TURNER MORRISON AND CO., LTD.

v.

HUNGERFORD INVESTMENT TRUST LTD.

March 9, 1972

[K. S. HEGDE AND K. K. MATHEW, JJ.]

Estoppel—Promissory estoppel—Scope of—Applicability of doctrine.

*Company Law—Incorporated Companies—Residence of—*Ultra vires*—Company authorised by resolution to discharge tax liability of holding company to which dividends due not distributed—If* ultra vires *the company's powers.*

Limitation Act, 1963—Section 15(5)—Applicability to incorporated companies—Company—When can be said to be residing in India and consequently not "absent" from the country.

The rule of estopple has gained new dimensions in recent years and a new class of estoppel, *viz.*, promissory estoppel has come to be recognised by Courts. Where parties enter into an agreement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the Court will treat the promise at finding on the promisor to the extent that it will not allow him to act inconsistently with it even allhough the promise may not be supported by consideration in the strict sense. [721D, 723C]

Hungerford Investment Co. owned hundred per cent shares in Turner Morrison & Co. During the assessment years 1939-1940 to 1955-1956 the latter did not distribute dividends and the undistributed dividends were utilised by it as working capital. In all those years the income-tax authorities took proceedings under s. 23-A of the Income Tax Act, 1922, and the deemed dividends were assessed in the hands of Hungerford. But, year after year, from 1939 to 1954, the Directors of Turner Morrison passed a resolution to the effect that it would be inequitable to ask Hungerford to pay the tax levied and that Turner Morrison itself should discharge that liability. The resolutions were implemented by Turner Morrison by paying all the taxes due from Hungerford. If the dividends had been declared Hungerford would have got more than two and a half times the tax paid on its behalf. The payments were not debited to the account of Hungerford; nor were they shown as debts due from Hungerford in the balance sheets. At no time Turner Morrison made any demand on Hungerford to reimburse the money paid. In 1955 the control of Turner Morrison changed hands and, thereafter, by agreement, Turner Morrison under-took to discharge the tax liability of Hungerford to the extent of Rs. 46 lakhs. In 1965 Turner Morrison filed a suit against Hungerford for recovery of the tax paid. The suit was dismissed. In the appeal to this Court Hungerford raised the plea of promissory estoppel. Turner Morrison urged that its resolutions were mere promises to do something in future; they were not representations of any and as those promises were not supported by any consideration, they afforded no legal basis to resist the claim. Hungerford argued that the promises made under those resolutions were supported by consideration

in as much as Hungerford, in response to those promises, refrained from enforcing the right to have the profits distributed as dividends. A

Held, that by acting on the basis of the representation made by Turner Morrison Hungerford placed itself in a disadvantageous position, and therefore, the pleas of promissory estoppel had to be sustained. [122B-C]

Union of India v. *Indo Afghan Agencies Ltd.*, [1968] 2 S.C.R. 366, *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] B 1 K.B. 130, *Combe* v. *Combe*, [1951] 2 K.B. 215, *Tool Metal Manufacturing Co. Ltd.* v. *Electric Co. Ltd.*, [1955] 2 All E.R. 657 and *Roberton* v. *Minister of Pensions* [1949] 1 K.B. 227, referred to.

It was urged on behalf of Turner Morrison that the authority given to it to discharge the tax liabilities of Hungerford were *ultra vires* its powers and, therefore, provided no legal basis to resist the plain, claim,

C

Held, that Turner Morrison had not acted *ultra vires* its powers. The nondistribution of the dividents had augmented the working capital of the company thus affording it facility to earn more profits. Any step taken to augment the working capital of the company was undoubtedly incidental to the business of the company and, further, the same was not for the attainment of the objects mentioned in the memorandum. When Turner Morrison paid the tax due from Hungerford, in substance, though not in form, it was distributing a portion of its assets to the 100 per D cent share holder of the company, but without reducing its capital. [726H]

Even on the assumption that the suit claim was otherwise good, Hungerford urged, it was barred by limitation. It was contended on behalf of Turner Morrison that in view of s. 15(5) of the Limitation Act, 1963, the claim made, leaving aside the claim made in respect of the assessment for the assessment years 1955-1956, was not barred, because, Hungerford was a non resident company never present in India, E and therefore, under the section the time during which "the defendant has been absent from India" had to be excluded for the purpose of computing the period of limitation. *Held*, that the suit was barred by limitation : (a) Turner Morrison had waived the lien it might have had over the shares held by Hungerford. Hence the only claim that Turner Morrison could have made against Hungerford was a money claim. (b) The suit was governed by the Limitation Act 1963, which fixed a period E of three years for money payable. The amounts claimed, except those in respect of the assessment for the assessment year 1955-1956, were all paid before November 15, 1962. Therefore, they were barred by limitation. So far as the payment made in respect of the assessment year 1955-56 was concerned, Turner Morrison had no claim against Hungerford, because, under the amended s. 23A of the Income Tax Act, 1922, that liability was of the Turner Morrison itself. (c) Section 15(5) of the share holders of Turner Morrison. Under these circumstances, it G that the provision does not apply to incorporated companies at all or, alternatively, that the incorporated companies must be held to reside in places where they carry on their activities and thus be present in all those places. Factually a company cannot either be present in India or absent from India. But it may have a domicile or residence in India. The Board of Directors of Hungerford used to meet in India now and then. It was, through its representatives, attending the general meeting of the share holders of Turner Morrison. Under these circumstances, it H must be held to have been residing in this country and consequently not absent from this country. Hence, s. 15(5) cannot afford any assistance to Hurner Morrison to save the bar of limitation. [727H-728C-730C]

A Dicey's *Conflict of Laws, New York Life Insurance Company* v. *Public Trustee*, [1924] 2 Ch. 201, *Carron Iron Co.* v. *Maclaren*, 5 H.L.C. 416 and *Sayaji Rao Gaikwar of Baroda* v. *Madhavrao Raghunathrao*, A.I.R. 1929 Bom. 14, referred to.

