Vs. Union of India* \*<sup>1</sup>, when the recognition granted to Passport agents by the Passport office was cancelled, the same question came up for consideration. The cancellation order was subsequently withdrawn. The court held that the withdrawal does not mean that the recognition originally granted will not be disturbed even if a new policy is evolved by the Government of India, since the withdrawal order does not spell out any such promise. In *Amrit Vanaspati Co. Ltd. Vs. State of Punjab*\*<sup>2</sup> the Supreme Court considered whether the Government can be held liable for the representations made by the government officials by applying the principle of promissory estoppel. It was held that the representations are binding on the government, if it was made in accordance with the government policy and within the scope of their authority. The representations coming from the Industries Secretary or the Director of Industries in pursuance of a government policy cannot be enforced beyond the scope of

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\*<sup>1</sup> AIR 1990 Gujarat 167

\*<sup>2</sup> AIR 1982 SC 1075



authority. The arguments of the State of Punjab that in the absence of any assurance by competent authority on behalf of the State, promise, if any, was incapable of giving rights to any equity cannot be accepted. The notice of the Secretary showed that the authorities were not only assuring the appellant but were making every effort that the unit was established in consonance with the policy of the government as it would result in industrialisation and development of the State. Such painstaking effort of respondent and senior officers of the State was not allowed to be enforced or acted upon beyond the scope of their authority. Government functions through their officials and so long as they acted bonafide in pursuance of the government policy, the government cannot be permitted to disown the activities of the officers since citizens have no means to know what is being done is with or without the approval of the government. If it is found that the representation made by the official concerned is such that a reasonable

person believed it to have been done on behalf of the government, then unless such a representation is established to be beyond the scope of the authority it should be held binding on the government. But a letter from the Secretary, containing assurance of refund of sales tax, in respect of new industries, the Supreme Court declined to apply the principle of promissory estoppel since the assurance is opposed to public policy.

In *Utpadakoni Co-operative Spinning Mills Ltd. Vs. General Manager*\*<sup>1</sup>, the authority brought out a scheme for giving cash subsidy for setting up of new industry. Accordingly subsidy was granted to the Co-operative Society for setting up an industry. The society spent more money and expanded the industry. In this case, the Supreme Court held that the authority is estopped from refusing additional subsidy for the expansion. In *Modi Alkalies & Chemicals Ltd. Vs. State of Rajasthan*\*<sup>2</sup> a notification was given for remission of electricity charges for new industries. Accordingly a person invested huge amounts and started an industry. At a latter point of time, government

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\*<sup>1</sup> AIR 1992 Gujarat 82

\*<sup>2</sup> AIR 1992 Rajasthan 51

cannot resile raising the plea of financial distress and drought conditions to avoid the liability by invoking the principle of promissory estoppel. In this judgment the Supreme Court observed that the government must disclose to the court all necessary materials for the subsequent conduct on account of which the earlier decision was sought to be varied. Mere claim of change of policy would not be sufficient and the government should establish that public interest would be prejudiced if the government is bound to implement the promise. In a dispute between citizen and citizen, it is comparatively easy to find out where equity or justice lies. But in a dispute between a citizen and public authority, elements of public interest intervene. To illustrate, suppose a citizen is told when land acquisition proceedings are in contemplation, that his land will not be acquired for the public purpose. Based on this representation, he starts building on the land. In a sense, it will be inequitable to allow the authority to go back on its assurance. But if the land is really required for a public purpose, it will be against public interest to allow the citizen to enforce a promise made to him. The choice then is to be

made between the interest of the citizen and the interest of the public in general. This is because, a public authority is not just like a private party, it is the custodian of public interest or public good also. In *State of Himachal Pradesh Vs. Ganesh Wood Products\**<sup>1</sup>, the Supreme Court observed that promissory estoppel being an equitable doctrine should be moulded to suit the particular situation. It is not a hard and fast rule but an elastic one, the object of which is to do justice between the parties and to extend an equitable treatment to them.

From the above discussion it is clear that State is also bound to honour its representation made to its citizens subject to certain qualifications. If the public interest demands the state may be justified in withdrawing the promise even if the promise might have been acted upon by a citizen. The reasonableness or basis of withdrawal of promise can be tested in a judicial forum and it is for the court to mould the remedy depending on the facts and circumstances of the case.

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\*1 1956 (6) SCC 363

## CHAPTER VI

### PROMISSORY ESTOPPEL : FROM SHIELD TO SWORD

The modern trend is that the principle of promissory estoppel applies not only as a defence but also as a cause of action against the government. The applicability of the doctrine cannot be hindered by invoking the doctrine of executive necessity or freedom of future executive action. This is a principle evolved by equity to avoid injustice. Even though it is named as promissory estoppel, it is neither in the realm of contract nor in the realm of estoppel. The basis of this doctrine is interposition of equity for the purpose of mitigating the rigour of strict law. Accordingly, this doctrine can be applied not only as defence but also as cause of action. However the doctrine of promissory estoppel must be yielded when equity so requires, if it can be shown by the government or public authority that having regard to the facts that transpired, it will be inequitable to hold the government or

public authority to the promise or representation made by it, the court will not raise an equity in favour of the person to whom the promise or representation was made and direct to enforce the promise or representation against the government or public authority. The doctrine of promissory estoppel will not be applied in such a case because from the facts, equity will not require the government or public authority to perform a promise or representation made by it.

A different view is also possible as held by the Supreme Court in *PTR Exports Pvt. Ltd. Vs. Union of India*\*<sup>1</sup>. In this case it was held that the government can only in appropriate case be made liable to honour its promise by applying the principle of promissory estoppel. The Export and Import policy of 1992-93 regarding ready made garments classified allotment under three heads viz. (1) Part performance entitlement (2) Manufacturer export entitlement and (3) Non quota exporters entitlement allotment. However a new policy was introduced with effect from 1st January, 1996 after approval

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\*<sup>1</sup> 1996 (5) SCC 268

of GATT incorporating separate agreements to Textile and Clothing section whereby total change was announced in garment quota policy envisaging only two methods namely performance entitlement and first come first serve. The new policy was challenged on the ground of promissory estoppel or legitimate expectation. Thus the question revolved upon the validity of the withdrawal of the previous policy and the introduction of the new policy. When the issue of policy arises, an important question emerges, whether the government is bound by the previous policy or whether it can revise the policy in view of the foreign potential market and need for the foreign exchange. It would be open to the government to evolve a new scheme and the petitioners would get their legitimate expectation accomplished in either of the two schemes subject to their satisfying the condition required in the scheme. This view of the High Court that the government is not barred by the promise or legitimate expectation from evolving a new policy was upheld by the Supreme court.

