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:
JUDGMENT

CIVIL APPEAL NO. 3940 OF 2007
[Arising out of SLP [C] No. 11683 of 2006]

TARUN CHATTERJEE, J.
1. Leave granted.

2. This appeal is directed against the judgment and order dated 20th January, 2006 of the Punjab and Haryana High Court at Chandigarh whereby the High Court affirmed the concurrent judgments of the courts below decreeing the suit of the plaintiff/respondent (for short the respondent') and declaring the resumption of plot allotted to the respondent by the defendant/appellant (for short 'the appellant') as illegal.

3. The appellant allotted an industrial plot bearing PlotNo.259, Udyog Vihar, Phase IV, Gurgaon to the respondent vide its allotment letter dated 24th November, 1987. Pursuant to the allotment letter dated aforesaid, the appellant entered into an agreement on 12th February, 1988 with the respondent Clause 8 of which provides that the respondent shall start construction on the plot for setting up of an industry within a period of three months and complete the construction thereof within one and a half years from the date of issuance of the allotment letter and further, the respondent shall complete the erection and installation of machinery and commence production within a period of two years from the date of allotment of plot failing which the plot shall be liable to be resumed and the security amount equivalent to ten per cent of the cost of the plot deposited by the respondent at the time of allotment shall stand forfeited. Clause 28 of the agreement provides that in case of breach of any of the terms and conditions of the agreement including Clause 8, the appellant reserves the right to exercise its right of resumption of the plot. The appellant, when found that the respondent had violated Clause 8 of the agreement, issued a show cause notice to it as to why the suit plot should not be resumed and the possession not be

taken back. On 13th September, 1991, the appellant issued a resumption order for non compliance of Clause 8 of the agreement by the respondent stating that the respondent had contravened the terms and conditions of the allotment order. According to the appellant, possession of the suit plot was taken back from the respondent on 20th September, 1991.

4. The respondent filed a Civil Suit before the Addl. Civil Judge (Senior Division), Gurgaon in 1995 more precisely on 5th October, 1995 praying for a decree of permanent injunction restraining the appellant from interfering and/or disturbing in any manner the possession of the suit plot and further restraining the appellant from re-allotting the plot to any other person on the basis of resumption order, if any. In the plaint, it was alleged that it was not possible for the respondent to comply with Clause 8 of the agreement because of high tension wires existing over the suit plot and until and unless the said high tension wires were removed from the suit plot, the respondent was not in a position to raise construction on the same within the time specified in Clause 8 of the agreement. For the reasons aforesaid, the appellant had no right to disturb possession of the suit plot or initiate any proceeding against them. Inspite of several letters written by the respondent to the appellant for removing high tension electric wires and electric pole, the appellant did not remove the same till in the year 1995, when suit was already pending, but instead the appellant sought to resume the suit plot for non compliance of Clause 8 of the agreement. Accordingly, a decree for permanent injunction restraining the appellant from interfering and/or disturbing the possession of the respondent in respect of the suit plot and other reliefs as noted herein above was prayed for.

5. After appearance in the suit, the appellant filed a written statement in which the appellant alleged that a resumption order was passed by it on 13th September, 1991 and possession of the suit plot was resumed on 20th September, 1991 for alleged violation of Clause 8 of the agreement. The plea of limitation was also raised saying that since the suit plot was resumed on 13th September, 1991 by the appellant and the suit was filed on 5th October, 1995, the suit must be held to be barred by limitation. In the written statement, it was also alleged by the appellant that the respondent had suppressed the fact regarding knowledge of the resumption order and also regarding taking over of the possession of the suit plot. Accordingly, the appellant had prayed for dismissal of the suit.

6. The following issues were framed by the trial court :

1. Whether the order dated 13.9.91, if any, is illegal, null and void and not binding upon the plaintiff ?
2. Whether the plaintiff is in possession over the plot in question ?
3. Whether the plaintiff has got no locus-standi to file the present suit ?
4. Whether the suit is barred by limitation ?
5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct ?
6. Whether the suit is bad for non-joinder of the necessary parties ?
7. Relief.