CIVIL APPELLATE JURISDICTION : C.A. No. 1223 of 1970.

B Appeal from the judgment and decree dated June 23rd/24th, 1969 of the Calcutta High Court in Appeal from Original Decree No. 203 of 1968.

A. K. Sen, Shankar Ghosh, D. N. Gupta, N. Khaitan, Krishna Sen and *B. P. Singh*, for the appellant.

C *S. V. Gupte, S. B. Mukherjee, B. N. Garg, K. K. Jain, D. N. Sinha, Lina Seth, M. M. N. Pombra* and *H. K. Puri*, for the respondent.

The Judgment of the Court was delivered by

D HEDGE J. This appeal by certificate is by the plaintiff-appellant, Turner Morrison Co. Ltd. (to be hereinafter referred to as Turner Morrison) from the decision of a Division Bench of the Calcutta High Court. The Division Bench affirmed the decision of the trial court dismissing the plaintiff's suit.

E In the suit Turner Morrison claimed a decree for a sum of Rs. 1,27,67,052/16 P. The claim was made on the ground that the plaintiff had paid either as an agent or on behalf of the defendant Hungerford Investment Trust Ltd. (in voluntary liquidation) (to be hereinafter referred to as the Hungerford) a sum of Rs. 79,70,802/- as super-tax which it was entitled to be reimbursed. To that sum a sum of Rs. 47,96,250/16 P. was added as interest in the shape of damages. In respect of that claim the F appellant claimed a paramount lien on the 2295 shares owned by Hungerford in the plaintiff-company. The defendant resisted the suit on various grounds. It denied that the plaintiff had paid the amounts shown in the plaint-schedule or it was liable to be reimbursed the payments made, if any. It also denied its liability to pay interest on the amounts that might have been paid. Further it pleaded that the suit was barred by estoppel, waiver and G acquiescence. It also pleaded the bar of limitation. In addition it pleaded that the lien claimed had been waived and that the suit was not properly instituted. According to the defendant, the suit was not a *bona fide* one. It was one of the manipulations of Haridas Mundhra to get at the defendants' 2295 shares the plaintiff-company without paying for them.

H The trial court dismissed the plaintiff's suit holding that the claim in question was barred by "estoppel, waiver or acquiescence". It held that it was also barred by limitation. It opined

that the liability to pay the tax in question was the joint liability of Turner Morrison as well as Hungerford and the same having been discharged by the former, it had no claim on Hungerford. It opined that the suit was a dishonest attempt on the part of Haridas Mundhra to absolve his liability for paying for the 2295 shares in respect of which he had obtained a decree for specific performance. The appellate court affirmed some of the findings of the trial court.

In order to appreciate the various contentions advanced before this Court, it is necessary briefly to refer to the history of the case. Hungerford was the owner of 100 per cent shares of Turner Morrison. John Geoffrey Turner and Nigel Frederic Turner (both since deceased) were the owners of the 100 per cent shares of Hungerford. As can be seen from the records, Turner Morrison was a prosperous company. Though that company was making enormous profits every year, it did not distribute any portion of those profits as dividends during the assessment years 1939-1940 to 1955-56. The profits that should have been available for distributing as dividends were kept back by the company and used as working capital. In all those years the income-tax authorities took proceedings under s. 23-A of the Indian Income-tax- Act, 1922. Thereafter the "deemed dividends" were assessed in the hands of Hungerford. But year after year the Directors of Turner Morrison passed a resolution to the effect that it would be inequitable to ask Hungerford to pay the tax levied and that Turner Morrison itself should discharge that liability. Those resolutions were duly implemented by Turner Morrison by paying all the taxes due from Hungerford. In about the middle of 1955, Haridas Mundhra entered into negotiation with Nigel Turner for purchasing all the shares of Turner Morrison. By exchange of letters in November and December of 1955, Hungerford agreed to sell and Mundhra agreed to purchase 49 per cent shares of Turner Morrison. The agreement also provided for an option to Mundhra to purchase from Hungerford the balance of 51 per cent shares of Turner Morrison within five years for the price agreed upon. A formal agreement in that regard was entered between Hungerford, John Geoffrey Turner, Nigel Turner, British India Corporation (a nominee of Mundhra) and Mundhra on October 30, 1956. In pursuance of that agreement Mundhra purchased 49 per cent shares of Hungerford. Thereafter as contemplated in that agreement Hungerford went into voluntary liquidation. On October 31, 1957 two documents came to be executed. One is a deed of guarantee and indemnity. That was a tripartite agreement. The first party to that deed was Turner Morrison. The second party was John Geoffrey Turner and Nigel Frederick Turner and the third party was Hungerford. In

