

**IN THE HIGH COURT OF DELHI**

**RSA 12/2001**

# Kanshi Ram (Deceased) ..... Appellant  
through his LR's.  
! through: Ms.Kum Kum Jain, Adv.

## VERSUS

\$ Delhi Development Authority ..... Respondent  
^ through: Ms.Sangeeta Chandra, Adv.

RESERVED ON: 07.01.2008

% DATE OF DECISION: 18.01.2008

**CORAM:**

**\* Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Following substantial question of law is framed for consideration in the present appeal:-

“Whether on the pleadings of the parties and evidence on record the view taken by the Courts below is legal and valid?”

2. The present appeal is directed against the judgment and decree dated 3.11.2000 passed by the learned Additional District Judge whereby the judgment and decree dated 22.8.1996 passed by the learned Civil Judge dismissing the suit filed by the appellant was affirmed.
3. Very briefly, admitted facts as culled out from the

impugned judgment as also from the records before this Court are that on 6.5.1961 appellant Kanshi Ram was admitted as a member of Panch Shila Cooperative House Building Society (hereinafter referred to as the Society), a Society registered under the Bombay Cooperative Societies Act, 1925 as extended to Delhi.

4. The Society acquired land in Village Shahpur Jat and developed the same into a residential colony 'Panch Shila Park'. A formal lease deed in respect of the said land was executed by the Delhi Development Authority (respondent herein) in favour of the Society.

5. On 19.7.1964 a draw of lots for the allotment of plots to the members of the Society was held. The appellant was declared successful for the allotment of the plot bearing municipal No.N-77, Panch Shila Park, Delhi (hereinafter referred to as the suit property). Intimation in said regard was sent by the Society to DDA.

6. On 3.12.1966 a perpetual sub-lease deed in respect of the suit property was executed by the DDA and the Society in favour of the appellant. Pursuant to the execution of said sub-lease possession of the suit property was handed over to the appellant.

7. After obtaining necessary sanctions from the authorities the appellant raised construction over the suit property.

8. On 31.1.1981 appellant received a letter, Ex.DW-1/4, dated 21.1.1981 issued by DDA informing him that the perpetual sub-lease deed dated 3.12.1966 executed in respect of the suit property has been cancelled. Said notice reads as under :-

"To,

Shri Kanshi Ram,  
C/o M/s. Jai Bharat Trading Co-Machinery  
Merchant,  
4025, Naya Bazar, Delhi.

Sub: Cancellation of sub-lease due to mis-statements to get plot No.N-77, Panch Shila C.H.B.Society.

Sir,

I am directed to inform you that the Lt. Governor (Lessor) has cancelled the sub-lease of the Plot No.N-77 in Panch Shila Coop. House Bldg. Society for breach under Clause III of the perpetual sub-lease deed. You are therefore requested to hand over the possession of the plot to our Asstt. Engineer on 30/1/1981 at 10.30 A.M.

Yours faithfully,  
sd/-

DY.DIRECTOR (CS)

9. Relevant portion of Clause-III of the perpetual sub-lease deed dated 3.12.1966 referred to in the letter Ex. DW1/4 dated 21.1.1981 reads as under :-

"III. If the sum or sums payable towards the premium or the yearly rent hereby reserved or any part thereof shall at any time being arrear and unpaid for one calender month next after any of the days whereon the same shall have become due, whether the same shall have been demanded or not, or if it is discovered that this Sub-Lease has been obtained by suppression of any fact or by any mis-statement, misrepresentation or fraud or if there shall have been, in the opinion of the Lessee or the Lessor, and the decision of the Lessor shall be final, any breach by the Sub-Lessee or by any person claiming through or under him of any of the covenants or conditions contained herein and in the Lease and on his part to be observed or performed, then and in any such case, it shall be lawful for the Lessor or the Lessee with the prior

consent in writing of the Lessor, notwithstanding the waiver of any previous cause or right of re-entry upon the residential plot hereby sub-leased and the buildings thereon, to re-enter upon and take possession of the residential plot and the buildings and fixtures thereon, and thereupon this Sub-Lease and everything herein contained shall cease and determine in respect of the residential plot so re-entered upon, and the Sub-Lessee shall not be entitled to any compensation whatsoever nor to the return of any premium paid by him."

