

CASE NO.:
Appeal (civil) 3940 of 2007

PETITIONER:
HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION

RESPONDENT:
M/S CORK MANUFACTURING CO

DATE OF JUDGMENT: 27/08/2007

BENCH:
TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 3940 OF 2007
(Arising out of SLP(C) No.11683 of 2006)

P.K. BALASUBRAMANYAN, J.

1. Leave granted.

2. The defendant in Suit No. 8 of 1995 in the court of Senior Sub-Judge, Gurgaon is the appellant in this appeal. The appellant allotted plot No. 259 on 12.3.1986 to the respondent through its sole proprietor Om Prakash Saharan. The approximate area of the plot is 1000 square meters and the tentative price was Rs. 1,20,000/-. On 12.2.1988, a formal agreement was entered into between the parties. According to the agreement, the allottee had to start construction of a building for the setting up of an industrial unit within a period of three months and had to complete the construction within one and half years from the date of issue of the letter of allotment. The construction had to be completed and the installation of the machinery had also to be completed and the commercial production was to be started within a period of two years from the date of allotment. The Agreement also provided that failing compliance with the above condition by the allottee, the plot was liable to be resumed and 10% of the cost of the plot deposited by the allottee at the time of allotment was liable to be forfeited. The letter of allotment was issued on 24.12.1987. The allottee did not fulfil the condition of starting commercial production within two years of the letter of allotment. This fact is not in dispute. The appellant thereupon issued various notices to the allottee. On 19.7.1991, the allottee requested for extension of time. That request was rejected. On 13.9.1991, according to the appellant, the appellant issued an order of resumption which specifically referred to the contravention of the terms and conditions of allotment by the allottee. According to the appellant, possession was taken back on 20.9.1991. The plot was thereafter re-allotted to M/s Insulation & Electrical Products (P) Ltd., New Delhi on 2.4.1992. Since that allottee also did not fulfil the conditions, the said allotment was cancelled on 6.1.1994.

3. The respondent, the plaintiff, filed an application

for referring the dispute to Arbitration. The same was rejected. Respondent then approached the Consumer Forum, but that complaint was also dismissed.

4. On 5.10.1995, the respondent filed the present suit No. 8 of 1995 for a permanent injunction restraining the defendant \026 appellant from interfering, disturbing or in any manner tampering with the possession of the plaintiff over the plot in dispute, and restraining the defendant \026 appellant from re-allotting the plot in question to any other person on the basis of the resumption order, if any, or otherwise. Though there was no prayer regarding any resumption order, it was asserted that the resumption order, if any passed by the defendant was void, illegal, non-est and not binding upon the plaintiff in any manner. A decree for mandatory injunction directing the defendant \026 appellant to remove an existing high-tension wire going over the plot in question and also to remove an electrical pole existing in the plot and to make available the plot free from all kinds of hindrances for raising the construction was also prayed for. The plaint was signed by one Uma Shankar who was said to be a power of attorney of the plaintiff \026 firm. The plaint proceeded on the footing that there was also an agreement between the parties that the electric pole located in the plot would be got removed by the appellant and it was in view of the failure of the appellant to get it done, that the construction could not be started by the plaintiff. It was also admitted in the plaint that there might have been an order of resumption of the plot, but if there was any such order, it was illegal, void and ineffective and not binding on the rights of the plaintiff because of lack of opportunity of hearing given to the plaintiff. The plaint proceeded to state that the defendant was threatening to dispossess the plaintiff pursuant to that order of resumption; that the plaintiff was in possession and that the plaintiff was entitled to relief as claimed.

5. The defendant filed a written statement contending that the plot in question was resumed on 13.9.1991 in view of the plaintiff contravening the terms of the allotment and possession was taken back on 25.9.1991. The plot had been re-allotted to another concern. The plaintiff had neither any right over the plot in question nor any possession over the same. Since the plaintiff had defaulted, the plot had been rightly resumed. There was no stipulation or condition in the allotment that the appellant had the obligation to remove the electric post located in the plot or the overhead electrical line. The plaintiff was not in possession. The suit was liable to be dismissed.

