PROMISSORY ESTOPPEL AND STATE LIABILITY

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IN THE modern context one distinct ground of liability which the state may incur towards individuals is said to be "promissory estoppel."[1] It is distinct in the sense that it differs from contract[2] on the one hand and estoppel[3] on the other. The following study is undertaken to highlight the scope and limits of this new ground of liability. In the first part, we deal with the origin and scope of this principle in India against the background of the position in England and the U.S.A. In the second part the development in the post-Constitution period are traced. In the third and final part the limits and problems in its implementation are examined.

Part I Origin and scope

(A) England

The rise of promissory estoppel in the past half century has been described as "one of the most significant developments in contract law."[4] As if to proclaim that the category is new the American *Restatement (Second) of Contracts* (1979) classifies promissory estoppel cases under "Contracts without consideration". The doctrine of promissory estoppel is comparatively of recent origin. It is said to have been "disinterred" by no less a judge-jurist revolutionary than Lord Denning in the now famous *High Trees* case.[5] It would appear that this doctrine was already smouldering in the expanse of the English common law but it was apparently left to the genius of Lord Denning to make it burst into a sudden blaze in 1946. As every student of contract law knows, the context in which it arose was with reference to a question relating to consideration. More specifically the question was: will a promisee -- namely a person entitled to the enforcement thereof--be bound by a return promise to give up or remit a portion of the original promise? In other words, will such a promise to remit be deemed to be supported by consideration, where nothing more than the original promise alone stood? For example *A* owes a debt of Rs. 10,000 to *B*. *B* promises to receive Rs. 5,000 in full discharge of the debt. *A* pays Rs. 5,000 to *B*. But B later on goes back on his promise and claims the balance of Rs. 5,000 from *A*, claiming that *B*'s promise to forego the 5,000 rupees was not supported by any consideration, as after all *A* who paid the sum of 5,000 rupees in

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1. See *Union of India* v. *Anglo Afghan Agencies*, A.I.R. 1968 S.C. 718.
2. *Jorden* v. *Money* (1854) 5 H.L. Cas. 185.
3. P.S. Atiyah, *An Introduction to the Law of Contract* 125-27 (3rd edn., 1982).
4. Jay. M. Feinman, "Promissory Estoppel and Judicial Method", 97 *Harv. L. Rev.* 678 (1984).
5. *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, (1947) K.B. 130.

anticipation of his discharge from the debt was only performing while making such payment a pre-existing contractual duty cast upon him under the original contract of debt. In English law under the well-known rule in *Pinnel's* case[6] reaffirmed by the House of Lords in *Foakes* v. *Beer*.[7] *B*'s promisee to remit will not bind him and he can recover the balance of Rs. 5,000. In our law under section 63 of the Indian Contract Act, 1872, "every promise may dispense with, remit wholly or in part the performance of the promise made to him or may extend the time for such performance or may accept instead of it any other satisfaction which he thinks fit." Even here it has been held that it is only through performance, not mere promise to perform in part, that the promisee can be bound.[8] The rule in *Pinnel's* case reaffirmed in *Foakes* v. *Beer* as aforesaid is one of the unredeemed dark area of the English law of contract. Inspite of the recommendation of the Law Revision Committee[9] for its abolition it has stood its ground, all the criticism against it notwithstanding. The doctrine of promissory estoppel has been invented, as it were, to alleviate the rigour of this rule. The doctrine as generally understood is that a promise to waive performance of a contractual duty is binding if it is intended to be acted upon, and is in fact acted upon. It is necessary and relevant to examine in some detail the origin and scope of this doctrine.

Lord Denning in *Central London Property Trust Ltd.* v. *High Trees House Ltd*[10] had to deal with a matter arising between a landlord and tenant of a block of flats. Though the agreed rent was 2,500 pounds per annum, the landlord (plaintiffs) agreed in 1940 to a reduction in rent, namely to half of the original sum (1,250 pounds), as the demand for flats fell because of war conditions (during 1940-45). The tenant (defendants) paid the reduced rent till 1945 when the demand for flats again rose. The plaintiffs claimed at the rate originally agreed for the latter half of 1945. Denning, J. held in favour of the plaintiffs. The later agreement to receive a reduced rent was held to be a temporary expedient and it did not continue to bind after the war conditions. If the plaintiffs had sued at the higher rate for the period between 1940-45, Denning, J., was of the opinion that the subsequent agreement in 1940 to receive a lower rent would have defeated such a claim. So the opinion about the effect of the subsequent agreement on the rights of parties was, as pointed out by Turner,[11] only *obiter dicta*. The judgment was based simply on a contract which was subject to a variation for a time, but which variation was not operative at the relevant time.

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6. (1602) 5 Co. Rep. 117a.

7. (1884) 9 A.C. 605.

8. *Balasundara* v. *Ranganatha* (1930) I.L.R. 53 Mad. 127. Refer also V. Ramaseshan, "Equitable Estoppel -- A Violent Side Wind", *The Year Book of Legal Studies* 88 (1978).

9. *Sixth Interim Report*, para 50(3).

10. *Supra* note 5.

11. Spencer Bower and Turner, *The Law Relating to Estoppel by Representation*, 347 *et seq.* (3rd ed., 1977).

This opinion--by way of an *obiter dictum*--has formed the basis of this new doctrine of equitable or promissory estoppel. This opinion, to repeat, was that a promise to accept a reduced rent (rent less than originally agreed) would be binding on the promissor although not supported by consideration. The reason was that the promissor was estopped from going back on his promise.

But estoppel could not be invoked as it could operate, as per the ruling in the early case of *Jorden* v. *Money*[12] only upon representation as to existing facts and not on a promise or assurance as to the future. So it was a promise but not supported by consideration; and it was an estoppel but still arising from an assurance as to future conduct. This hybrid variety, to borrow the phraseology of Prosser in a different context,[13] born of the illicit intercourse between contract and estoppel, had to trace its legitimacy in some 'equity' and so it was christened 'equitable estoppel' in the beginning. That equity was found, by Denning J., to lie imbedded in *Hughes* v. *Metropolitan Railway Co.*[14] In *Hughes*, too, the matter related to a lease. The lessor had given a notice of six months to repair the premises. If the lessee failed to comply with it, the lease could be forfeited. But during the notice period negotiations for sale of the premises to the lessee between the lessor and lessee took place for about two months but finally broke off. The lessor on the expiry of six months' notice period claimed that the lease was forfeited, the lessee not having complied therewith.

The House of Lords held that by opening the negotiations the lessor had led the lessee to believe that the notice would not be enforced. The six months' notice would therefore run only from the time when the negotiations broke off, not from the date of the notice itself. In the words of Lord Cairns (which has formed the basis of this doctrine and its subsequent development): "[I]t is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results -- certain penalties or legal forfeiture -- afterwards by their own act or with their own consent enter upon a course of neogtiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."[15] As Lord O' Hagan put it more pointedly, "if they [the defendants-lessees] acted, or failed to act, through a mistake induced by the conduct of the Plaintiff, if they were misled by it into the belief that his [the

12. *Supra* note 2.

13. Prosser, "The Assault upon the Contract", 69 *Yale L.J.* 1097 and 1126 (1957).

14. (1877) 2 A.C. 439 followed in *Burmingham and District Land Co.* v. *London and North Western Rly. Co.*, (1880) 90 C.N.D. 268; *Panoustos* v. *Hadley Corporation of New York* (1917) 2 K.B. 473; and *Salisbury* v. *Gilmore* (1942) 2 K.B. 38.

15. *Id.* at 448.

plaintiff-lessor's] strict legal right wasa bandoned or suspended for the time, he cannot be allowed to take advantage of the forfeiture which was so accomplished."[16]

It is noteworthy, as pointed out by Wilson[17] that to stabilise what Lord Cairns called the 'first principle' he quoted no authority. And the later cases which trace its source in the above statement of Lord Cairns have been considered by Spencer Bower[18] as of no great support for the *High Trees* case. The scope of this new doctrine as it developed in England enter with the *High Trees* is rather difficult to ascertain. It was said that promissory estoppel to arise, there must be a representation--amounting to a promise--not as to an existing fact, for then it would be mere estoppel and no more, but as to the future conduct of the representor--promissor on which the promisee relies and acts to his detriment.[18a] But representation though interchangeably also called a 'promise' is treated as less than a promise, binding the parties in the manner of a contract. If the promise in this context amounts to a contract, it would render the whole doctrine of promissory estoppel redundant. In fact it seems to be not only redundant but would seem to lack substance for the claim of a separate doctrine so long reliance on the promise or representation and consequent suffering of detriment is insisted upon as a precondition of liability under this doctrine. Detriment to the promisee, it must be recalled, is one of the two components of consideration, the other being benefit to the promissor. So if detriment to the promisee (representee) who acts in reliance on the representation is posited as necessary for the promissory estoppel doctrine to apply, then one fails to see any difference between a contract and liability or claim based on promissory estoppel. The only other difference, as suggested by Atiyah[19] is that the reliance and act in a contract on the part of a promisee proceeds at the request of the promissor but in promissory estoppel it is not so. Two practical consequences are said to follow from this difference: (i) that promissory estoppel cannot be a ground of a claim but act only as a defence; it cannot, in other words, be used as a sword but only as a shield.[20] It has to be noted however that in breach of this new orthodoxy which would not allow new causes of action where none existed before, it was after all an easy step in cases of detrimental reliance to allow promissory estoppel to be used as a sword as well, which was what Lord Denning himself did in *Robertson* v. *Minister of Pensions*[21] and in certain other cases. But whereas in the *High Trees* itself there was found to be no detrimental reliance (except perhaps that the tenant in that case spent away the higher rent due to the lessor in the

16. *Id.* at 448-49.
17. J.F. Wilson, "Recent Developments in Estoppel", 67 *L.Q.R.* 330 (1957).
18. *Supra* note 11.
18a. *Ibid.*
19. *Supra* note 3.
20. See *Combe* v. *Combe* (1951) 2 K.B. 215.
21. (1949) 1 K.B. 227.

belief that it would not be demanded) to allow a cause of action based on the representation would undermine accepted notions on the essentiality of consideration in contract; (ii) that promissory estoppel operates only to suspend and not to extinguish rights. A landlord who, without any consideration promises to reduce the originally agreed rent--as in the *High Trees* may be promissorily estopped by that promise; but it appears he can on reasonable notice revive his claim for the higher (old) rent.

These differences based on whether the act or acts performed in reliance on the promise were at the request of the promissor or not, seem to rest on what Atiyah calls "somewhat insecure foundations."[22] There are also some additional qualifications specified for the application of this doctrine. For example, it is said that for the doctrine to apply the parties must already be in contractual relation. The clear implication of *Hughes* seems to favour the above statement. But in *Combe* v. *Combe*,[23] *Durgham Fancy Goods* v. *Michael Jhonson*,[24] *Evenden* v. *Guildford City Football Club Ltd.*,[25] and *Crabb* v. *Arun D.C.*[26] seem to dilute this qualification but expert opinion is that it is not warranted by history or authority.[27]

So to sum up the position as it prevails today in England, the doctrine of promissory estoppel does not appear to be a "coherent principle" and it seems to await systematic exposition. For one thing it does not at all seem to be different from contract strictly so called and the need for such a separate doctrine is not self-evident. The impression that it will endanger a vital pillar like consideration in the law of contract seems baseless, as the new doctrine depends entirely for the equity to arise under its implementation on, as already stated, detrimental reliance--which will after all take the place of consideration in this context.

(B) U.S.A.