A that deed after setting out the agreement between Hungerford and Mundhra, it was stated :

> "NOW THIS DEED WITNESSETH that in consideration of the liquidators having at the request of the Company (Turner Morrison) the said John Geoffrey Turner and Nigel Frederick Turner agreed (as is testified by their being parties to and executing these presents) to distribute the assets of Hungerford in specie amongst the contributories of Hungerford (such contributories being the said John Geoffrey Turner and Nigel Frederick Turner) and in consideration of the premises.
>
> 1. The Company and the said John Geoffrey Turner and Nigel Frederick Turner hereby jointly and severally undertake to pay and/or satisfy all claims for or in respect of Income-tax and Super-tax which is or are not payable or recoverable or may at any time be payable or recoverable under the Indian Income-tax Act by or from Hungerford and which payments are in fact legally enforced and made.
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> 2. The Company and the said John Geoffrey Turner and Nigel Frederick Turner hereby jointly and severally covenant with the Liquidators and each of them that the company and the said John Geoffrey Turner and the said Nigel Frederick Turner will jointly and severally at all times hereinafter keep indemnified the Liquidators and each of them from all actions, proceedings, claims or demands in respect of or in connection with any liability of Hungerford to Income-tax or Super-tax under the Indian Income-tax Act and also against all costs, damage or expenses which the Liquadators or any of them may pay, incur or sustain in connection therewith or arising therefrom or otherwise in relation to the premises."

The second document was a deed of indemnity between the Turner brothers and Turner Morrison. That deed provided that in the event of Turner Morrison "paying in terms of the deed of guarantees and indemnity any sum in excess of 46 lakhs in satisfaction of the income-tax and super-tax which may at any time be payable or recoverable, payment of which are in fact legally enforced and made under the Indian Income-tax Act by or from Hungerford the Guarantors and each of them in consideration of the premises undertake to pay to the company (Turner Morrison) the amount of such excess as aforesaid".

At this stage, it may be mentioned that in accordance with the agreement entered into between Mundhra and Hungerford Turner Morrison was to discharge the tax liability of Hungerford to the extent of Rupees 46 lakhs. After the sale of the 49 per cent shares referred to earlier, some dispute appears to have arisen between Mundhra and Hungerford in regard to his option to purchase the remaining 51 per cent shares of the later. Consequently Mundhra filed a suit in the Calcutta High Court on its original side for the specific performance of the agreement entered into between him and the Hungerford. The suit was resisted by Hungerford. But it was decreed. It appears that when the learned trial judge was about to conclude his judgment, in that case the Counsel for Mundhra requested the court to issue an injunction requiring Hungerford to exercise its voting rights in respect of the 51 per cent shares which was the subject matter of the suit in accordance with the directions of Mundhra until the implementation of the decree for specific performance. The learned trial judge accepted that prayer and issued the injunction asked for. This led to serious consequences, some of which we have dealt with in our judgment in Civil Appeal No. 488 of 1971 which we have just now pronounced. This case appears to be an off-shoot of that unfortunate injunction. In the suit for specific performance, though Turner Morrison was a party, it did not plead that it had any lien over the shares with which we are concerned in this case. By agreement between Mundhra and Turner Morrison, the later was removed from the array of defendants and the suit proceeded against the remaining defendants.

After obtaining the decree for specific performance and the injunction mentioned above, Mundhra appears to have not been interested in purchasing the 51 per cent shares by paying for the same evidently because he was in a position to have an absolute control over Turner Morrison as a result of the injunction issued. Though Hungerford filed an appeal against the decree in that suit, that appeal was withdrawn for reasons which are not clear. After the withdrawal of the appeal, by a Master's summons dated August 30, 1965 Hungerford moved the trial court for fixing a time within which Mundhra should purchase the 51 per cent shares by paying for the same. That application was rejected on September 1965 on the ground that the application being one for execution, it must be in a tabular form and "that any imposition of time limit would be to engraft something on the decree which does not exist in the decree". The appeal against that order was also unsuccessful.

After the suit for specific performance was decreed, Mundhra by himself or through Turner Morrison appears to have made

A various attempts to see that Hungerford is placed in such a position as not to be able to implement its part of the agreement. We have had to deal with some of those aspects in Civil Appeal 488 of 1971. Suffice it to say that according to Hungerford, the suit from which this appeal arises is one of the attempts of
B Mundhra in that direction.

One other circumstance that is necessary to be mentioned before proceeding to consider the points in controversy is that despite the various resolutions passed by the Board of Directors of Turner Morrison as well as by the shareholders of that com-
C pany at the general meeting, the present suit was filed by the Secretary of Turner Morrison even without obtaining the sanction of the Board of Directors. The Board of Directors' sanction was sought only after the defendants' objected to the maintainability of the suit. From the proceedings of the Board of Directors, it is clear that they were not even aware of the company against whom the suit was filed. From the two resolutions passed by the
D Board of Directors ratifying the action taken by the Secretary, it is obvious that either they were callous or they were mere tools in the hands of Mundhra.

It is not denied on behalf of Hungerford that the tax due from that company for the assessment years 1939-40 to 1955-56 had
E been discharged by Turner Morrison. Hungerford's liability to pay tax arose because of the dividends it was deemed to have received from Turner Morrison as a result of s. 23-A proceedings. But there is dispute between the parties as to the exact amount paid by Turner Morrison. We have not thought it necessary to go into that controversy as we have, agreeing with the High Court, come to the conclusion that the suit is not maintainable for the
F reasons to be presently stated.