The applicants have no vested right of import or export licence in terms of the policy on the date of its making application. For obvious reasons, granting of licence depends upon the policy prevailing upon the date of grant of the licence or permit. The authority concerned may be in a better position to have a picture of diverse factors to grant permit or refuse the same. The decision, therefore, would be taken from diverse economic perspective which the executive is in a better informed position. Unless a refusal is malafide or is an abuse of the power, the court should not intervene if the applicant is not able to satisfy the court that the refusal was based on the above factors. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power in matters of economic policy. It is settled law that the court accepts the wide power vested on the executive and legislature. Granting licence for import or export is an executive



or a legislative policy. The government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priority to various items in the overall interest of the economy of the country. It is, therefore, within the power of the executive or the legislature to evolve such policies. A private decision would not bind the government for all times together. When the government is satisfied that the change in policy is necessary in public interest, it would be entitled to revise the policy and lay down the new policy. The court, therefore, would prefer to allow free play to government to evolve a new policy in public interest and to act upon the same. Equally, the government is free to determine priorities in matters of allocation or utilization of its finance in public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. The Supreme Court again considered the effect of change of policy of the government in *STO Vs. Shri Durga Oil Mills*\*<sup>1</sup>. Government of Orissa

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\*<sup>1</sup> AIR 1998 Orissa 163

issued Industrial Policy Resolution (IPR) on 18/7/1979. Clause 8 of the IPR which was effective for the period from 1979 to 1983 provided that village, cottage and tiny industries certified as such by the government and small scale industries should be exempted from purchase/sales tax for 5 years for construction materials, raw materials, machinery and packing materials. Small scale industrial units in non-backward areas would be entitled to this exemption only for four years. The IPR specifically made clear that "government will order laying down the mode of administration, concessions and incentives through the department concerned". Section 6 of the Orissa Sales Tax Act provides that the state may, by notification, subject to such conditions and exceptions, exempt from tax, sale or purchase of any goods, or class of goods, and likewise withdraw any such exemption. The respondent claimed that he set up the industry in the district of Majur Bhang pursuant to IPR obtaining huge loan from the bank. The industry has commenced production on 19/3/1980 and hence eligible for the exemption given by the notification dated 18/7/1979.

The case of the respondent before the High Court was that by virtue of the principle of promissory estoppel, the State Government could not change the exemption notification to the detriment of the assessee. The High Court allowed the writ petition. The question before the Supreme Court was whether the government had made any promise to the respondent and if so, can it depart from the promise so made ? Allowing the appeal, the Supreme Court held that IPR can be changed if there is an overriding public interest. In the instant case, it was submitted on behalf of the State that various notifications granting sales tax exemption to the dealers resulted in severe resource crunch. On reconsideration of the financial position, it was found that the exemption granted was outside the scope of exemption notification u/s 6. Considering the peculiar economic situation, the scope of the earlier notification had to be restricted. Withdrawal of notification was done in public interest. Public interest must override any consideration of private loss or gain. Thus the plea of change of policy on the basis of resource crunch should have been sufficient for dismissing the respondent's case.

Whether promissory estoppel can be invoked for compelling the government to do an act which is statutorily prohibited came up for consideration before the Supreme Court in *Panval Alloys & Castings Pvt. Ltd. Vs. Uttar Pradesh State Electricity Board*\*1. In this case incentive development rebate was offered by the Electricity Board to new industries for a special period. New industries established their units on the said promise. Subsequently the Board withdrew the benefit before the expiry of the said period. The said action was not supported by any demand of public interest. In this case, the Supreme Court held that the promise or representation made by the State should not be statutorily prohibited or against legislative or quasi legislative power of the State or opposed to the public policy. The promisee should have acted upon such promise or representation and by doing so he should have changed his position not necessarily to his detriment. In such an event, if the promise or representation is intended to operate for a specific period, State or its instrumentality would be bound by promissory estoppel not to resile from the same

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\*1 1997 (7) SCC 251

at least for that period. However, State can withdraw its promise or representation even before the expiry of the specified period on the ground of overriding public interest or by giving reasonable opportunity to the promisee to resume his earlier position if restoration of status quo ante is possible.

Principle of promissory estoppel is not applicable where the State or its instrumentality in exercise of its sovereign taxing power grants any exemption, concession or rebate for a specified period to a class of persons in public interest and withdraws the same prior to that specified period again in public interest under changed circumstance. Promissory estoppel is also inapplicable where State or its instrumentality acts in exercise of delegated legislative function which can be assailed only on the ground of unreasonableness or arbitrariness. If the State or statutory authority or an executive authority of the State or its limb, like, the State Electricity Board, covered by Article 12 functioning on behalf of the State

in exercise of its legally permissible powers made a promise to a party, who, relying on the same, has changed his position not necessarily to his detriment, and if this promise does not offend any of the provisions of the law or does not fetter any legislative or quasi legislative power inherent in the promiser or it is not otherwise opposed to the public policy, then on the principle of estoppel, the promiser can be pinned down to the promise made by it by way of representation for the benefit of the promisee.

In *Ashok Kumar Maheshwari Vs. State of Utter Pradesh*\*1 it was held that the promissory estoppel cannot be invoked to enforce a promise contrary to law. Even if it is expected that the State Government or the Director, Medical Education Training, asked the appellant or any of his colleagues that they would be promoted to the post of lecturer, such a promise cannot be enforced against the respondent as the avenue of promotion of demonstrators to the post of lecturer was not provided either under the statute or in

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\*1 1998 (2) SCC 502

executive instructions. More over, if the post of lecturer was filled by posting a demonstrator, it would defeat the existing mode of recruitment, namely, that it can be filled up by direct recruitment only and not by promotion. The appellant did not make any clear, sound or positive argument as to which officer of the government, when and in what manner, gave assurance to the demonstrators. It was also not stated that the appellant had at any time acting upon the promise, altered his position in any manner to his detriment. Bald pleadings cannot be made as a foundation for invoking the doctrine of promissory estoppel.

### **GOVERNMENT CONTRACTS**

The doctrine of promissory estoppel is applicable to the government and its agencies even in contractual matters. The basic principle in every contract made by the government is that the same must be in writing as provided under Article 299 of the Constitution. Certain conditions are prescribed in

Article 299 for making contracts with the government. In *KP Choudhary Vs. State of Madhya Pradesh*\*1 the Supreme Court observed as follows:

"In view of Article 299 (1) there cannot be implied contract between the government and another person, the reason being that if such implied contract between the government and another person were followed, the same would, in effect, make Article 299 (1) useless. Then a person making a contract with the government which was not executed in the manner provided under Article 299 (1) can get away by saying that an implied contract may be inferred on the facts and circumstances of a particular case".

