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THE DOCTRINE OF PROMISSORY ESTOPPEL

By

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The doctrine of 'promissory estoppel' had its origins in Principles of Equity which had developed in the Court of Chancery of the English Legal System. Like the other principles of Equity, this particular principle also had the object of reducing the rigour of the Common Law and it aimed at holding the parties to their promises, by preventing them from taking inconsistent stands in legal relations. In pursuing such a policy the Court of Chancery ignored certain procedural requirements of Common Law and insisted upon the parties to be faithful towards each other in carrying out their mutual obligations. The Common Law was not totally ignorant of this concept but the Judges of the Courts of Common Law applied this principle to a limited number of transactions. For example, they would not allow the parties to deny what the Courts had declared in their judgments. Such a principle followed by the Courts of Common Law was known as Estoppel by Record. Likewise, the Courts of Common Law would not allow the parties to take an inconsistent stand from what they had agreed upon earlier and had reduced their understanding to a writing. Such a principle was known as Estoppel by Deed. Yet in certain other transactions also the parties were held to their commitments. Such a principle was known as Estoppel in Paris. Thus, a limited number of transactions only were governed by the principle of Estoppel, and a large number of matters relating to civil transactions remained out of the purview of estoppels. What was to the credit of Equity however was the application of the principle of estoppel to a large number of matters which the Common Law did not deal with. Though the principle of estoppel in the beginning was applied to contractual obligations it was extended to various other matters which fell in the spheres of property, trust, family and service relations.

This article has the object of explaining, with reference to leading cases, how the Doctrine of Estoppel has been applied by the English Courts in recent years in various matters; what conditions are insisted upon for the application of this principle and what are the implications arising from the application of this principle.

The first important area in which the application of the Doctrine of Estoppel has been noticed is the area concerning the contractual transactions. Under the rules of Common Law a bare promise without a deed having been executed or without a consideration having been offered by the concerned parties was not enforceable in a court of law. But in Equity the situation was different; where therefore in a relationship of creditor and debtor the creditor promises to accept a smaller sum in full settlement intending the debtor to rely on that promise, and the debtor does rely on it, but the creditor later on sues for the payment of the balance amount by the debtor, the debtor can successfully raise the defence of promissory estoppel when sued by the creditor for the balance amount.

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So strong had been the principle and so vast had been its application to various transactions that no one could argue that there was no right with the court of Equity or any practice of the court of Equity, by way of mercy or by way of saving the parties in their contractual obligations or saving the property of the aggrieved parties or giving relief where the prayer is for relief against penalties or forfeitures or against an excessive claim.

It was the first important principle upon which the court of Equity proceeded that if parties who have entered into definite and distinct terms involving certain legal results like penalties or legal forfeiture afterwards by their own act or with their own consent enter upon a course of negotiation 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, 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...

The decisions of the English courts rendered earlier[1] afforded a suffic t basis for saying that a party would not be allowed in equity to go back on such a promise. Such was the policy of Equity when it was an independent institution by itself, but in the latter part of the nineteenth century the Courts of Common Law and the Courts of Equity were sought to be merged with each other; there was the fusion of Law and Equity too, with the result that in one and the same jurisdiction Law and Equity could be enforced.

Upon the merger of the Courts of Common Law and the Court of Equity it was possible for the Courts of Law to apply the principle of equity as Law and Equity flowed in the same stream. Since Law and Equity were joined together their effect was seen in the application of the principle of equity in the administration of civil justice.

An illustration of such a principle followed is the case of Central London Property Trust Ltd. v. High Trees House Ltd.[2] The facts of the case were: in September 1937 the plaintiffs let a block of flats in London to the defendants for a term of 99 years at a rent of £2,500 a year. In 1940, owing to the war-time conditions and bombing raids over London, only a few of the flats were actually let to tenants, and it became apparent that the defendants would not be able to pay the rent unc the main lease. After prolonged negotiations the plaintiffs agreed to reduce the rent from £2,500 to £1,250, and thereafter the defendants paid the reduced rent. By the beginning of 1945, all the flats were let, but the defendants continued to pay the reduced rent. In September 1945, the plaintiffs wrote to the defendants claiming rent at the rate of £2,500 a year, and they brought an action claiming the full rent for the last two quarters of 1945.

[1] In cases like Hughes v metropolitan Railway. Co. (1877) 2 App Cas 439, Birmingham and District Land Co. v London & North Western Railway. Co. (1888) 40 ChD 268 and Salisbury (Marquis) v Gilmore (1942) 2 KB 38,

[2] (1947) KB 130

If the plaintiffs had claimed it, they would have been entitled to recover ground rent at the rate of 2,500/= a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parole (whether in writing or not), but only by deed. Equity however stepped in, in such cases, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it...

