88 CWN 840

Calcutta High Court

Case No: Matter No. 1045 of 1983

M/s. C.V. Enterprises		APPELLANT
	Vs	
M/s. Braithwaite and Co. Ltd.		RESPONDENT

Date of Decision: May 4, 1984

Acts Referred:

- Constitution of India, 1950 - Article 12, 226

Citation: 88 CWN 840

Hon'ble Judges: M.M. Dutt, J; A.K. Sengupta, J

Bench: Division Bench

Advocate: Ashok Sen and Goutam Mitra, for the Appellant;Milan Banerjee, Addl. Solicitor General and Bhaskar Gupta, for the Respondent

Final Decision: Dismissed

Judgement

M.M. Dutt, J.

In this appeal, the appellant, M/s. C.V. Enterprises, a partnership firm, has challenged the propriety of the judgment and order dated March 21, 1984 of D.K. Sen, J. dismissing the writ petition of the appellant. On September 2, 1982, the respondent No. 1 Braithwaite & Co. Ltd., which is a Government company, issued a notice in the Statesman, Calcutta inviting tenders for the purchase of REP licences that would be issued to the respondent No. 1, inter alia, against the exports of structural to Bahrain and exports of wagons to Vietnam under export contracts registered in 1966-67 and 1978-79. The enclosure to the tender notice was a chart containing particulars of the exports for which the REP licences were applied for. The particulars included the value of REP licences against the exports of wagons to Vietnam as Rs. 45,52,843/- and the exports of structurals to Bahrain as Rs. 3,03,988/-. In response to the said notice, the appellant submitted his offer for the purchase of REP licences of the respondent No. 1. After the submission of the offer by the appellant, there were some discussions and correspondence between the appellant and the respondent No. 1. Ultimately, the respondent No. 1 by its letter dated February

19, 1983 accepted the offer of the appellant. The terms and conditions of the contract are contained in the said letter, which is set out below :

M/s. C.V. Enterprises,

18, Raja Woodmunt Street,

Calcutta 700001.

Dear Sirs,

Transfer of REP Licences

1. We refer to your revised offer bearing Ref. No. CVZ/50/82.83 dated 31st Jaunary 1983 submitted in response to our Invitation to Tender reference DCP/376/82 dated 12th December 1982 as amended by our letter Corp (Pur/RE) Tender dated 15th January 1983.

2. We are pleased to confirm acceptance of your offer to the extent described below :

a) We accept your offer to pay to us a lumpsum amount of Rs. 40,00,000/- (Rupees Forty lakhs only) irrespective of the value of the licences to be issued to us against export of Rly. wagons to Vietnam as consideration payable to us for transfer of the corresponding licences to you.

b) We accept your offer to pay to us a lumpsum amount of Rs. 2,25,000/- (Rupees Two lakhs and twenty five thousand only) irrespective of the value of the licenses to be issued to us against export of P.S. Tanks (Structurals) on Bahrain as consideration payable to us for transfer of the corresponding licences to you.

c) We note that necessary and effective liasons with'' the licensing authorities and customs for expeditious issue of the licences will be done by you for which we accept your charge of 1/2% (one half of one per cent) of the value of licences. These charges will become due to you upon receipt of the licences by us and will be adjusted from the amounts payable to us against (a) and (b) above respectively.

3. We stipulated that having accepted your offers on a lumpsum basis irrespective of the face value of the licences to be issued no claim shall be entertained for any change and/or review of the lumpsum amounts payable by you as consideration for transfer of the licences.

4. The amount of Rs. 1,00,000/- (Rupees one lakh only) paid to us along with your offer as earnest money is being retained by us as initial security deposit in terms of para 5 (a) of our Invitation to Tender.

5. In accordance with para 5(a) of our Invitation to Tender you are requested to pay to us an additional sum of Rs. 4,85,683.10 (Rupees Four lakhs eightyfive thousand six hundred eighty three and paise Ten only) being 10% of the expected value of licences against the contracts mentioned in para 2 above. This amount should be paid to us by a Crossed Demand Draft favouring "Braithwaite & Co. Ltd." and payable at State Bank of India, Hide Road Branch, Calcutta 43, within 7 days from the date of this acceptance failing which you shall render yourselves liable for forfeiture of the initial security deposit and treatment of this acceptance of your offer as lapsed.