In the United States this doctrine seems to have been applied in a far more thoroughgoing fashion uninhibited by the limits of equity jurisdiction. Section 90 of the *Restatement (First) of Contracts* sought to embody this new principle for the first time in 1932 and as modified by the *Restatement (Second) of Contracts* in 1979 reads as follows:

> (1) A promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action is binding if injustice can be avoided only by enforcement of the promise. The

22. *Supra* note 3 at 127.
23. *Supra* note 20.
24. (1968) 2 All. E.R. 987.
25. (1975) 1 All. E.R. 269.
26. (1975) 3 All. E.R. 865.
27. *Supra* note 11 at 383-384.

remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under sub-section (1) without proof that the promise induced such action or forbearance.

But the exact and distinctive scope and operation of this new head of liability is rather vague. As one learned commentator observes "Janus-like these two heads of promissory liability stared out in different directions, barely acknowledging one another's existence. Neither text nor commentary addressed, the knotty questions of how their co-existence should be imagined."[28] In the *Restatement (Second) of Contracts* (1979) this problematic relationship is said to continue. Gilmore in fact argues that detrimental reliance has "in effect swallowed up the bargain principle."[29] According to Feinman, "the contours of promissory estoppel doctrine remain uncertain: the doctrine's current application represents an uneasy compromise between restricting and extending the reliance principle."[30] Although the introduction of section 90 in the *Restatement* was more as a concession to exceptional cases than as a recognition of reliance principle in its own right, and although the drafters did not contemplate the use of promissory estoppel to commercial cases,[31] it was applied by Justice Traynor in a commercial context in *Drennan* v. *Star Paving Co.*,[32] and at present promissory estoppel is followed both in commercial and non-commercial cases. But even today, "the rhetorical dominance of consideration still relegates promissory estoppel to a secondary role."[33] According to the same author, notwithstanding the seminal article by Fuller in 1936,[34] which marked the beginning of a new approach to contract theory by adopting the standard of "interests" in awarding contract damages (namely, expectation interest, reliance interest and restitution interest) the difficulty of ascertaining and delimiting the relationship of reliance and expectation continues. "[S]ection 90 of the *Restatement* highlighted the paradoxial nature of contract law. [It] exemplified the doctrinal and methodological collapse of classicism, while the uneasy coexistence of promissory estoppel with the bargain principle that permeated the *Restatement* demonstrated that no alternative structure of doctrine and method had been devised, or at least that no such structure had been accepted."[35] Section 90 is further said to "reflect a spurious distinction between promises as a class and promises upon which reliance can

28. Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine", 94 *Yale L.J.* 997 at 1084 (1985).

29. See G. Gilmore, *The Death of Contract* 7 (1974).

30. *Supra* note 4 at 689.

31. *James Baird Co.* v. *Gimbel Bros.*, 64 F. 2d. 344 (2d cir. 1933).

32. 51 Cal. 2d. 409 (1958).

33. *Supra* note 4 at 680.

34. Fuller and Ferdue, "The Reliance Interest in Contract Damages" (pts. 1 and 2), 46 *Yale L.J.* 52, 373 (1936).

35. *Supra* note 4 at 683-84.

reasonably be expected; (it) wrongly focuses attention on the expectation of the promissor rather than the reliance of the promisee and wrongly implies that expectation, not reliance, is the normal measure of damages in cases in which enforcement is based on the reliance principle."[36]

Spencer Bower[37] has pointed out the rather unbridled extension of this doctrine in the United States has in no small measure led to the "uncertainty which besets American texts," with the result that the law in the United States, according to Burrows[38] provides no definite answer to which the English courts can refer.

(C) India

Such being the insecure foundations of this amalgam of estoppel and contract, in the past two decades Indian courts have taxed their ingenuity to the maximum towards developing it and giving a place of honour in our jurisprudence. The doctrine being a creation of our courts has inevitably lacked consistency and its scope and limits are to be ascertained from a maze of cases spreading over a period of a little more than a century. Taking however a formulation of the doctrine by Bhagwati, J., (as he then was) in the Supreme Court in *M.P. Sugar Mills* v. *State of Uttar Pradesh*[39] as a typical one, we find that the doctrine is said to have a form and applicability, so far as the states or other public authorities are concerned, on the following lines:

> Where a government or governmental agency makes a promise (meaning thereby a representation) knowing or intending that it would be acted upon by the promisee (representee) and if the promisee acting in accordance therewith and thereby alters his position, the government or the governmental agency would be held bound by the promise (representation) and the promise would be enforceable against the government or governmental agency at the instance of the promisee notwithstanding that there is no consideration for the promise or that the promise has not been reduced to writing in the form of a contract as required under article 299 of the Constitution.

If we analyse this long winding statement of the doctrine, the following seem to be the necessary elements:

(1) A government (or any other public authority) makes a promise (*i.e.* not a promise as defined by the Contract Act section 2. cl. (e), but rather a representation) to an identified person or class of persons;

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36. M.A. Eisenberg, "Donative Promises", 47 *Univ. of Law Rev.*, 1 at 32 (1979).

37. *Supra* note 11 at 355.

38. A.S. Burrows, "Contract, Tort and Restitution--A Satisfactory Division or Not?", 99 *L.Q.R.* 217 (1983).

39. A.I.R. 1979 S.C. 621.

(2) this promise is made with the knowledge or intention that the promisee would act in reliance upon the promise;

(3) the promisee acts in accordance with, that is, in reliance upon the promise and alters his position;

(4) and the government would then be bound by the promise, that is, would be bound to act in conformity with, or, in fulfilment of the promise.

The above formulation, it would appear, has more affinity with contract than estoppel. Still it is distinguished from both--on the ground that as there is no 'consideration' as defined by section 2, cl. (d) of the Contract Act, it differs from a contract; and as it relates to representations *de future* and not to existing facts, it does not correspond with either estoppel as defined by section 115 of the Indian Evidence Act.[40] We would reserve a closer examination of this to a later stage and now embark on a survey of the cases which have contributed to its development.

The earliest source of this doctrine in Indian law is said to be found in *Ganges Manufacturing Co.* v. *Sourjmull*.[41] A certain company by name M/s Cohen & Bros. had entered into a contract for the purchase of gunnny bags from the defendants. They gave delivery orders to the company although the goods remained unpaid for the company endorsed--that is, assigned--certain of those delivery orders to the plaintiffs. The plaintiffs coult not take delivery of certain gunny bags as the defendants refused to honour their own delivery orders, although the defendants had at the request of the company, written on those orders the following words: "The bearer of this (order) will personally take delivery of each lot as required." The plaintiffs sued the defendants for failure to deliver the gunny bags. The trial court having decreed the suit, the defendants appealed and it was held that the defendants by their conduct "induced the plaintiff to advance Rs. 1,500 to M/s Cohen & Bros. and it was not open to the defendants to repudiate the transfer." Garth, C.J. pointed out that the "fallacy of the argument is in supposing that all rules of estoppel are rules of evidence. Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety and are by no means confined to subjects which are dealt with in Chapter VIII of the Evidence Act. A may be estopped not only from giving particular evidence but from doing acts or relying upon any particular arguments or contentions which the rules of equity and good conscience prevent him from using as against his opponents."[42]

As explained by Justice Wad in *Jasjeet Films (Pvt.) Ltd* v. *Delhi Development Authority*,[43] three principles are supposed to have been laid

40. It reads: 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.

41. (1880) I.L.R. 5 Cal. 670.

42. *Id.* at 679.

43. A.I.R. 1980 Del. 83.

down in *Ganges Manufacturing Company* case:

(1) that equity by way of representation is a separate variety from one which is incorporated in sections 115 and 117 of the Evidence Act and that court has always a power to invoke this principle in equity and good conscience to prevent a defendant from resiling from his promise;
(2) that a promise or representation can furnish a cause of action and is not merely a defence;
(3) it is not necessary that for the application of this rule of equity consideration should pass between the promissor and the promisee.[43a]

It is arguable if so much as these three rules can be derived from the facts and decision in *Ganges Mfg. Co*. The plaintiffs were after all assignees of the promise (contained in the delivery orders of the defendants) and they were allowed to succeed against the defendants who tried to go back on their promise. The reason for holding the defendants bound by their promise was stated, inadvertently perhaps, to be an estoppel (rather than a promise) of some non-descript variety. The inference therefore that this new variety of estoppel unlike the estoppel as defined in the Evidence Act, could furnish a cause of action is due to the same misdescription of the situation. Further the inference that the case serves as an authority for the proposition that this new estoppel--or equity, for that matter--requires no consideration to be shown as having been provided by the promisee is rather naive. On the facts of the case the promisee was after all the assignee from the original promissor and so it is a well recognised way under the law of contract, of enforcing promises (contracts) without dispensing with the requirement of consideration for the promise.

So the claim to find in *Ganges Mfg. Co,* a nucleus, as it were, for the doctrine does not appear to be well-founded. About twenty years later, in *Ahmed Yar Ali khan* v. *Secretary of State*,[44] the Privy Council had to construe the terms of a grant by the Government to the predecessors-in-interest of the appellant. It related to a private canal constructed by the appellant's predecessors over the Sutlej and through the lands of the Government. The Government appreciating the value of the canal for agriculture in the District of Multan gave the lands by way of *inam* to the appellant's predecessors. Later it passed an order permanently taking over the management of the canal and seriously contesting the proprietory right of the appellant to the canal land. The appellant failed in the Court of the Divisional Judge, Lahore and the Chief Court at Lahore. On appeal to the Privy Council he succeeded. The Privy Council applied the rule in *Ramsden* v. *Dyson*.[45]

43a. *Id*. at 86.
44. (1901) 29 Ind. App. 211.
45. *Law Reports* (1866) 1 H.L. 129.

As rightly pointed out by Narayana Nair,[46] "this decision is actually based on the construction of the terms of a grant (contract) -- is not an authority for the application of the doctrine of promissory estoppel." There was no occasion to lay down any such principle. The tall claim made by Wad, J., in *Jasjeet Films* that these two cases, namely *Ganges Mfg. Co.* and *Ahmed Yar Ali Khan*, have resolved the questions such as whether a prior legal relationship is necessary between the parties, or whether existence of consideration is necessary as prior condition, or whether the principle can serve as a cause of action, or whether the doctrine can be invoked against the State or not "and that Indian Courts solved these questions "at the beginning of the 20th century itself--[while] [t]hese questions are still debated in England and the U.S.A."[47] is to give ourselves the pat and smacks of masochism which exhibits fundamental lack of appreciation of the legal principles involved.

Instead of the two cases noted above, we might as well search for the origin of this doctrine in the case so well-known to students of Indian law of contract, namely, *Kedar Nath* v. *Gori Mohamed*.[48] A promise was made for the contribution of Rs. 100 for the construction of a Town Hall at Howrah; it was a promise to make a gift and could not amount to a contract for the simple reason that the promissor derived no benefit from making it. Still the promisee had incurred certain liabilities in reliance upon the promise, there was consideration in the sense of detriment to the promisee and so it was enforceable as a contract. As contrasted from this case in *Abdul Azeez* v. *Mazum Ali*,[49] a similar offer of contribution of a sum of money was made for the renovation of a mosque. It was held to be not enforceable as nothing further had been done, no liability in reliance upon the offer had been incurred.

The ratio of the cases last cited seems to be so well established in the law of contract[50] that action in reliance upon a representation or promise will make it binding, and the representee or promisee can base a cause of action on such a promise. So it may well be argued that the new doctrine of promissory estoppel is after all new wine in old bottle in so far as it is propounded in the form and manner in which it has been done by Bhagwati, J., in *M.P. Sugar Mills*. The requirements particularly as to the promisee acting in reliance on the representation and altering his position seems in no way different from the ratio in *Kedar Nath* v. *Gori Mohamed*. The speciality of novelty of the doctrine should therefore be sought elsewhere. Where a representation--like that of a creditor promising to forego part of the debt

46. "Doctrine of Promissory Estoppel in Public Law", *Academy Law Review* 118 (1977).