The Court of Appeal held that since the plaintiffs knew that their promise would be acted upon and it had been acted upon, it was enforceable despite the absence of consideration while the conditions giving rise to it continued to exist; and when they ceased to do so in 1945, the plaintiffs wee entitled to claim the full rent.

The case of Hughes v Metropolitan Railway Company[3] is an illustration of how the relief against forfeiture was granted by the Court on grounds of the principle of estoppel. The facts of the case were:

On 22nd October 1874, the landlords gave the tenants six months' notice to repair the premises. However, on 28th November, negotiations began between the parties for the sale of the lease to the landlords. The tenants stated that they would defer commencing the repairs until they had heard whether their proposal was acceptable. After the six months had elapsed, the landlords claimed that the lease was forfeited for breach of the covenant and sought to eject the tenants. The tenants sought a stay of execution. The Court of Appeal held that the tenants were entitled in equity to be relieved against forfeiture because the negotiations had the effect of suspending the notice, and while they continued the six-month period did not run. It ran again only from the time the negotiations had ended.

In order that the doctrine may be applied what the court insists is that there must be a clear and unequivocal promise or representation that the existing legal rights will not be fully enforced. The case of Woodhouse A. C. Israel Cocoa Ltd. SA v. Nigerian Produce Marketing Company Ltd.[4] is an authority for the proposition that there must be a clear and unequivocal promise or representation with regard to the existing legal rights. In this case a sale contract provided for payment in Nigerian pounds in Lagos. The buyers had asked if the sellers would be-prepared to accept sterling in Lagos, and the sellers had replied on 30 September 1967 that 'payment can be made in sterling and in Lagos'. The pound sterling was devalued so that it was worth 15 per cent less than the Nigerian pound. The buyers argued that the seller's letter amounted either to a variation (supported by consideration) or a representation that they could make payment in sterling in Lagos on the basis of one pound sterling for one Nigerian pound, so that the sellers were estopped from going back on it. Held: to found a promissory estoppels a representation had to be clear and unequivocal (i.e., expressed so that it would be understood in the sense required). The seller's representation was not sufficiently precise either to amount to a variation of the contract terms (i.e., an alteration supported by consideration) or to found an estoppel.

[3] (1877) 2 App Cas 439 (HL)

[4] (1972) AC 741 (HL)

In Baird Textiles Holdings Ltd. v Marks & Spencer[5] one of the reasons why the claim based on estoppels failed was because the alleged representation was not sufficiently certain for a court to be able to give effect to it. Baird attempted to sidestep this deficiency (and the formal requirements for a binding contract) by limiting the claim to the recovery of reliance loss (discussed at page 373), as opposed to an expectation loss claim. The Court of Appeal considered there was no authority justifying such a radical conclusion.

Mance, L. J. said, "In the present case, what is submitted is that the law ought to attach legal consequences to a bare assurance or conventional understanding (falling short of contract) between two parties, without any actual contract or third party being involved or affected. The suggested justification is the limitation of the relief claimed to reliance loss. On this submission, the requirements of contract (consideration, certainty and an intention to create legal relations) are irrelevant because no contract is asserted. The requirements of estoppel (e.g. that is an unequivocal promise to found a promissory estoppel or conventional conduct of a sufficient clarity to found an estoppels by convention and, secondly, the objective intention to affect some actual or apparent pre-existing legal relationship) are by-passed by the limitation of relief. But no authority in this jurisdiction supports the submission that estoppels can here achieve so expanded an application, simply by limiting recovery to reliance loss (assuming that reliance loss could anyway be distinguished satisfactorily from expectation loss an apparent difficulty which have already mentioned). Any development of English law in such a direction could and should in my view, now take place in the highest court..."

Yet another condition for the application of the doctrine is that the representation or promise must be intended to be binding and acted upon and was in fact acted upon. An illustration of such a rule is the case of E.A. Ajayi v R.T. Briscoe (Nigeria) Ltd.[6] In this case the defendant had hired a number of Lorries from the plaintiffs on hire-purchase and was paying the purchase price in installments. Some were withdrawn from service because of difficulties with service arrangements. The defendant wrote to the plaintiffs asking that they carry out the repairs and proposing that this would be paid for when the Lorries were back in service. By a letter of 22 July 1957, the plaintiffs replied that they were agreeable to the defendant' withholding installments due on (the lorries) as long as they are withdrawn from active service'. The plaintiffs later claimed the full installments due. On appeal the defendant raised the defence of promissory estoppels, arguing that the estoppels applied because he had relied upon the promise in not putting forward alternative proposals on payment for the repairs, and he had organized his business on the basis that he would not have to make the payments until the Lorries were back in service. Held: the defendant had failed to establish the defence of promissory estoppels since he had not altered his position as a result of the plaintiffs' letter. The Lorries had been withdrawn from service before this promise.