Article 299 provides that all contracts entered into by the government should be executed in the name of the President or Governor of the State and only by such authorised persons in such manner as directed or authorised. These requirements, both of form and substance, are mandatory. Presumably,

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\*1 AIR 1967 SC 203



Article 299 is designed with the motive that the government should not be burdened with claims which do not conform to the stipulated requirement. These requirements are in addition to the normal formalities of a valid contract, namely, competency of the parties, free consent, lawful consideration etc. Promissory estoppel arises even when there is no written agreement and no consideration. In some decisions dealing with promissory estoppel the courts even did not consider the competency of the officer to hold the promise.

In *N.L. Dalmia Vs. Union of India*<sup>\*1</sup>, the maintainability of writ petitions against government in contractual matters was considered. The dispute arose out of a contract for supply of goods. The government, alleging non supply of goods before the stipulated date, cancelled the contract. The petitioner claimed the value of the goods which he had already supplied. Writ petition was filed by the petitioner. Supreme Court dismissed the writ petition saying that the contractual right could not be enforced through writ petitions.

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\*1 AIR 1976 Delhi 154

Supreme Court took the view that in case of contracts where general complicated questions of facts are involved, the same cannot be resolved in the High Court or Supreme Court on the basis of affidavits.

However, if a party relies on promissory estoppel and comes with a writ petition, these instructions do not weigh with a court of law. In *Gujarat State Financial Corporation Vs. M/s. Lotus Hotels Pvt. Ltd.*\*<sup>1</sup>, the appellant sanctioned to the respondent a loan of Rs. 29.23 lakhs for constructing a hotel on certain terms and conditions. Respondents started construction work. Thereafter, certain allegations were raised against the respondents and the appellant decided not to disburse the loan and the said decision was conveyed to the respondents. The respondents moved the court pleading promissory estoppel. The Corporation repudiated the same by saying that the dispute was in the realm of contract and therefore, the matter can be decided only by the Civil Court. This contention was negated by the Supreme Court observing

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\*<sup>1</sup> AIR 1983 SC 848

"if the appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondents acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury flowing from its unreasonable conduct. In such a situation the court is not powerless in holding the appellant to its promise and it can be enforced by a writ of mandamus directing to perform its statutory duty". This view shows that a writ of mandamus cannot be issued for enforcement of a contract but can be issued for enforcement of a promise by invoking promissory estoppel. It is well settled that contractual obligations and promissory estoppel cannot act simultaneously, as one belongs to law and the other belongs to equity. This analysis reveals a peculiar situation. A person after complying with all the statutory requirements makes a contract with the government will become helpless except by filing a civil suit for the compensation etc. against the government. At the same time the person who alleges that he had believed the representation made by the government and

altered his position, can get a relief by invoking promissory estoppel. This is a remedy similar to specific performance of contract. So far, no decisions are there as to why the right for remedies are distinct in these two situations.

### CHANGE OF POLICY

The government can change its policy at any time in public interest. Public interest means, act beneficial to the general public, that is, action taken for public good. Public policy is defined as a policy of judicial, legislative or interpretation founded on the current needs of the community. As far as principle of promissory estoppel is concerned, question is whether its applicability is conditioned by the change of policy by the public authorities in public interest. If the government can convince the court that having regard to the facts subsequently transpired, it would be inequitable to hold to the promise made by it, court may not find equity in favour of the promisee and enforce the promise against

the government. But in such a situation, court has to balance the loss or prejudice to the citizen and the public interest likely to suffer if the promise is required to be carried out. A mere plea of change in policy is not sufficient to claim an immunity. Thus a balance between the public interest and private interest is to be made before applying the principle of promissory estoppel.

In *Ramanatha Pillai Vs. State of Kerala*\*<sup>1</sup>, Supreme Court refused to interfere in the abolition of a post which was being held by the petitioner. Mr. Ramanatha Pillai was an advocate practising in the High Court of Kerala. His contention was that he had left his lucrative practice to take up the office which was offered to him. His contention was negated by the Supreme Court since the abolition of the post was done by the government in public interest. After Ramanatha Pillai's case, a series of decisions were made where public interest was made to prevail over private interest. In *Achuthan Pillai Vs. State of Kerala*\*<sup>2</sup> the petitioner filed applications for clearing of trees on the land on lease with Devaswom. The lease

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\*<sup>1</sup> AIR 1973 SC 2641

\*<sup>2</sup> AIR 1972 Kerala 39

was granted in favour of the petitioner by the Commissioner of Hindu Religious & Charitable Endowments. The government allowed the application for clear felling. Later, after seven years, the government cancelled the lease of the land. This action of the Government was challenged stating that relying on the promise made by the Government, the petitioner has altered his position by investing substantial amount. The challenge of the cancellation by the petitioner was repelled by the court. In *R.K. Deka Vs. Union of India*<sup>\*1</sup>, the Government, in 1978, announced a scheme to allot land to non-resident Indians for construction of house. The petitioner's application for allotment of house plot was sanctioned. Later, government in public interest dropped the entire scheme stating that it was a non-priority one. The petitioner's plea on promissory estoppel was rejected by the court and the court observed "public policy should not and does not remain static".

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<sup>\*1</sup> AIR 1984 Delhi 413

Public policy would be useless if it is to remain in fixed mould for all times. It is to be transformed suitably or varied from time to time depending upon the welfare of the community at any given time. Executive necessity is an inherent power of the state which allows variation of policy decision of the State. In *Malhotra & Sons Vs. Union of India*<sup>\*3</sup>, the court observed "the court will not bind the government by its promise to prevent manifest injustice or fraud and will not make the government a slave of its policy for all times to come when the government acts in its governmental, public or sovereign capacity". Similarly, the court observed "the authority has to exercise its discretionary power as and when it ought to exercise as required by the statute and the courts may not prevent the authority in genuine exercise of discretionary statutory powers".

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<sup>\*3</sup> AIR 1976 Jammu & Kashmir 41

## ESTOPPEL AGAINST ADMINISTRATIVE INSTRUCTIONS

Administrative instructions are issued to subordinate officers in exercise of the powers conferred on the government. It is true that administrative instructions do not have any force of law. These instructions are issued by the Union and State Governments under Articles 73 and 162 of the Constitution respectively. These instructions issued for the guidance of authorities exercising discretion are only directory in nature and not enforceable in a court of law.

