(2007) 04 MAD CK 0111

Madras High Court

Case No: Writ Petition No''s. 23422 and 23734 of 2006 and M.P. No''s. 1 of 2006

Grasim Industries Limited (Cement Division South)		APPELLANT
	Vs	
Tamil Nadu Electricity Board and The India Cements Limited Associated Cement Companies Limited Vs The Chief Engineer/Civil Designs-TNEP and Others		RESPONDENT

Date of Decision: April 19, 2007

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 5
- Constitution of India, 1950 - Article 14, 226
- Electricity (Supply) Act, 1948 - Section 43, 43A, 43A(2)
- Evidence Act, 1872 - Section 115
- Finance Act - Section 154

Citation: (2007) 3 MLJ 684

Hon'ble Judges: K. Raviraja Pandian, J

Bench: Single Bench

Advocate: R. Krishnamurthy for S. Ramasubramaniam, in W.P. No. 23422 of 2006 and T.R. Andhyarujina and V.A. Rana, for Sampathkumar Associates in W.P. Nos. 23734 and 24322 of 2006, for the Appellant; P.S. Raman, A.A.G. for N. Muthusami, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Raviraja Pandian, J.

The petitioner in the first two writ petitions in W.P. Nos. 23422 and 23734 of 2006 are cement companies and the petitioner in the third writ petition in W.P. No. 24322

of 2006 is a Company engaged in installation and collection of fly ash collection system. In all the three writ petitions, the orders of the first respondent reducing the percentage of collection of fly ash allotted to the respective petitioners by the impugned orders are assailed. Except minor variations in respect of the period for which and the percentage of fly ash they were allowed to collect originally and the reduction in percentage by reason of the impugned orders, in all other respects, the facts are one and the same. As the grounds of attack, the arguments advanced to assail the orders and the defence put forth to sustain the impugned orders are one and the same, all the writ petitions are taken up together for disposal. For the sake of narration of facts, the first of the writ petition in W.P. No. 23422 of 2006 is taken up as a typical case.

2. The facts of the case as culled out from the pleadings are as follows:

The petitioner in the course of their business entered into a memorandum of understanding (hereinafter called "MOU" for brevity) with the respondent Electricity Board on 15.5.2002 for collection of fly ash generated by Mettur Thermal Power Station at Mettur dam. The material terms and conditions of the Memorandum of Understanding are to the following effect:

1. The petitioner has to install collection system for collection of fly ash at its cost in unit No. 1 allotted to it in the Mettur Thermal Power Station; that the system would become the property of the respondent and the petitioner would have no right over all electrical, mechanical and civil structures and equipments so installed.

2. The petitioner has to pay service charges determined by the respondent - Tamil Nadu Electricity Board from time to time for collection of fly ash (Rs.60/- per tonne was the rate at the time of MOU)

3. The petitioner should pay security deposit in a sum of Rs. 5 lakhs to the respondent Board. In addition to that, they should deposit in advance one month''s proceeds of fly ash that would be issued to it.

4. The memorandum of understanding would be valid for a period of nine years.

5. The petitioners should collect 100 percent of the fly ash generated from the allotted units, out of which 20 percent of the fly ash should be spared to the respondent Board for allotting the same to other Industries.

6. The petitioner Company has to pay 80 percent of the charge towards the water and current consumption since it was allowed only 80% of collection.

7. The petitioner should arrange for collection and transfer of fly ash in closed tankers.

8. Dry fly ash choke collected in the ESP hoppers and chutes and released during choke releasing in the lines have to be cleared immediately.

9. In the event of overhauling/shutdown of any of the units, the allottee companies should mutually accept to spare fly ash to the Company to which the unit allotted is under overhauling/shutdown in consultation with the respondent.

10. The performance of the Company in collection of 100 percent of fly ash would be reviewed for a period of one year and the penalty deemed fit would be imposed for short collection of fly ash due to the fault of the companies after one year of the review period.

11. In case the company is not able to lift fly ash, the company should give 21 days advance notice to enable Chief Engineer/MTPs to allot it to others. Two spells of 15 days each in a year would be permitted on this account.