6. On behalf of the plaintiff, one Jai Bhagwan was examined as P.W. 6. He gave evidence to the effect that the plot in dispute was allotted to Om Parkash Saharan. He had been appointed as General Power of Attorney by the said Om Parkash Saharan on 9.4.1996. Om Parkash Saharan was the sole proprietor of the business of the plaintiff \026 company. Obviously, this witness who entered the picture by virtue of a power of attorney executed on 9.4.1996, was not a party to any of the things that had taken place prior to the grant of power of attorney in his favour and had no knowledge of them. Om Parkash Saharan in whose name the allotment was made did not go to the box. In the box, P.W. 6 admitted that the

company had received the letter warranting of the proposal to resume the plot because of its failure to fulfil the condition of allotment. He stated that because of the high-tension wire passing over the plot in dispute, it was not possible to raise construction thereon. He admitted that one week prior to the institution of the present suit, the plaintiff came to know that defendant had resumed the plot in dispute and had also prepared a report that possession had been taken back. He asserted that the plaintiff had not surrendered the possession of the suit property and the plaintiff was in possession till date. He stated that letters sent intimating the proposal to resume the plot were illegal and void. No opportunity of hearing was afforded prior to the resumption of plot in dispute. He admitted that the defendant had issued Exhibit PW4/11 letter to Om Parkash Saharan, but no payment was made by Saharan in pursuance thereof. He stated that he knew Om Parkash Saharan since 1983. He admitted that the allottee had to start construction within two years from the date of allotment. He admitted that within the prescribed period, no construction was raised but claimed that that was because of the passing of the high-tension wire over the property. He denied the suggestion that the plot was resumed on 13.9.1991 and possession was taken on 25.9.1991. He pleaded ignorance of the fact that the plot in question was re-allotted to another Om Parkash, son of Arjan Lal and that possession had been given to him since 2.9.1994. He denied the suggestion that he was aware at the time of execution of the Power of Attorney in his favour that the plot in dispute was re-allotted to Om Parkash son of Arjan Lal. He pretended ignorance of the filing of a complaint in the District Consumer Forum earlier by the plaintiff and about the dismissal of the same. He also pretended ignorance of the fact that a petition under the Arbitration Act was filed by the plaintiff and that was also dismissed. But, he admitted that no construction was started by the time the suit was filed. He denied the suggestion that he had no right to file the present suit. The power of attorney in his favour was marked as PW6/1.

7. Letter PW-4/5 produced by the plaintiff and proved through P.W. 4 examined on behalf of the plaintiff, was a final show cause notice given to the plaintiff \026 company on its failure to set up an industrial unit in the plot in question. In that notice, after informing the plaintiff that no further extension of time was possible, the plaintiff was called upon to show cause within a period of 35 days from the date of issue of that letter as to why the plot allotted to the plaintiff be not resumed on account of the failure of the plaintiff to set up the unit within the extended period. The plaintiff was informed that in case no satisfactory explanation was received within the period specified, the Corporation would be constrained to resume the plot without making any further reference to the plaintiff. Exhibit PW4/16, the letter dated 1.4.1991 sent in reply to the above letter dated 4.3.1991 after acknowledging the threat of resumption stated that the plaintiff was quite eager and sincere in its desire to set up an industrial unit but since Shri Om Parkash Saharan, who signed the letter, was under severe stress and strain due to a serious accident which made him almost incapacitated for a long period, he could not take effective steps to undertake the work, and that the plaintiff hoped to take up the work and complete it in four months and

praying that some more time may be allowed for that purpose. It is also seen from an earlier letter PW 4/6 dated 27.3.1991, that the appellant had specifically brought to the notice of the plaintiff that the plaintiff had contravened the terms of the agreement by not taking up the construction and calling upon the plaintiff to show cause within 35 days why the plot of land should not be cancelled. This was followed by PW4/9 dated 15.9.1991 conveying the decision of the appellant to resume the plot for non-compliance with the terms of allotment. Thus the correspondence marked on the side of the plaintiff itself clearly indicated that the plaintiff had been given notice of the resumption for failure of the plaintiff to fulfil the terms of the allotment. The correspondence produced by the plaintiff also indicates that there was no stipulation outside the terms of the written allotment letter about any promise of removal of any electrical pole or electrical line passing over the plot in question. Otherwise, that would have been mentioned in Ex. PW4/16 dated 1.4.1991.