10. From a perusal of the letter Ex. DW1/4 it is apparent that the perpetual sub-lease deed dated 3.12.1966 was cancelled for the reason appellant allegedly made a mis-statement and thus committed a breach in terms of Clause-III of the Sub-lease deed.

11. Appellant thereafter filed a suit against the respondent DDA inter alia praying for :-

A. A decree of declaration that the cancellation of perpetual sub-lease deed dated 3.12.1966 by DDA is null and void.

B. A decree of permanent injunction restraining DDA from taking the possession of the suit property.

12. Material averments in the plaint filed by the appellant are being noted here-in-under:-

"9. That on 31.1.1981, the plaintiff received a notice No.F.2(214)78/CB/DDA dated 21.1.1981 from the Deputy Director (CS) of Delhi Development Authority (Co-operative Societies Cell) intimating him that the Lt.Governor (Lessor) has cancelled the Sub-Lease of the plot No.N-77 in Panchsheela Co-operative House Building Society for breach under Clause III of the Perpetual Sub-Lease and further called upon the plaintiff to hand over the possession of the plot to the Asstt. Engineer on 30.1.1981 at 10.30 a.m.

10. The plaintiff submits that he has not

committed any breach of the Perpetual Sub-Lease or of any Clause thereof and the defendant have no right or title to cancel the Sub-lease or to claim possession of the said plot from the plaintiff.

11. In any case, the plaintiff submits that according to Clause IV of the said Perpetual Sub-Lease, no forfeiture or re-entry shall be affected until the lessor or lessee have served on the Sub-lessee a notice in writing specifying the particular breach complained of and if the breach is capable of remedying requiring the sub-lessee to remedy the breach.

13. That no show cause Notice or notice cancelling the sub-lease was ever served on the plaintiff as alleged by the DDA in the notice dated 21.1.1981. The plaintiff had not opportunity to put all the facts before the Officer concerned and no opportunity of being heard had been granted to him and no order of cancellation of Sub-Lease or forfeiture and re-entry thereof could be effected."

13. Relevant portion of Clause-IV of the perpetual Sub-Lease Deed dated 3.12.1966 relied upon by the appellant reads as under :-

"IV. No forfeiture or re-entry shall be effected until the Lessor or the Lessee has served on the Sub-Lessee a notice in writing

(a) specifying the particular breach complained of, and

(b) if the breach is capable of remedy, requiring the Sub-Lessee to remedy the breach,

and the Sub-Lessee fails within such reasonable time as may be mentioned in the notice to remedy the breach if it is capable of remedy; and in the event of forfeiture or re-entry the Lessor in his discretion or the Lessee, with the prior consent in writing of the Lessor, may relieve against forfeiture on such terms and conditions as the Lessor thinks proper."

14. Case thus projected by the appellant in the plaint was

that the cancellation of the perpetual Sub-Lease Deed dated 3.12.1966 by the DDA is null and void because of the following 2 reasons:-

A. Appellant has not committed any breach in terms of Clause-III of the perpetual Sub-Lease Deed or of any other clause.

B. Clause-IV of the perpetual Sub-Lease Deed mandated that before determination of the Sub-Lease the lessor DDA must serve a show cause notice upon the sub-lessee i.e. the appellant. That no show cause notice as required under Clause-IV of the perpetual Sub-Lease Deed was served upon the appellant.

15. In response to the case set up by the appellant respondent DDA filed its written statement relevant averments whereof are being noted hereinbelow:-

Preliminary Objections:

1. That the sub-lease in favour of the plaintiff was obtained on the basis of mis-representation of facts and so the sub lease has been cancelled after the serving of show cause notice on the plaintiff.