3. The petitioner, pursuant to the memorandum of understanding, invested huge sum of more than Rs. 4 crores and put up necessary collection system in the allotted units to collect fly ash. From the date of commission of the system, they have been strictly adhering to the terms of the memorandum of understanding and collecting fly ash. The proportionate electricity, water and other charges payable for collection of 80 percent of the fly ash was also being paid promptly. The collection of fly ash from time to time has been recorded and communicated by the respondent to the petitioner on monthly basis from the date of commencement till date. The petitioner has also been supplying a portion of the fly ash collected by it to some other cement companies owned by the Government of Tamil Nadu.

4. While that being so, the petitioner was issued with the impugned order of the respondent dated 14.7.2006 informing the petitioner that the quantity of the fly ash to be collected by the petitioner has been revised from 80 percent to 40 percent. The petitioner was further directed to contact a Committee under the Chairmanship of the Chief Engineer, Mettur Thermal Power Station, Mettur Dam to finalise the operation/maintenance cost to be reimbursed to the petitioner.

5. The said order is assailed by the petitioner on the ground that the impugned order is passed in violation of the terms and conditions of the MOU, which permits the petitioner to collect 80 percent of fly ash for a period of nine years. There is no clause in the MOU for reducing the quantum of collection of fly ash. The impugned order is a non-speaking order and passed in violation of the principles of natural justice. No prior notice was given to the petitioners. The reason stated in the order is that the off-take of fly ash by the petitioner is less than the target is not correct and not supported by materials. The impugned order is arbitrary, unilateral and malafide, in the sense, it was passed only to accommodate the third party - impleaded respondent in this writ petition, which is manifest from the order dated 17.7.2006 allotting 25 percent of the fly ash from each unit in favour of the impleaded respondent. The order is hit by the principle of promissory estoppal and in violation of the doctrine of legitimate expectation.

6. The respondent refuted the contentions by contending inter alia that as the MOU between the petitioner and the respondent is not a statutory one, the breach of which is not amenable to writ jurisdiction under Article 226 of the Constitution of India. The petitioner''s collection of dry fly ash has always been far less than that of contemplated under the MOU. The MOU was entered into to dispose of the fly ash to protect from the environmental hazard caused in making the dry fly ash into a form of slurry and depositing it in an ash dyke. Owning to non-collection of required amount of fly ash as contemplated in the MOU by the petitioner, the respondent Board was constrained to make the fly ash into slurry which has resulted in considerable inconvenience and expenditure to the respondent apart from environmental hazard. For the period from October 2003 to March 2004 the petitioner''s average collection was 45 percent and the respondent was constrained to find other takers for collecting the balance 35 percent of the fly ash required to be collected by the petitioner. The petitioner has collected as low as 19 percent of the fly ash in some months. However, the highest average collection of the petitioner was only 53 percent as against the 80 percent provided under the MOU. The petitioner sold a portion of collected fly ash to other companies, which proves that the petitioner''s need is for less than the allotted 80 percent. The petitioner having consistently removed less amount of fly ash than contemplated for last few years, the respondent was at liberty to make alternative arrangement for disbursement of fly ash to the needy parties. The petitioner would be reimbursed the expenses of the operation and maintenance cost in proportion to the quantity reduced. The order passed by the respondent on 17.7.2006 in favour of the impleaded respondent for collection of 25 percent of the dry fly ash cannot be considered as malafide on the part of the respondent, as the same was issued by reason of the short collection by the petitioner and honour the bona fide requirement of other parties similarly placed like that of the petitioner.

7. The learned Senior Counsel appearing for the petitioner argued that the MOU has to be regarded as a statutory one as it was entered into pursuant to a notification issued by the Ministry of Environment and Forests, Central Government. He relied upon India Thermal Power Ltd. Vs. State of M.P. and Others, and Verigamto Naveen Vs. Government of Andhra Pradesh and Others, in support of the above contention.

In support of his argument that as the petitioner has invested huge amount by way of installation of collection machineries and construction in support thereof in view of the promise held out by the respondent for fixed percentage of fly ash and thus altered his position to its detriment, the impugned order is hit by the principle of promissory estoppal and in violation of the doctrine of legitimate expectation, he relied on M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, .

He further argued that the impugned order passed by the respondent by arbitrary exercise of the powers and in violation of principles of natural justice, for which he

relied on Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, .

He further contends that the impugned is a non-speaking order and that has to be tested on the reason stated therein and cannot be improved by means of counter affidavit by relying on a decision of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and Commissioner of Police, Bombay Vs. Gordhandas Bhanji, . He further contends that the impugned order is malafide, in the sense, even before the order dated 14.7.2006 reached the petitioner on 17.7.2006, an order has been passed allotting 25 percent of the fly ash in favour of the impleaded respondent.