A great deal of controversy centres round the question whether when an assessment is made on the shareholders of a company as a result of an order under s. 23-A, the company's liability to pay that tax is primary or secondary. It was contended on
G behalf of Hungerford that that liability is a joint liability of both the company's as well as that of the shareholders. But according to the appellant that liability is primarily that of the shareholders and if the company is compelled to discharge that liability, it is entitled to be reimbursed by its shareholders. Both the trial judge as well as the appellate bench have upheld the conten-
H tion of Hungerford and have come to the conclusion that when Turner Morrison paid the tax due from Hungerford, it was discharging its own liability under law and that being so, it was not entitled to seek reimbursement from Hungerford.

Section 23-A empowers the Income-tax Officer to order in writing if the conditions prescribed in that section are satisfied that the undistrubuted portion of the assessable income of a company earned in the previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof, shall be deemed to have been distributed as dividends amongst the shareholders as on the date of the concerned general meeting. That deemed income has to be assessed in the hands of the shareholders either under s. 23 or under s. 34 of the Indian Income-tax Act, 1922.

The two provisos to s. 23-A that are important for our present purpose are found in cls. (ii) and (iii) of sub-s. (2) of s. 23-A. Clause (ii) says:

> "Where the proportionate share of any member of a company in the undistributed profits and gains of the company has been included in his total income under the provisions of sub-section (1) the tax payable in respect thereof shall be recoverable from the company, if it cannot be recovered from such member."

Clause (iii) reads:

> "Where tax is recoverable from a company under this sub-section, a notice of demand shall be served upon it in the prescribed form showing the sum so payable, and such company shall be deemed to be the assessee in respect of such sum, for the purposes of Chapter VI."

It was urged on behalf of Hungerford that the income that can be brought to tax as a result of an order under s. 23-A is not a real income; it is only a deemed income; that income came to be taxed because of the failure of the company to declare dividends. It is only for the purpose of convenience that income is taxed in the hands of the shareholders; hence the liability to pay that tax in equity must be that of the company and it is for that reason s. 23-A has provided for the realisation of the tax due from the shareholders from the company. The fact that before passing an order under s. 23-A the shareholders are not even required to be heard was emphasised. In this connection our attention was invited to the amendment of s. 23-A in 1955 as a result of which now the tax liable to be paid as a result of an order under s. 23-A is payable exclusively by the company. In this connection reliance was also placed on the language of s. 42 which empowers the Revenue to assess the income of a non-resident assessee in the hands of his agent, but at the same time that section empowers that agent to retain in his hands a sum

A equal to his estimated liability under that section from out of the non-resident's monies in his hands. It was lastly urged that if dividends were deemed to have been declared, those deemed dividends remained in the hands of the company and when the company paid tax in respect of the same, it must be held to have paid the same out of the dividends of the shareholders that remained in B its hands. On the other hand, it was contended on behalf of Turner Morrison that any assessment made in pursuance of an order under s. 23-A is an assessment on the shareholders and not on the company. The dividends deemed to have been distributed under s. 23-A is considered to be the income of the shareholders and not that of the company. It is added on to the other income of C the shareholder for the purpose of assessment. It is recoverable from the shareholder. It is recoverable from the company only if it cannot be recovered from the shareholders and the company is deemed to be an assessee in respect of such sum for the purposes of Chapter VI only and not for all purposes. Further the deemed distribution of dividends as a result of an order under s. 23-A is in no sense a real distribution of dividends which can D be done only by the shareholders at the general meeting of the company. We do not propose to pronounce on this controversy firstly because this appeal can be decided on other grounds and secondly for the reason that that controversy has now become more or less academic in view of the amendment of s. 23-A in 1955.

E For the assessment years 1940-41 to 1952-53, Turner Morrison was assessed as the agent of Hungerford as could be seen from the assessment orders. For that reason it was contended on behalf of Turner Morrison that it is entitled to be reimbursed in respect of the tax paid by it. Hungerford denies that Turner Morrison was its agent. According to Hungerford, the payments in F question were made by Turner Morrison voluntarily and therefore it is not entitled to claim any reimbursement. Section 43 of the Indian Income-tax Act, 1922 prescribes as to who could be assessed as an agent under s. 42. That section says :—

> "Any person employed by or on behalf of a person residing out of the taxable territories or having any G business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall for all the purposes of this Act, be deemed to be such agent."

H It was contended on behalf of Hungerford that it was not residing out of the taxable territories; it is a private limited company; hence it must be held to be residing in all places where it

earns or deemed to earn any income. It was further urged that Turner Morrison was not a person employed by or on behalf of Hungerford nor did Hungerford have any business connections with Turner Morrison. It was also the contention of Hungerford that it did not receive any income, profits or gains through Turner Morrison. Lastly it was urged that the Income-tax Officer had not caused any notice to be served upon Turner Morrison intending to treat that company as the agent of Hungerford. On the other hand it was Turner Morrison which had volunteered to be assessed on behalf of Hungerford. For all these reasons it was said that Turner Morrison cannot be held to have been taxed as the agent of Hungerford. All these contentions were taken for the first time in this Court. They do not appear to have been taken either before the trial court or before the appellate court. The contentions raised involve determination of questions of fact. In the plaint, it was specifically averred that the payments in question were made by Turner Morrison as the agent of Hungerford. That averment has not been specifically denied. In that view, we are not called upon to go into the various submissions noted above.

