M/S. INDUSTRIAL PROMOTION AND INVESTMENT CORPORATION OF ORISSA LIMITED

v.

M/S. TUOBRO FURGUSON STEELS PRIVATE LIMITED & OTHERS

(Civil Appeal No.1850 of 2007)

DECEMBER 5, 2011

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

State Financial Corporation Act, 1951: s.29 – Contract of sale –Corporation took over a Foundry Unit after its original promoters defaulted in payment of its dues – Publication of advertisement for sale of Unit – Sale of Unit to respondent on down payment of Rs. 8 lacs – Balance amount of Rs.32 lacs was to be paid on installments – However, after taking possession of the Unit, respondent did not take steps to complete the documentation as required in the sale letter – Notice issued u/s.29 to respondent and assets of the Unit taken over by the Corporation – Writ petition by respondent – High Court directed the Corporation to refund to the respondent Rs.8 lacs along with interest – On appeal, held: High Court did not even refer to the sale advertisement, stipulations made in the sale letter and correspondences between the parties and completely overlooked that the parties, with their eyes widely open, had entered into the contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands – Both sides had acted on the basis of the contract, changing their respective positions and assuming rights and obligations against each other – The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides – In terms of the contract, the respondents

were obliged to pay the balance consideration amount of Rs.32 lacs along with interest as provided in the sale letter – In default of payment, it was the statutory right of the Corporation to take possession of the Unit u/s. 29 of the Act – Corporation had not only the right to retain Rs.8 lacs paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law – Order of the High Court not sustainable.

The appellant-Corporation took over a Foundry Unit situated along with land, building, plant and machineries under Section 29 of the State Financial Corporation Act, 1951, as its original promoters defaulted in payment of its dues. The taken-over Unit was put to sale by publishing advertisement in newspapers inviting offers for purchase of the Unit. In the advertisement, it was stipulated that the sale would be on 'AS IS WHERE IS' basis. The intending purchasers were allowed inspection of the Unit-on-sale.

In response to the advertisement, the respondents made an offer to purchase the Unit for a total consideration of Rs.40,00,000/- with down payment of Rs.8,00,000/-. The offer made by the respondents was accepted and the Corporation issued the sale letter. It was stated in the sale letter that possession of the Unit would be handed over to the respondents on payment of Rs.8,00,000/- and the balance amount of Rs.32,00,000/- would be treated as fresh loan to respondent no.1 to be repaid within a period of 6 years in quarterly instalments after a moratorium of 18 months with interest at the rate of 18 per cent per annum from the date of handing over the physical possession of the Unit. The sale formalities were required to be completed within 30 days from the date of issue of the letter. It was further stipulated in the letter that the sale would lapse and the earnest money forfeited if the documents were not executed within the prescribed time.

In furtherance of the sale, respondents made payment of Rs.8,00,000/- to the appellant and following the payment, possession of the Unit was made over to respondents. Before the delivery of possession, the Director and other technical persons of the respondent company verified/compared the assets with the inventory of assets item-wise and thereafter, took over possession of the assets in presence of officers of the Corporation, OSFC and SBI and the security personnel.

After taking possession of the Unit, the respondents did not take any step to complete the documentation with IPICOL and OSFC as required in clause 7 of the sale letter. The appellant then wrote number of letters asking the respondents to execute the documents/loan agreement with the Corporation and with the OSFC. The respondents, however, went on temporising in the matter. Instead of executing the necessary documents, the respondents wrote to the appellant complaining about the high rate of interest and requesting to lower it down. The respondents also made the complaint that the machineries were in very bad shape and were required to be replaced and unless the issue of the rate of interest was resolved, it was not possible to start the operation of the factory. The respondents also complained about the difficulty in getting loans from the bank or other financial institutions and asked the appellant whether it would give its consent to creation of *pari passu* or second charge as security for the loan amount advanced by the financial institutions. It also complained about the electricity dues and sought the intervention of the appellant to resolve the difficulties being faced by it.