6. Kindly note that this acceptance letter together with our Invitation to Tender and your offer cited above constituted an irrevocable binding contract between this Company and you. Any breach in the performance of this contract by you shall confer upon this Company the right to forfeit the security deposit and to take such other action as may be deemed necessary and fit to secure and recover its rightful dues.

7. Please acknowledge receipt.

Yours faithfully,

Braithwaite & Co. Limited

Sd. S.S. Mathur

Dy. Controller (Purchase)

2. It is the case of the appellant that under the said contract, the appellant became entitled to have the transfer of the REP licences that would be issued to the respondent No. I against the exports of Railway wagons to Vietnam and P.S. Tanks (Structurals) to Bahrain during the years 1979-80, 1980-81 and 1981-82. On the basis of the said contract, the appellant paid a further sum of Rs. 4,85,683.10 by a pay order issued by the Bank of Maura Madurai Limited, Calcutta Branch. Pursuant to clause 2 (c) of the contract, the appellant took up liason work for securing the issue of REP licences against the import entitlement of the respondent No. 1. It Is the case of the appellant that after the relevant papers were handed over to the appellant by the respondent No. 1, the appellant came to know that the value of the REP licences was much, higher than that mentioned in the said chart being an enclosure to the tender notice. It is not disputed that the respondent No. 1 was and is still entitled to REP licences of the value of Rs. 1,07,08,210/- in respect of Vietnam exports and licences of the value of Rs. 9,12,000/- In respect Bahrain exports and not Rs. 45,52,843/- and Rs. 3,03,988/- respectively as believed to be and applied for. The real value was, however, brought to the notice of the respondent No. 1 by the appellant as revised applications for the issuance of the said REP licences had to be made before the Joint Chief Controller of imports and Exports (JCCI & E). The respondent No. 1 signed the revised applications, The liason was completed by the appellant by May 31, 1983 in respect of REP licences to be issued against exports to Bahrain. The appellant accordingly, by its letter dated June 3, 1983

while intimating to the respondent No. 1 about the completion of the said liason work, sent a Bank draft for Rs. 2,25,000/- in full payment of the price for the transfer of REP licences against exports to Bahrain. There after, although the respondent No. 1 got the REP licences, by its letter dated June 24, 1983, the respondent No. 1 resiled from the contract on the ground that the contract was void and of no effect.

3. It was contended in the said letter that It transpired that the respondent No. 1 was entitled to REP licences of the value of Rs. 1,07,08,210/- in respect of Vietnam--exports and of the value of Rs. 9,12,000/- in respect of Bahrain exports, that is to say, much higher than the values of Rs. 49,52,843/- and Rs. 303,988/- as believed to be and applied for. Further, it was contended that at the time of the contract, both parties proceeded on a common mistake as to the value of the licences to which the respondent No. 1 was entitled. The contract was, accordingly, entered into under a mistake as to a matter of fact essential to the contract and, accordingly, it was of no effect and the respondent No. 1 had no obligation under the law to transfer the REP licences to the appellant for the consideration as agreed to between the parties on the basis of the erroneous assumption of the entitlement of the respondent No. 1. The respondent No. 1 returned to the appellant a bank draft of Rs. 2,25,000/- and also sent a cheque for Rs. 5,85,683.10 being the amounts paid by the appellant to the respondent No. 1 including the earnest money.

4. Being aggrieved by the refusal of the respondent no: 1 to transfer the REP licences, the appellant filed a writ petition before a learned single Judge of this Court, inter alia, praying for a writ in the nature of mandamus commanding the respondent No. 1 to deliver to the appellant REP licences in respect of exports to Bahrain which have already been issued to the respondent No. 1 by the JCCI & E and also REP licences against Vietnam exports to be issued to the respondent No. 1, both the exports having been effected by the respondent No. 1 In the year 1979-80, 1980-81 and 1981-82.

5. The learned Judge, on an equitable consideration of the facts and circumstances of the case, dismissed the writ petition. Hence this appeal by the appellant.