8. The case tottered out on behalf of the plaintiff in the trial court was that the authorities had agreed to have the electrical pole removed from the plot and since it was not removed, the work could not be started. This is not reflected by the written allotment letter. In other words, there is no term therein to that effect. Such a claim is also belied by the letters written by the plaintiff which have been marked on the side of the plaintiff as exhibits and reference to one of them has been earlier made. Some correspondence with some officers of the appellant regarding the removal of the electric pole was relied on to say that outside the written agreement, the appellant had agreed to get the electric pole and overhead line removed. There was also no evidence to prove the possession claimed by the plaintiff as on the date of suit.

9. In spite of such glaring factors emerging, the trial court proceeded to accept the story of the plaintiff that it had not been given notice of the resumption of the land and that it continued to be in possession and that there was a condition for removal of the electric pole and the electrical line and since the pole and the line were removed only by 30.11.1995, the plaintiff had time to take up the project thereafter. I must say that the decision of the trial court shows total lack of application of mind and non consideration of the pleadings and the evidence in the case. The suit was thus decreed declaring the resumption order dated 13.9.1991 illegal and against the principles of natural justice and setting it aside, a relief that does not even seem to be sought in the plaint. The lower appellate court also toed the line of the trial court and dismissed the appeal, again, without proper advertence to the relevant materials available in the case and even without advertent to the fact that P.W. 6, the power of attorney holder had no knowledge of what had transpired earlier even on his own showing and that the original grantee Om Parkash Saharan had not even come forward to speak to the case of the plaintiff. The appeal was dismissed by the Appellate Court. I must say that as a court of first appeal and as the final court of facts, the Appellate Court had a duty to reappraise the entire material to decide the points arising and the appellate court in this case has miserably failed to perform its duty.

10. The defendant filed a Second Appeal. Along with the Second Appeal, since the plaintiff had pretended ignorance of the order of resumption, on behalf of the

defendant, a legal notice sent by counsel for the plaintiff was also produced by way of additional evidence by invoking Order 41 Rule 27 of the Code of Civil Procedure. We must say with regret that the Second Appellate Court without any application of mind ---- in fact it pains me to record out of my experience in this Court for three years, that the particular High Court is disposing of Second Appeals in such a cavalier manner that nothing else is needed to bring discredit the system itself --- rejected the Second Appeal by stating that no substantial questions of law arose in the Second Appeal. This was after dismissing the application filed under Order 41 Rule 27 of the Code, I get the impression, even without trying to understand what the suit is for, what was the nature of disposal of the suits by the courts below and what that document implied and what it established. The decree thus granted is under challenge before us.

11. Learned counsel for the appellant submitted that it was not a condition of the grant or allotment, that the appellant would get removed an existing electric pole or electric wire passing over the property before handing over possession to the respondent. It is pointed out that the plaintiff had unconditionally taken possession pursuant to the allotment. Learned counsel pointed out that the written letter of allotment does not contain any such stipulation, on the other hand it contained a clear stipulation that the allottee had to complete the entire construction and start the commercial production within two years from the date of issue of the letter of allotment. Learned counsel further pointed out that even the letters on the side of the plaintiff seeking extension of time did not put forward any such claim and what was put forward was only the incapacitation of the proprietor of the plaintiff and the consequent delay in starting the construction. Learned counsel further pointed out that P.W. 6 examined as the power of attorney of the plaintiff, came into the picture only in the year 1996 and had no knowledge of things that transpired in the year 1991 when the allotment was cancelled, the resumption order was passed and the land was resumed. Om Parkash Saharan who was the eo nomine allottee, had not even gone to the box to speak about the letters relating to the failure of the plaintiff to fulfil the conditions of allotment and speak about the so called absence of knowledge about the order of resumption. Learned counsel submitted that it was in that context that the original notice sent by one P. Bhaskaran, Advocate on behalf of the plaintiff to the appellant \026 defendant was sought to be produced in the Second Appellate Court so that the conscience of the court may be satisfied in that regard since the said notice clearly acknowledged the letter conveying the factum of the resumption of the plot allotted to the plaintiff by the appellant. Learned counsel submitted that the High Court was clearly in error in rejecting the application under Order 41 Rule 27 even without applying its mind as to the purpose for which the said document was produced and the need for that document for rendering a decision more satisfactory to the conscience of the Court and without even properly understanding the scope of Section 100 of Code of Civil Procedure and the duty a Second Appellate Court is called upon to perform. Learned counsel pointed out that even a finding of fact ignoring vital documents or without advertence to the relevant evidence and without asking itself the relevant questions, was a finding that was