47. *Supra* note 43 at 87.

48. (1887) I.L.R. 14 Cal. 64. See also *Doraiswamy* v. *Arunachala*, A.I.R. 1936 Mad. 135.

49. (1914) I.L.R. 36 All. 268 followed in *Jamna Das* v. *Rajkumarji*, A.I.R. 1937 Pat. 358.

50. Which incidentally is in conformity with the famous definition of consideration in *Currie* v. *Misa* (1602) 76 E.R. 1074: "A valuable consideration in the sense of the law may consist in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

due to him and later going back on his undertaking as in the case of Mrs. Beer in *Foakes* cited above, or a lessor agreeing to receive a lower rent than what was first agreed upon but later going back on his undertaking and claiming the higher agreed rent, as the plaintiffs did in the *High Trees* case, in these situations, in order to hold the promissor to his promise, there was a need to find some principle of equity, rather than law, in the sense that neither the law of contract based on the strict rules as to consideration nor the rule of estoppel constricted in its scope by *Jorden* v. *Money*[51] would ever come to the rescue of the promisee. That was why Denning, J in the *High Trees* case had to go in search of a peculiar equity and the principle of 'equitable' promissory or quasi-estoppel is said to have been developed. However in India our courts have not steered clear of these important differences clarifying this new doctrine. We shall trace here its further course through the cases which came later than *Ganges Mfg. Co.* and *Ahmed Yar Ali Khan*.

It is said that this doctrine has been adopted and applied by the Bombay High Court in *Municipal Corporation of Bombay* v. *Secretary of State*[52] and by the Supreme Court in *Collector of Bombay* v. *Municipal Corporation of Bombay*.[53] In the former case, the Municipal Corporation of Bombay surrendered its own land in favour of the government in consideration of a lease of government lands created in favour of the municipal corporation on the nominal rent of one pie per square yard annually. After taking possession of the lands the corporation constructed at considerable expense stables, workshops etc. The Secretary of State for India in Council filed a suit against the corporation claiming arrears of rent at Rs. 12,000 per annum and for a declaration that the lease be determined. Against the decree passed by the trial court, the corporation appealed to the High Court which set aside the trial court's decree, upheld the leasehold rights of the corporation and directed that a reasonable rent be fixed in accordance with the agreement between the parties. It was upon a sort of equity that the High Court proceeded. The municipal corporation having been placed under an expectation created and encouraged by the government that a certain interest would be granted, took possession of the land with the consent of the government and upon the faith of such promise or expectation and with the knowledge of and without objection by the government laid out money upon the land, had an equitable right to have such expectations realised.

This was followed in the latter case, namely *Collector of Bombay*, wherein the facts were somewhat comparable to the facts of the former case which have been narrated above. Justice Chandrasekhara Iyer in the Supreme Court made it clear that it did not matter what type of equity formed the basis, whether it was equity recognised in *Ramsden* or some other equity. Courts must do justice by promotion of honesty and good faith as far as it lies

51. *Supra* note 2.
52. (1905) I.L.R. 29 Bom. 580.
53. (1952) S.C.R. 43.

in their power.

Part II Developments in the post-Constitution period

So far we have tried to show that the cases starting with the *Ganges Mfg.* case have not propounded any new principle which could be elevated to the status of a doctrine falling somewhere between contract and estoppel. It shall be our endeavour to pursue the course of its development in the post-Constitution period. The first Supreme Court decision which gave the impetus is *Union of India* v. *Anglo Afghan Agencies*.[54] The respondent in the appeal before the Supreme Court were exporters of woollen goods. Under a scheme of the Union Government announced in 1962 they were given permission to import certain articles equal in value to their exports. The respondents were not given the permission so to import for the full value of their exports as per the scheme. The government denied that the respondents had any claim as of right under the scheme. The respondents filed a writ petition for the issue of a writ of *mandamus* in the Punjab High Court to direct the government to issue the import entitlement certificate for the full value of their exports. On the High Court allowing the writ petition, the Union Government appealed to the Supreme Court. The Supreme Court adumbrated the rule that "under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefiend and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen of an *ex parte* appraisement of the circumstances in which the obligation has arisen."[55] While the decision is seen to be founded on some 'equity which arises' in favour of the respondents, the government pleaded executive necessity--rather, the freedom of the executive to act unhindered by any representation or promise made by it at an earlier point of time. This was negatived by the Supreme Court. This is as it should be, for even in the matter of contractual obligations the executive has no power to vary or terminate those obligations unilaterally at least in commercial undertakings.[56] But the point which needs attention in this context is that the government was held bound by a certain equity or rather estoppel, based on a representation or promise. We should however remember that in the Indian Contract Act, 1872, which lays down the principles of the law of contract and is still in force in India, we find a promise being defined in clause (*b*) of section 2 thus:

> "A proposal when accepted becomes a promise" and clause (*e*) of section 2 explains that "every promise or every set of promises

54. *Supra* note 1.

55. *Id.* at 728.

56. See, *State of Madras* v. *Madras Electric Tramways Co. Ltd.*, A.I.R. 1957 Mad. 169. For a survey of this aspect of the law see "State Contracts in Indian Law", XIII *Indian Yearbook of International Affairs* 275 and 279 (1964).

> forming consideration for each other is an agreement" and under clause (*h*) of the same section "a contract is an agreement enforceable by law."

To hold the government bound by a promise, or for that matter to hold any person to be so bound, there must be an agreement (a promise being the equivalent of, and wholly identical with, an agreement, as aforesaid under the Indian Contract Act) enforceable by law. Under section 10 of the Act, "all agreements are contracts if they are made by the free consent of parties, competent to contract, having a lawful object and lawful consideration and if they are not declared to be void..."

In *Anglo-Afghan* there was an agreement, much less a contract but still the Supreme Court held the government bound by a promise or representation which took the form of export promotion scheme. So this was a new legal category which had a binding character although it was not a contract. At the same time the government could not have been held bound by an 'estoppel' as defined by section 115 of the Indian Evidence Act, 1872. This section reads:

> 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 crucial words here are "to believe a thing to be true", namely, to induce a belief in the existence of a thing. If the declaration, act or omission refers to a promise *de future*, no estoppel can arise; and for such declaration act or omission to be binding, it must be a promise, that is a contract.[57] In other words a declaration to do something in future will not give rise to an estoppel.[58] But the export promotion scheme was no more than a declaration by the government to act in a particular manner in future, namely to issue import entitlement certificates to those who fulfilled the conditions of the scheme. These are perhaps the reasons which impelled Bhagwati, J., (as he then was) in his classical judgment in *M.P. Sugar Mills*, to affirm that in the *Anglo-Afghan* case "the doctrine of promissory estoppel found its most eloquent exposition,"[58] though in that case itself this nomenclature was never adopted.

Three years later, *i.e.*, in 1971 the Supreme Court took the opportunity of applying this principle against a Municipality in *Century Spinning and Manufacturing Co. Ltd.* v. *The Ulhasnagar Municipal Council*.[59] The

57. See, *Jethabhai* v. *Nathabhai*, (1904) I.L.R. Bom. 407.

58. *M.P. Sugar Mills Ltd.* v. *State of Uttar Pradesh*, *supra* note 39 at 642.

59. A.I.R. 1971 S.C. 1021. See also *Turner Morrison Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 3 S.C.R. 711.

municipality went back on its representation that it would not levy octroi duty for a period of seven years, on the raw materials brought into its jurisdiction by the appellants. The Supreme Court held that a public body was not exempt from liability to carry out its obligations arising out of its representations of facts and promises relying upon which a citizen altered his position to his prejudice. It said that different standards of conduct for the people and the public bodies could not ordinarily be permitted.

It appears however that neither the Supreme Court till the decision in *M.P. Sugar Mills* nor the High Courts have adopted a uniform rule in these cases where an individual as against the state or other public authority is aggrieved because of some representation or promise made by the public body relying on which he has suffered some detriment. In *State of Kerala* v. *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*[59a] and in *Assistant Custodian Evacuee Property* v. *B.K. Agarwala*[60] the Supreme Court did not think fit to apply the estoppel rule--whether equitable or promissory--against the state on the ground in the former that there could be no estoppel against the power of the state to legislate and in the latter on the ground that official representation or advice could not change a legal position existing under a particular law.

The High Courts too swayed from one extreme to the other, from holding the state bound by its representation on undefined equity[61] to denying any such binding whatsoever.[62]

(A) Locus Classicus--M.P. Sugar Mills v. State of Uttar Pradesh

The judgment of Bhagwati, J. (as he then was) in *M.P. Sugar Mills*[63] rose like the morning sun clearing the misty atmosphere with a bold and

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59a. A.I.R. 1973 S.C. 2734.

60. A.I.R. 1974 S.C. 2325. See also *C. Samkaranarayanan* v. *State of Kerala*, A.I.R. 1971 S.C. 1997; *State of Tamil Nadu* v. *S.K. Krishnamurthy*, A.I.R. 1972 S.C. 1126; *Ramnatha* v. *State of Kerala*, A.I.R. 1973 S.C. 2641; *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd.* v. *Sipahi Singh*, A.I.R. 1977 S.C. 2149 and *Excise Commissioner, U.P. Allahabad* v. *Ram Kumar*, A.I.R. 1976 S.C. 2237.

61. See for *e.g., Atam Nagar Co-operative House Building Society Ltd.* v. *State of Punjab*, A.I.R. 1979 P. & H. 196; *Kusheshwar Singh* v. *State of Bihar*, A.I.R. 1974 Pat. 267; *Khunnoo Lall and Sons* v. *Union of India*, A.I.R. 1974 All. 170; *Laghu Udyog Karamchari Co-operative Housing Society Ltd.* v. *State of Madhya Pradesh*, A.I.R. 1975 M.P. 93; *S.K.G. Sugar Ltd.* v. *State of Bihar*, A.I.R. 1975 Pat. 123; *Jai Dev* v. *Land Acquisition Collector*, A.I.R. 1971 Del. 35; and *Venkatachalam* v. *State of Andhra Pradesh*, A.I.R. 1973 A.P. 65.

62. See for e.g., *R. Subrahmanyam* v. *District Collector*, A.I.R. 1974 A.P. 55; *Girdhari Lal* v. *Assistant Collector, Central Excise*, A.I.R. 1974 H.P. 261; *V.S. Ranganath* v. *Institute of Chartered Accountants*, A.I.R. 1975 Kant. 189; *Indian Aluminium Co.* v. *K.S.E. Board*, A.I.R. 1975 Ori. 100; *Steelware Industries* v. *Collector of Imports and Exports*, A.I.R. 1976 Mad. 377; *Malhotra and Sons* v. *Union of India*, A.I.R. 1976 J. & K. 41 and *Union of India* v. *Maruthai*, A.I.R. 1979 Mad. 207.

63. *M.P. Sugar Mills Ltd.* v. *State of Uttar Pradesh*, *supra* note 39. This judgment is also described as the "sheet anchor of the...doctrine of promissory estoppel" in *R.K. Deka* v. *Union of India*, A.I.R. 1984 Del. 413 at 418.

imaginative approach to the whole problem. The appellant in this case was a company engaged in the manufacture and sale of sugar. It was also having a cold storage plant and steel foundry. In October 1968, the U.P. Government with a view to promote industrial progress in the state notified tax exemption for a three year period to all new industrial units. The appellant wanted to avail of the exemption by setting up a hydrogeneration plant for the manufacture of vanaspati. In answer to the appellant's enquiry, the Director of Industries confirmed the tax concession as announced in October 1968 by the government.