Before going into the other contentions, we may briefly deal with the contention that the suit was not properly instituted. There appears to be basis for Hungerford's contention that this suit was inspired by Mundhra and Ardeshir Jivanji Hormasji, the Secretary of Turner Morrison, who signed the plaint on behalf of Turner Morrison was a mere tool in his hands. There is also reason to believe that when the Directors of Turner-Morrison ratified the action taken by Hormasji, they behaved in an irresponsible manner as seen earlier. But all the same it cannot be said, the suit is not maintainable. It is true that under the Articles of Association of Turner Morrison, a suit on behalf of that company has to be filed with the consent of the Directors. But the Secretary of the company held a general power of attorney from the Directors and the action taken by him was approved by the Directors. Hence there can be no valid objection to the maintainability of the suit.

Three important questions remain to be considered. They are :

1. Whether the claim made by Turner Morrison is barred by the rule of estoppel, or waiver or abandonment ?

2. Whether the decision of Turner Morrison to take over the liability of Hungerford either with or without any guarantee from Turner brothers was *ultra vires* its powers and

A 3. Whether the claim made in the suit or any portion thereof is barred by limitation?

The judgments of the trial court and the appellate court have not made any distinction between estoppel, waiver and abandonment. The distinction between those three concepts is fine but B real. In this case, there was no plea of any release under s. 63 of the Contract Act. Hence the argument of Mr. A. K. Sen, learned Counsel for Turner Morrison on the scope of that section is irrelevant and we shall not go into the same. The essential question to be considered is whether the facts established in this case support the plea of estoppel put forward by Hungerford. If the answer to that question is in the affirmative then there is no need C to examine whether there was any waiver or abandonment as pleaded by Hungerford.

'Estoppel' is a rule of equity. That rule has gained new dimensions in recent years. A new class of estoppel *i.e.* promissory estoppel has come to be recognised by the courts in this D country as well as in England. The full implication of 'promissory estoppel' is yet to be spelled out. We shall presently refer to decisions bearing on that topic but before doing so, let us examine whether Turner Morrison made any representation to Hungerford, if so, what is that representation. Further, whether Hungerford acted on the basis of that representation to its disadvantage. It E is not denied that year after year from 1941 to 1954 Turner Morrison passed resolutions undertaking to discharge the tax liability of Hungerford. In pursuance of those resolutions taxes due from Hungerford were paid. There can be no doubt that the steps taken by Turner Morrison were within the knowledge of Hungerford as it held 100 per cent shares of Turner Morrison. The Directors of Turner Morrison must have been its nominees. F The profit and loss accounts of Turner Morrison must have been approved by Hungerford year after year at the general meeting of that company. In reality the Turner brothers were the owners of Hungerford as well as Turner Morrison though each of those companies was a separate legal entity. It may be that Turner Morrison did not declare dividends so that Hungerford may avoid G paying tax at a high rate. But at the same time Hungerford would not have agreed for not distributing dividends unless Turner Morrison took over the responsibility of paying the tax on the dividends deemed to have been distributed. It is established that if dividends had been declared Hungerford would have got more than two and half times the tax paid on its behalf. The undis- H tributed dividends were available to Turner Morrison to be utilised as working capital and thereby earn more profits. The arrangement regarding the non-distribution of dividends as well as the payment for the tax due from Hungerford by Turner Morrison

must have been with the consent of Hungerford as well as Turner brothers. Those arrangements had clearly benefited all the parties. Till Mundhra entered the scene, there could not have been any conflict of interest between Hungerford and Turner Morrison. When Turner Morrison paid the tax due from Hungerford, legal fiction apart, it was really paying from the monies belonging to Hungerford. If for any reason, Turner Morrison had not undertaken the responsibility to discharge the tax liability of Hungerford, the latter could have taken steps to compel the former to declare dividends or even compel it to go into voluntary liquidation. Hence there can be no doubt that by acting on the basis of the representation made by Turner Morrison, Hungerford had placed itself in a disadvantageous position. But it was urged on behalf of Turner Morrison that the resolutions in question were mere promises to do something in the future : They were not representations of any fact and as those promises were not supported by any consideration, they afford no legal basis to resist the claim made in the plaint. Hungerford's answers to these contentions are, that firstly those resolutions afford a good basis for raising a plea of promissory estoppel; secondly those representations became representation of fact as soon as the tax liability of Hungerford was discharged by Turner Morrison in pursuance of its resolutions and lastly the promises made under those resolutions were supported by consideration inasmuch as Hungerford in response to those promises refrained from enforcing its right to have the profits distributed as dividends. Now coming to the payments made after 1955, it is seen that according to the agreement between Turner Morrison, Hungerford and Mundhra, Turner Morrison was required to set apart a sum of Rupees 46 lakhs to discharge the tax liability of Hungerford. Accordingly Turner Morrison transferred Rupees 46 lakhs from its general reserve to a special reserve. Further by the agreements dated October 31, 1957 set out earlier Turner Morrison took over the entire tax liability of Hungerford and the Turner brothers agreed to reimburse Turner Morrison any payment made on behalf of Hungerford in excess of Rupees 46 lakhs. All these arrangements clearly enured to the benefit of Turner Morrison inasmuch as it allowed that company to refrain from declaring dividends and utilise that money for business purposes. There can be no doubt that it was done in the best interest of that company and with a view to further its business interests.