Replies on Facts:

10. That para 10 of the plaint is denied. The plaintiff has committed the breach of the perpetual sub-lease deed. In fact the plaintiff has sworn an affidavit stating that "he does own either in full or in part any lease hold/free hold plot/house in Delhi/New Delhi/Delhi Cantt nor that his wife including unmarried minor children and dependent relations own any plot/house/flat in Delhi/New Delhi/Delhi Cantt". Subsequently it came to the notice to the defendant that the plaintiff owned a portion of plot no.25/41 in Punjabi Bagh. In this way he has sworn a falls affidavit on the basis of which he obtained the

allotment of plot no.N-77 in Panch Shila Park. Besides the criminal action against the plaintiff for sworn falls affidavit plaintiff's sub lease became liable for cancellation and hence sub lease of the plot in dispute was rightly cancelled under clause III of the perpetual sub lease deed for mis-statement of the facts.

11. Para 11 of the plaint is denied. The plaintiff was sent a show cause notice on 26.3.80 requiring to show cause why the sub lease of the plot may not be determined. The show cause notice was received back undelivered with the remarks "refused to receive". Since the plaintiff intentionally refused to receive the notice. For all intents and purposes the notice is legal and supposed to be served and action for determination of the sub lease taken is just legal and proper."

16. In the written statement filed no particulars of false affidavit allegedly sworn by the appellant were specified. However, the false affidavit allegedly sworn by the appellant was filed on record. The said affidavit Ex. PW2/D1 is dated 11.6.1966 and reads as under :-

#### AFFIDAVIT

I, KANSHI RAM son of L. Badlu Ram aged 60 years, resident of C/o Jai Bharat Trading Co., Naya Bazar, Delhi and a member of the Panch Shila Cooperative House Building Society Ltd., New Delhi-17 do hereby affirm and declare as under :-

1. That neither I nor my wife nor any of my dependent relations (including unmarried children) is a member of any other house building Cooperative Society functioning in Delhi/New Delhi/Delhi Cantt.

2. That I do not own, either in full or in part, on leasehold or freehold basis, any plot of land or a house in Delhi/New Delhi/Delhi Cantt nor does my wife or any of my dependent relations including unmarried children, own either in full or in part on

leasehold or free-hold basis, any plot of land or a house in Delhi/New Delhi/Delhi Cantt.

3. That I have noted the conditions in the bye laws of the house building Cooperative Society of which I am a member that I am required to inform the said society as well as the Chief Commissioner within one month if any plot of land or house is acquired by me or by my wife or my dependent relations, including unmarried children, during the period of my membership of the Society.

17. The show cause notice Ex. DW1/2 dated 26.3.1980 allegedly sent to the appellant reads as under :-

SHOW CAUSE NOTICE

To,

Sh. Kanshi Ram,  
C/O M/s Jai Bharat Trading Co.  
Machinery Merchant, 4025, Naya Bazar,  
DELHI.

WHEREAS you were allotted plot No.N-77 in Panch Shila Park Cooperative House Building Society, the sub lease of which was executed on 3.12.1966;

AND whereas you had filed an affidavit to the effect that you did not own, either in full or in part on lease hold basis any plot of land or a house in Delhi/New Delhi/Delhi Cantt. nor does your wife or any of your dependent relations including unmarried children own either in full or part on lease hold/free hold basis any plot of land or a house in Delhi/New Delhi/Delhi Cantt. which was a pre-requisite condition for the allotment of a plot;

AND whereas it has come to notice that you hold the  $\frac{1}{2}$  share in another property 25/41, Punjabi Bagh.

THUS you obtained the allotment of plot No.N-77, Panch Shila Park Cooperative House Building Society after concealing the facts.