8. Per contra, the Additional Advocate General in order to sustain the case of the respondents contends that the writ petition is not maintainable as the memorandum of understanding is not a statutory contract based on any statutory provisions and the remedy of the petitioner is not by way of writ petition. The principles of promissory estoppal and legitimate expectation do not apply to the facts of the present case. The contention of malafide raised by the petitioner is raised without any factual basis. The grant order of 25 percent to a similarly situated cement company cannot be regarded as malafide having regard to the peculiar facts an circumstances of the present case. He relied on Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, at 298. He further contends that when there is a dispute relating to terms of contract, proper course would be reference to arbitration or institution of civil suit and not a writ petition by relying on State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., at page No. 29. It is further contended that in respect of issues involving civil rights of parties flowing from a contract, Writ Petition under Article 226 is not maintainable by relying on State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, .

9. From the above, the points to be resolved in these writ petitions are as follows:

(1) Whether in the facts and circumstances of the case the petitioner can maintain a writ petition under Article 226 of the Constitution of India?

(2) Whether the disputed questions could be resolved under Article 226 of Constitution of India?

(3) Whether the impugned order is hit by the principle of promissory estoppal and legitimate expectation

(4) Whether the impugned order could be attributed as a one passed malafide and with ulterior motive and hit by the principles of natural justice.

10. Points No. 1 to 4: As all the points are interrelated, they are considered together. The contention that the MOU entered into between the petitioner and the respondent is a statutory one as contended by the learned Senior Counsel for the petitioner is based upon the notification issued by the Ministry of Environment and Forest Department dated 14.9.1999. Under the notification, the Ministry of Environment and forest issued directions for use of fly ash, bottom ash or pond ash in the manufacture of brick and other construction activities, utilization of ash by Thermal Power Plants. One of the directions is that every coal or lignite based power plant Commissioned subject to environmental clearance conditions stipulating the submission of an action plan for utilization of fly ash shall within a period of nine years from the publication of the notification phase out the dumping and disposal of fly ash on land in accordance with the plan. Such an action plan shall provide for 30 percent of the fly ash utilization within three years from the publication of the notification with further increase in utilization by at least ten percent points every year progressively for the next six years to enable utilisation of the entire fly ash generated in the power plan atleast by the end of the 9th year. It further provides that every coal or lignite based thermal power plant not covered by the above said direction shall within a period of fifteen years from the date of publication of the notification, phase out the utilisation of fly ash in accordance with an action plan to be drawn up by the power plants. Such action plan shall provide for twenty percent of fly ash utilisation within three years from the date of publication of the notification, with further increase in utilsiation every year progressively for the next twelve years to enable the utilisation of the entire fly ash generated in the power plant.

11. It is pertinent to state here that the above said notification has been issued to protect the Environment, conserve top soil and prevent the dumping and disposal of fly ash discharged from coal or lignite based Thermal Power Plants on land with the further reasoning to restrict the excavation of top soil for manufacture of brick and promoting utilisation of fly ash in the manufacture of building materials and in construction activities, having regard to the environmental hazard caused by the fly ash produced by thermal power plant.

12. In the above stated circumstances of the case, if we consider the MOU entered into by the petitioner with the respondent Electricity Board which determines the terms and conditions under which the petitioner should clear the fly ash with the penalty clause, it can only be regarded as independent MOU of any statute and as such it cannot be elevated to a position either of a statute or an enabling provision in a statute, which enable the respondent to enter into an agreement. Under the notification issued by the Environment and Forest Department, the Central Government has only directed the Thermal Power Stations to dispose of the fly ash, but never directed any of the modes by which it has to be disposed of. The respondent Board is not obliged to allot the fly ash to a particular person even after allotment it is not obliged to maintain the percentage in the same standard. The

percentage is depending upon the generation. Hence, I am of the view that though the MOU has been entered into to clear the environmental hazard, that cannot be regarded as a statutory one.