7. The trial court, after the parties had adduced evidence, both oral and documentary, in support of their respective claims, decreed the suit of the respondent inter alia on the following findings of fact :-

(I) As the high tension line and an electric pole which existed, was removed on 30th November, 1995 when the suit was already pending, the Construction in compliance with Clause 8 of the agreement could not be raised on the suit plot.

(II) Other allottees in the same area were granted extension of time to raise construction on identical facts and accordingly it was the duty of the appellant to extend the time for the respondent also after removing the electric wire and pole which existed on the suit plot.

(III) Even if the appellant had resumed the suit plot on 13th September, 1991, the same was so done without giving any opportunity of hearing to the respondent.

(IV) No show cause notice was served by the appellant on the respondent and no procedure was followed to resume the suit plot.

On the above findings of fact arrived at by the trial court on appreciation of the evidence, oral and documentary on record, the following conclusions were drawn :-

1. The order of resumption passed by the appellant dated 13th September, 1991 whereby the suit plot was allegedly resumed, was illegal and against the principles of natural justice and therefore liable to be set aside.

2. The suit was not barred by limitation as the respondent was in possession of the suit plot and resumption order of the appellant was not served upon the respondent.

3. The respondent had by cogent evidence proved his possession over the suit plot and accordingly the respondent was entitled to a decree of permanent injunction as prayed for.

8. Feeling aggrieved, the appellant preferred an appeal by which the decree of the trial court was affirmed. The appellate court also echoed the finding of the trial court and held that the appellant instead of removing the high tension wire and electric pole from the suit plot resumed the plot in question on 13th September, 1991 without affording the respondent any opportunity of being heard and, therefore, held that the resumption order was ineffective and not binding on the respondent. The appellate court also held that the suit was not barred by limitation because no cogent evidence was produced by the appellant to show that the respondent was served with the copy of the resumption order at all or that the respondent had any prior knowledge of the resumption order.

9. A second appeal was, thereafter, filed by the appellant before the High Court and in the second appeal, the appellant filed an application under Order 41 Rule 27 read with Section 151 of the CPC for acceptance of an additional evidence which was nothing but a legal notice dated 8th October, 1991 sent by the counsel for the respondent wherein the respondent had acknowledged the receipt of resumption order of the appellant dated 13th September, 1991. The appeal as well as the application for acceptance of additional evidence under Order 41 Rule 27 of the CPC was taken up for final hearing and by the impugned judgment, the High Court rejected the said application filed under Order 41 Rule 27 of the CPC and also the appeal of the appellant. Before the High Court in second appeal, the main thrust of the argument of the learned counsel for the appellant was that the legal notice allegedly served by the respondent on the appellant should be permitted to be produced on record as additional evidence in the exercise of its power under Order 41 Rule 27 of the CPC to show that the suit filed in 1995 was barred by limitation. On the merits of the second appeal, the High Court recorded the following :-

"Nothing has been shown that the findings recorded by both the courts below suffer from any infirmity or are contrary to the record. No question of

law, much less any substantial question of law arises in the present appeal."

10. Feeling aggrieved by the judgment of the High Court, the instant special leave petition has been filed in respect of which leave has already been granted.

11. On behalf of the appellant, Mr. R. Mohan, Additional Solicitor General submitted at the first instance that the High Court was not justified in rejecting the application for acceptance of additional evidence filed under Order 41, Rule 27 of the CPC. By the application under Order 41, Rule 27 of the CPC, a legal notice alleged to have been served by the counsel for the respondent on the appellant was in fact sought to be admitted in evidence to prove that the respondent had clear knowledge of the resumption order passed on 13th September, 1991 and if such fact was accepted, the suit filed in the year 1995 was clearly barred by limitation. The High Court, however, while rejecting the application for acceptance of additional evidence, held that the legal notice which was alleged to have been served on the appellant was per se not admissible in evidence nor was it proved that the legal notice was issued by the respondent. The High Court also held that even if the same was issued, such a legal notice did not advance the case of the appellant.

12. Before we deal with the aforesaid submission of Mr.Mohan, we may remind ourselves of the provisions of Order 41 Rule 27 of the CPC which are as follows:

"27. Production of additional evidence in Appellate Court \026 [1]The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in Appellate Court. But if-

[a] the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[aa] the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

[b] the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for

any other substantial cause,
the Appellate Court may allow such
evidence or document to be
produced, or witness to be
examined.