The appellant thereupon took steps towards getting financiers for the project and necessary machinery. The 4th respondent, namely, the Chief Secretary and Advisor to the Governor made a further oral assurance about the exemption from sales tax in December 1968 and a written confirmation in January 1969. The appellant went ahead in full speed and made considerable progress in the setting up of the vanaspati factory.

In May 1969, however, the state government started having second thoughts on the sales tax exemption. In spite of the appellant bringing it to its notice and ignoring its earlier assurances the state government went back on those assurances. In January 1970 it intimated that the government had taken a policy decision to grant only partial sales tax concessions--three and a half per cent for the first year, three percent for the second year and two and a half percent for the third year--to new vanaspati units. The appellant in reply (in June 1970) said that it would accordingly be availing of the exemption at the concessional rate. The appellant's vanaspati factory went into production in July 1970. The state government once again changed its mind in August 1970 and rescinded the concessional rates.

The appellant thereupon filed a writ petition in the Allahabad High Court praying for a direction to be issued to the state government to exempt vanaspati manufactured and sold by it from sales tax for a period of three years commencing from July, 1970. The plea of promissory estoppel was included in the writ petition by way of a subsequent amendment of the petition which was rejected by the Allahabad High Court principally on the ground that the appellant had waived the exemption, if any, by accepting the partial concessional rates announced by the government in January 1970 as aforesaid. The appellant thereupon preferred the present appeal to the Supreme Court after obtaining the certificate of fitness from the High Court.

The appellant relied on promissory estoppel. The categorical assurance of the government and the appellant's taking steps in reliance thereon were pressed into service. The state government on the other hand pleaded waiver by the appellant. Further there could be no promissory estoppel against the government so as to inhibit it from implementing policies in public interest. The Supreme Court upheld the appellant's claim and allowed the appeal.

The Supreme Court rejected the government's plea of waiver on the ground that the appellant was not shown to have been aware of its right under the law, much less under the novel principle of promissory estoppel

and the plea had not been properly pleaded or proved. Now turning to this doctrine on which the appellant rested his case, Bhagwati, J., eulogised it having the appellation of "promissory", "equitable", "new" and at times also "quasi" estoppel. His Lordship referred to *Hughes*,[64] and *High Trees*[65] among others and traced its origin in equity. It was described to be neither in the realm of contract nor of estoppel. It was "a child of equity brought into the world with a view to promoting honesty and good faith and bringing law closer to justice..."[66] It should not therefore be held in fetters and should be allowed to operate in its activist magnitude so that it may fulfil the purpose for which it was conceived and born. Bhagwati, J. found that the facts in the present case were eminently fit for the application of the doctrine of promissory estoppel. He repelled also the contention of the state that the appellant did not suffer any detriment by acting on the representation, assurance, as the vanaspati factory although started in reliance on the tax exemption was alleged nevertheless to be making good profits. It was observed that alteration of position in reliance on the promise or representation was enough. If the promise has led the promisee to act differently from what he would otherwise have done, that would be sufficient detriment. The learned judge also pointed out that if detriment was insisted upon as a necessary element there would be no need for the doctrine of promissory estoppel because in that event detriment would form the consideration and the promise would be binding as a contract. The detriment is constituted, it was observed, by the prejudice which would be caused to the promisee if the promissor were allowed to go back on the promise. In the result the Supreme Court held that the government was bound to exempt the appellant from the payment of sales tax in respect of sales of vanaspati effected by the appellant in the State of U.P. for a period of three years from the date of commencement of the production as per the original notification of the government.

Announcing a tax exemption just as much as a levy thereof, although a sovereign function of the state, did not preclude the application of the doctrine, Bhagwati, J., observed that no distinction could be made between the exercise of a sovereign and governmental function and a trading or business activity, so far as the doctrine of promissory estoppel was concerned. Pausing here for a moment it has to be noted that in this judgment the doctrine was freed, as it were, from any kind of fetter whatsoever. In its "activist magnitude"it can found a cause of action; the parties need not have been in any prior contractual relation; it cannot be negatived by any plea of executive necessity by the government; it is applicable irrespective of whether the impugned action--a resiling from the promise or representation--is a sovereign or non-sovereign function; the requirements of article 299 of the Constitution cannot militate against the doctrine being applied. All the

64. *Hughes* v. *Metropolitan Railway Co.*, *supra* note 14.
65 *Supra* note 5.
66. *Supra* note 39 at 635.

same the Supreme Court purported to lay down a few limits to its operation:

(1) Equity is the basis of this doctrine. It lies in the balancing of public and private interests. But the government cannot on some indefinite and undisclosed ground of necessity or expediency or on an *ex parte* appraisement of circumstances seek to evade its promise or representation. The court would not act on the mere *ipse dixit* of the government.
(2) On reasonable notice--which need not be formal--to the promisee the state may resile from its promise, provided the *status quo ante* for the promisee can be restored.
(3) It (this doctrine) cannot be applied in "the teeth of an obligation or liability imposed by law", a statutory prohibition or against the exercise of a legislative power.

This new arrival in the doctrinal storehouse was welcomed wholeheartedly in judicial circles and especially by the Supreme Court which applied it in *Bhim Singh* v. *State of Haryana*.[67] Employees of the government were offered certain inducements to join a newly created department. The Supreme Court held, applying this doctrine, that those inducements could not be denied to them once they had acted in reliance thereon.

(B) A reversal into the cauldron

However hot on the heels of such welcome and adoration came the shock and disappointment, as it were. Kailasam, J., in *Jeet Ram Shiv Kumar* v. *State of Haryana*[68] threw the whole question in the cauldron. The sun of *M.P. Sugar Mills* got eclipsed by *Jeet Ram*. The writ petitioners in *Jeet Ram* were purchasers of plots from the Municipal Committee of Mandi Fateh lying within Bahadurgarh town. They were offered incentives by way of exemption from octroi duty. This exemption was later withdrawn by the committee with the concurrence of the state government. The petitioners challenged this withdrawal on various grounds. A Full Bench of the Punjab High Court[69] dismissed the petitions and on appeal the Supreme Court too rejected them.

The reason for its decision was spelt out by the Supreme Court thus: The action of the government was a statutory function against which no estoppel could operate. The Municipal Committee had no authority to exempt Fateh Mandi from the levy of octroi duty; it was beyond the scope of its authority. Further it (the exemption) was not found in any contract which was required to be in writing by section 47 of the Municipal Act. Plea of estoppel, much

67. A.I.R. 1980 S.C. 768.

68. A.I.R. 1980 S.C. 1285. See also *Municipal Corporation for the City of Poona* v. *Bijlee Products (India) Ltd.*, A.I.R. 1979 S.C. 304 for an opposite decision on almost the same set of facts, without discussing the principle or cases.

69. A.I.R. 1970 Punj. 462 (F.B.).

less promissory estoppel, cannot apply in a situation statutorily required to be in writing is not found to be so; and to permit such a plea to avail in those circumstances would mean the repeal of an important statutory or constitutional provision, to writ, Article 299(1) of the Constitution.

Kailasam, J. pointed out that in view of statutory provisions like sections 63, 65, 70, 10 and 25 of the Indian Contract Act, the scope of promissory estoppel in India is very limited. He expressed his reservations on the "activist jurisprudence" of Bhagwati, J. in *M.P. Sugar Mills* and the wide implications thereof. His Lordship observed:

> It is no doubt desirable that in a civilised society man's word should be as good as his bond and his fellowmen should be able to rely on his promise. It may be an improvement if a cause of action would be based on a mere promise without consideration. The law should as far as possible accord with the moral values of the society. [T]he concept of moral values is not static one... It is hazardous for the Court to attempt to enforce what according to it is the moral value.... Lord Denning might have exhorted the Judges not to be timorous souls but to be bold spirits, ready to allow a new cause of action if justice so requires. These are lofty ideals which one should steadfastly pursue. But before embarking on this mission, it is necessary for the Court to understand clearly its limitations. The powers of the Court to legislate is strictly limited.[70]

Kailsam, J., however seems to have contemplated the application of a principle like promissory estoppel in the extreme case of an officer of the government or other person acting on behalf of a public authority going back on his representation merely on his whim and fancy and arbitrarily; otherwise he proclaimed freedom of state action either as a legislative authority or an executive organ fulfilling the purposes of and guarding public interest.

In view of this open controversy in the judicial approach to the problem of "representations" or "promises" falling short of contracts made by the government or other public authority and their binding character, especially as the cleavage is revealed in judgments of the Supreme Court consisting of two judges in both, we are left in a state of perplexity.

The Madras High Court has given a new dimension to this doctrine, unwittingly though, in *Ramasubbu* v. *Government of India*.[71] A freedom fighter was denied the *ex-gratia* pension he was receiving from the Government of India all of a sudden and to add, as it were, insult to injury, proceedings under the Revenue Recovery Act, for recovering the amounts already paid to him were commenced, without even giving him any notice to

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70. *Jeet Ram Shiv Kumar* v. *State of Haryana*, *supra* note 68 at 1305 and 1306.

71. (1980) I.L.R. Mad. 93. See a similar decision in *Paru Charan* v. *State*, A.I.R. 1987 Ori. 283.

show cause against such move. The court allowed his writ petition quashing the impugned order. Though the decision was based on the principles of natural justice, it spoke really of promissory estoppel. This was eminently so because no detriment or change of position of the representee (the freedom fighter and grantee of the pension) in reliance on the representation held out by the Indian Government's Freedom Fighters Pension Scheme, could ever be spelt out.

In *Kothari Oil Products* v. *Government of Gujarat*[72] the petitioner firm was engaged in the manufacture of vanaspati ghee. It diversified its activities, with a view to taking benefits announced by the Gujarat State in 1977: namely, cash subsidy and interest free sales-tax loan for promoting industrial expansion in backward areas. It was accordingly awarded a sum of Rs. 6 lakhs and odd as cash subsidy, out of which a sum of Rs. 64,000 remained to be paid. By a subsequent resolution in 1979 the government reserved the edible oil industry including manufacture of vanaspati for the co-operative sector with the result that the above benefits were no longer available to the industrial units like the petitioner firm. The petitioner firm sought the benefits originally promised by the government through their writ petitions. The Gujarat High Court granted the relief sought. The government was held bound by its earlier resolution--on the ground of promissory estoppel--which the court said would "very much apply" in the instant case. Referring to *Jeet Ram*, the court pointed out that the Supreme Court in *Jeet Ram* curiously enough had not referred to *Bhim Singh*,[73] the latter being a decision of three judges while the former being of two judges and later in point of time ought to have followed *Bhim Singh*. The Delhi High Court applied this doctrine in one case[74] and made laudatory remarks about its development in another,[75] though in the latter the facts were not held to be fit enough for the application of this doctrine.