not binding on a Second Appellate Court under Section 100 of the Code. Learned counsel pointed out that there was no evidence of the possession being with the plaintiff as on the date of the suit and even the local Commissioner's report taken at the instance of the plaintiff showed that the land was lying vacant. The appellant had allotted the land to another person though it had to be resumed again because of failure of that person to fulfil the terms of the allotment to him. The decree for injunction in favour of the plaintiff restraining the appellant from interfering with the so called possession of the plaintiff was clearly a decree not supported by the necessary finding required under law and a relief granted, unsupported by the necessary finding based on evidence in that behalf, clearly amounted to the lower appellate court making a substantial error of law warranting correction by the High Court in Second Appeal. Learned counsel submitted that the relief of declaration granted was also unwarranted in the nature of the reliefs claimed in the plaint.

12. On behalf of the respondent \026 plaintiff, it was contended that the understanding was that the electric pole and the overhead electric lines will be got removed by the defendant \026 Corporation and since that was not done till the year 1995, there was no default on the part of the plaintiff. The High Court was justified in not admitting fresh evidence in Second Appeal since the defendant had the opportunity to produce the same before the trial court. Learned counsel also submitted that the finding of possession was a finding of fact and the High Court was justified in not interfering with the same. Learned counsel submitted that there is no reason to interfere with the decree passed in the case.

13. The plaintiff had come forward with a dubious case regarding the order of resumption of the plot in question. There was clearly a default on the part of the plaintiff in complying with the requirement of putting up an industry in the plot and starting commercial production within two years of allotment. The excuse put forward by the plaintiff for not doing anything in the plot was the existence of a electric pole and overhead electric wires, which stood in the way of the construction. It was the further case of the plaintiff that it was for the defendant \026 Corporation to have got them removed while delivering possession of the plot. We find from the written instrument of allotment, that there was no such stipulation therein. Having accepted the allotment on its basis and taken possession of the plot, it is not open to the plaintiff to raise a contention based on some other subsequent understanding between the plaintiff and some of the officers of the defendant or outside the agreement. In fact, in the letter PW4/16, when such a case if true, should have been put forward, such a case is not put forward. There is also no evidence of any subsequent agreement in that regard. Merely because the officers of the appellant were induced to write letters regarding removal of the pole long after the resumption does not establish any such condition of allotment.

14. The plaintiff's plea that it was not aware of the order of resumption is belied by the letters marked on its side through PW4 and the admission of PW6. These letters clearly show that the plaintiff was given notice of the resumption and was informed that if he did not

comply with the requirement and sent satisfactory reply, the land will be resumed without any further notice within the time stipulated therein. Thus obviously, adequate notice and adequate opportunity was given to the plaintiff before the order of resumption was passed. The non-examination of Om Prakash Saharan was fatal to the case of the plaintiff under the circumstances. The courts below acted perversely in entering a finding that the order of resumption was illegal and was not binding on the plaintiff. I find that the courts below have not adverted to the relevant materials available. Moreover, it is seen that P.W.6, who is examined on behalf of the plaintiff came into the picture only in the year 1996 and was not a competent witness to speak about anything that transpired in the year 1991 and that the original allottee Om Parkash Saharan had not even come forward to give evidence on behalf of the plaintiff. It was a clear case for drawing an adverse inference against the plaintiff for non examination of Om Parkash Saharan. These vital aspects have been ignored by the trial court and by the first appellate court when they purported to find that the order of cancellation was not binding on the plaintiff. I am of the view that a finding ignoring legal evidence available in the case and ignoring the inferences to be drawn from the circumstances established, is a finding that can only be described as perverse and such a finding is not binding on a Second Appellate Court under Section 100 of the Code. In fact, it compels interference by the Second Appellate Court. The High Court has unfortunately not adverted to anything relevant and was incorrect in thinking that the findings of fact are not liable to be interfered with in the case on hand. At least, it should have seen that parole evidence to alter the terms of a written instrument was not permissible and the fact that the courts below had relied on such evidence justified interference by the High Court in Second Appeal.