In *Amritlal Ramanlal Vs. Gujarat*<sup>\*1</sup>, the question came up for consideration whether promissory estoppel would be applied to enforce administrative instructions. In that case, management of a private school terminated the service of a Headmistress of the school against which she filed an appeal to the Director of Education. The appeal was allowed and she was ordered to be reinstated. The management did not care to carry out the order of reinstatement. The Director of Education, there upon, issued orders that an amount equivalent to the salary of the Head Mistress be deducted from the

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\*1 AIR 1972 Gujarat 260



educational grant to be paid to the school. The said action was challenged by the management. The contention of the Government was that grants-in-aid were given to the schools under executive instructions which cannot have force of law and hence cannot be enforced in a court of law. The contention of the management was that the instructions were in the nature of a promise to the management and on the basis of these instructions they had agreed for abridgement of their rights to management. The court upheld the contention of the management.

In *Rev. Fr. Joseph Valamangalam Vs. Kerala*<sup>\*1</sup>, the rules and procedures regarding disbursement of salary to teachers of private schools were challenged. Formerly, salaries of teachers were given to the Managers and the Managers used to disburse the salary to the teachers. Owing to the changed policy, the salary was payable to the Head Master, instead of Managers, for disbursement to the teachers. The court held that the Travancore Education Code was only executive instruction and has no statutory force. Hence the contention of the Manager was rejected.

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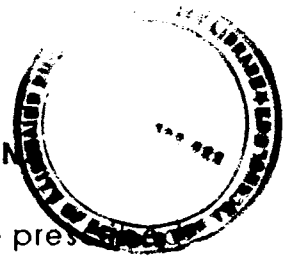
<sup>\*1</sup> AIR 1958 Kerala 290

In *Sanjiv Textiles Pvt. Ltd. Vs. State Bank of India*<sup>\*1</sup>, State Bank of India announced a scheme to rehabilitate sick and small scale industrial units. Many units sought assistance. A detailed inspection of a particular unit revealed mismanagement and it was the cause of its sickness. The unit was not willing to the conditions suggested by the Bank. Therefore, the benefits promised by the Bank were declined. The court refused to direct the Bank to fulfil the promise because giving benefits is under the discretion of the Bank and public money should not be squattered by such mismanaged units.

Administrative instructions can confer rights upon the citizens only in the absence of statutory rules. Since administrative instructions are issued for the guidance of the subordinates, the court has a duty to examine the source of power for issuing such instructions. If the authority possesses rule making power and instructions are issued in exercise of such rule making powers, the court can treat them as statutory rules. If such instructions are relied upon by the citizens, the same should be given effect to. The authority who issued the instruction subsequently withdraw the instruction, such action could be challenged by invoking promissory estoppel.

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<sup>\*1</sup> AIR 1993 Gujarat 132

**ESTOPPEL AGAINST LEGISLATIVE FUNCTION**

The powers and privileges of legislatures are preserved and protected by the Constitution of India. Such a power can be exercised by the legislatures and it cannot be challenged on the basis of fundamental rights\*<sup>1</sup>. The legislature does not infringe any legal right of a person since the legislature has the power to make laws. That is why, a writ cannot lie against legislature. Courts are not competent to interfere with the procedures of the legislatures. This view was taken by the Supreme Court in *Kerala Vs. Gwalior Rayons Manufacturing Co.*\*<sup>2</sup> The respondent company established a factory in Kerala for the manufacturing of rayon cloth pulp on an understanding that the government would supply raw materials for the company. The company actually decided to establish the factory in Kerala on the basis of this promise and also a letter of undertaking by the Government not to legislate for the acquisition of private forest for a period of 60 years. The company purchased 30,000 acres of forest land. Later, the Kerala

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\*<sup>1</sup> *MSM Sharma Vs. Sreekrishna Sinha* (AIR 1959 SC 395)

\*<sup>2</sup> AIR 1973 SC 2734

Legislative Assembly passed the Kerala Private Forest (Vesting & Assignments) Act, 1971, a legislation, providing for vesting of all private forest lands in the State. The company challenged the same contending that the Government was estopped from enacting such a legislation in as much as it had already undertaken not to legislate for the acquisition of forest land relying on which the company had acted to its detriment by establishing a factory in Kerala. The court rejected this contention stating that promissory estoppel cannot be invoked to estop legislature in exercise of its legislative functions.

#### ESTOPPEL AGAINST STATUTE

A statute is an Act of Legislature. Any amendment to it can be made only by legislature. The doctrine of estoppel cannot be invoked to make an invalid transaction as void which the legislature has declared as invalid on the ground of public policy. Similarly, it cannot confer jurisdiction over a court whose jurisdiction is specifically denied by statute. In *Jas Jeet Films Pvt. Ltd. Vs. Delhi Development Authority*\*<sup>1</sup>, the petitioner was allotted a plot of land for construction of a

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\*<sup>1</sup> AIR 1980 Delhi 83

cinema theatre by the respondent. Lease was concluded and rent for the current year was also paid. Later, when the petitioner failed to pay the rent for the subsequent years, the respondent took step to recover it. The contention of the petitioner was that the respondent failed to carry out the promise to do development works according to the master plan and that he was induced to conclude the lease agreement on the expectation that the development of the surrounding area would be carried out according to the master plan. Rejecting the said contention, the court observed that estoppel cannot override statutory provisions. The Acts of Parliament cannot be treated as representation to citizens.

If the government or its agencies are misusing the statutory provisions the court may allow estoppel in spite of the statute. In *Express News Papers Pvt. Ltd. Vs. Union of India*\*<sup>1</sup>, the Minister granted permission to the petitioner to construct a new building in Delhi. The land was under continuous lease for several years. Later, the Lt. Governor of Delhi called for the relevant files from

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\*<sup>1</sup> AIR 1986 SC 872

the Ministry and ordered demolition of the building on technical grounds after issuing show cause notice holding that the construction was in violation of the definite provisions of the Delhi Municipality Act. It was contended by the petitioner that the impugned order was issued to take vengeance on the news paper. Supreme Court invoked promissory estoppel and negated the order of the Governor finding that the action was issued with malafides and ulterior motives. This proves that estoppel can be invoked even against the statute if the authority exercising the powers under the statute is acting malafidely.

Based on the above discussions, the following conclusions can be arrived at; namely,

a) The doctrine of promissory estoppel will apply even though there is no pre-existing relationship between the parties. It can be applied even if a promise is intended to create relationship for future.

(b) Equitable estoppel is not an estoppel in the strict sense. It is a rule evolved by equity for doing justice. Promissory estoppel can be used as a cause of action as well.

(c) The doctrine of consideration cannot be invoked to defeat the applicability of estoppel. Considerations can be qualified by the doctrine of estoppel.

(d) Government cannot retract from its obligation under a promise on the basis of executive necessity. Government also should be held to its own promise like any other citizen notwithstanding its responsibility as the executive arm of the State.

(e) Absence of consideration or failure to embody the terms of promise to conform to the requirements of Article 299 would be no ground to exonerate the State from such obligations and the State should be treated just like any other citizen in such matters.