The appellant-Corporation once again wrote to respondents asking them to pay the over due interest of Rs.3,51,445/- as on March 31, 2000 and to execute the necessary documents. The respondents did not make

A any payment nor did they take any step to complete the documentation. Instead, by letter dated July 20, 2001, they asked the appellant to take back the Unit stating that from July 31, 2001, they would withdraw the security personnel engaged by them in the factory premises which was till
B that date under their control. The appellant issued notice under Section 29 of the State Financial Corporation Act, 1951 to respondents and took over the assets of the Unit. The respondents filed a writ petition before the High Court challenging the taking over of the assets by the appellant.
C The High Court allowed the writ petition and directed the Corporation to refund to the respondents Rs.8,00,000/ along with interest at the prevailing bank rate that was received by it as part of the sale consideration. The instant appeal was filed challenging the order of the High Court.
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Allowing the appeal, the Court

HELD: 1. The case of the respondents, as noted by the High Court was untenable on its face. Even according
E to the respondents it was only *after having taken possession* of the Unit that they found that some vital parts of the machineries were missing and there were huge arrears of electricity dues and that the recommendation for the industrial policy resolution was
F not forthcoming. In those circumstances, the respondents realised that the Unit was not worth Rs.40,00,000/-. The respondents went to the High Court seeking refund of the part consideration money Rs.8,00,000/- paid by them as if the antecedent acts of the parties, namely, the issuance of the advertisement, the
G offer made by the respondents followed by negotiations between the parties and the issuance of the sale letter by the Corporation, the payment of Rs.8,00,000/- by the respondents in pursuance of the sale letter followed by their taking over the possession of the Unit meant
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nothing and did not create any rights or obligations in the parties. Strangely, the High Court did not even refer to the sale advertisement, the stipulations made in the sale letter and the correspondences between the parties. The High Court completely overlooked that the parties, with their eyes widely open, had entered into the contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands. In other words, both sides had acted on the basis of the contract, changing their respective positions and assuming rights and obligations against each other. The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides. In terms of the contract, the respondents were obliged to pay the balance consideration amount of Rs.32,00,000/- along with interest as provided in the sale letter. In default of payment it was the statutory right of the appellant-corporation to take possession of the Unit under Section 29 of the Financial Corporation Act. In the aforesaid facts and circumstances, there was no ground for the High Court, to interfere in favour of the respondents, much less to direct for refund of the part consideration money paid by the respondents to the appellant. [Paras 11-13] [456-A-H; 457-A-B]

2. The question of forfeiture of the earnest money would arise in case the parties had not acted upon in furtherance of the sale letter but the matter in this case went much beyond that stage. The parties agreed for the sale of Unit for an amount of Rs.40,00,000/- out of which the respondents were required to make a down payment of Rs.8,00,000/-, which they did. On payment of the part consideration money, the possession of the Unit was made over to them. The respondents were, thus, under the legal obligation to pay the balance consideration of

A **Rs.32,00,000/- in instalments and along with interest, as stipulated in the letter. The Corporation had, therefore, not only the right to retain Rs.8,00,000/- paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law. The order of the**
B **High Court is completely unsustainable. [Paras 14, 17] [457-D-G; 458-E]**

Isha Marbles vs. Bihar State Electricity Board & Anr., **(1995) 2 SCC 648 – relied on.**

C *Haryana Financial Corporation v. Rajesh Gupta* **(2010)1 SCC 655;** *V.K.Ashokan v. Assistant Excise Commissioner* **(2009) 14 SCC 85 – held inapplicable.**

Case Law Reference:

D **(1995) 2 SCC 648**	**relied on**	**Para 15**
(2010)1 SCC 655	**held inapplicable**	**Para 17**
(2009) 14 SCC 85	**held inapplicable**	**Para 17**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1850 of 2007.

From the Judgment and Order dated 29.06.2006 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 1556 of 2003.
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Raj Kumar Mehta, Antaryami Upadhyay and David A. for the Appellant.

Shrish Kumar Mishra and Ajay Kr. Singh for the
G Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal, at the instance of M/s Industrial Promotion and Investment Corporation of Orissa
H Limited ("Corporation" for the sake of brevity), is directed

against the judgment and order dated June 29, 2006 passed by a Division Bench of the Orissa High Court. By the impugned judgment, the High Court allowed the Writ Petition [W.P.(Civil) No.1556/2003] filed by respondent Nos.1 & 2 (M/s Tuobro Furguson Steels Private Limited and its Director) and undoing a contract of sale of an Industrial Unit entered into between the parties, directed the appellant to refund Rs.8,00,000/- (Rupees Eight Lacs), that was paid by the respondents to the appellant as part of the sale consideration, together with simple interest at prevailing rates of interest of the State Bank of India on deposits made by customers during the relevant period.