[2] Whenever additional evidence is
allowed to be produced by an Appellate
Court, the Court shall record the
reason for its admission."

13. We have carefully examined the provisions made under Order 41 Rule 27 of the CPC. The parties to an appeal shall not be entitled to produce additional evidence, oral or documentary, before the appellate court except on the grounds enumerated in Clause (a), (aa) and (b) of Order 41 Rule 27(1) of the CPC. The court may permit additional evidence to be produced only when it is satisfied with the three grounds namely, (i) if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; (ii) a party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed; and (iii) when the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment; or for any other substantial cause.

14. In Municipal Corporation For Greater Bombay Vs. Lal Pancham of Bombay and Ors. [1965 (1) SCR 542], this Court held that power under Order 41 Rule 27 of the CPC could not be used for removing a lacuna in the evidence and did not entitle the appellate court to let in fresh evidence at the appellate stage when even without such evidence it could pronounce judgment in the case. Following the aforesaid decision in Municipal Corporation For Greater Bombay Vs. Lal Pancham of Bombay and Ors. [1965 (1) SCR 542], this Court again in State of Gujarat and Anr. Vs. Mahendra Kumar Parshottambhai Desai [Dead] by LRs [(2006) 9 SCC 772] in para 10 page 775 observed as follows:

"\005. Though the appellate court has the
power to allow a document to be
produced or a witness to be examined
under Order 41 Rule 27, the
requirement of the said Court must be
limited to those cases where it found
it necessary to obtain such evidence
for enabling it to pronounce judgment.
This provision did not entitle the
appellate court to let in fresh
evidence at the appellant stage where
even without such evidence it can
pronounce judgment in the case. It

does not entitle the appellate court to let in fresh evidence only for the purposes of pronouncement of judgment in a particular way. The High Court referred to the earlier proceedings before various authorities and came to the conclusion that though the appellants had sufficient opportunity to bring the evidence on record, for reasons best known to it, the State did not produce the entire evidence before the trial court and it was only 8 years after the dismissal of the suit that the applications were filed for adducing additional evidence in the appeal." (Emphasis supplied)

15. In Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Ors. [(1980) 1 SCC 412], it has been held that the High Court was not unjustified in refusing to admit the additional evidence under Order 41 Rule 27 of the CPC when such additional evidence purported to defeat the claim of one of the parties and such additional evidence was sought to be laid many years after filing of the suit. In that circumstance, this Court has held in the aforesaid decision that the discretion used by the appellate court in refusing to receive additional evidence at the late stage cannot be interfered with.

16. In a recent decision of this court in the case of Karnataka Board of Wakf Vs. Government of India and Ors. [(2004) 10 SCC 779], this Court has again clearly laid down the principles for acceptance or refusal of additional evidence at the appellate stage observing that the scope of Order 41 Rule 27 of the CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and that such documents are required to enable the court to pronounce a proper judgment.

17. Keeping the aforesaid principles in mind and applying the same on the facts and circumstances of this case, we are unable to accept the contention of the learned Additional Solicitor General appearing for the appellant that the legal notice dated 8th October, 1991 could not be produced in evidence before the trial court or before the first appellate court due to inadvertence and lack of proper legal advice. For this purpose, we have examined the pleadings made in the application for acceptance of additional evidence closely and in detail. Admittedly, the legal notice issued by the counsel for the respondent to the appellant which was sought to be admitted as additional evidence at the second appellate stage was lying with the