15. Same is the position regarding the finding on possession. The correspondence with the Electricity Board does not establish that the plaintiff continued to be in possession notwithstanding its default and the order of resumption with notice to the plaintiff. . The evidence of P.W. 6 is not evidence at all of possession of the plaintiff as on the date of the suit or of possession subsequent to 1991. There is no evidence to show that the plaintiff Om Parkash Saharan, the allottee continued in possession until the power of attorney was executed in favour of P.W. 6. The suggestion to P.W. 6 that he was aware of the resumption and re-allotment to another entity when he filed the suit, is a justifiable suggestion on the facts of this case. The finding on possession is also found to be based on no legal evidence and consequently infirm and liable to be interfered with by this Court as it should have been interfered with by the Second Appellate Court.

16. I am also of the view that the Second Appellate Court was clearly in error in refusing to admit in evidence the notice sent on behalf of the plaintiff by its advocate to the defendant. It must be noticed that not even an objection was filed on behalf of the plaintiff to the application under Order 41 Rule 27 of the Code denying the issue of such a notice. There was no denial of the status of the counsel who had issued the notice on behalf of the plaintiff. There is a presumption that when an Advocate sends a notice on behalf of a client, the notice is sent by him on instructions from his client. The plaintiff had no case before the High Court that it had not

instructed the concerned counsel to send such a notice. After all, the purpose for which the notice was produced was only to show that the plaintiff was aware of the resumption made in the year 1991 and the specific acknowledgement of receipt of the concerned letters in that behalf. Even otherwise, the letters produced at the trial do indicate that the plaintiff was aware of the resumption of the plot. Therefore, this was a case where the document produced under Order 41 Rule 27 of the Code was required to enable the High Court to pronounce a judgment more satisfactory to its conscience constituting other sufficient cause within the meaning of Order 41 Rule 27 of the Code for production of additional evidence. The authenticity of the notice had not been questioned by filing an objection and the High Court was therefore in error in thinking that it was not a document which could be straight away accepted.

17. Thus, on the whole, I am satisfied that the plaintiff had not made out any case for relief in the present suit. The judgments of the courts below therefore call for interference. I am satisfied that the appeal deserves to be allowed. If the decree now passed is not set aside, I apprehend that I would be failing in my duty exercising jurisdiction under Article 136 of the Constitution of India. After all, the jurisdiction of this Court is a corrective jurisdiction and not a restricted one.

18. The appeal is therefore allowed. The judgments and decrees of the courts below are set aside and the suit filed by the plaintiff is dismissed with costs throughout.

19. During the course of the hearing, the defendant -- appellant offered that the plot could be allotted afresh to the plaintiff, if the plaintiff was willing to pay the price at the rate of Rs.13,000/- per square meter which is the current rate. The plaintiff was not willing to pay that price. But learned counsel for the plaintiff contended that the plaintiff had, obviously subsequent to the decreeing of the suit, had put up a construction in the property. It is obvious that on the date of suit, there was no construction. The Local Commissioner's report establishes that and the evidence of P.W. 6 also indicates that. In that situation, taking note of the circumstances, I think it proper to give the plaintiff an opportunity to have the land allotted to it afresh, on its paying a price for the plot at the rate of Rs.10,000/- per square meter. In other words, if the plaintiff \026 respondent pays to the defendant \026 appellant, the price of the plot at Rs.10,000/- per square meter within four months from today, there will be a fresh allotment of the plot by the defendant to the plaintiff. While calculating the amount, the plaintiff will be entitled to adjust any sum that might have been paid towards the allotment of the plot originally made in the year 1987 and it need only pay the balance amount. In case, the price at the rate of Rs.10,000/- per square meter is not paid by the plaintiff to the defendant within a period of four months as stipulated above, the defendant would forthwith take physical possession of the land and report that fact to the trial court by way of the affidavit and deal with the plot in accordance with law.

20. Before leaving this case, I think it necessary to issue a direction and to make an observation. The direction is to the appellant to initiate action against those officers who were dealing with the cancellation of the allotment and taking possession of the property, and more particularly those who were in charge of the litigation and who failed to produce vital documents including the notice

issued on behalf of the plaintiff that was sought to be produced in Second Appeal. It is absolutely necessary to take such action in the interests of the appellant, the citizens and the State since it should not be forgotten that the appellant is a trustee of public property and is expected to deal with it as a trustee with all care and caution. The second is to exhort the trial courts, the first appellate courts and the second appellate courts in the State to show better application of mind while deciding a lis keeping in mind that what they are performing is a divine function that is onerous and at the same time challenging. I am making these observations regarding the courts in the concerned State since for the last three years I have been noticing with regret the lack of application in many a case that had come before this Court.

JUDIS