(C) Further developments

(i) Supreme Court

It was in *Gujarat State Financial Corporation* v. *Lotus Hotels Pvt. Ltd.*,[76] that the Supreme Court swung to the other extreme of invoking the doctrine. The Gujarat Financial Corporation entered into a contract of loan of Rs. 30 lakhs with M/s. Lotus Hotels Pvt. Ltd. secured by an equitable mortgage in July 1978. The financial corporation for its own reasons did not disburse the loan. The respondent company, namely M/s. Lotus Hotels Pvt. Ltd. moved a petition under article 226 of the Constitution for a writ of *mandamus*

72. A.I.R. 1982 Guj. 107.
73. *Bhim Singh* v. *State of Haryana, supra* note 67.
74. *Jasjeet Films* v. *Delhi Development Authority, supra* note 43.
75. *Sangeetha* v. *V.N. Singh*, A.I.R. 1980 Del. 27.
76. A.I.R. 1983 S.C. 848.

directing the appellant (Financial Corporation) to advance the promised loan. A single judge issued the writ; a division bench confirmed the issue on appeal. On further appeal by special leave to the Supreme Court the argument *inter alia* of the appellant was that the dispute was in the realm of contract and at best or worst the corporation could be charged with only a breach of contract for which the remedy was by way of a suit for damages. This aspect of the matter requires investigation and is pursued elsewhere. The Supreme Court dismissed the appeal. It directed the corporation to make the loan. The Supreme Court observed that this was a fit case for the application of the doctrine of promissory estoppel. "Acting on the promise of the appellant, evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the back drop of this incontrovertible fact situation, the principle of promissory estoppel would come into play."[76a] The Supreme Court cited *M.P. Sugar Mills* and also *Jeet Ram*. The latter was held not to lay down any different rule and to be scarcely of any help to the appellant.

This is a remarkable judgment in several ways. It is a fortnight decision rendering substantial justice without paying too much regard to the technicalities of the law. We are however tempted to ask: What is law without technicalities? Conscience, justice, reasonableness *etc.*, have to be channelised so that the deciding authority is not moved merely by its own ideas on these matters which have necessarily to be vague. Are not the technicalities the safeguards ensuring such regulation? Was the Supreme Court making any distinction between contract and promissory estoppel? Can we call the breach committed by the appellant corporation as a breach of statutory duty and not a breach of contract? Can *mandamus* be issued for a breach of contract calling it a breach of duty rather than a breach of contract? Is the promissory estoppel net to be cast so wide as to lug in actions even for specific performance? Can specific performance of a promise to make a loan of money be ordered, branding the promise as one of promissory estoppel rather than as a promise coming within the meaning of the Indian Contract Act and enforceable, if at all, only as a contract? These questions seem legitimately to arise from the decision.

In two later decisions the Supreme Court has confirmed that promissory estoppel is here to stay. In *Union of India* v. *Godfrey Philips India Ltd.*,[77] a bench of three judges, with Bhagwati, C.J., delivering the main judgment of the Supreme Court resurrected, as it were, the doctrine of promissory estoppel from the near burial which it suffered in *Jeet Ram*. Respondents in these appeals (Godfrey Philips) were cigarette manufacturers. When they sold cigarettes to wholesale dealers they (manufacturers) delivered the cigarettes in packets of 10 to 20 and these packets were packed in paper/cardboard cartons, these cartons being in their turn packed in corrugated

76a. *Id.* at 851-52.
77. A.I.R. 1986 S.C. 806.

fibre board containers. The wholesale price charged by the respondent-manufacturers included the cost not only of the primary packing (packets) but also of secondary packing (cartons) and the final packing (corrugated fibre board containers). The dispute was whether excise duty on the cost of final packing, namely the packing with corrugated fibre board containers was leviable or not. The government claimed that it was leviable as the section, namely section 4(4)(*i*) read with the Explanation of the Central Excise Act, 1944, contemplated the levy of excise duty on the value of cigarettes packed and delivered to the wholesale dealer and it did not allow any room for any distinction between primary, secondary or final packing. But the respondents argued that packing in corrugated fibre board containers was not essential for the sale of cigarettes to the wholesale dealers at the factory gate but it was done only to facilitate transport without damage. Further a responsible official of the government, the Under-Secretary of the Board of Excise and Customs had by a letter, dated 26th May, 1976 intimated to the Cigarette Manufacturers Association that the cost of fibre board containers would not form part of the value of the cigarettes for the purpose of excise duty. The respondents acting on this letter did not recover from the wholesale dealers any amounts by way of excise duty attributable to the cost of such corrugated fibre boards. From the date of this letter till 2nd November 1982, this was the position. But on the second mentioned date the Central Board of Excise abandoned this stance and sought to collect excise duty for the cost of packing in corrugated fibre boards even for this period, namely from 24th May to 2nd November 1982. This going back on their representation, according to the respondents, invited the bar of promissory estoppel and the government should be prevented from thus collecting excise on the cost of corrugated fibre board packing. It was also on record that the Central Government had in a proceeding before the Gujarat High Court filed affidavits and presented arguments that the cost of corrugated fibre board containers would not form part of the value of the goods for assessment of excise duty. So the above letter of the Under Secretary, according to the respondents, had to all intents and purposes the approval of the Central Government.

Bhagwati, C.J in the Supreme Court accepted the respondents' contention. The government was promissorily estopped from going back on their representation. With this conclusion the other two judges, Pathak, J. and Amarendra Nath Sen, J., concurred, though they held, differing from the learned Chief Justice, that the packing in corrugated fibre board containers was not a necessary packing and therefore not includible in the cost of cigarettes for purposes of excise duty. The learned Chief Justice took occasion to reiterate the doctrine as formulated by him in *M.P. Sugar Mills*, unaffected by *Jeet Ram* with which His Lordship openly expressed his disagreement and doubted its authority.

We find it difficult to understand how a Bench of two Judges in Jeet

> Ram's case could possibly overturn or disagree with what was said by another Bench of two Judges in Motilal Sugar Mills case. If the Bench of two Judges in Jeet Ram's case found themselves unable to agree with law laid down in Motilal Sugar Mills case they could have referred Jeet Ram's case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a co-ordinate Bench of the same Court in Motilal Sugar Mills.[77a]

His Lordship also repeated the parameters of the doctrine, as already laid down by him in *Motilal Sugar Mills*.

The other Supreme Court decision which invoked and applied this doctrine is *Express Newspapers Pvt. Ltd.* v. *Union of India*.[78] A lengthy judgment running to about 78 pages finds but a passing reference to this doctrine. It is found in the comparatively extensive judgment of A.P. Sen, J. The decision was rendered in a position filed under article 32 of the Constitution by the Express Papers Ltd. The petitioners challenged the constitutional validity of a notice of re-entry upon forfeiture of a lease by the Government of India and a notice by the Delhi Municipal Corporation to show cause why the Express Buildings on the demised plots 9 and 10, Bahadurshah Zafar Marg, New Delhi, being allegedly unauthorised, should not be demolished under sections 343 and 344 of the Delhi Municipal Corporation Act, 1957.

The petitioners alleged that the impugned notices of re-entry upon forfeiture of the lease and the threatened demolition of the Express Buildings which constituted the "nerve-centre" of the newspaper the Indian Express, were wholly *mala fide* and politically motivated. The facts are somewhat involved and elaborately narrated in the judgment. The respondents--Union of India--raised a preliminary objection that petitions under article 32 cannot lie in the present case because the right to occupy the land leased was not a fundamental right under article 19(1)(*a*) or 19(1)(*g*) of the Constitution but derived from a contract or grant. The Supreme Court rejected this argument. It said the above contention ignored "the object and purpose for which the grant (lease) was made, namely, for the construction of a building or installation of a printing press for the publication of a newspaper and the direct and immediate effect of the impugned notices for re-entry...and threatened demolition...must amount to a violation of the freedom of speech and expression enshrined in article 19(1)(*a*)".

The petitioners are said to have pleaded *inter alia* the doctrine of promissory estoppel. The lessor, namely the Union of India, could not go back upon its assurances given by the previous government in reliance

77a. *Id* at 815.
78. A.I.R. 1986 S.C. 872.

whereupon the petitioners had acted and constructed the Express Buildings at a cost of about 1.30 crores of rupees. The Supreme Court upheld this plea. It said that the lessor (Government of India) was clearly precluded from contending that the order of the Minister (granting the permission) to build was illegal, improper or invalid by application of the doctrine of promissory estoppel, and cited English and Indian decisions. The Supreme Court said that it was not necessary for purposes of this decision to resolve the apparent conflict between the decision of Bhagwati, J. in *M.P. Sugar Mills* and that of Kailasam, J., in *Jeet Ram*. However, it is clear, continued the Supreme Court, that "no estoppel can legitimate action which is *ultra vires*. Another limitation is that the principle of estoppel does not operate at the level of Government policy. Estoppels have however been allowed to operate against public authority in minor matters of formality where no question of *ultra vires* arises."[78a]

In the present case admittedly the then Minister (for Works and Housing) acted within the scope of his authority in granting permission as lessor to the Express Newspapers (P) Ltd. to construct the building. The Union of India was precluded by the doctrine of promissory estoppel from questioning such permission.[79]

(ii) High Courts

At the High Court level, there have been wholesale endorsements of the doctrine in some cases[80] and in others a denial of its application,[81] to the facts of the case as they were presented before the court. It is appropriate at this juncture to take stock of the situation obtaining today regarding the scope and applicability of this doctrine. Though it is a principle which sprang from the deficiencies of the law of contract and though it has naturally to form part of the private law, its transplantation in the field of public law has created, from the point of logic, reason or symmetry in the legal system, more problems than it has solved.[82] While in public law the doctrine is subject to the principle of *ultra vires* and that of freedom of executive discretion, its expansion in private law is rather stultified by the requirement of consideration and the qualification that the parties should be in a pre-existing contractual relation. Kodandaramayya, J., in *Borthu Nagabhushanam*[83] therefore calls for an "independent doctrine in public law based on equity

78a. *Id.* at 948.

79. See also *Bakul Oil Industries* v. *State of Gujarat*, A.I.R. 1987 S.C. 142.

80. See *M.P. Periaswamy* v. *State of Tamil Nadu*, 1986 II M.L.J. 199; *Social Work and Research Centre* v. *State*, A.I.R. 1987 Raj. 26; *Purushotam Das* v. *State*, A.I.R. 1987 All. 56.

81. *Jasjeet Films, supra* note 43; *Suresh Chandra* v. *Berhampur University*, A.I.R. 1987 Ori. 38; *C.V. Enterprises* v. *Braithwaite Co.*, A.I.R. 1985 Cal. 306; *R.K. Deka* v. *Union of India, supra* note 63.

82. See, *Borthu Nagabhushanam* v. *Secy., Agrl. Mkt. Committee*, A.I.R. 1984 NOC. 312 at p. 154.

83. *Ibid.*

without importing [the] full-fledged doctrine of promissory estoppel on the basis of a contractual relationship into public law. In the interests of administrative law, an independent concept must be allowed to grow akin to doctrine of natural justice, colourable exercise of power, or an abuse of power based on [the] general requirement of exercising constitutional or statutory power by the authorities without resting on [the] literal meaning of constitutional or statutory provisions. Instead of resting this principle on a mere private law doctrine of promissory estoppel it must be tested on independent administrative concepts of equity between State and citizen which may be called administrative estoppel, the touchstone being public interest either to enforce the promises made by the State or permit the State to withdraw them."[83a]

Part III Limits of the doctrine and problems in its application

Whether we call this new device which has come to stay either as a private law product of promissory estoppel or as a non-descript category of equity, we cannot really do away with the several difficulties which inevitably arise in the *modus operandi* of this legal instrument. The available case data on its operation reveals a bewildering variety of approaches and the contours of this newcomer still remain vague. The following problems arise for consideration:

(1) It is often said this doctrine is not applicable to the exercise of functions of a legislative, sovereign and sometimes even executive nature. This rule seems to have been followed more in its breach than observance.

(2) It is said to be not applicable to matters of policy but there are no reliable criteria for deciding which are policy matters and which are not so.

(3) It is not clear whether an estoppel--promissory or otherwise--can arise in the face of non-observance of the mandatory rule in article 299(1) of the Constitution.

(4) The cases in which relief has been denied for non-compliance with Article 299(1) will on examination be found to be no less worthy than those cases which quite by accident were treated as cases fit for the application of promissory estoppel and in which therefore the aggrieved party was lucky in getting relief without being debarred by non-compliance with article 299(1). In other words the relief one may get depends on whether we call it a contract or a case of promissory estoppel. This will also lead to the bypassing of article 299(1) which it has been repeatedly asserted is mandatory.