appellant during the pendency of the suit and also during the pendency of the first appeal. The appellant in its written statement had categorically taken the plea of limitation which was also one of the main issues in the suit. It is therefore difficult for us to conceive that the said notice issued by the lawyer of the respondent could not either be produced before the trial court or before the first appellate court due to lack of proper legal advice. It cannot also be imagined that the appellant having taken a specific plea in the written statement regarding limitation of the suit could not produce the same due to inadvertence. In any view of the matter, Order 41 Rrule 27 of the CPC also does not empower an appellate court to accept additional evidence on the ground that such evidence could not be produced or filed either before the trial court or before the first appellate court due to inadvertence or lack of proper legal advice. Mr. Mohan, learned Additional Solicitor General however sought to argue that the pleadings made in the application for acceptance of additional evidence would come within the meaning of "substantial cause" under Order 41 Rule 27 (1)(b) of the CPC which would require the appellate court to accept the legal notice in order to pronounce its judgment. We are unable to accept this submission of Mr. Mohan. In our view, lack of proper legal advice or inadvertence to produce the legal notice in evidence is not a ground to hold that there was substantial cause for acceptance of the additional evidence. Mr. Mohan, Learned Additional Solicitor General further sought to argue that the importance of the legal notice was not realized and it was due to inadvertence and lack of proper legal advice that the same could not be produced before the courts below. In our view, we do not think that non realization of the importance of the documents due to inadvertence or lack of proper legal advice as noted hereinabove also would bring the case within the expression "other substantial cause" in Order 41 Rule 27 of the CPC. In this connection, reference can be made to a decision of this court in the case of Sunder Lal & Son Vs. Bharat Handicrafts Pr. Ltd. [(AIR) 1968 SC 406]. In any view of the matter, we do not find that the legal notice was required by the appellate court to pronounce a proper judgment in the appeal. It was open for the High Court to decide the second appeal on merits with the documents and evidence already on record. Therefore, we are in agreement with the High Court that the additional evidence namely the legal notice issued by the counsel for the respondent to the appellant ought not to have been admitted at the stage of the second appeal. As noted hereinabove, the suit was filed by the respondent on 5th October 1995. The Trial Court decreed the suit about nine years thereafter more precisely on 12th March 2004. An appeal

was carried against the aforesaid judgment of the trial court which was disposed of on 31st January 2005. The appellant had failed to satisfy the High Court as to why the legal notice which was admittedly lying with them could not be produced during all these years i.e. from 5th October 1995 till 31st January 2005. Such being the position and in view of the discussions made herein above, we are unable to hold that the High Court was not justified in rejecting the application for acceptance of additional evidence at the second appellate stage.

18. Let us now consider whether the three courts below were justified in decreeing the suit of the respondent. Before we consider the findings of the courts below, it may be kept on record that in the second appeal, the High Court held that no question of law much less any substantial question of law arose in the same. On a perusal of the judgment of the High Court in the second appeal, we also do not find that any substantial question of law, as enumerated in Section 100 of the CPC was in fact raised before the High Court. So far as the trial court is concerned, it came to a finding of fact that the respondent was found to be in possession of the suit plot in spite of resumption notice having been issued by the appellant. The trial court also came to a finding of fact that it was due to inaction on the part of appellant to remove the electric wires and poles from the suit plot and the explanation given by the respondent for not being able to take any step to raise construction in compliance with Clause 8 of the agreement must be accepted and therefore a decree for permanent injunction should be granted in favour of the respondent. These findings of fact were echoed by the appellate court as well. It is well settled that in a second appeal, High Court is not permitted to set aside the findings of fact arrived at by the two courts below until and unless it is shown that such findings of fact are either perverse or arbitrary in nature. Mr. Mohan learned Additional Solicitor General, however, could not satisfy us that the findings of the courts below which were also accepted by the High Court in the second appeal were either perverse or arbitrary. Accepting this position, the High Court in second appeal found that the appellant had failed to satisfy it that the findings recorded by the courts below suffered from any infirmity or that they were contrary to the record. The High Court also concluded that there was no question of law much less any substantial question of law which arose in the second appeal. Before we part with this judgment, we keep on record that Mr. Mohan appearing for the appellant substantially argued before us on the issue that the High Court was not justified in rejecting the application for acceptance of additional

evidence. We have already discussed this aspect of the matter herein before and after such discussion, we have already held that there was no infirmity in that part of the judgment by which the High Court had rejected the application for acceptance of additional evidence.

19. For the reasons aforesaid, we do not find any ground for which interference with the judgment of the courts below can be called for. Accordingly, the appeal requires to be dismissed and is dismissed as such. There will be no order as to costs.