13. The Supreme Court in the case of India Thermal Power Ltd. Vs. State of M.P. and Others, , while considering the power purchase agreement entered into by the Madhya Pradesh Electricity Board with the independent power producers, having regard to Sections 43 and 43A of the Electricity Supply Act, has held thus:

...The provisions of Sections 43 and 43A of the Electricity Supply Act indicate that the agreement can be on such terms as may be agreed by the parties except that the tariff is to be determined in accordance with the provision contained in Section 43A(2) and notifications issued thereunder. Merely because a contract is entered into in exercise of an enabling power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43A(2). Opening and maintaining of an escrow account or an escrow agreement are not the statutory requirements and, therefore, merely because PPAs contemplate maintaining escrow accounts that obligation cannot be regarded as statutory.

14. In the case of Verigamto Naveen Vs. Government of Andhra Pradesh and Others, , the Government of Andhra Pradesh invoking power under the Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1959 reserved two villages for exclusive exploitation of minerals by public sector unit and by two Government Orders granted different areas in favour of the Andhra Pradesh Mineral Development Corporation. Thereafter, the Government of Andhra Pradesh accorded permission to the Corporation for grant of sub-lease of the areas subject to certain terms and conditions. However, the Government subsequently took a decision to put an end to all the existing sub-leases in order to enable the Corporation to carry on the mining operations directly and withdrew permission granted earlier to the Corporation to grant sub-leases. The validity of the notification withdrawing the permission granted earlier to sub-lease the mining lease in question was challenged. The grant of prospecting mining or direct mining and execution of contract pursuant thereto are governed by the statutory provisions of the MMRD Act, 1957 and the Rules made thereunder i.e., Mineral Concession Rules, 1956. While considering the issue with reference to the statutory provision contained in the MMRD Act, 1957 and Mineral Concession Rules, 1956, which

governed the conditions of lease for quarrying, the Supreme Court held that in cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, the Court could intercede even after the contract was entered into between the parties and the Government and its agencies.

15. The other decision of Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., was a case in which the Gujarat State Financial Corporation entered into an agreement to advance the loan to the respondent therein, in performance of a statutory duty cast on the Corporation by the Statute under which it was created. On its promise the respondent incurred expenses, suffered liability to set up a Hotel. If the grant of loan was not promised, the respondent would not have undertaken such a huge hotel project. In the back drop of those factual situation, the Supreme Court has held that the writ petition under Article 226 could be maintained for specific performance of the contract and also on the principle of promissory estoppel. Here again, the promise is a statutory one under the statute governing the State Financial Corporation Act. As I have already held on the facts of this case that the MOU cannot be regarded as statutory, the above referred two cases are not applicable to the present case.

16. In the case of Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , wherein a contractual and commercial activity of the State Statutory Body Electricity Board was called in question. The Supreme Court held that a contract would not become statutory simply because it is for construction of a public utility (generating system) and it has been awarded by a statutory body. It was further held that the interpretation and implementation of clause in the contract cannot be subject matter of writ petition. Merely because the Contract Act is applicable to the State Contract and that the Statute may expressly or impliedly empower the statutory body to enter into contract in order to enable it to discharge its function it does not follow that every act of the statutory body need necessarily involve an exercise of statutory power. Statutory bodies may enter into contract, which may not raise any issue of public law and hence those matters ought to be adjudicated by a Civil Court or arbitration if provided for in the contract. This case was also pertaining to Electricity Board of Kerala State. This decision is directly on the point and stares at the petitioner''s contention to the contra.

17. The decisions of Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, and Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, have been taken in aid by the petitioner to contend that the State action must be fair and reasonable even though it is contractual in nature. Any breach of contract, which is not fair and reasonable or founded on frivolous reasoning, the judicial review is permissible. In all the above cases, the Court has concentrated to the public law element involved in the contract, has held that judicial review is

available if the aggrieved party approaches the Court. It is useful to refer paragraph No. 26 of the judgment in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , which would answer the issue in tantum.

26. A useful treatment of the subject is to be found in an article "Judicial Review and Contractual Powers of Public Authorities". The conclusion drawn in the article on the basis of recent English decisions is that "public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest". The trend now is towards judicial review of contractual powers and the other activities of the government. Reference is made also to the recent decision of the Court of Appeal in Jones v. Swansea City Council (1990) 1 WLR 54 : (1989) 3 All ER 162 where the court''s clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed ''solely in order t hat it may use them for the public good''. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.

18. Paragraph No. 27 of the very same judgment was very much pressed into service to contend that even in a contract entered into by a State or Public Body, judicial review is available to the Court. There cannot be any second opinion about it. However, the Court can refuse to exercise its jurisdiction under Article 226, if the Court is not satisfied that there involves no public interest in it. In that case, the Supreme Court held thus:

Every holder of the public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

19. In the above said judgment, the Law Officers appointed to represent the Government were en bloc sent out by a Government Order. In those circumstances of the case, when contended that the appointments are contractual in nature. The Supreme Court held such action could also tested under Article 226.