2. The facts relevant to appreciate the rival contentions of the parties are brief and may be stated thus. A Foundry Unit situated at Ganeswarpur Industrial Estate, Balasore, by the side of NH-5, along with land, building, plant and machineries was taken over by the Corporation under Section 29 of the State Financial Corporation Act, 1951, as its original promoters namely, M/s Josna Casting Centre, defaulted in payment of its dues. The taken-over Unit was put to sale *vide* advertisement dated February 8, 1999 issued in Oriya and English newspapers inviting offers for purchase of the Unit. A copy of the sale advertisement is at Annexure P1 which gives a complete description of the Industrial Unit along with all the relevant details. It is significant to note that in the advertisement it was stipulated that the sale would be on 'AS IS WHERE IS' basis. Further, the intending purchasers were allowed inspection of the Unit-on-sale from February 16 to 27, 1999.

3. In response to the advertisement the respondents made an offer (revised by letters dated April 12, 1999 and August 5, 1999) to purchase the Unit for a total consideration of Rs.40,00,000/- (Rupees Forty Lacs) with down payment of Rs.8,00,000/- (Rupees Eight Lacs). The offer made by the respondents was considered by the Advisory and Disposal Committee of the Corporation, and in acceptance of the offer, the Corporation issued the sale letter dated September 10,

A 1999. A copy of the sale letter is at Annexure P2. In the sale letter it was stated that possession of the Unit would be handed over to the respondents on payment of Rs.8,00,000/- (Rupees Eight Lacs) and the balance amount of Rs.32,00,000/- (Rupees Thirty Two Lacs) would be treated as fresh loan to respondent B no.1 to be repaid within a period of 6 years in quarterly instalments after a moratorium of 18 months with interest at the rate of 18 per cent per annum from the date of handing over the physical possession of the Unit. The sale formalities were required to be completed within 30 days from the date of issue C of the letter. It was further stipulated in the letter that the sale would lapse and the earnest money forfeited if the documents were not executed within the prescribed time. In clause 2 of the letter it was once again repeated that the sale was on "AS IS WHERE IS" basis and no further claim in that respect would be entertained by the Corporation. In clause 5 it was stated that D the sale of fixed assets was free from liabilities other than the deferred payment of loan of Rs.32,00,000/- (Rupees Thirty Two Lacs) with interest as stated in the earlier paragraph of the letter. Clause 8 made it clear that the sale did not pre-suppose sanction of any additional loan in favour of the purchaser for E operation of the Unit. In clause 9 of the letter it was stated that though the Corporation would recommend to all concerned to assist and help the buyer of the Unit (the respondents) but would not be in any manner responsible if any of the benefits were not granted to the Unit or if there was delay in grant of F any of the benefits. It was expressly made clear that the denial of any benefits to the Unit by any financial organisation or any other body or delay in grant of any concession or benefit shall not be a ground for non-payment of the Corporation's dues.

G 4. In furtherance of the sale, respondents made payment of Rs.8,00,000/- (Rupees Eight Lacs) to the appellant and following the payment, possession of the Unit was made over to respondents on September 15, 1999. Before the delivery of possession, the Director and other technical persons of the H respondent company verified/compared the assets with the

inventory of assets item-wise and thereafter, took over possession of the assets on September 15, 1999 in presence of officers of the Corporation, OSFC and SBI and the security personnel. The handing over of possession of the Unit was witnessed by a 'Memo of Delivery of Possession of Assets' executed both on behalf of the appellant and the respondent company. A copy of "the Memo of Delivery of Possession of Assets" is annexed as Annexure P-3 to the appeal memo.

5. After taking possession of the Unit, the respondents did not take any step to complete the documentation with IPICOL and Orissa State Financial Corporation as required in clause 7 of the sale letter. The appellant then wrote a number of letters (on October 12, 1999, January 4, 2000 and February 28, 2000) asking the respondents to execute the documents/loan agreement with the Corporation and with the Orissa State Financial Corporation. The respondents, however, went on temporising in the matter. Instead of executing the necessary documents, the respondents wrote to the appellant complaining about the high rate of interest and requesting to lower it down. The respondents also made the complaint that the machineries were in very bad shape and required to be replaced and unless the issue of the rate of interest was resolved, it would not be possible to start the operation of the factory. The respondents also complained about the difficulty in getting loans from the bank or other financial institutions and asked the appellant whether it would give its consent to creation of *pari passu* or second charge as security for the loan amount advanced by the financial institutions. It also complained about the electricity dues and sought the intervention of the appellant to resolve the difficulties being faced by it.