6. It is not disputed by either party that at the time the contract was entered into, the respondent No. 1 was under a mistake as to its entitlement, that is, the real value of the REP licences. It appears that both the parties proceeded on the assumption that the entitlement of the respondent No. 1 was to the tune of Rs. 45,51,803/- In respect of exports to Vietnam and Rs. 3,03,988/- in respect of exports to Bahrain. On the basis of that erroneous assumption, the contract was concluded by the parties. The appellant, however, came to know of the real value of the REP licences after he started liason work for securing the licences. This necessitated the filing of revised applications by the respondent No. 1, and the appellant brought the said fact of much higher entitlement of the respondent No. 1 or higher value of the REP licences to the notice of the respondent No. 1 for the purpose of making the revised applications. The respondent No. 1 made the revised applications without which the licences would not be issued. Thus the respondent No. 1 also came to know of its mistaken belief as to the value of the REP licences. There

can be no doubt that if the respondent No. 1 had delivered the REP licences at the consideration at which it was agreed upon, the respondent No. 1 would have suffered the loss of a huge sum of money. $o the respondent No. 1 by its said letter dated June 20, 1983 written to the appellant, rescinded the contract on the ground of mistake as to the fact essential to the contract, that is, the real value of the REP licences on the date of the contract.

7. Mr. Ashoke Kumar Sen, learned Counsel appearing on behalf of the appellant has drawn our attention to the terms of the contract to show that the parties deliberately and expressly entered into the contract on the basis of lumpsum payment and irrespective of the value of the licences to be issued after processing by the appellant. Further, it was stipulated that no claim would be entertained for a change or review of the lumpsum amount payable by the appellant as consideration for transfer of the licences. It is submitted by the learned Counsel that as the appellant had acted upon and performed its part of the contract by liason works and by payment and got the two valuable licences issued to the respondent No. 1, there is a promissory estoppel and the respondent No. 1 is estopped from rescinding the contract or from transferring the licences to the appellant as promised or agreed upon. Secondly, it is contended by the learned Counsel that there cannot be any mutual or common mistake vitiating a contract, otherwise concluded, unless there are three things which go to the root of the contract, namely, (a) mistake of the party as to the identity of the party, (b) mistake about the subject- matter and (c) where the parties agree on the basis of the fundamental fact, that basis under goes a fundamental change.

8. We may first of all consider the second contention of the learned Counsel. It is not in dispute that there is no mistake as to the Identity of the parties or about the subject-matter of the contrect. It is the contention of the appellant that there is no mistake with regard to any fundamental fact like the expected value of the REP licences, inasmuch as the respondent No. 1 inserted a term in the contract that the lumpsum payment of consideration by the appellant will be irrespective of the value of the licences to be issued, and that no claim would be entertained for a change or review of the lumpsum amount payable by the appellant. In other words, the implication of the said term is that even if the value goes down to the detriment of the appellant the appellant would have no other alternative than to discharge its obligation by getting a transfer of the licences by payment of the consideration as agreed upon. Similarly, even if the value goes up, the appellant will not have to pay any extra sum as the licences will have to be transferred by the respondent No. 1 to the appellant at the same consideration as agreed to by the parties. Therefore, it is contended that the said stipulation shows that there was no common mistake on any fundamental or essential fact vitiating the contract.

9. We do not think we are called upon to embark upon the adjudication of the question whether there has been a common or mutual mistake between the parties vitiating the contract. There is, however, no doubt, and it is also not disputed, that the respondent No. 1 was under an erroneous assumption as to the values of the REP licences on the date

the tender notice was issued or on the date of the contract with the appellant, and that such erroneous assumption or mistake affected the respondent No. 1 prejudicially, but conferred a benefit upon the appellant.

10. Now we may deal with the question of promissory estoppel. The doctrine of promissory estoppel as laid down by the Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , is as follows :

The true principle of promissory estoppel, therefore, seems to be that where one party has by his words of conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be in equitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

11. The above observation shows unmistakable that there is no question of any promissory estoppel in respect of a contract which stands concluded. It applies only in the case where there is no concluded contract, but a promise has been made by one party intending to create legal relations or affect legal relationship to arise in the future and the other party has acted upon and changed his position. Thus where the contractual relationships between the parties have been established under a completed contract, there is no scope for the application of the principle of promissory estoppel The rule of promissory estoppel is a rule of equity, while contractual relationship between the parties is governed by the law of contract. Where the provisions of the law of contract are applicable, the case comes within the domain of common law courts, but the enforcement of the rule of promissory estoppel is mainly the concern of Courts of equity.