The above principles are restricted by a subsequent judgment in *Madhya Pradesh Sugar Mill's case*\*1. The Supreme Court considered the entire aspect and expressed the following views.

- (a) Promissory estoppel is not available against the exercise of legislative functions of the State.
- (b) The doctrine cannot be invoked for preventing the Government from the discharge of its functions under the law.
- (c) Where an officer of the government acts outside his authority, the doctrine of ultra vires will operate and the government cannot be held responsible for such unauthorised act.
- (d) Where an officer acts within his authority the court will compel him to act according to his representation.
- (e) Special considerations having bearing on the general interest of the State may enable an officer to retract from the promise made within the scope of his authority.

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\*1 AIR 1979 SC 621



But these views were again changed in *Bensal Exports Pvt. Ltd. Vs. Union of India*\*1. In this case the Supreme Court observed that promissory estoppel can be used not only as a shield but also as a sword. Detriment is no longer required to be proved. It is just sufficient that promisee has altered his position on the faith of the representation. In spite of the above divergent opinions, there is unanimity in all decisions delivered by the Supreme Court that where government owes duty to the public to act in a particular manner, promissory estoppel cannot be invoked to prevent the government from doing so. But to succeed in a plea of promissory estoppel, it is indispensable to prove that the promisee has altered his position in reliance to the promise made to him. The only consideration which makes it inequitable for the promisee to stand on his strict legal right must be the fact that the promisee has in some way altered his position in reliance on the promise. It is not essential that the alteration of position would amount to his detriment. The meaning of detriment where the term is used in estoppel is injustice to the promisee which would result if the promiser is allowed to withdraw from his promise.

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\*1 AIR 1983 Delhi 445

Estoppel being the product of equitable doctrine, presupposes equity in the representation. One who raises equitable estoppel, must do equity himself, otherwise equity will not assist him. It is also equally true that the doctrine of promissory estoppel is an equitable doctrine and it must yield when equity so requires.

Involvement of government and governmental agencies in trade and commerce is a practical reality which cannot be overlooked. If a promise can form part of the cause of action, communicated under statutory obligation, it cannot be extended, but it should be restricted to the promise only. It is sufficient for a person to show that he has altered his position relying on the representation or promise whether it is statutory or otherwise. Supreme Court pointed out that alteration of the position of the promisee is not the only requirement to attract promissory estoppel. The damage or prejudice or detriment to him need not always be proved. In the formative stage it was said that the doctrine of promissory estoppel cannot be invoked by the promisee unless he

has suffered a detriment or damage. But that view is being changed. All that is required now is that the party asserting estoppel must have acted upon the assurance given to him. That is, he must have relied upon the representation made to him and changed or altered his position by relying on the assurance or representation. Thus the alteration of the position of the party is the main requirement for invoking the doctrine. In *DCM Vs. Union of India*\*1, an assurance was given by the Railways to the Company as regards charges for carriage of Naftha to its proposed place of factory at A. The company set up the factory at A on that assurance. Subsequently the Railway demanded higher rate than what was promised. Supreme Court observed that for invoking the doctrine of promissory estoppel the company need not show that the assurance given by the Railway was responsible for establishing the factory at A. Thus, the reliance based on the promise alone is required and nothing more is necessary to invoke the doctrine of promissory estoppel.

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\*1 AIR 1987 SC 2414

## SCOPE OF THE DOCTRINE

In the modern age, the involvement of the Government in various spheres of human activities has increased. Consequently, the promise made by the government to its own subject for a future conduct is subject matter of public concern. When there is no formal contracts but a person acts on the assurance of a competent authority, is it possible for him to bind the government to its assurance ? In equity can the person who has represented the facts relying upon which the other has acted deny those facts later?

The government or governmental agencies have a duty to the public in general to act fairly and reasonably so as to create a feeling among the general public that the latter would not be deprived of justice and fair play. This should be the underlying principle of administration. Any contrary action on the part of the government or the governmental agencies would violate the basic principle of rule of law. The concept of justice and rule of law is not a static one; it should face the social and economic changes of the society.

The government or public authority cannot claim immunity from the applicability of estoppel and repudiate the promise made by them on the ground that such a promise may fetter their future executive action. The doctrine of promissory estoppel should be applied against the government or governmental agencies where interest of justice, morality and fairness dictate such a course.

Would administration require that government or other public authority be bound by the promise made by them upon which the others have acted, as much as private parties bound by similar promise ? The people for whom government acts require to be protected against the unauthorised or mischievous act of the persons who act for the government. People cannot be bound by promise which are unauthorised or which are prejudicial to the public interest or productive of public mischief. Hence it is necessary to restrict the governmental activities by applying promissory estoppel. Of course, there should be obvious limitations when the government acts in the sovereign capacity. There could be no estoppel to prevent parliament from

making laws. The government while functioning as a delegate of parliament cannot also be estopped from legislating contrary to the promise held out earlier in the executive capacity. No estoppel can prevent government from carrying out the mandate of parliament. Government cannot be bound by estoppel to do an act indirectly which it cannot do directly. The government cannot bind itself or a succeeding government to a fixed policy. The public dynamism of the state requires a review and revision of policy and the government must have the right at all times to change its policy. No one can be permitted to take undue advantage of a representation made by a servant of the people and claim rights as against the people themselves if such rights are not consonant with public good. Thus the promissory estoppel can be of no application against the State when the State is acting in its public, governmental or sovereign capacity except when it is necessary to prevent fraud or manifest injustice.

On the basis of the above discussions, it is clear that there are certain areas which require detailed consideration before applying this principle. Some of the matters requiring consideration are :-

(a) **Nature of the promise** - Whether a representation of existing fact is necessary for the foundation of true estoppel? Are the words or conduct necessary to support promissory estoppel essentially different in nature? It consists of a promise or assurance regarding the future conduct of the promiser on which the promisee relies and acts to its detriment. The promise or assurance necessary to support this should be less than a promise binding upon the parties of a contract. In other words, if the promise has a contractual force, there is no necessity to invoke the doctrine of promissory estoppel but in certain circumstance the promise supporting a promissory estoppel may have similarity in many respects. A promise having the effect of a contract is an example since both are having the same degree of unequivocality.

(b) **Limitation of the doctrine** - The doctrine cannot be invoked if the parties are bound by the contract. In such cases, the relationship between the parties should be governed by the terms of the contract itself. In such a case

the assurance on which the promissory estoppel rests may not have any applicability. But when one party to a contract in absence of any consideration agreed not to enforce his right, equity will rise in favour of the other party. This equity is subject to the qualifications like alteration of position, detriment etc. A promiser can resile from his promise on giving reasonable notice; the promise becomes final only if the promisee can not resume his position.

