A HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION

v.

M/S CORK MANUFACTURING CO.

AUGUST 27, 2007

B **[TARUN CHATTERJEE AND P.K. BALASUBRAMANYAN, JJ.]**

Code of Civil Procedure, 1908:

s. 100 and Order 41, Rule 27—Application for production of additional
C *evidence in second appeal before High Court—Legal notice issued by counsel for plaintiff to defendant sought to be produced as admissible evidence at second appellate stage by latter which was lying with it during pendency of suit and first appeal—In appeal before Supreme Court, difference of opinion between the two Judges comprising the Bench with regard to decision of*
D *High Court rejecting application under Or.41 r.27 as also dismissing the second appeal—Matter referred to larger Bench.*

The plaintiff-respondent was allotted an industrial plot by the defendant-appellant Corporation as per allotment letter dated 24.11.1987. An agreement was entered into between the parties on 12.2.1988, Clause 8 whereof provided
E **that the allottee would start construction on the plot within a period of one and half years from the date of issuance of the allotment letter and would complete the erection and installation of machinery and commence production within a period of two years from the date of allotment of the plot, failing which the plot would be liable to be resumed and the security amount forfeited. The**
F **appellant, finding that Clause 8 of the agreement was not complied with by the respondent, issued a show cause notice to it as to why the plot be not resumed and possession taken. According to the appellant, it issued the resumption order on 13.9.1991, and on 20.9.1991 took possession of the suit plot. On 5.10.1995 the respondent filed a civil suit in the Court of Addl. Civil Judge praying for a decree of permanent injunction restraining the appellant**
G **from interfering with the possession of the suit plot and further reallotting it to any other person. It was submitted that Clause 8 of the agreement could not be complied with because of the high tension wires running over the suit plot and unless the same were removed the plaintiff was not in a position to raise any construction. The appellant filed a written statement stating that**

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the suit was time barred since the plot had been resumed on 13.9.1991. It was also submitted that the plaintiff suppressed the facts regarding knowledge of the resumption order and taking over possession of the suit plot. The trial court, however, decreed the suit; and the first appellate court affirmed the decree. In the second appeal, the defendant-appellant filed an application under Order 41, Rule 27, C.P.C. for acceptance of additional evidence, i.e. the legal notice issued on behalf of the plaintiff to the defendant showing acknowledgement of receipt of the resumption order dated 13.9.1991 by the plaintiff-respondent. The High Court rejected the application and dismissed the second appeal holding that no substantial question of law arose therein.

In the instant appeal filed by the defendant-Corporation, it was contended for the appellant that the High Court erred in rejecting the application under Order 41, Rule 27 CPC since the additional evidence was sought to be adduced in order to prove that the plaintiff had clear knowledge of the resumption order passed on 13.9.1991, and the suit having been filed on 5.10.1975 was barred by limitation.

Referring the matter to the larger Bench, the Court

HELD: (*By the Court*):

In view of the difference of opinion, let this matter be placed before Hon'ble the Chief Justice of India for referring it to an appropriate larger Bench.

Per Chatterjee, J.

1.1. The High Court was right in holding that the additional evidence, i.e. 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. Keeping in view the principles enunciated by this Court, and applying the same to the facts and circumstances of the instant case, it cannot be assumed that the said additional evidence sought to be adduced under Order 41 Rule 27 CPC, 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. Admittedly, the said legal notice 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. [Para 17] [521-E; 520-D-F]

A *Municipal Corporation For Greater Bombay* v. *Lal Pancham of Bombay and Ors.*, [1965] 1 SCR 542; and *State of Gujarat and Anr.* v. *Mahendra Kumar Parshottambhai Desai [Dead] by Lrs.*, [2006] 9 SCC 772, relied on.

Smt. Pramod Kumari Bhatia v. *Om Prakash Bhatia and Ors.*, [1980] 1 SCC 412; *Karnataka Board of Wakf* v. *Government of India and Ors.*, [2004] B 10 SCC 779 ; and *Sunder Lal & Son* v. *Bharat Handicrafts Pr. Ltd.*, AIR (1968) SC 406, referred to.

1.2. 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 C acceptance of the additional evidence under Order 41, Rule 27(1)(b) of the Code. It cannot be said 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. 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 D all these years i.e. from 5th October 1995 till 31st January 2005.