It is necessary to note that despite Turner Morrison paying the tax due from Hungerford from 1941 uptill 1953, those payments were not debited to the account of Hungerford; nor were they shown as debts due from Hungerford in the balance sheets placed before the general meeting. Those balance sheets were approved by the general meeting. It was plainly admitted by the

A witnesses examined on behalf of Turner Morrison that the amounts paid on behalf of Hungerford were not considered as debts due from that company till about the time of filing the suit. In the general meeting of Turner Morrison held on March 29, 1956, the recommendation of the Board of Directors to transfer Rupees 46 lakhs from the general reserve to a special reserve for B the purpose mentioned earlier was approved. Thereafter Turner Morrison paid the tax due from Hungerford for the assessment year 1952-53 and debited the same to that special reserve. While Turner Morrison was keeping Hungerford informed of the assessments made on it and the refunds ordered, at no time it made any demand on Hungerford to reimburse the moneys paid. On several C occasions Turner Morrison entered into agreements with the President of India undertaking to discharge the tax liabilities of Hungerford upto an agreed maximum. Turner Morrison was representing Hungerford in all the assessment proceedings. It used to file appeals on behalf of Hungerford against the orders of the Income-tax Officers. It had received all the amounts ordered to be refunded. It was keeping Hungerford informed of the D various orders passed by the Income-tax authorities, but yet without making any demand for the payment of tax paid by it. The documents produced in the case and the admissions made by the witnesses examined on behalf of Turner Morrison make it abundantly clear that the idea of claiming back the tax paid on behalf of Hungerford came to be entertained by Turner Morrison only E after Mundhra came to control that company. With this background let us now consider whether Turner Morrison is estopped from making the claim in question.

In support of its case Hungerford relies primarily on the doctrine of Promissory Estoppel. This doctrine has assumed importance in recent years though it was dimly noticed in some of the F earlier cases. The leading case on the subject is *Central London Property Trust Ltd.* v. *High Trees House Ltd.*(1). The facts of that case are as follows:

Central London Property Trust Ltd. let to the High Trees House Ltd., a subsidiary of the former a block of flats for a term G of 99 years from September 29, 1937 at a ground rent of £ 2500 a year. In the early part of 1940, owing to war conditions then prevailing only a few of the flats in the block were let to tenants and it became apparent that the High Trees House Ltd. would be unable to pay the rent reserved by the lease out of the rent of the flats. Discussions took place between the Directors of the two H companies and as a result on January 3, 1940, a letter was sent by the lessor to the lessee confirming that the ground rent of the

(1) [1947] 1 K.B. 130.

premises would be reduced from £ 2500 to £ 1250 as from the beginning of the term. The lessee thereafter paid the reduced rent. By the beginning of 1945, all flats were let but the lessee continued to pay only the reduced rent. In September 1945, the lessor wrote to the lessee demanding rent at the rate of £ 2500 per year. It also claimed at that rate for the quarters ending September 29 and December 25, 1945. The lessee repudiated that claim. The question for decision was whether the lessor was bound by the concession that it had agreed to show as the same was not supported by any consideration. Answering that question Denning J. (as he then was) held that where parties enter into an agreement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense. Therein the court divided the claim made in the suit into two categories one for the period prior to the end of 1945 and the other for the period thereafter. It disallowed the claim of the lessor in respect of the former and allowed the claim relating to the later period.

The rule laid down in *High Trees case*(1) again came up for consideration before the King's Bench in *Combe* v. *Combe*(2). Therein the court ruled that the principle stated in *High Trees'* case(1) 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 his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no seuch 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. But that principle does not create any cause of action which did not exist before; so that, where a promise is made which is not supported by any consideration, the promises cannot bring an action on the basis of that promise. The principle enunciated in the *High Trees'* case(1) was also recognised by the House of Lords in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*(3). That principle was adopted by this Court in *Union of India* v. *Indo Afghan Agencies Ltd*(4). The facts of that case, in brief, are as follows :

(1) [1947] 1 K.B. 130.
(2) [1951] 2 K.B. 215.
(3) [1955] 2 All E.R. 657;
(4) [1968] 2. S.C.R. 366.