(5) It is said that promissory estoppel cannot apply to a concluded contract. Justification for such exclusion must be based on valid reasons and we shall evaluate them in the appropriate place.

83a. *Id.* at 157.

84. *Excise Commissioner, supra* note 60 at 2241.

(A) Sovereign functions

Taking up the above in their order, one limitation on the doctrine of promissory estoppel is that it cannot operate "against the government in the exercise of its legislative, sovereign or executive functions."[84] This has been thin end of the wedge which has to a considerable extent undermined utility of this doctrine. In the Supreme Court decision last cited the question arose whether the government was bound by a notification exempting country liquor from sales tax or whether it could go back upon that representation. It appears further that the authorities had also assured orally that there would be no sales tax on the sale of country liquor by way of a reply to a query made by the respondents who undertook the retail vend of country liquor in reliance upon that representation.[85] Now the exercise of legislative or other sovereign functions of the State is so pervasive in its nature at the present day that this may well offer a defence in all cases whatsoever. In *M.P. Sugar Mills*, it may be recalled, the exemption from which the government wanted to resile was also one relating to sales tax. And the Supreme Court bound the government in that case to its offer of exemption although it was in the exercise of the same legislative, sovereign and executive functions as was alleged in *Ram Kumar*. The test of "legislative, sovereign or executive" function of the government, for allowing or disallowing promissory estoppel as the case may be, is therefore, rather nebulous. We cannot help recalling the ancient pedigree of the term "sovereign" in this context, starting from *P & O Steam Navigation Co.* v. *Secretary of State*[86] through the succeeding line of cases which have quoted this progenitor times without number.[87]

It was said in *P & O Steam Navigation Co.* that the Secretary was liable for damages occasioned by the negligence of servants in the service of government, if negligence was such as would render an ordinary employee liable. The test really was whether the contract was a sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it was the former the Secretary of State was not liable, but if it was the latter he could be sued in the same way that the East India Co. could have been sued for acts done in their capacity as traders and not as the sovereign power.

Though the above statement has ordinarily been interpreted by text writers as having application to the liability in tort rather than contract in India and though it is almost taken for granted that a sovereign or non-sovereign function of the State has no relevance as far as its liability in contract is concerned, yet it has to be remembered that even in the case of

85. It is rather perplexing how so eminent an author as M.P. Jain has observed while adverting to this case that "on the facts estoppel could not arise at all because at the time of auction, the Government had made no promise or any representation that it would not impose any sales tax in future." See M.P. Jain, *The Evolving Indian Administrative Law* 140 (1983).

86. (1861) 5 Bom. H.C.R. 1.

87. *Nobin Chunder Dey* v. *Secy. of State*, (1875) I.L.R 1 Cal. 11; *Secy. of State* v. *Hari Bhanji*, (1882) I.L.R. 5 Mad. 273; *Kesoram Poddar* v. *Secy. of State*, (1927) I.L.R. 54 Cal. 969.

Kesoram Poddar v. *Secretary of State*[88] the suit was for recovery of a sum of 33 lakhs of rupees from the Secretary of State as damages for breach of a contract of sale of goods. Nor for that matter could the facts in *Kasturilal* v. *State of Uttar Pradesh*[89] be construed as excluding totally contractual aspects, as the gold seized from an accused person (who was found guilty) and missing from the malkhana could well be treated as a case of bailment. The distinction in such contexts between sovereign and non-sovereign presents insuperable difficulties and it has been characterised as irrational and unsound. The Indian Law Commission[90] referred to this weak spot and recommended a Draft Bill doing away with this distinction concerning the liability of the State in tort.

Our concern here is to examine whether one should import this sovereign and non-sovereign functional dichotomy which stands already self-condemned, in the new field of promissory estoppel. Inevitably this test has led to a direct conflict between *Ram Kumar* and *M.P. Sugar Mills*. As further illustrations of this difficulty, we should here refer to two decisions: one by the Delhi High Court[91] and the other by the Kerala High Court.[92]

In *R.K. Deka* v. *Union of India*[92a] a housing scheme was announced by the government early in 1978 to facilitate non-resident Indians living abroad to build residential houses in India (Delhi) and thus to satisfy their natural urge to own property in their motherland and to settle down therein whenever they wished to do so. A non-resident living abroad who did not own a plot or house or flat in his or her name or in the name of his family members was eligible to apply for allotment of a house plot under the above scheme. The mode of payment of the price was also provided. The price of the plot and cost of construction on the plot was payable in foreign exchange. The plots were to be allotted on leasehold basis. The price of the plot was payable in a lump sum within 3 months of allotment.

Applications for the allotment of plots under the scheme were invited accompanied by a demand draft as earnest money in foreign currency of an amount equivalent to Rs. 10,000 for a plot of 400 sq. yards. The earnest money was not to carry any interest and could be forfeited in case the applicant did not accept the allotment if offered to him and if he did not comply with the terms and conditions of the allotment within the stipulated period. The writ petitioners in this case applied separately for allotment of plots under the scheme together with the earnest money as required. The Land Development Officer acknowledged the receipt of their applications and sent them a draft lease agreement for being initialled by the applicants on each page. This was complied with by the applicants. On enquiry they

88. *Kesoram, Ibid.*
89. A.I.R. 1965 S.C. 1039.
90. *First Report*. 6 (1956).
91. *R.K. Deka, supra* note 63.
92. *Jacob Philips* v. *Union of India*, A.I.R. 1985 Ker. 255.
92a. *Supra* note 63.

were told that the development of the land had already been taken in hand and allotment of plots would be made by December 1980. However in August 1981 the Minister of Works and Housing stated in the Rajya Sabha in answer to an unstarred question that the government had decided to drop the scheme. The petitioners then moved the Delhi High Court through the present writ petitions for quashing this decision on the ground that it was arbitrary, capricious and contrary to the doctrine of promissory estoppel. The government in reply said that the petitions were not maintainable inasmuch as they sought to enforce a civil liability for an alleged breach of contract and that there was no breach of any fundamental or statutory right. The government dropped the scheme as it weighed heavily with them and it was not desirable according to the government, to direct the scarce resources of the country to such non-priority scheme, namely providing residential plots to non-resident Indians who were affluent and could afford the market price for the land. While the scheme proposed the sale of the plots at Rs. 200 per sq. yard, the pre-determined price fixed by the government itself stood at Rs.600 per sq. yard upto March 1979 and Rs. 1,660.66 per sq. yard from April 1981 (Rs.2000 per sq. metre). It was felt that the allotment of land at the price of Rs. 200 per sq. yard which was far below the market price could not be justified and was against public interest. An expense of one crore of rupees would have been incurred by the government on the scheme. The country, the government said, could ill-afford such heavy expense for a non-priority scheme.

The Delhi High Court held firstly that the petitions were not maintainable, if, as urged by the government, the question involved was merely the breach of an alleged contract. The court cited in support the case of *Radhakrishna Agarwal* v. *State of Bihar*.[93] But as the petitioners based their claim rather on promissory estoppel the court proceeded tn ex[illegible] the same. The petitioners had altered their position to their prejudice, argued the counsel for the writ petitioners, because they being applicants under the present scheme were disabled from applying under any other scheme. The court refuted this argument by pointing out that they suffered no prejudice as there was no bar against the petitioners applying simultaneously in other schemes. Further detriment arose according to the counsel for the petitioners, when in reliance on the applications and deposit of earnest money and the government making it appear that it intended to be legally bound and intended its promise to be acted upon, some of the petitioners left their jobs abroad and came to Delhi with their hard earned money to build their own houses and settle in their own country. The petitioners urged that the defence of executive necessity did not, as per the ruling of the Supreme Court in *M.P. Sugar Mills*, relieve the government from its obligations to honour the promises made by it, if the citizen acting in reliance on the promise had altered his position. The mere inadequacy of the consideration

93. A.I.R. 1977 S.C. 496.

for the transfer of the plots was no ground, as the government could not, rather should not, act like a real estate dealer; even such a dealer was debarred from raising such a plea on the analogy of the provisions of section 20 of the Specific Relief Act, 1963.

The court however did not agree with the above argument of the petitioners. It was a "policy decision pure and simple" of the government. Though the earlier announcement of the scheme was made "with a view to lure non-resident Indians...to augment the foreign exchange resources of the country," the government had the right to drop the scheme as a matter of public policy. Public policy should not and does not remain static. Public policy would be useless if it was to remain a fixed mould for all time to come. It has to be transformed, suited and varied from time to time depending on the welfare of the community at any given time. The executive necessity includes the power of variation of the earlier policy decision of the State." The principle of promissory estoppel was not available, the court said, against the government in the exercise of "legislative sovereign and executive power." The court cited in this context the decision in *Jeet Ram* and concluded..."the considerations are such that as to render it inequitable to enforce the withdrawn promise against the government."

In this decision we see how wide a dent has been caused by the wedge of sovereign or executive function in this new principle of promissory estoppel. Of course freedom of executive action or executive necessity is not a new philosophy and it has often been resorted to by governments "to evade its obligations under contract."[94] Here is the area of real conflict between private law (of which sanctity of contract is the core principle) and public law (in which public interest is all important and for which the government is presumably the guardian). This conflict has inevitably led to what Atiyah calls the "grey murky area"[95] where ideas of private and public law struggle for supremacy. In the interests of justice as well as uniformity and certainty in the law, we should rather prefer the view of Bhagwati, J., expressed in *M.P.Sugar Mills* that executive necessity ought not to prevail against a promise of the government relying on which a person has altered his position. As the learned judge said:

> If the government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it.... It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual; in so far the obligation of the law is concerned the former is equally bound as the latter. The government must be held "to a high degree of

94. "State Contracts in Indian Law", *supra* note 56.
95. *Ibid.*

rectilinear rectitude while dealing with its citizens.[95a]

The security of transactions, honesty and good faith, the detriment or prejudice suffered as a consequence would all require a strict enforcement of any representation or promise by the government. In the present case too, the government could have thought about the expense and public interest involved before announcing the scheme. It imposed a condition of forfeiture of the earnest money on the other party in case of breach. Under those circumstances the government could not in all conscience have been excused for leaving the other party high and dry on the principle of executive necessity or policy decision pure and simple.

In the other decision, namely *Jacob Phillips* v. *Union of India*[96] the writ petitioner (typical of several others) was granted a cement permit for 200 bags of cement in or about November 1981 and the petitioner made an advance payment of Rs. 6,000 to the supplier, namely the Civil Supplies Corporation. The permit was later cancelled and the amount was refunded to the petitioner, as a result of an amendment in the Cement Control Order of the government in February 1982. Under the amendment there was partial decontrol, and allocation of levy cement was restricted to priority sectors and weaker sections. The petitioner not falling under either of those categories, no quantity of cement could be delivered to him. The petitioner filed a writ petition for the issue of a writ of *mandamus* compelling the State to sell the 200 bags of cement allotted to him under the cancelled permit. The petitioner's case had a two-fold basis:

(1) there was a concluded contract of sale of the quantity of cement for the 200 bags covered by the permit and it was not open to the government to decline delivery of the same. The court rejected this argument by referring to section 23 of the Sale of Goods Act, 1930.[97] The subject matter of the contract related to unascertained or future goods. Further goods had not been put in a deliverable state to be appropriated towards the contract. The payment of the sum of Rs. 6,000 was only an initial payment subject to adjustment at the final stage of delivery. So no title passed to the buyer (petitioner) and he had therefore no right to ask for the delivery of the goods to him. According to the petitioner there was a promise or representation by the state government on the faith of which the petitioner has acted in making payment of the advance and also in incurring expenses by starting construction of buildings in expectation of the cement. The State was bound by promissory estoppel to supply the cement as per permit issued. The petitioner quoted the ruling of the Supreme Court in *M.P. Sugar Mills*.