You are hereby required to show cause within 30 days from the date of issue of this notice as to

why the Sub-Lease of the plot in question may not be cancelled & possession be resumed for mis-statement of facts.

sd/-  
Deputy Director (Coop.)”

18. From a cumulative reading of the letter Ex. DW1/4 dated 21.1.1981, show cause notice Ex.DW-1/2 dated 26.3.1980 issued by the DDA and the written statement filed by the DDA defence set up by DDA can be culled out as under:-

A. Appellant has obtained allotment of the suit property and got executed the perpetual Sub-Lease Deed in respect of the suit property on basis of mis-representation of facts. That by making mis-representation of facts appellant has committed a breach in terms of Clause-III of the perpetual Sub-Lease Deed.

B. Mis-representation of facts alleged to be made by the appellant was that the appellant has sworn a false affidavit by deposing that neither he, his wife or his dependents owned a residential plot/house/flat in Delhi. While an enquiry conducted by DDA revealed that he was co-owner of the plot bearing municipal No.25/41, Punjabi Bagh, Delhi.

C. A show cause notice Ex. DW-1/2 dated 26.3.1980 was duly sent to the appellant and that the same was returned by the postal authorities with an endorsement 'refused to receive'.

19. In the replication filed to the written statement of the DDA appellant averred as under :-

“Statements made in para 1 of the preliminary objections are not admitted. It is denied that the

plaintiff made any mis representation of facts to obtain the sub lease as alleged. It is denied that the defendant can cancel the sub lease as alleged.

Para 2 of the preliminary objections is not admitted. It is denied that the defendant can cancel the sub lease or that the action of the defendant is just, legal or proper as alleged or that the plaintiff has no cause of action to file this suit.

Para 10 of the written statement in so far as it is inconsistent with para 10 of the plaint is traversed and para 10 of the plaint is reaffirmed. It is denied that the plaintiff committed any breach of the perpetual Sub-Lease as alleged. It is submitted that the defendant have not disclosed as to how the plaintiff has committed breach of the Perpetual Sub-Lease and of which clauses of the said Lease after its execution. It is further denied that the plaintiff sworn any affidavit after the execution of the Perpetual Sub-Lease which could amount to committing breach thereof.

It is further denied that the Perpetual Sub-Lease was granted on the basis of any affidavit or any other representation which can amount to breach of the Perpetual Sub Lease and no mention of any such particular affidavit finds mention in the said Perpetual Sub Lease.

The plaintiff further submits that at that time the Bye-Laws of the Panchsheela Co-operative House Building Society Ltd, did not contain restrictions on members to own any other land or house and on 3.12.1966 the Perpetual Sub Lease was executed in favour of the plaintiff.

The plaintiff does not recollect execution of any affidavit. Several papers were got signed from him on and before the perpetual sub lease was executed but it is submitted that no such restrictions were conveyed to the plaintiff.

It was only on 1969 when the Bye-Laws of the Society were amended as to incorporate clause (d) (e) & (f) to Clause (5) but it is submitted that the said clauses could not bind the plaintiff as the Perpetual Sub-lease in his favour had been executed on 3.12.1966.

As regards the Punjabi Bagh Plot No.25/41, it is submitted that the same was in fact purchased in 1964 for the benefit of the five sons of the plaintiff ostensibly in the name of the plaintiff and his sons, Jagdish Rai Aggarwal and Shri Ved Perkash by Sale Deed dated 22.10.1964. Initially, the plaintiff became a member of that Society but subsequently, the membership/share was transferred by the plaintiff to the name of Shri Ved Perkash, one of the sons, on 24.12.1965, and the said property is now held by Shri Jagdish Rai Aggarwal and Shri Ved Perkash for themselves and their other brothers, who are all married with their families and are all independent. The plaintiff ceased to be a member in 1965 of the said Society."