20. In respect of the promissory estoppel and legitimate expectation, it is contended by the learned Senior Counsel for the petitioner that the MOU entered into would amount to a promise and because of the promise the petitioner has altered its position by spending huge amount in Crores. In those circumstances of the case, the respondent cannot unilaterally alter the promise by reducing the quantity. For that purpose, he relied on M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, .

21. I am afraid to accept the contention of the petitioner for the following reason:

The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. The doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance of the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties. It has been settled by the Court of law that the doctrine of promissory estoppel is applicable against the Government also particularly where it is necessary to prevent fraud or manifest injustice. The doctrine, however, cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make.

22. The doctrine of promissory estoppel cannot be invoked in the abstract and the Courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must for ever be present to the mind of the Court, while considering the applicability of the doctrine. The doctrine must yield when the equity so demands if it can be shown having regard to the facts and circumstances of the case that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation.

23. In the case of Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another, , it has been held as follows:

8. Doctrine of ''promissory estoppel'' has been evolved by the courts, on the principles of equity, to avoid injustice.

9. ''Estoppel'' in Black''s Law Dictionary, is indicated to mean that a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly. Section 115 of the Indian Evidence Act is also more or less, couched in a language which conveys the same expression.

10. ''Promissory estoppel'' is defined as in Black''s Law Dictionary as: ''that which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise''.

11. These definitions in Black''s Law Dictionary which are based on decided cases, indicate that before the rule of ''promissory estoppel'' can be invoked, it has to be shown that there was a declaration or promise made which induced the party to whom the promise was made to alter its position to its disadvantage.

12. In this backdrop, let us travel a little distance into the past to understand the evolution of the doctrine of ''promissory estoppel''.

13. Dixon, J., an Australian jurist, in Grundt v. Great Boulder Pty. Gold Mines Ltd. (1938) 59 CLR 641 laid down as under:

It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it.

14. The principle, set out above, was reiterated by Lord Denning in Central London Property Trust Ltd. v. High Trees House Ltd. (1946) 1 KB 130 when he stated as under:

A promise intended to be binding, intended to be acted upon, and in fact acted upon is binding....

15. Lord Denning approved the decision of Dixon, J. (supra) in Central Newbury Car Auctions Ltd. v. Unity Finance Ltd. (1956) 3 All ER 905. Apart from propounding the above principle on the judicial side, Lord Denning wrote out an article, a classic in

legal literature, on ''Recent Developments in the Doctrine of Consideration'', Modern Law Review , Vol. 15, in which he expressed as under:

A man should keep his word. All the more so when the promise is not a bare promise but is made with the intention that the other party should act upon it. Just as a contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.

The difference may lie in the necessity of showing "detriment". Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it.

24. A line of judicial opinion has been rendered by the apex Court for nearly half a century on the rule of promissory estoppel, right from the decision in the case of Thiru John v. Subramanian AIR 1957 SC 1724; Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, ; M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, ; State of Rajasthan and Another Vs. M/s Mahaveer Oil Industries and Others, , and MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, .

25. In all these cases, based on industrial policy concessional notification granting concession from payment sales tax or electricity tariff concession or incentive notification, granting waiver of sales tax, deferral of collection of sales tax, are issued and when such a benefit granted was withdrawn by the State, the Court took the view that it was not open or permissible for the State to deprive the petitioner from the benefit promised by such notifications, when the State had enjoyed the benefit from the investment made by the petitioner in the form of industrial development in the State and the contribution to the labour and employment and benefit to the State exchequer in terms of the excise duty, etc.

26. In the present case, no such promise had been held out by the respondent for granting the benefit for the purpose of putting up some industry or some developmental activities. All that the respondent had done was that it permitted the petitioner to clear the fly ash generated by the thermal power plant free of cost. In order to prevent pollution in such clearing, the petitioners were directed to provide clearing system of their own, with the condition that after the period of time, the clearing system would become the property of the respondent. The clearing system provided by the petitioners cannot be regarded as an advantage in favour of the respondent. It is just like the lorry hire charges incurred by the petitioner for clearing. As already stated, the fly ash had been supplied to the petitioner free of cost. The petitioners has not contributed anything for industrial development for the

State or contributed to the labour and employment or benefit of the State exchequer by their act of installation of clearing system. Further, the permission granted in favour of the petitioners is not made by general offer or a tender floated by the respondent. If justice and fair play are to be put against the respondent in their present action, the same would stare at the petitioners as to how the petitioners alone were selected for clearance of the fly ash when there are number of persons equally placed as that of the petitioners are standing in queue for clearing the fly ash.