The court repelled this argument also by observing that the amendments

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95a. *M.P. Sugar Mills, supra* note 39 at 822.

96. A.I.R. 1985 Ker. 255.

97. This section reads: Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated...the property in the goods thereupon passes to the buyer.

(to the Cement Control Order) were effected by statutory orders and there could be no estoppel against statutory orders issued by a competent authority, having the force of law. Whether the issue of the permit by the state authority, payment of the advance etc. would involve the permit holder and the State in a contract of sale of goods or not is outside the scope of the present discussion,[98] it may be noted that the ruling of the court on the applicability of promissory estoppel seems to follow a well-recognised norm. But the scope of the term "statutory orders" in this context appears to be of a variable standard. For that matter even in the leading case of *M.P. Sugar Mills* promissory estoppel was applied apparently against orders under a statute only, to wit, the Sales Tax Act. The original validity of the cement permit could be traced to a statutory order even as its subsequent nullification too owed its origin to such orders. As Bhagwati, J., himself observed in *Indian Aluminium Co.* v. *K.S.E. Board*,[99] where the stipulation, representation or promise itself is in pursuance of a statutory power, it cannot be rendered a nullity by a subsequent exercise of the same statutory power. "The distinction must always therefore be borne in mind whether the stipulation by which the public authority is alleged to have fettered in advance the future exercise of the statutory power is one which is entered into as part of "private contract in general terms", or in exercise of a statutory power. If it is the former the stipulation would be bad on the principle that a public authority cannot by contract fetter the exercise of a statutory power which is conferred upon it for the public good. But if it is the latter it would not be open to the public authority to disregard the stipulation.

(B) Policy matters

A second difficulty noted above in the implementation of the principle of promissory estoppel is that it cannot be invoked in matters of policy. While this sort of defence for a public authority sought to be bound by its representation or promise is in no way different from a plea based on the exercise of sovereign powers, it is dealt with in some cases[100] as if it were an independent ground on which it could escape the obligation. In *Union of India* v. *Maruthai*[101] sugar manufacturers were the writ petitioners. They had to sell their product, namely, sugar, as per the directions of the Union Government and in accordance with the modifications issued by it from time to time under the Essential Commodities Act, 1955. They had to set apart 70% of their production as 'levy sugar' to be sold by the manufacturers to such allottees as the government may direct. On this quantity of levy sugar,

98. See "Compulsory Contracts -- A Riddle of Modern Jurisprudence", 13 *J.I.L.I.* 195 (1971).

99. A.I.R. 1975 S.C. 1967 at 1976.

100. See for *e.g.*, *Union of India* v. *Maruthai*, (1979) I.L.R. 1 Mad. 426; *Malhotra* v. *Union of India*, A.I.R. 1976 J & K. 41.

101. (1979) I.L.R. 1 Mad. 426.

they (the petitioners) were given a concessional rate (25%) as regards payment of excise duty. On the remaining portion, namely on 30% of their production, which they could sell in the open market, they had to pay a higher rate of excise duty, namely 37 and a half percent. It so happened that the allottees of sugar under orders of government did not lift the quantities of levy sugar with the result that stocks of sugar accumulated in the sugar factories which the manufacturers had to dispose of in the open market. The government sought to collect on these unlidted quantities of levy sugar sold in the open market the higher rate of 37 and a half percent excise duty. The manufacturers wanted that excise duty at the concessional rate of 25% should only be collected for such levy sugar left unlifted by the allottees and the manufacturers having no option but to sell these quantities in the open market. So they prayed for a writ directing the collection of excise at the lower rate. The writ petitions were allowed by a single judge. The government came up on appeal. Delivering the judgment of the court, Ismail, J., (as he then was) reversed the order of the single judge and dismissed the writ petitions.

The petitioners relied on estoppel. It is not clear whether it was estoppel pure or promissory, that was pleaded. The argument was that the government having asked the manufacturers to set apart 70% of their production to be supplied as levy sugar to the allottees of the government and 30% to be sold as free market sugar and having given the concessional rate of excise duty 'n levy sugar, could not go back upon their representation and ask for payment of excise duty at the higher rate. But Ismail, J., in rejecting this argument observed the representation or notification or by whatever name we call it was only a "policy of the government announced with regard to the percentage of the procurement and free market sale of sugar" and "was merely a declaration of intention of the government and as such cannot be enforceable in a court of law." Estoppel could not be pleaded against it. His Lordship concluded that "as far as this court is concerned the latest decisions of the Supreme Court has set at rest the controversy by holding that there can be no estoppel against any statement of the government on the exercise of its sovereign power or executive functions."

So here is this plea of "policy statement" which has proved to be another rock upon which estoppel be it promissory or pure has founded. It would appear that the exemption of levy sugar from the excise duty of 37 and a half percent and the privilege therefor of 25% excise rate was itself announced by way of a notification under the Central Excise and Additional Duties Act of 1957. If this notification were to be treated as a policy statement, then all notifications, rules, orders etc.; must be considered to emanate merely as matters of policy of the government and no binding character can ever be attached to them. No doubt the decision of the Supreme Court in *M.P. Sugar Mills* must be deemed to have impliedly overruled this decision of Ismail, J. However there seem to be yet some unrepentent adherents to this "policy" exception to the application of estoppel including the promissory type, as

noted above.[102] No one has cared to explain or lay down the criteria for deciding when representations are mere statements of policy and when they are not. This point remains yet another unsolved problem in the application of the new doctrine of promissory estoppel.

(C) Requirements of article 299(1)

Yet another obstacle in its adoption lies in the context of article 299(1)[103] of our Constitution. It is by now almost an uncontroverted proposition, as already stated that this article is mandatory and not merely optional in its import.[104] It would logically follow that neither estoppel arising from, nor ratification of, a transaction which is required to be made in the form prescribed by this article is theoretically speaking possible. Consequently the principle of promissory estoppel in its operation has to overcome the obstacle posed by this requirement as to form. It is not however clear as yet from the decisions bearing on this point how this problem has been squarely faced, much less solved.

The progenitor of these cases adverted to above, namely the *Anglo-Afghan Agencies* in fact enforced a promise or representation against the government, although it was not in the form required by article 299(1). It was based on some undefined "equity" which was said to arise in favour of the party seeking relief on the basis of the promise of the government. No attention seems to have been paid to the requirements of article 299(1) in the situation. Bhagwati, J., in *M.P. Sugar Mills* was more outspoken when he observed that the promise or representation though it was not in the form of a formal contract as required by that article would not militate against the applicability of the doctrine of promissory estoppel. But Kailasam, J., in *Jeet Ram* objected that so far as article 299(1) did not merely relate to form but being intended to safeguard government against unauthorised contracts was clearly mandatory, the plea of estoppel--promissory or otherwise--could not be permitted, as it would then mean the repeal of this very important constitutional provision.

In the later decisions of the Supreme Court, namely *Godfrey Phillips* and *Express Newspapers*, in which the plea of promissory estoppel availed against the government, no reference to this implied repeal of article 299(1) which these decisions involved is found. Similarly in *Manickam* v. *State of Madras*[105] a promise to assign the suit property to the plaintiffs was specifically enforced against the government on the basis of the ruling in *Anglo-Afghan Agencies*, without making any reference to article 299(1) whatsoever. Requirements of

102. See *R.K. Deka, supra* note 63.

103. Art. 299(1) reads: All contracts made...(by) the Union or... a State shall be expressed to be made by the President or the Governor as the case may be and shall be executed by the President or the Governor or by such person and in such manner as he may direct or authorise.

104. See *State of West Bengal* v. *B.K. Mondal*, A.I.R. 1962 S.C. 779; *New Marine Coal Co.* v. *Union of India*, A.I.R. 1964 S.C. 152; *State of Uttar Pradesh* v. *Murari*, A.I.R. 1971 S.C. 449.

105. (1978) II M.L.J. 475.

justice and fairplay no doubt in the case called for a decision in favour of the plaintiffs and *Sathiadev, J.*, saw through the legal facade of technicalities *where justice lay in the matter*. The questions involved being so important a narration of the salient facts of this Madras decision becomes necessary.

The plaintiffs were the owners of certain land bearing T.S.(No. 577 hn Thhrupur Municipality. In or about 1935 the plaintiffs' predecessors-in-title constructed a rice mill and a theatre in the abovesaid land. There was an alleged encroachment in the adjoining poromboke while so constructing the mill. They offered to purchase the encroached land and the government agreed to it, subject to the payment of the market value of the encroached land. They accordingly paid in 1961 the market value demanded (about Rs. 6,000). But after protracted proceedings the government failed to assign the land for reasons of its own. The plaintiffs thereupon filed the present suit for specific performance of the contract with the government to assign the land. The defendant government claimed the prerogative right to cancel or modify any orders by the Board of Revenue in the matter of assignment of government lands. The trial court did not grant a decree for specific performance but allowed the plaintiffs to recover the sum of Rs. 6,000 paid by them to the government. The lower appellate court confirmed the trial court's decision. On second appeal to the High Court, it was held that the plaintiffs were entitled to the specific performance of the contract as found in the Board of Revenue proceedings. The claim of the government was that an assignment was in the discretion of the State and there could be no binding obligation of any kind upon the State to fulfil its promise to assign. This argument, said Sathiadev, J., was one of extremism. Citing *Anglo-Afghan Agencies*, the learned judge observed:

> Each case has to be appreciated on the facts and circumstances which had resulted in the State extending its assurances and promises....[I]n an assignment *simpliciter*, the citizen has to necessarily look to the benevolence of the State. But when a stage has come, wherein the Board of Revenue had taken a firm decision and had stipulated certain conditions to be complied with by the assignee and when the citizen had parted with his lands and also money, it cannot be said that still the Government has such an omnipotent power so as to enable it to resile from its promises and assurance.[105a]

It was with a *"sense of remorse"* that the learned judge had to record that it took 22 years for the state to decide whether the decision taken in 1946 to assign the lands should be complied with or resiled from. Besides paying the sum of Rs. 6,000 as aforesaid, the plaintiffs had, believing the representations of the State, handed over their patta lands to an extent of 242 sq. ft. to the State even in the year 1952. The patta lands have not been returned to the

105a. *Id.* at 481.

plaintiffs nor any compensation paid. It was beyond one's comprehension how such an obstinate attitude could be taken by the State. It would appear that the learned judge adjourned the matter to find out whether the stand of the government could change and be anything different from what had transpired. But the Additional Government Pleader returned to the court only to claim its extraordinary powers to cancel any assignment and no offer came from the government to set right the injustice which had been faced by the plaintiffs' family for the past thirty years. "Citizens of the State are fortunate that they are never informed annually or otherwise of the number of files pending with government or in its subordinate offices and of the duration taken for deciding petitions filed by citizens. To know that it has taken twenty two years to draw the final curtain in this matter may make such of those who have received final orders earlier happy and those who have waited longer periods than this, quite jealous of the plaintiffs in this matter."

The court concluded that the State was "estopped from pleading that no enforceable contract had come into existence," and hence the appellants (plaintiffs) were entitled to get the relief of specific performance of the contract, on the basis of the decision in *Anglo-Afghan Agencies*.