(c) **Whether it is a matter of defence only ?** Representation in some cases may do double functions and may become a cause of action as also a ground for defence. A reference to the doctrine of consideration is capable of causing some confusion in judicial minds. But now it has gone to the extent of allowing the claim even in absence of consideration. In this view the principle never stands as a cause of action in itself; it can never do away with the necessity of consideration when the same is an essential part of cause of action. It still remains that consideration is a necessity in the formation of a contract while the same need not stand in the way of applying this principle in case where withdrawal of the promise will prejudicially affect the other party.



(d) **Inducement** - The necessity of intention on the part of the promiser to effect the legal relation existing between the promiser and the promisee is to be considered in all aspects. The promise creating a promissory estoppel must be the one which intend to create legal relations with the person making the promise and the knowledge that the promise will be acted upon. Thus, both the parties must have the intention to create legal obligation. This inducement must be the basic feature to be examined before applying this principle.

(e) **Alteration** - It is indispensable to prove that the promisee has altered his position relying on the promise. This requirement is implicit even if not express. If a promise is acted upon, such action may result in alteration of position. Such alteration must be to the detriment of the promisee. But at the same time, it is necessary for the promisee to show that he acted to his detriment in reliance of the promise. Concept of detriment does not have much force as in the case of ordinary contract.

(f) **Other doctrines** - Estoppel, being the product of equity, presupposes equity in representing. He who seeks equity must do equity. Therefore, he who raises the equitable estoppel must do equity by himself. It cannot be equitable to proceed to enforce legal rights notwithstanding a promise not to do so, if that promise was the basis of the entire transactions.

(g) **Permanent estoppel** - Promissory estoppel does not give rise to a permanent modification of the rights of the parties. In general, original rights are modified as long as the same is inequitable. Thus, representor may refer to the status-quo-ante either by giving sufficient notice or by restoring the representee to the relative position equivalent to what he occupied. There are some cases in which the representor is regarded as one for all by the assurance which he has given. But those cases are only exceptions. There are cases which are not correctly regarded as a contractual basis to determine the rights. Similarly, there may be cases where a further exemption to show why a party should not be allowed to revert to his former position as regards future obligations.

The above factors have to be considered in detail while applying the principle of promissory estoppel. All the above said factors are interconnected and the decision could be taken only after considering the entire aspect.

### **LIMITATION OF THE DOCTRINE**

The doctrine of promissory estoppel is having certain limits in its application. Where government owes the duty to the public to act in a particular manner, promissory estoppel cannot be invoked for preventing the government from acting in discharge of its duties. It cannot be applied on the government on its obligations imposed by them. Again it cannot be used to compel the government to do an act prohibited by law. This doctrine cannot be applied against the exercise of legislative power, whether delegated or subordinate.

In *Vittal Rao Mahale Vs. State of Madhya Pradesh*<sup>\*1</sup>, Supreme Court observed that the government is free to modify its policy from year to year depending on various factors. The government could not be bound by the acts of its officers and agents when they are

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\*1 AIR 1984 MP 170

acting beyond the scope of their authority. A person dealing with the agent of a government must be held to have known of the limitations of that authority. The limitations in the applicability of the doctrine of estoppel can be summarised as follows:

- (a) This doctrine cannot be applied to Acts of Parliament because the Parliament is not making any representation.
- (b) No one can be compelled to act against a statute. Thus the government or public authority cannot be compelled to carry out a representation or promise if that is contrary to a statute or is outside the authority or power of the officer or the Government or the public authority making such representation.
- (c) Even where application of the doctrine is involved as equitable considerations, the doctrine is not applicable if it is against public interest.
- (d) The doctrine will not apply where there is a statutory prohibition in doing a particular act. The doctrine is not applicable where there is no representation or promise made by the government or public authority.

- (e) The public law imposes limitation on the doctrine that it cannot be invoked so as to give an over riding power which it does not possess. That is, no estoppel can legitimate an action which is ultra vires.
- (f) The doctrine cannot operate above the level of government policy. However it operates against the public authority in minor matters or formality where no question of ultra vires arises.
- (g) The advice given by a negligent officer cannot change the legal position and hence the doctrine has no application under such circumstances.
- (h) The doctrine will not apply where there is fraud or manifest injustice or collusion.
- (i) The doctrine is not applicable if the public authority suffers to its detriment for compelling the performance of the promise.
- (j) It would be inequitable to enforce the doctrine where it is not applicable.

The scope and limit of this principle is not legally settled. Hence the principle can be applied if equity demands for the purpose of rendering justice.

## CHAPTER 7

# CONCLUSION

The object of every law is to render justice. But sometimes the strict implementation of law may result in injustice. Under such circumstances equity will step in to prevent the injustice. Estoppel is one such concept evolved by equity for rendering justice even deviating from strict legal principles. The idea that a man must keep his word and must be responsible for the consequences of his conduct when other men have trusted him is accepted by all civilizations. As law developed, this was recognized as a part of the legal system even though the same is not codified as such. Thus estoppel was used by the courts for preventing injustice in appropriate fact situations.

Ever since the principle of estoppel has been expounded and applied in judicial proceedings there has been a conflict of views as to whether estoppel is a rule of evidence or a rule of substantive law. Such a conflict is out of place now since estoppel has been recognised as a rule of law. If the principle is confined as a rule of

evidence it will only enable a party in a litigation to invoke the doctrine against his opponents as to prevent him from retracting the stand earlier taken by him in the course of their dealings and which led to a relationship between them. If the principle is treated as a rule of substantive law, it would enable the party to initiate legal proceedings founded on the principle. Thus as a part of substantive law, the principle of estoppel will provide a cause of action in itself. There are other distinctions also. For example, as a rule of evidence, the principle can be applied only to the present and past incidents whereas as a rule of substantive law the principle can be invoked in respect of a promise or assurance as to the future conduct of the promiser. Again, as a rule of evidence it can be applied in a cause only when the parties thereto have a pre-existing legal relationship while as substantive law it can be applied even if the parties have no such relationship. However, now it is almost settled by various judicial pronouncements that estoppel could be treated as a part of substantive law. It is based on equity and good conscience and is intended to secure justice between the parties by upholding honesty and good faith. The object is clearly to prevent fraud and manifest injustice.

In England the courts of equity were distinguished and different from the ordinary courts of law which administered common law. Thus, dual jurisdiction of the courts and the administration of law gave rise to various controversies. Later it was established that estoppel in equity is same as that in common law. For example, the doctrine of estoppel by representation is one and the same whether administered by the court of law or by courts equity. There is however a distinction between the principle of estoppel by representation and promissory estoppel. Estoppel by representation is a rule of evidence. Therefore the representation must be on an existing fact and not on mere intention or belief. Promissory estoppel is a comparatively new concept and is not depending on existence of a legal relationship. It is applicable even in the case of promise or future conduct. An early decision in the application of the principle was in *Hughes Vs. Metropolitan Rail Company*\*<sup>1</sup>. But the said judgment was not applied in England for a long time. Thereafter the principle was again applied by Lord Justice Denning in *High Trees Case* in 1947\*<sup>2</sup>. Having applied the rule of promissory estoppel in *High Trees Case* which involved a

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\*<sup>1</sup>(1877) 2 AC 448.