A In exercise of its powers under s. 3 of the Imports and Exports (Control) Act, 1947, Central Government issued the Imports (Control) Order, 1955 and other orders setting out the policy governing the grant of import and export licences. The Central Government also evolved an Import Trade Policy, to facilitate the mechanism of the Act and the orders issued thereunder, and B it was modified from time to time by issuing fresh Schemes in respect of new commodities. In 1962, the Central Government promulgated the Export Promotion Scheme providing incentives to exporters of woollen textiles and goods. It provided for the grant to an exporter certificates to import raw materials of a total amount equal to 100% of the F.O.B. value of his exports. C Clause 10 of the scheme provided that the Textile Commissioner could grant an import certificate for a lesser amount if he is satisfied, after holding an enquiry, that the declared value of the goods exported is higher than the real value of the goods. The Scheme was extended to exports of woollen textiles and goods to Afghanistan. M/s. Indo-Afghan Agencies Ltd. exported woollen goods to Afghanistan and were issued an Export Entitlement Cer- D tificate by the Textile Commissioner not for the full F.O.B. value of the goods exported but for a reduced amount on the basis of some private enquiry supposed to have been held by him but not after holding an enquiry as contemplated by the Scheme. The representation made by the Indo-Afghan Agencies in that connection to the Central Government was rejected. Thereafter E M/s. Indo-Afghan Agencies Ltd. moved the High Court to set aside the order of the Textile Commissioner and the government and to issue a direction to them to grant licences for an amount equal to 100% of the F.O.B. value of their exports. That prayer was resisted by the government on various grounds, *inter alia,* that the Export Promotion Scheme was administrative in charac- F ter, that it contained mere executive instructions issued by the government to the Textile Commissioner and created no enforceable rights in the exporters who exported their goods in pursuance of the scheme and it imposed no obligation on the government to issue import certificates. The High Court and later this Court in appeal rejected that contention. This Court held that the government is not exempt from liability to carry out the representa- G tion made by it as to its future conduct. In arriving at that conclusion this Court placed reliance on the decision of Denning J. in *Robertson* v. *Minister of Pensions*(1). Therein (Denning J.) was dealing with a case of serving army officer who wrote to the War Office regarding a disability and received a reply that his disability had been accepted as attributable to "military service". H Relying on that assurance he forebore to obtain an independent medical opinion. The Minister of Pensions later decided that his

(1) [1949] 1 K.B. 227.

disability could not be attributed to War Service. Therein the court held that as between the subjects such an assurance would be enforceable because it was intended to be binding, intended to be acted upon and was in fact acted upon, and the assurance was also binding on the ground because no term could be implied that the Crown was at liberty to revoke. The rule laid down in these decisions undoubtedly advance the cause of justice and hence we have no hesitation in accepting it.

It was urged on behalf of Turner Morrison that the authority given to it to discharge the tax liabilities of Hungerford as well as the agreements entered into by it with Hungerford and the Turner brothers were *ultra vires* its powers, and consequently they provide no legal basis to resist the plaint claim. It is true that a Private Ltd. company cannot exceed the powers conferred on it under its Memorandum of Association. Therefore, for considering whether Turner Morrison was competent to undertake the liability it did, we have to look to the provisions in the Memorandum. Clause 3(b) of the Memorandum empowers the Turner Morrison to carry on business in India and elsewhere as merchants, general merchants, agents and traders etc. Sub-clause (q) of that clause gives power to the company "to receive money on deposit at interest or otherwise and lend money to such persons, with or without security and on such terms as may seem expedient and in particular to customers of and other persons having dealing with the company and to give any guarantee or indemnity as may seem expedient."

Sub-cl. (x) authorises the company:

> "to distribute among the members of the company in specie any property of the Company, but no distribution amounting to a reduction of capital shall be made without the sanction, if any, for the time being required by law."

Sub-cl. (z) authorises the company to do all such other things as are incidental or conducive to the attainment of objects mentioned in Memorandum.

As seen earlier the non-distribution of the dividends had augmented the working capital of the company thus affording it facility to earn more profits. Any step taken to augment the working capital of the company is undoubtedly incidental to the business of the company and further the same was conducive to the attainment of the objects mentioned in the Memorandum. When Turner Morrison paid the tax due from Hungerford in substance, though not in form, it was distributing a portion of its

A assets to the 100 per cent shareholder of the company but without reducing its capital. Hence we are unable to see how it can be said that Turner Morrison had acted *ultra vires* its powers. Mr. A. K. Sen, learned Counsel for Turner Morrison invited our attention to several decisions wherein the courts had taken the view that the actions taken by the companies concerned were

B *ultra vires* their powers. Those decisions were rendered on the facts of those cases. Whether a transaction entered into by a company can be said to be within its powers or not has to be decided on the basis of the facts established and the provisions in its Memorandum and not on the basis of any abstract rule.

C The only other question that remains to be considered is whether the suit claim is barred by limitation even on the assumption that claim is otherwise in order. For pronouncing on this question, it is first necessary to decide whether Turner Morrison had waived its lien over the shares held by Hungerford. There can be no doubt that Turner Morrison has the power to waive the paramount lien it has upon all the shares registered in the name

D of each member, for his debts or liabilities to the company. That much is clear from art. 22 of the Articles of Association. That article provides that :

> "Unless otherwise agreed the registration of transfer of shares shall operate as a waiver of the Company's lien (if any) upon such shares."

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In Buckley on Companies Acts (13th Edn. at p. 797) dealing with the question of lien, it is observed :

> "...For such a provision is for the protection of the company, and is capable of being waived by the company."