[Para 17] [521-B, D, F]

2.1. The High Court held that no question of law much less any substantial question of law arose in the second appeal. A perusal of the judgment of the High Court also does not show that any substantial question E of law, as enumerated in Section 100 of the CPC was in fact raised before the High Court. [Para 18] [521-H; 522-A]

2.2. 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 F 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 G respondent. These findings of fact were echoed by the first appellate court as well. [Para 18] [522-A-C]

2.3. 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 H in nature. 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. [Para 18] [522-C, D] A

Per Balasubramanyan, J

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1. The High 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 issuance of such a notice. After all, the purpose for which the notice was sought to be 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 relevant 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 satisfactorily 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 straightaway accepted. [Para 16] C D

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2. The plaintiff came 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 the allotment. The excuse put forward by the plaintiff was the existence of an electric pole and overhead electric wires, which stood in the way of the construction, and that it was for the defendant-Corporation to have got them removed. In the written instrument of allotment, there was no such stipulation. 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 officers of the defendant or outside the agreement. [Para 13] [529-B-E] F G

3.1. 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 H

A and sent satisfactory reply, the land would 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. [Para 14] [529-F]

3.2. Non-examination of the original allottee was fatal to the case of the B plaintiff under the circumstances. P.W.6, who is examined on behalf of the plaintiff came into picture only in the year 1996 and was not a competent witness to speak about anything that transpired in the year 1991. It was a clear case for drawing an adverse inference against the plaintiff for non-examination of the allottee. These vital aspects have been ignored by the trial C court and by the first appellate court. The courts below acted perversely in entering a finding that the order of resumption was illegal and was not binding on the plaintiff. [Para 14] [529-G; 530-A]

3.3. A finding ignoring legal evidence available in the case and ignoring the inferences to be drawn from the circumstances established, is a finding D that can only be described as perverse and such a finding is not binding on the 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 E 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. [Para 14] [530-B-C]

3.4. Similarly, the finding on possession is also found to be based on no F 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. There is no evidence to show that the plaintiff-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 G case. [Para 15] [530-F, E]

4. Thus, on the whole, the plaintiff has not made out any case for relief in the present suit. The judgments of the courts below, therefore, call for interference. The appeal deserves to be allowed. If the decree passed is not set aside, the Court would be failing in its duty exercising jurisdiction under H

Article 136 of the Constitution of India. After all, the jurisdiction of this Court is a corrective jurisdiction and not a restricted one. [Para 17] [531-D] A

5. During the course of the hearing, the defendant-appellant offered that the plot could be allotted afresh to the plaintiff, if the latter 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. Taking note of the circumstances, it would be 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. [Para 19] [531-F-G] B

6. The appellant would 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. [Para 20] [532-C] C D

7. Time has come 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. These observations regarding the courts in the State are made noticing with regret the lack of application of mind in many a case that had come before this Court.

[Para 20] [532-D-E] E

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3940 of 2007. F

From the final Judgment and Order dated 20.01.2006 of the High Court of Punjab and Haryana at Chandigarh in Regular Second Appeal No. 2320 of 2005.

R.Mohan, ASG., Ravindra Bana for the Appellant. G

Gaurav Bhatia and Abhishek Chaudhary for the Respondent.

The Judgment and Order of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted. H

A 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/ B 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 C 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 D 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 E 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 F 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 G 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 H 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.

A 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
B 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
C 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.

D (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
E 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
F 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
G 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
H 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

A 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 B 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 C as follows:

> "27. *Production of additional evidence in Appellate Court* - [1]The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in Appellate Court. But if-
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> D [a] the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
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> [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 E due diligence, be produced by him at the time when the decree appealed against was passed, or
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> [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,
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> F the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
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> [2] Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."
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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 H 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* v. *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* v. *Lal Pancham of Bombay and Ors.*, [1965] 1 SCR 542, this Court again in *State of Gujarat and Anr.* v. *Mahendra Kumar Parshottambhai Desai [Dead] by LRs,* [2006] 9 SCC 772, in para 10 page 775 observed as follows:

> *".... 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."*
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> (Emphasis supplied)

15. In *Smt. Pramod Kumari Bhatia* v. *Om Prakash Bhatia and Ors.*,

A [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* v. *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 Rule 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* v. *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

A 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 B 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 C 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 D 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 E 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.

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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.

G **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. H 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 o 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-appellant from interfering, disturbing or in any manner tampering with the possession of the plaintiff over the plot in dispute, and restraining the defendant-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 - 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

A to be a power of attorney of the plaintiff - 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.

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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 posssession. The suit was liable to be dismissed.

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E 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-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

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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 - 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

A 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 B 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 C 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 D 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 E 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 F 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 G 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 seen 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 H relevant materials available in the case and even without adverting 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

A resumption order was passed and the land was resumed. Om Parkash Saharan who was the eo nominee 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 B plaintiff to the appellant - defendant was sought to be produced in the Second Appeallate 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 C 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 D 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 E 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 F 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 G in the plaint.

12. On behalf of the respondent-plaintiff, it was contended that the understanding was that the electric pole and the overhead electric lines will be got removed by the defendant-Corporation and since that was not done till the year 1995, there was no default on the part of the plaintiff. The High H 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 - 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

A 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 B 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 C 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 D 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 E 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 F 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 G 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 H 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 - respondent pays to the defendant - 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.

ORDER

In view of the difference of opinion between us, let this matter be placed before Hon'ble the Chief Justice of India for placing the matter before an appropriate larger Bench.

R.P. Referred the matter to the larger Bench.