\*<sup>2</sup>*Central London Property Trust Ltd Vs. High Trees House Ltd* (1956) 1 AER 256.



dispute between private individuals as land lords and tenants as regards tenants' liability to pay only reduced rate of rent as promised by the land lord, Denning J. again applied the principle in a case involving representation made by public authorities to citizens and considered the binding effect\*<sup>1</sup>. In a subsequent decision, Denning J. further extended the principle of promissory estoppel by holding that the rule would be applicable and binding on the Government even if the Government officer, who made the representation exceeds his authority if the subject acts upon such representation\*<sup>2</sup>.

In India also this concept was prevalent from the origin of its civilization. Indian civilization projects the concept of truth and righteousness (Sathyam and Dharmam) as the basic virtue in all thoughts and acts. A person should not be allowed to resile from his words irrespective of another has relied on those words and acted accordingly. This is the principle behind the truth and righteousness. This concept is now statutorily recognized as estoppel, by Evidence Act in Section 115 of the Indian Evidence Act.

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\*<sup>1</sup>*Robertson Vs. Ministry of Pension* (1948) 2 AER 767

\*<sup>2</sup>*Falmouth Boat Constructin Co. Ltd. Vs. Howell* (1950) 2 KB 16.

Section 115 of the Indian Evidence Act, 1872 lays down the principle of estoppel as a rule of evidence. It provides that "when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing".

The illustration to this section reads as follows:

"'A' intentionally and falsely leads 'B' to believe that certain land belongs to A and thereby induced B to buy and pay for it. The land afterwards becomes the property of A and A seeks to set aside the sale on the ground that at the time of the sale, he had no title. He must not be allowed to prove his want of title". Thus as a rule of evidence the same is codified in India. As a rule of substantive law, it is entirely judge made, both in England and in India. The principle is evolved as a result of compulsions felt by the Judges when called upon to adjudicate

cases based on equity and good conscience in the absence of any statutory provision dealing with the subject matter of the case. The result is that the rule is invoked and applied even in cases where there is no pre-existing legal relationship between the parties to a cause either in the form of a contract or otherwise. The principles are applied even to a mere promise to perform an act in future even if the promise is not supported with consideration. All that is required to be established is that the promise made was intended to be acted upon and on that belief some one did act and altered his position. The promiser is then not allowed to resile from his promise.

*Indo Afgan Agency's case*\*1 is one of the cases where the principle of promissory estoppel was applied by the Indian Courts as a substantive law. In this case the principle followed by Justice Denning in High Trees Case and Robertson's case were applied by Justice C. Shah. While delivering the judgment, Justice Shah observed that "government was not exempted from liability to carry out the representation made by it as to its future conduct and it cannot on some indefinite and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it".

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\*1 *Union of India & ors Vs. M/s. Indo Afgan Agencies Ltd.* 1968 (2) SCR 366.

In a subsequent decision in *Century Spinning & Manufacturing Co. Ltd. & another V/s. Ulhasnagar Municipal Council and another*\*<sup>1</sup> Justice Shah observed "If our nascent democracy is to thrive different standards of conduct in the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempted from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice". This view was followed by Justice Bhagavati in *MP Suger Mills Vs. State of UP*\*<sup>2</sup>. The contention of the Government that it can withdraw the promise of tax exemption was rejected by the Supreme Court. While delivering the judgment Justice Bhagavati observed "it is indeed difficult to say on what principle can a government be exempted from the rule of law, claim immunity from the doctrine of estoppel? Can government say that it has no obligation to act in a matter of such affairs and contend that it is not bound by consideration of equity and good will? Even though the approach of Justice Bhagavati was reversed in subsequent decisions, later in 1986 Justice Bhagavati reiterated the principle in *Union of India Vs. Godfrey Philips India Ltd.*\*<sup>3</sup> Justice Bhagavati applied the principle of promissory

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\*<sup>1</sup> 1970 (3) SCR 845

\*<sup>2</sup> AIR 1979 SC 621

\*<sup>3</sup> AIR 1986 SC 06

estoppel against the Government and held that value of the corrugated fibre boards cannot be included for the purpose of calculating the excise duty.

The question whether the new doctrine of promissory estoppel has any application to cases where the promisee does not suffer any detriment by acting upon the representation made by the promisor, Justice Bhagavati ruled that it was not at all necessary that the promisee should suffer any detriment while acting in reliance of the promise in order to attract the doctrine of promissory estoppel\*<sup>1</sup>. This was stated to be the position impliedly admitted by Denning J. in the *High Trees* case. Even earlier to the judgment the Supreme court had occasion to consider in *Motilal Padampat Sugar Mills Co.Ltd. Vs. State of Uttar Pradesh*\*<sup>2</sup> the extent to which the principle of estoppel could be applied against the government and governmental bodies. Supreme Court of India held that Government and its agencies were bound to honour their promise when the citizens had acted to their detriment relying on the promise made by such agents.

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\*<sup>1</sup> *M/s. Jitram Shivkumar Vs. State of Hariyana*, 1981 (1) SCC 11.

\*<sup>2</sup> 1979 (2) SCC 409

But it is to be remembered that all functions of the Government as also the discharge of duties by public authorities, whether exercised under statute or otherwise, have to be for "public good". Even when the government or a public authority enters into a contract with a private individual, the contract has to be for "public good" and if that be so, the government or public authorities are bound to fulfil the terms of a contract as much as a private person would be, and that, by itself, would be for a "public good". It is, therefore, not open to the government or to a public authority to "escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the "public good" \*1. However there could be certain circumstances which may justify the government to take action de hors the contract with a view to subserve a greater public interest. In such cases Supreme Court held that government cannot be restricted to frame its policy matters when neither fraud nor lack of bonafide is alleged or established against the government. Thus the government or public authority could not be bound down to a promise for all times if supervening public equity demands the government to resile from its promise or repre-

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\*1 *Commissioner of Crown Lands Vs. Page* (1960) 2 QB 274

-sentation in the larger public interest. However a mere claim by the government or public authority that it has changed its policy in "public interest" and therefore was not bound by its earlier promise or representation, would not hold good as discussed in Chapter VI Supra. Since the court is the final arbiter of the question as to whether, in view of supervening manifest public interest, the government or a public authority would be justified in resiling from its promise, the government or public authority would be required to satisfy the court with sufficient materials brought on records before it that the change in policy had, in fact, been actuated by such manifest supervening "public interest". If the court accepts that the government's action was actuated by such consideration of supervening public interest, the *superior equity* would then over ride the individual equity and the government's changed policy would then stand. Even when there is no such over riding "public interest" the court may still adjust equities by permitting the government to resile from its promise, if it has given a reasonable notice to the promisee and afforded him a reasonable opportunity of resuming his position. If the promisee cannot resume his original position, the promise made by the government earlier would become final and irrevocable and would become enforceable on the basis of the rule of promissory estoppel.