27. The Supreme Court in the case of Ester Industries Ltd. Vs. U.P. State Electricity Board and Others, , held that the principle of promissory estoppel does not apply to cases where there is a written contract between the parties. After referring to Kasinka Trading and another, etc. etc. Vs. Union of India and another, and Shrijee Sales Corporation and Another Vs. Union of India (UOI), , the Supreme Court held in Pawan Alloys case referred above that even after holding out a promise, the State can withdraw from it even prior to the period specified on the ground of overriding public interest or by giving a reasonable opportunity to the promissee of resuming his earlier position after restoration or status quo ante is possible. The Supreme Court in the case of R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others, upheld the retrospective withdrawal of the exemption notification issued u/s 5 of the Central Excise Act, 1944 on the ground that the exemption notification did not effectuate the intent of the Notification. If the grant of exemption had operated as it was intended to, there would have been no necessity to enact Section 154 of the Finance Act for withdrawal of the exemption granted.

28. In the facts of the present case, the one and only public interest is prevention of environment hazard, which is likely to be caused due to the short collection by the petitioner. It is the specific case of the respondent by giving data that consistently, there is short collection of fly ash by the petitioner, which has been intimated to them periodically and the respondent has made several arrangements to clear the uncleared fly ash by themselves. Further, the respondent has also offered reimbursement of the operational maintenance cost, which the petitioner loses by virtue of reduction of the percentage of collection under the impugned order. In addition to that, materials were made available that the petitioner is making profit out of the collection of fly ash by selling to others in higher rate. Incidentally it must also be noticed that the respondent is not collecting any amount from any of the petitioners for parting with the dry fly ash. The service charges are explained to be collected for the expenses incurred by the respondents'' personnel. Condition No. 10 of the MOU extracted in paragraph No. 2 of this judgment provides for imposition of penalty for short collection of fly ash. The respondent by their letters dated 13.12.2005, 9.1.2004, 6.6.2005, 23.6.2005 and 31.12.2005 informed about the short collection and ultimately passed the order impugned. When the petitioner agreed and signed the MOU with its eyes wide open agreeing for the imposition of penalty cannot now wriggle out and say that there is no provision in the MOU to

reduce the percentage of fly ash.

29. When it is the case of the respondents that the petitioner is not able to clear the allotted percentage of dry fly ash and they have also not placed any material to prove that the quantity allotted to them is required without any reduction for their use and the reduction would affect their business, they cannot plead for legitimate expectation. It is evident from the MOU that the respondent has not assured with any fixed quantity either month-wise or year-wise. The quantity available for collection may vary from month to month. If the quantity of dry ash generated by the units is reduced by 25 percent or 50 percent, for any reason, can the petitioner compel the respondent to raise the generation of the fly ash? or can the petitioner require the respondent to make available a fixed quantity for every month?. The only answer is "NO". So, the plea of legitimate expectation falls to ground. Further, in the case of Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , the Supreme Court has held : "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant''s perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny."
This has been followed by the apex Court in the case of State of West Bengal and Ors. v. Niranjan Singha (2001) 2 SCC 326, wherein it has been held that the doctrine of legitimate expectation is only an aspect of Article 14 of the Constitution in dealing with the citizens in a non arbitrary manner and thus, by itself, does not give rise to an enforceable right but in testing the action taken by the government authority whether arbitrary or otherwise, it would be relevant.

30. Having regard to the stand of the parties to the effect that the petitioner contends that they have cleared allotted quantity every month and it is the respondent, who diverted their quantity to third parties by giving statistics.

31. On the other hand, the respondent Board contends that none of the petitioners has cleared the allotted quantity in any one of the years and it was the respondent, who made the arrangement to clear the fly ash by contacting other parties, who required the fly ash and dispatching the same through the vehicles produced by them and also projecting the case that if the dry fly ash is not cleared, the respondent has to convert it as a slurry by spending huge amount, which factum has been denied by the petitioner by giving certain statistics. Thus, there exist a

strong disputed question of fact, which require more evidence than affidavit and counter affidavit.