12. The learned Counsel for the appellant has, however, placed strong reliance upon a decision of the Supreme Court in the Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., . What happened in that case was that the Gujarat State Financial Corporation set up u/s 3 of the State Financial Corporation Act, 1951 and devised to provide medium and long term credit to industrial concerns, inter alia, Hotel Industries, Sanctioned on certain terms and conditions a loan of Rs. 30 lakhs to Lotus Hotels (P) Ltd., which proposed to set up a 4-Star Hotel under the name and style of Lotus Hotels. The Company purchased the land where the 4-Star Hotel would be construe? ted. The purchase was, however, made before the sanctioning of the loan by the Corporation. As a part of the deal, the Company had to create an equitable mortgage of the land in favour of the Corporation for securing the loan. It was provided that on the loan the rate of interest will be 12% p.a. if re-finance is available from Industrial Development Bank (IDBI) at 9% p.a. otherwise it will be 13% p.a. The Corporation, however, did not ultimately disburse the amount of the loan to the Company as IDBI informed the Corporation that in view of

certain pending police enquiry against the promoter of the Lotus Hotel, the application for refinancing was treated as closed. One of the contentions of the appellant Corporation before the Supreme Court was that the dispute between the parties was in the realm of contract and even if there was a concluded contract between the parties about grant and acceptance of loan, the failure of the Corporation to carry out its part of the obligation might amount to breach of contract for which a remedy lay elsewhere, but a writ of mandamus could not be issued compelling the Corporation to specifically perform the contract. It appears from the said contention that it was also not the case of the Corporation that there was a concluded contract. The Supreme Court also did not come to any finding that there was a concluded contract between the parties. Be that as it may, in dealing with the contention, the Supreme Court laid emphasis on the fact that the agreement to advance the loan was entered into by the Corporation in performance of its statutory duty cast on by the statute under which it was created and set up. Thereafter, the Supreme Court observed as follows :

On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have under taken such a huge project. In the back drop of this incontrovertible fact situation, the principle of promissory estoppel would come into play." In Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, at p. 662 (Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, at p. 631) this Court observed as under.(Already quoted before).

Thus the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent.

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

13. In our opinion, it follows from the above observations that the Supreme Court never meant to lay down that the principle or promissory estoppel would apply to a concluded contract. Had that been the view of the Supreme Court, then the Supreme Court would not have referred to and set out its observation in the case of Motilal Padampt Sugar Mills Co. (P) Ltd. (supra) which undoubtedly relates to a "promise which is intended to create legal relation or affect a legal relationship to arise in the future" and not to a concluded contract. Further, the agreement was entered into or the promise was made by the Corporation in pursuance of its statutory duty. It is clear from the observation of the Supreme Court that the refusal of the Corporation to advance the loan as agreed to by it

Was in breach of its statutory duty, and for the enforcement of such statutory duty a petition under Article 226 would lie.

14. In the instant case, although the respondent No. 1 is a Government company and hence comes within the expression" ''other authority" under Article 12 of the Constitution, yet it did not enter into the contract with the appellant in pursuance of any statutory duty, so that it could be contended that the breach of the contract would be tantamount to breach of statutory duty, and a writ petition would lie to enforce performance of such statutory duty. The decision of the Supreme Court in Lotus Hotel''s case (supra) in not applicable to the facts of the instant case. It has been already noticed by us that the respondent No. 1 was under a mistaken view as to its own entitlement and entered into the contract with the appellant on the basis of such mistaken view. Even if we assume that the principle of promissory estoppel applies to a concluded contract yet, where, as in the instant case, the promissor made the promise under a bonafide mistake as to an essential or vital fact, a court of equity would not direct the promissor to act in accordance with the promise, for to enforce the promise in such circumstances, would be inequitable. The question, however, does not arise as the principle of promissory estoppel is inapplicable to a concluded contract. It has, therefore, been rightly contended by the learned Additional Solicitor General appearing on behalf of the respondent No. 1 that as the contract was a concluded contract and the same was not entered into by the respondent No. 1 pursuant to any statutory duty cast upon it by any statute, the appellant is not entitled to any relief as prayed for in the writ petition.

15. There is another difficulty for the appellant The learned Additional Solicitor General has placed strong reliance upon the case of Motilal Padampat Sugar Mills (supra) where it has been observed by Bhagwati J, speaking for the Court, that since the doctrine of promissory estoppel is an equitable doctrine, it must yield where equity so requires. When, therefore, the Government is able to show that in view of the facts which have transpired since the making of the promise, public interest would be prejudiced if Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden.