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We have to see whether the company in fact had waived the lien it had in respect of the suit claim, assuming that the said claim is otherwise good. As seen earlier at all stages Turner Morrison took over the responsibility of paying the tax due on behalf of Hungerford. There was no idea of recovering the amount paid

G as tax, from Hungerford. When Hungerford sold 49 per cent of its shares to Mundhra, the same was registered without any objection. It was clearly admitted by the Secretary of Turner Morrison and other witnesses examined on behalf of that company that the idea of suing Hungerford for recovering the tax paid was conceived for the first time after Mundhra obtained the decree for

H specific performance. Under these circumstances, it is clear that Turner Morrison had waived the lien that it might have had over the shares held by Hungerford. Hence the only claim that Turner Morrison could have made against Hungerford was a money

claim. The present suit was filed on November 15, 1965. Hence it is governed by the provisions of the Limitation Act, 1963 which came into force on April 1, 1964. Article 23 of that Act fixes a period of three years for instituting a suit "for money payable to the plaintiff for money paid for the defendant" and the cause of action for the same commences when the money is paid. To the same effect was Art. 63 of the Limitation Act, 1908. The amounts claimed in the present suit except those in respect of the assessment for the assessment year 1955-56 were all admittedly paid before November 15, 1962. Hence they are *prima facie* barred by limitation. So far as the payments made in respect of the assessment for the assessment year 1955-56 is concerned, Turner Morrison can have no claim against Hungerford because under the amended s. 23-A of the Income-tax Act, 1922, that liability was that of Turner Morrison itself. But it was urged on behalf of Turner Morrison that in view of s. 15(5) of the Limitation Act, 1963, the claim made, leaving aside the claim made in respect of the assessment for the assessment year 1955-56, is not barred. Section 15(5) prescribes:

> "In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government shall be excluded."

It was urged on behalf of Turner Morrison that Hungerford is a non-resident company. Therefore it cannot be said that at any time it was present in India. Hence the suit is not barred. If this argument is correct then there can be no period of limitation for filing a suit against a non-resident company—a proposition which is *prima facie* startling. Can we hold that s. 15(5) applies to a suit of the type with which we are concerned? That provision contemplates the case of a defendant who has been absent from India. That article presupposes that defendant was at one time present in India and later he has been absent from India. A person who was never in India cannot be considered as having been absent from India. Factually a company cannot either be present in India or absent from India. But it may have a domicile or residence in India. Sometime questions have arisen as to what is the place of residence of an incorporated company. Dicey in his Conflict of Laws (4th Edn. p. 152 rule 19) pointing out the difference between the domicil of a natural person and that of a corporation, says:

> "The domicil of a human being is a fact which on certain points, subjects him to the law of a particular country. The domicil of a corporation is a fiction suggested by the fact that a corporation is, on certain points

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> *e.g.*, the jurisdiction of the Courts, subject to the law of a particular country. A man, that is to say, is in some respects subject to the law of England because he has in fact an English domicil; a corporation is by a fiction supposed to have an English residence or domicil because it is in certain respects subject to the law of England. Hence a corporation may very well be considered domiciled or resident, in a country for one purpose and not for another, and hence, too, the great uncertainty as to the facts which determine the domicil, or residence of a corporation. In each case the particular question is not, at bottom, whether a corporation has in reality a permanent residence in a particular country, but whether, for certain purposes (*e.g.* submission to the jurisdiction of the Courts or liability to taxation), a corporation is to be considered as resident in England or in some other country."

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The question of residence of an insurance company registered and having its registered office in a foreign country came up for consideration before the Chancery Division in *New York Life Insurance Company* v. *Public Trustee*(1). Therein Pollock M.R. quoted with approval the following passage from the judgment of Lord St. Leonards in *Carron Iron Co.* v. *Maclaren*(2).

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> "I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured... There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business, one is just as much a domicile of the corporation as the other."

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The same view was expressed in that case by Warrington L.J. and Atkin L.J.

A division bench of the Bombay High Court in *Sayaji Rao Gaikwar of Baroda* v. *Madhavrao Raghunathrao*(3) dealing with the scope of s. 13 of the Limitation Act 1908 which is identical with the present s. 15(5) held that s. 13 must be read so as to avoid the obvious absurdity that arises if such corporate bodies

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(1) [1924] 2. Ch. 201.

(2) 5, H.L.C. 416.

(3) A.I.R. 1929 Bom. p. 14.

are deemed to reside out of British India so that suits against them can never be barred at all. And this can be done by treating them as defendants, who by reason of their special character, are not absent from British India within the meaning of the section, because they have not got the same liberty as private individuals to reside personally in British India and attend to their affairs and they must do so through agents or representatives. Under those circumstances, they can be held to reside in British India in so far as they actually carry on business through their representatives in British India.

Section 15(5) of the Limitation Act, 1963 can be viewed in one of the two ways *i.e.* that that provision does not apply to incorporated companies at all or alternatively that the incorporated companies must be held to reside in places where they carry on their activities and thus being present in all those places. Hungerford is an Investment company. It had invested large sums of monies in Turner Morrison. Its Board of Directors used to meet in India now and then. It was, (through its representatives) attending the general meeting of the shareholders of Turner Morrison. Under these circumstances, it must be held to have been residing in this country and consequently was not absent from this country. Hence s. 15(5) cannot afford any assistance to Turner Morrison to save the bar of limitation.

For the reasons mentioned above, this appeal fails and it is dismissed. Turning to the question of costs, from what we have said earlier, it is clear that there was no justification for bringing the suit. The suit was clearly engineered by Mundhra to attain certain ulterior purposes of his. But unfortunately neither he nor his likely collaborators the Directors of Turner Morrison, are before us. The only accessory of Mundhra who is before us is the Secretary of Turner Morrison, Hormasji. There is no justification to make Turner Morrison in which Mundhra has only 49 per cent shares to bear the costs. In the circumstances, we think it proper to direct Hormasji to bear the costs of both the parties in this Court. The order made by the High Court as regards costs will stand.

K.B.N. *Appeal dismissed.*