In *Manickam* no mention of article 299(1) or its non-compliance is found. On the contrary the binding obligation upon the government was often in the judgment referred to as a *contract*; it was enforced more on the ground of promissory estoppel than contract though no express reference to such estoppel is made in the judgment. And it is seen to be used here to found a cause of action, in fact as a basis for an active, not merely passive, equity, for the granting of specific performance. So this decision serves as a standing illustration of promissory estoppel serving as means of escape from the rigours of article 299(1), whatever may be its implications for the future.

Against such an essentially just approach without paying heed to the technicalities, certain cases denying relief on the ground of non-compliance with article 299(1) stand as depressing examples of approval of unjust pleas of public bodies. In *Manoharlal* v. *Union of India*[106] a strict view was taken and relief denied to a party who had not taken care to have his dealing with the government recorded as per article 299(1) of the Constitution. A firm applied for a lease of a piece of land situate within the Saharsa railway station compound belonging to the North Eastern Railway for constructing and maintaining thereon a petrol pump and high speed diesel filling station. The firm was granted the lease upon its fulfilling the requirements of the railway officers. After going through several stages of dealing the District Engineer of the Railway received on its behalf an advance rent of Rs. 1,556 for one year and &a+2Hfour months and the agreement was executed by the firm. The land was handed over to the fihrm a'd it was asked to go ahead with the construction. The firm spent moneys on filling the ditches in the land, raising boundary pillars, and constructing two culverts and two gates. It however

106. A.I.R. 1974 Pat. 56.

subsequently received a letter from the Chief Engineer of the Railway disallowing the installation of the petrol pump to which the firm replied stating its position. Eventually the Chief Engineer cancelled the lease. The firm sued the Railway for recovering the moneys spent in pursuance of the contract of lease. The Union of India--owner of the Railway--took the plea that the agreement had not been executed in accordance with the requirements of article 299(1)--that it had not been executed by the General Manager who was the competent authority to execute the agreement on behalf of the Union of India. The trial court allowed recovery of the advance rent paid by the plaintiffs but dismissed the claim for the expenses incurred. On appeal by the plaintiff the Patna High Court dismissed it. The reason, so far as it may be relevant in this context, for the dismissal was that the contract of lease not having been made by the General Manager of the Railway who alone was the competent authority did not exist in law, article 299(1) of the Constitution being mandatory in its requirement as to proper execution of contracts made by the Union or state government.

If in the above case the plaintiffs had put forward their claim as one based on promissory estoppel instead of the contract, these two categories being treated by our courts as somehow different, the non-compliance with article 299(1) might not have proved an obstacle to them. To all intents and purposes the railway authority represented--promised-that they would give the land for use by the plaintiffs as a petrol pump station if they paid the rent. The plaintiffs had acted on the representation and suffered sufficient detriment by alteration of their position and incurring those expenses. How can they be denied the relief sought, if as per Bhagwati, J., in *M.P. Sugar Mills*, article 299(1) can have no application to a case based on promissory estoppel? In every case[107] this sort of argument may be open to an aggrieved party whose claim against the State fails on account of non-compliance with article 299(1). But surprisingly in none of these cases[108] where the plea based on the non-fulfilment of formalities prescribed by that article of the Constitution, the ingenuity of the counsel nor the wisdom of the court seems to have explored this manner of escape through promissory estoppel. The chances are, however, that in all probability promissory estoppel will lose in the battle as it will have to stand the ground against constitutional provision, the assurance of Bhagwati, J., notwithstanding.

In our country, therefore, growth of this new doctrine, let alone its survival, is highly problematic with this constitutional hurdle. From this difficulty follows the impossible task of justifying those cases which have denied relief to the aggrieved party on ground of non-compliance with the constitutional requirement and which are not less worthy judicially speaking of being granted relief than those in which relief was granted to the applicant

107. A.G. Noorani (ed.) *Public Law in India* 164 (1982).

108. *Mohd. Murad* v. *U.P. Govt.*, A.I.R. 1956 All. 75; *Seth Bhikraj Jaipuria* v. *Union of India*, (1962) 2 S.C.R. 880; *Union of India* v. *Chotumal*, A.I.R. 1976 M.P. 199.

on ground of promissory estoppel. Take for example the contrast between the petitioners in *M.P. Sugar Mills* and the plaintiffs in *Seth Bikhraj Jaipuria* v. *Union of India*.[109] The reliance on the promise of the State and the consequent loss to them cannot be treated as different in essentials. Yet in the one they succeeded because there was promissory estoppel and no contract and therefore no need either to comply with article 299(1) and in the other they failed for their claim took the label of contract and article 299(1) proved insuperable.

(D) Existence of contract

However in a recent case, namely *C.V. Enterprises* v. *Braithwaite Co.*,[110] the Calcutta High Court has ruled that promissory estoppel does not apply to a concluded contract. Respondent company in this case was a government company and it invited tenders for the purchase of REP licences that would be issued to the respondent *inter alia* against exports of structurals to Bahrain and exports of wagons to Vietnam under export contracts made in 1966-67 and 1978-79. In response to this invitation the appellant submitted his offer and it was accepted and the contract concluded in February 1983. Under this contract the appellant was to liaison with the licensing authorities and customs department for getting the licences issued and he was to be paid half percent of the value of the licences for such services. On getting the licences the respondent was to transfer the licences to the appellant and receive their value.

The appellant after he started the liaison work for securing the licences discovered that the value of the licences was much higher than what was mentioned in the tender notice. The real value of the licences was brought to the notice of the respondent by the appellant as revised applications for the issuance of the REP licences had to be made before the Joint Chief Controller of Imports and Exports. Upon getting the REP licences in May 1983, the respondent resiled from the contract in June 1983 on the ground that the contract was void for a common mistake[111] as to the value of licences and it refused to transfer them to the appellant. The appellant therefore filed a writ petition praying for a writ in the nature of *mandamus* commanding the respondent to deliver the appellant the REP licences as per contract. A single judge dismissed the writ petition. And the present appeal was filed by the appellant against such dismissal. The High Court of Calcutta in this appeal held that as the appellant was not at fault he could claim the transfer of the licences on payment of the same percentages of the correct value as were offered by the appellant on the assumed but erroneous C.I.F. values of the REP licences. It accordingly directed that if the appellant paid within a

109. (1962) 2 S.C.R. 880.

110. A.I.R. 1985 Cal. 306.

111. See Ramaseshan, "Scope of Common Mistake in the Law of Contract", XIX *The Indian Year Book of International Affairs* 423 (1986).

stated period to the respondent the same percentages aforesaid the respondent should transfer the REP licences to the appellant and on default the appeal would stand dismissed. While making the above order as equitable arrangement the court dealt with the plea of promissory estoppel by the appellant. According to the appellant the respondent was promissorily estopped from rescinding the contract as the appellant had acted upon and performed its part of the contract by liaison works and by payment of the value of the licences and got the two valuable licences issued to the respondent. The court rejected this plea on two counts: *first*, promissory estoppel does not apply to a concluded contract as in the present case. The court cited in support *M.P.Sugar Mills* and *Lotus Hotel*; *second* even if promissory estoppel did apply, a court of equity would not direct the promisee to act in accordance with the promise, where as here the promissor made the promise under a *bona fide* mistake as to an essential or vital fact and to enforce the promise in such circumstances would be inequitable.

Regarding the first reason for rejecting the plea of promissory estoppel, it would appear that the court has proceeded on an obvious and preconceived notion that promissory estoppel and contract are essentially different and one cannot apparently come in where the other has already occupied the reigning position. But looking back at its origin, promissory estoppel was invented, as it were, to alleviate the hardships arising between parties who had already entered into contractual relations. To recall the words of Lord Cairns in *Hughes*,[112] it becomes applicable to "parties who have entered into definite and distinct terms involving certain legal results..." In fact the early proponents of this principle considered this requirement as to a pre-existing contractual relation as a limiting circumstance in the absence of which it will cease to operate. So where was the justification for the court to say that the principle of promissory estoppel will have no application to a concluded contract? Of course there seems to be a popular fallacy if we may so call it that promissory estoppel will dash forth where meek contract will fear to tread.

(E) Assessment

The foregoing study reveals once again the prevalent mood of *ad hocism* of the present day in this field of promissory estoppel too, as elsewhere. As Atiyah pertinently observes, "the difficulties facing lawyers in this world of moral pluralism help to explain one of the most striking phenomena of modern law, namely the increasing disinclination to lay down general principles, the growth of discretion and of the practice of disposing of legal cases by findings of fact rather than decisions of law."[113] Facts, not principle seem all important. Notions of justice and fairplay based on the facts are the

112. *Hughes* v. *Metroppolitan Railway Co., supra* note 14.

113. P.S.Atiyah, *Rise and Fall of the Freeaom of Contract* 670 (1979).

deciding criteria, not abstract inflexible principle. All the same some lip service is rendered to a high sounding doctrine or principle the parameters of which are left unspecified. The conflict of *dicta* of the highest court of our land, as reflected in *M.P.Sugar Mills*, *Jeet Ram* and *Godfrey Philips* unmistakably point to the lack of a coherent, logically valid principle. While this seems to be the state of affairs, the tall claim sometimes made like the one by the Delhi High Court in *Jasjeet Films* that "the questions such as whether a prior legal relationship is necessary between the parties, or whether existence of the consideration is necessary, as a prior condition, or whether the principle can serve as a cause of action, or whether the doctrine can be invoked against the State or not, [in the face of the requirements of article 299(1)] were resolved by the Indian Courts at the beginning of the 20th century itself [while] these questions are still debated in England and the U.S.A.[114] is an unabashed judicial flaunting of our native achievement worthy perhaps of a Falstaff. It is remarkable that Wad, J., in the case last cited went on to add, "High Trees [does] not appear to be so high at all on the background of mature and independent development of the doctrine in India. To look to High Trees for solution is like importing H.M.T. Watch from England with English marking or to go to England to see Indian peacock in London Zoo. This attitude is injurious to the development of Indian jurisprudence."[114a]

Abandoning this somewhat uncritical self-elation and taking a realistic view of the scene, promissory estoppel has to contend in our soil unlike in England and U.S.A. not only against statutory but constitutional provisions. So long as the Indian Contract Act, 1872 contains the definition in section 2(1) that an accepted proposal is a promise, a promise or set of promises forming consideration for each other is an agreement and an agreement enforceable by law is a contract and declared that an agreement (that is a promise) without consideration is void (section 25), our courts cannot go behind these provisions. As it appears while applying the promissory estoppel principle they have not stated how a promise in promissory estoppel is different from a promise as defined by the Contract Act and how the statutory requirement of consideration can ever be dispensed with in such cases. Nor has the alteration of position by the promisee in reliance upon the promise been treated as consideration at all in this context. The Supreme Court has in fact in a recent decision[115] opined that it was only alteration of position by a promisee, not necessarily damage or detriment suffered by him, that is sufficient for supporting a plea of promissory estoppel. This sort of evading a statutory condition has little justification.

Further the formalities required to by article 299(1) of the Constitution for the making of contracts by the Union or state governments remain a

114. *Supra* note 43 at 87.

114a. *Id.* at 88.

115. *Delhi Cloth and General Mills Ltd.* v. *Union of India*, A.I.R. 1987 S.C. 2414.

serious obstacle to the application of promissory estoppel against the state. And in none of the cases in which this principle was applied against the state or other public authority no more than a mere *ipse dixit* worthy of an arbitrary executive power) of the judge that promissory estoppel does not militate against article 299(1) or other corresponding provision is found.

These remain the unexplored problems of the doctrine of promissory estoppel in India. The positive aspect however is that it has proved to be a ready instrument at the hands of the judiciary to curb, if not to prevent the arbitrary action of a public authority causing loss to the individual who acts in reliance upon the promises of such authority. Nevertheless there is great need for a secure theoretical foundation on which the edifice of a system with just exceptions can be built.