6. On March 24, 2000, the appellant – Corporation once again wrote to respondents asking them to pay the over due interest of Rs.3,51,445/- as on March 31, 2000 and to execute the necessary documents.

7. The respondents did not make any payment nor did they

A take any step to complete the documentation. Instead, by letter dated July 20, 2001, they asked the appellant to take back the Unit stating that from July 31, 2001, they would withdraw the security personnel engaged by them in the factory premises which was till that date under their control. On October 12, 2001, B respondents informed the appellant that a theft had taken place in the factory premises which was at that time under their possession. On April 29, 2002, respondents once again wrote to the appellant that they would withdraw the security personnel if the assets were not taken over by the appellant within 15 days. C Faced with the recalcitrant attitude of respondents, the appellant issued notice under Section 29 of the State Financial Corporation Act, 1951 to respondents and took over the assets of the Unit.

8. On February 17, 2003, the respondents went to the High D Court challenging the taking over of the assets by the appellant.

9. On June 17, 2004, the appellant decided to sell the Unit along with its assets to Sun Agro Foods & Exports for a consideration of Rs.17,00,000/- (Rupees Seventeen Lacs) but E could not hand over possession to the new buyer in view of the interim order passed by the High Court in the Writ Petition filed by the respondents. Finally, by the impugned order dated June 29, 2006, the High Court allowed the Writ Petition filed by the respondents and directed the Corporation to refund to the F respondents Rs.8,00,000/ (Rupees Eight Lacs) along with interest at the prevailing bank rate that was received by it as part of the sale consideration.

10. The order of the High Court is brief and does not even advert to all the relevant facts as stated above.

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11. It took note of the case of the respondents-writ petitioners in the following manner:-

"According to the petitioner, *after* taking possession of the said Unit, it found that because of missing of some

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vital parts of the machines and machineries, huge arrear electric dues and lack of grant of recommendation for I.P.R. the Unit does not worth Rs.40,00,000/- (Forty Lakhs) and, therefore, petitioner made correspondences with opposite party No.1 seeking reliefs on those accounts besides requesting to reduce the rate of interest on the differential amount to be paid in instalments and that when opposite party No.1 turned a deaf ear to all such approaches and representations, *petitioner opted to withdraw from the Industrial Unit* and surrender the same in favour of opposite party No.1. With such assertion, petitioner has filed the present writ petition with the prayer to issue a writ of mandamus directing opposite party No.1 to give the rehabilitation package (as mentioned in the prayer portion of the writ petition) or alternative to direct opposite party No.1 to return the amount of Rs.8,00,000/- (eight lakhs) which was paid by it in September, 1999 with interest at the prevailing Bank rate."

The High Court then noted the stand of the Corporation that it was not possible to give the rehabilitation package, as requested by the respondents because they had failed to adhere to the terms of the sale letter. Having noted the stand of the Corporation, the High Court disposed of the Writ Petition and passed the operative order in the following terms:-

"Regard being had to the aforesaid facts and submission, we find that when opposite party no.1 is not intending to give rehabilitation assistance package as prayed for by the petitioner, therefore, it is appropriate that opposite party No.1 should refund the amount of Rs.8,00,000/- (eight lakhs) together with simple interest at prevailing rates of interest of the State Bank of India on deposits made by customers during the relevant period. The amount be worked out accordingly and be paid to the petitioner within a period of four months, failing which the entire sum shall carry compound interest therefrom."

A We are unable to appreciate the order of the High Court and we see no basis on which such an order could have been passed. The case of the respondents, as noted by the High Court was untenable on its face. Even according to the respondents it was only *after having taken possession* of the B Unit that they found that some vital parts of the machineries were missing and there were huge arrears of electricity dues and that the recommendation for the industrial policy resolution was not forthcoming. In those circumstances, the respondents realised that the Unit was not worth Rs.40,00,000/- (Rupees C Forty Lacs).