Lord Hodson said, "The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an

[5] (2001) EWCA Civ 274, (2002) 1 All ER (Comm. 737)

[6] (1964) WLR 1326 PC

equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resale from his promise on giving reasonable notice, which need not be a formal notice, giving the promise a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promise cannot resume his position.

In its nature, Promissory Estoppel is a defence and not a cause of action. An illustration of this principle is the case of Combe v. Combe[7]. In this case, an ex-husband promised to pay his ex-wife £100 per annum maintenance, free of income tax. However, he failed to pay, and six years later the wife brought an action claiming the arrears. She had given no consideration for her husband's promise, since she had chosen not to apply to the Divorce Court for maintenance and had not refrained from doing so at her husband's request (her income in fact being greater than her husband's). Nevertheless, Byrne J gave judgment for the wife on the basis of the doctrine in High Trees. He held that the husband's promise was clear, it was intended to be binding and acted upon, and it was acted upon by the wife. The Court of Appeal allowed the husband's appeal. The Court of Appeal held that the wife had provided no consideration for the husband's promise and could not rely on promissory estoppels which did not give rise to a cause of action.

Lord Dennin said, "Much as I am inclined to favour the principle stated in the High Trees case[8] it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before; it only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. ..."

The principle was nicely analyzed in the following words : "The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at is word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word..."

The above case is an authority for the proposition that promissory estoppel can be 'used as a shield and not as a sword'.

However, that is not the case with Proprietary Estoppel, which can be used as a sword and not merely as a shield. A proprietary estoppel can arise despite the absence of a clear and unequivocal representation, e.g., in the belief or expectation that the property interest will be granted, and it can give rise to a cause of action. The extent of the application of this principle can be explained with reference to the case of Amalgamated Investment & property Co. Ltd (in liquidation) v Texas

[7] (1951) 2 KB 215 (CA)

[8] (1947) KB 130

Commerce International Bank Ltd[9]. In this case the defendant bank had agreed to make a loan to the plaintiffs' subsidiary company (ANPP) which was based in the Bahamas. This 'Nassau' loan was to be secured by a guarantee from the plaintiffs. For exchange control purposes the money was lent to Portsoken, a subsidiary company which the bank acquired in the Bahamas, and Portsoken then lent the money to ANPP. The plaintiffs' guarantee in fact referred only to loans made by the defendant bank rather than the defendant's subsidiary. However, it was assumed by both the plaintiffs and the defendant bank that the guarantee covered this 'Nassau' loan made by the defendant's subsidiary, Portsoken. When the plaintiff company was wound up the liquidator sought a declaration that the guarantee did not cover this 'Nassau' loan. The Court of Appeal held that since the parties had acted upon the agreed assumption that the plaintiffs were liable for the 'Nassau' loan, the plaintiffs were stopped by convention from denying that they were bound to discharge any indebtedness of ANPP to the defendant's subsidiary. (In effect the defendant bank was establishing that the guarantee was enforceable. The majority (Lord Denning and Brandon LJ) considered that the estoppels could operate so as to enable a party to succeed on a cause of action.

Explaining the nature of Estoppel and the course of its development in English Law, Lord Denning said, "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. It has evolved during the last 150 years in a sequence of separate developments; proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law whether due to misrepresentation or mistake makes no difference on which they have conducted the dealings between them neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands..."

In Conclusion it may be stated that in good old days the Doctrine of Estoppel was very much a part of Common Law but owing to its rigid formalities the concept was applied to a limited number of transactions only and many matters remained outside the purview of Common Law, with the result that aggrieved individuals could not get protection to their rights and could not get sufficient remedies in their dealings. Equity addressed the deficiency of Common Law and came to the rescue of the aggrieved parties. Proceeding further in its zeal of pursuing the cause of providing remedies to the aggrieved individuals ignoring the rigid technicalities of the bygone era, it took the step of further promoting the cause of justice by expanding the horizons of estoppel. This development is of far reaching significance in the realm of English Law.

It may be pointed out that the Doctrine of Estoppel is very much applicable to legal transactions in India also. The writer will cover the Indian perspective in the next issue of this Journal.

[9] (1982) QB 84 (CA)