16. On the basis of the above observations, it is contended by the learned Additional Solicitor General that even assuming that the doctrine of promissory estoppel is applicable to the instant case, if the respondent No. 1 is required to transfer the REP licences to the appellant, the respondent No. 1 would loss a huge sum of money, on the other hand, if the respondent No. 1 is not required to transfer the licences, the appellant

will not, in the least, be prejudiced as the amount paid by the appellant has already been returned to it. It is, therefore, submitted on behalf of the respondent No. 1 that equity lies in favour of the Government and, accordingly, the Government should not be directed to act in accordance with the contract.

17. In our opinion, there is considerable force in the contention of the learned Additional Solicitor General. It is now abundantly clear that the appellant would be benefited at the cost of public interest and public fund. If equitable principles are to be applied than it must be said that equity would not allow the appellant to gain an advantage on account of the mistake of the respondent No. 1 to the prejudice of the respondent No. 1. It is not the case of the appellant that in acting upon the contract, it has altered its position to its detriment, nor has it been argued on behalf of the appellant that status quo ante cannot be restored so far as the appellant is concerned, Thus the appellant Would not stand to lose anything if the contract is not enforced, but the respondent No. 1 would suffer loss and injury if it is required to transfer the REP licences at the agreed consideration. Although it has been already held by us that the doctrine of promissory estoppel is not applicable to the instant case, yet on the assumption that it applies, it would be quite inequitable to direct the respondent No. 1 to transfer the licences to the appellant at the consideration agreed upon to the loss and prejudice of the Government. The doctrine of promissory estoppel being an equitable doctrine, the Court will not apply the doctrine in a case where it is proved to the satisfaction of the Court that the promissor made the promise on the basis of some mistake as to an essential or material fact to his prejudice. So, even if it be the unilateral mistake of the respondent No. 1, still, on equitable principles, the appellant cannot be allowed to take advantage of such mistake to the loss and prejudice of the respondent No. 1.

18. The appellant cannot, therefore, compel the respondent No. 1 to transfer the REP licences at the consideration. agreed upon. In this connection, we may refer to the affidavit of the respondent No. 1 which has been affirmed on March 29, 1984 by one Alak Kumar Ghosh, the Secretary of the respondent No. 1. In paragraph 31 of the affidavit, it has been stated inter alia that the offers of the appellant were 74.02 per cent and 87.86 per cent of the assumed CIF values of the licences for Bahrain and Vietnam respectively; whereas the said offers only constitutes 24.67 per cent and 37.36 per cent of the real CIF values of the licences respectively for Bahrain and Vietnam. Therefore, it is apparent from the said statements in paragraph 31 of the affidavit that the respondent No. 1 accepted the offers of the appellant on the erroneous assumption that such offers constituted 74.02 per cent and 87.86 per cent of the CIF values. So, it may not be unreasonable to infer that the respondent No. 1 will not be prejudiced if the appellant offers 74.02 per cent and 87.86 per cent of the real CIF values of the licences. Although we have held that the principle of promissory estoppel does not apply to the instant case, and the appellant cannot compel the respondent No. 1 to transfer the licences at the consideration agreed upon, yet as the appellant was not at fault, there being no evidence that the appellant was aware of correct CIF values of the licences on the date of the contract, we think there is

some equity in favour of the appellant to claim the transfer of the licences on payment of the same percentages of the correct CIF value as were offered by the appellant on the assumed erroneous CIF values of the REP licences.

19. In the circumstances, we direct that if within ten days from date the, appellant pays to the respondent No. 1, 88 per cent (eighty eight per cent) of Rs. 1,07,08,210/- (Rupees one crone seven lakhs eight thousand two hundred ten only) being the CIF values of the HEP licences for Vietnam exports and 75 per cent (Seventy five per cent) of Rs. 9,12,100/- (Rupees nine lakhs twelve thuosand one hundred only) being the CIF values of REP licences for Bahrain exports, the respondent No. 1 shall transfer the said REP licences to the appellant. If, however, the appellant fails to make the payments as directed within the period of ten days from date, the respondent No. 1 will not any more be liable to transfer the said licences to the appellant and this order will stand vacated and the appeal will stand dismissed.

20. Subject to the directions given above, the appeal and the application for interim order are both disposed of. The undertaking is discharged. The appellant shall pay cost of the appeal to the respondent No. 1, hearing fee being assessed at 30 G.Ms. for each day of hearing.

Ajit Kumar Sengupta, J.

I agree.