12. The respondents went to the High Court seeking refund of the part consideration money Rs.8,00,000/- (Rupees Eight Lacs) paid by them as if the antecedent acts of the parties, namely, the issuance of the advertisement, the offer D made by the respondents followed by negotiations between the parties and the issuance of the sale letter by the Corporation, the payment of Rs.8,00,000/- (Rupees Eight Lakhs) by the respondents in pursuance of the sale letter followed by their taking over the possession of the Unit meant nothing and did E not create any rights or obligations in the parties. Strangely, the High Court did not even refer to the sale advertisement, the stipulations made in the sale letter and the correspondences between the parties. The High Court completely overlooked that the parties, with their eyes widely open, had entered into the F contract for sale of the Unit which was subject to the terms and conditions clearly spelled out in the advertisement and in the sale letter; that in furtherance of the contract, payment was made and possession of the Unit changed hands. In other words, both sides had acted on the basis of the contract, G changing their respective positions and assuming rights and obligations against each other. The contract having been acted upon, it could not be unilaterally abrogated on the sweet will of any of the two sides. In terms of the contract the respondents were obliged to pay the balance consideration amount of H Rs.32,00,000/- (Rupees Thirty Two Lacs) along with interest as

provided in the sale letter. In default of payment it was the statutory right of the appellant-corporation to take possession of the Unit under Section 29 of the Financial Corporation Act.

13. In the aforesaid facts and circumstances, there was no ground for the High Court, to interfere in favour of the respondents, much less to direct for refund of the part consideration money paid by the respondents to the appellant.

14. Before concluding, however, we must take note of the submissions made by Mr. Shrish Kumar Misra, learned counsel for the respondents, who tried to defend the order of the High Court. Mr. Misra submitted that the Corporation had no right to forfeit the amount of Rs.8,00,000/- (Rupees Eight Lacs) paid by the respondents as part consideration for the sale of the Unit and at best they could forfeit the earnest money of Rs.50,000/- (Rupees Fifty Thousand) paid by the respondents while making the offer to purchase the Unit. There is no substance at all in the submission. The question of forfeiture of the earnest money would have arisen in case the parties had not acted upon in furtherance of the sale letter but the matter in this case went much beyond that stage. The parties agreed for the sale of Unit for an amount of Rs.40,00,000/- (Rupees Forty Lacs) out of which the respondents were required to make a down payment of Rs.8,00,000/- (Rupees Eight Lacs), which they did. On payment of the part consideration money, the possession of the Unit was made over to them. The respondents were, thus, under the legal obligation to pay the balance consideration of Rs.32,00,000/- (Rupees Thirty Two Lacs) in instalments and along with interest, as stipulated in the letter. The Corporation had, therefore, not only the right to retain Rs.8,00,000/- (Rupees Eight Lacs) paid to it as part consideration but also to realise the balance amount of consideration, in accordance with law.

15. Mr. Misra next submitted that according to clause 5 of the sale letter the fixed assets of the Unit were free from liabilities other than the deferred payment of loan of

A Rs.32,00,000/- (Rupees Thirty Two Lacs) but in reality there were many dues, including dues of electricity, against the Unit. We find no substance in this submission either. According to us, there was no misrepresentation of facts in clause 5 or in any other clauses of the sale letter. As to the electricity dues, it B may be noted that the decision of this Court in *Isha Marbles vs. Bihar State Electricity Board & Anr.*,(1995) 2 SCC 648 had already come by the time the respondents took over the Unit and it was for them to take benefit of the decision of this Court.

C 16. Mr.Misra also tried to seek support from two decisions of this Court (1) in *Haryana Financial Corporation Vs. Rajesh Gupta* (2010) 1 SCC 655, paragraphs 20 and 22 and (2) in *V.K.Ashokan vs. Assistant Excise Commissioner* (2009) 14 SCC 85, paragraph 69. These two decisions have no application to the facts of the case and do not even slightly D advance the case of the respondents.

17. On hearing counsel for the parties and on going through the materials on record, we find, for the reasons stated above, that the order of the High Court is completely E unsustainable. We, accordingly, set aside the impugned order and dismiss the writ petition filed by the respondents.

18. In the result, the appeal is allowed with costs, quantified at Rs.10,000/- (Rupees Ten Thousand).

F D.G. Appeal allowed.