32. In order to prove that the percentage of collection is poor, it has been indicated by various letters dated 13.12.2005, 19.1.2004, 6.6.2005 and 23.6.2005, which have been annexed at page Nos. 35, 37, 39 and 41 respectively of typed set of papers filed by the respondent Board. Thus, in each and every occasion, for the poor take-off, the petitioner has been informed about it and the proposed action to be taken is also duly informed. Hence, the impugned order cannot be regarded as one passed either by not issuing any notice or violating the principles of natural justice. In order to prove the poor off-take of the petitioner, the respondent Board has produced a tabular statement unit-wise for the month of November, 2006, which has been annexed at page No. 7 of the typed set of papers filed along with the additional counter affidavit, from which it is manifestly clear that the off-take of the petitioner is not even 35 percent. However, the petitioner has relied on statements at page Nos. 14 and 32 of the typed set of papers filed by them in the additional typed set of papers to prove that their off-take from April 1995 onwards was above 53 percent. Further, the letters of the petitioner at page No. 49 of the typed set and at page No. 15 annexed to the additional counter affidavit filed by the respondent shows the increasing of sale price for fly ash by the petitioner to the third parties, which prima facie made out a case that the petitioner is not requiring the dry fly ash for their cement manufacturing activities and they are selling to third parties for profit. Certain other letters by the petitioner in W.P. No. 23734 of 2006, requesting the petitioner to make available for allocation of morel quantity. Thus, these are disputed questions of fact, which cannot be resolved by means of an affidavit and counter affidavit and by filing statements on either side. Useful reference can be had to the judgment of the Supreme Court in State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., and Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others, .

33. So far as the petitioner in the third writ petition is concerned, they are selling to third parties and there is no material produced by them to show that they are using for their own use, except saying that they have invested money for installation of equipments and further the handing over of the unit has not been done by the respondent in a proper manner, which is also a disputed question of fact, and cannot be decided by means of an affidavit and counter affidavit.

34. The last of the contention raised by the petitioner is that the respondent has improved the reason stated in the impugned order by filing counter affidavit and more than the reason stated in the impugned order which is not legally permissible by relying on the often quoted judgment of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . The reason stated in the impugned order is "poor take-off" of fly ash than the quantity allotted to them. No other reason has been supplemented than the one above stated in the counter

affidavit. What was done in the counter affidavit is that certain details were given to amplify the reason given in the impugned order. However, the reason is one and the same that the petitioner has not cleared the quantity allotted to them. Hence, that contention is also raised for the sake of rejection alone.

35. Another subsidiary contention that the allotment of 25% of fly ash in favour of the impleaded party is mala fide also, I am of the view, cannot hold good for the following reason : Admittedly in this case the allotment made in favour of the impleaded party has not been questioned, but however put in issue to contend that only in order to give 25% of fly ash to the impleaded party, the respondent reduced the percentage of fly ash allotted to the petitioner. The discussion made above makes it amply clear that the petitioners have not cleared the allotted quota. This factum has been discussed in detail in the above paragraphs which does not require repetition here. The impleaded respondent is also the cement factory which requires the fly ash for their own use. The allotment made in favour of the impleaded respondent is also only for clearance of the fly ash which the petitioners failed to do it consistently for more than a year. Hence, the contention that the allotment made in favour of the impleaded party is arbitrary is also rejected.

36. In respect of the petitioner in the third petition, originally the MOU entered between the petitioner and the respondent was for 14 years which was reduced to nine years, by the impugned order, in order to maintain uniformity with the other petitioners. Whatever is said for the petitioner in the first petition would equally be applicable to the petitioner in the third petition as well. It is stated that the cement factories use the fly ash in the factory to manufacture cement. However, the petitioner in the third petition is only a company engaged in installation and collection of fly ash and selling it to third parties. They have failed to perform the clearance as expected and in view of the availability of the clause in the MOU to review the performance and levy of penalty, if the respondent so desire, the reduction in the number of years and the percentage, as referred to above, in my view, does not require any interference.

37. In view of the above discussion of the peculiar facts of the case, I am of the view that the petitioner has not made out any case for interference under Article 226 of the Constitution of India and accordingly all the points were answered against the petitioner.

38. For the above said reasons, all the writ petitions are dismissed. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are all dismissed.