In all welfare societies, the doctrine of promissory estoppel or equitable estoppel has been established as a principle of administrative law. Transformation of the principle of estoppel from a mere rule of evidence to a rule of substantive law is itself an indication of the invaluable role played by the courts not only in the preservation of individual rights but in sensitising governments, its officers and other public authorities of their duty to act fairly and honestly while dealing with the citizens. Such norms of accountability are necessary for preservation of a democratic society governed by the rule of law. Application of the principle of promissory estoppel against the government and other public authorities is necessary to prevent fraud or manifest injustice. The doctrine itself is founded on a sound public policy and is intended to secure justice between the parties by promotion of honesty and good faith. These considerations should no way warrant compelling the government or public authorities to carry out a representation or a promise, which is contrary to law or which is outside their authority or ultra vires their power Refer Supra Page 186.



**Ultra vires acts**

However, difficulties may arise when a citizen is misled by representation made by an officer of the government or a public authority as regards his competence and power and acting on good faith on such representation, he alters his position. The question that arises for consideration of the court in such cases is not only complex, but difficult one to be resolved on the touch stone of equity and good conscience which is the foundation of the rule of estoppel. To insist that citizen who chooses to move the government and its officers and public authorities takes the accompanying risk if eventually the act of the government and its officers turn out to be *ultravires*, would not only negative the very presumption of legality attached to every act of the government and its officers, but would also impose a burden on the citizen which they would never be able to discharge. To insist that anyone who deals with the government acts at his risk would only put both the government and citizens in a quandary. In the face of multifarious activities that modern governments are involved in, this would virtually render impossible for the government to discharge its duties. In fact, much of the development and maintenance work, whether in the field of building infrastructure, provision of basic amenities, education and the like under-

taking by the modern governments are exercised through private agencies. Persistence of this attitude of depending private agencies would only hinder the functioning of the government and adversely affect every aspect of the nation building process.

Every society will have to make up its mind and determine the price it is willing to pay for the enjoyment of certain privileges by its members. It may possibly be preferable to insist that the government, its officers and other public authorities should not escape from a firm, clear and unambiguous promise made in favour of the citizens unless it is proved that the promise was vitiated due to fraud or misrepresentation. This would ensure faith of the citizen in a democratic representative government and would also protect the interest of the government. If a democratic representative government is permitted to ignore basic moral values how could individual members of the society in their dealing with their fellow beings be expected to maintain such values? It is the bounden duty of the government, its agencies and the other public authorities to honour its promises when they are relied upon by the citizens. Over riding public interest can be taken as a ground for the government to resile from its promise. But it shall not be at the detriment of the citizens who bestowed confidence on the government.

Government cannot be made a slave of its promises for all times to come particularly due to multifarious activities undertaken by the government. The needs of the society may be changing and the government is bound to honour such needs. Therefore a citizen who relied upon the promise made by the government and acted on the basis of such promise shall not be permitted to stand in the way of the government in protecting the larger interest. At the same time, the citizen, who relied on the promise made by the government shall not be left without a remedy. Government or its agencies or other public authorities are bound to protect the interest of even individual citizen. Therefore, government can be permitted to resile from its promise only after giving reasonable notice to the citizens who are affected by relying upon such promise. If they have suffered any detriment the same should be adequately compensated by the government. Thus a striking balance between public interest as well as private interest should be maintained for the smooth functioning of a democratic government.

If a citizen is relying on an assurance made by the government and is acting to his detriment, he shall not be blamed for the same. This is because in a democratic government public attributes

a greater confidence to Government than dealings between private citizen. Hence it is only just and reasonable that the citizen who suffered detriment should be adequately compensated by the government when over riding public interest compels the government to resile from its promise. The essential features of binding effect of a promise need not be looked into. If the promise is intended to be acted upon, and actually acted upon, the government should be made liable to honour the promise as far as possible. This will create confidence among the public to their own government. Refer page 202 Supra.

**Need for statutory provision:**

According to Harming Maine, in early law, substantive law is often secreted in the interstices of procedure. Salmond also points out instances where a procedural rule may gradually pass over into the area of substantive law\*<sup>1</sup>. He notes as important three instances

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\*<sup>1</sup> *Salmond, 12th edition (1966), page 463. These substantive rules are (1) a contract which would be proved only by writing has given rise to the rule that if writing is not there the contract is void. (2) A bond under a seal which was evidence of debt is now creative of debt and (3) Intimation of action is the procedural equivalent of prescription of rights.*

in the law of evidence where substantive principles have emerged from procedural rules. Estoppel is also one such rule which starting as a procedural one has developed as substantive legal principle. The question is whether the time has not come to give statutory recognition to this change.

Estoppel, originated from the sense of justice, equity and good consciousness has since developed through various judicial pronouncements. The same has almost settled. Further Section 115 of the Evidence Act has statutorily recognized and laid down the principles of estoppel. But the modern development of estoppel in the form of promissory estoppel is not covered by Section 115 of the Evidence Act or any other statute. At the same time the occasions for the application of promissory estoppel have considerably increased due to the involvement of Government and its agencies in various social, cultural, economical and developmental activities. The indiscriminate application of the principle may cause irreparable damage and hardship to larger interest of the society as also individual interest of the citizens. Therefore, it is necessary to reconcile these two conflicting interests of public at large and individual rights as between individual and Government.

As on today there is no statutory provision compelling the government either to honour or to discard its promise except judicial decision. Similarly there is no limit presented to what extent the citizens can exercise his private right as against the Government invoking promissory estoppel. Therefore, it is necessary that the concept of promissory estoppel, which is created on the basis of equitable consideration, should be given statutory recognition. Suitable enactment should be made under what all circumstance and to what extent the government can be made bound by the principle of promissory estoppel and what relief could be granted to citizens if government want to resile from its promise. This statutory recognition can be given either by suitable amendments to the Evidence Act or Contract Act. Introduction into Contract Act would be advisable because the essentials for enforceability of a contract are governed by the provisions therein. This could be introduced even as an exception to the general law of contracts. Such a codified law based on the various judgments has become the need of the society.

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