20. Perusal of the replication shows that the appellant reiterated the stand taken by him in his plaint and additionally stated that :-

A. In the year 1966, i.e. at the time when the perpetual Sub-Lease was executed there were no restrictions on the members of the Society from holding any other property in Delhi apart from the plot allotted to them by the Society.

B. He has never sworn a false affidavit as alleged by the DDA.

C. He was a benami owner of the plot in Punjabi Bagh and in any case in the year 1965 he transferred the ownership of the said plot in favour of his son Ved Prakash i.e. before the execution of the perpetual Sub-Lease Deed dated 3.12.1966.

21. On the basis of pleadings of parties under-noted 5 issues were framed by the Trial Court:-

"1. Whether the action of the defendant in

cancelling the lease is illegal and ultra vires? OPP

2. Whether the suit is barred for want of notice u/s 53-B, DD Act? OPD
3. Whether the plaintiff has any right, title or interest in the suit property? OPP
4. Whether the plaintiff is entitled to the relief claimed? OPP
5. Relief.”

22. In support of his case appellant examined himself as PW-2 and one Mr.A.B.Gupta, Office Assistant, Panch Shila Cooperative House Building Society as PW-1.

23. A.B.Gupta in his testimony as PW-1 deposed that on 6.5.1961 appellant was admitted as a member of the society. That on 19.7.1964 suit property was allotted to the appellant by the Society. In order to establish the membership of the appellant in the Society PW-1 duly proved application filed by the appellant for membership in the Society as PW-1/1, members register of the Society as Ex.PW-1/2, share allotment register of the Society as Ex. PW-1/3 and counter foil of the share certificates issued to the appellant by the Society as Ex.PW-1/4.

24. Appellant in his testimony as PW-2 deposed on the lines of the pleadings filed by him.

25. As regards affidavit Ex.PW2/D1 dated 11.6.1966 allegedly executed by him appellant deposed as under:-

“I do not know English and cannot read and write. I can only sign in English. Several lease deeds were presented for registration on that day and the

person representing the society asked me to sign as a witness in the perpetual sub-leases of other members. I signed as a witness in several perpetual sub-lease. I do not know what was written on the papers which I signed.....I have seen paper mark-X, I cannot say who got the same typed. I cannot read its contents. I never went to any Oath Commissioner. I do not know if this is the affidavit claimed by DDA to be executed by me. I never violated any terms and conditions of the bye-laws of Punchsheel Housing Society.

XXXXXX by Shri A.K. Goel for DDA

Ex. PW2/D1 bears my signatures. I did not file this to DDA. DDA never asked me to submit any affidavit to the effect that I have no other property. (Vol. There was no such rule in 1964 when the plot was allotted to me). There was no occasion for me to file the copy of sale deed of Punjabi Bagh plot with DDA. It is correct that lease of plot no.77 was sought to be cancelled by DDA.....It is incorrect that I filed Ex.PW2/D1 with DDA."

26. As regards ownership of the plot in Punjabi Bagh appellant deposed as under:-

"My son Shri Ved Parkash is the member of Punjabi Bagh Refugee Housing Society. He purchased plot No.25 Punjabi Bagh colony, Rohtak Road from Shri Sarabjit Singh. He got the sale deed executed in favour of himself, my other son Shri Jagdish Rai Aggarwal and myself. The sale deed was executed on 22.10.64 and was presented for registration on 23.10.64. The plot in Punchsheel had already been allotted to me on 19.7.1964. There was not restriction on my part to become a member of the said society or to the allotment of the plot in my favour Ex.P-2 is the certified copy of the sale deed of the Punjabi Bagh Society. On a part of the said plot NO.25, Punjabi Bagh, I and my sons jointly constructed the small house. My elder son and the other son have filed a suit against me and the two sons mentioned in the sale deed claiming ownership of the said land and property on the ground that it belongs to HUF. The said suit is still pending in the Court of Ms. Rekha

Rani CJ, Delhi.....My sons were not dependent on me. They use to carry on their own business and have their independent income.”

27. It is relevant to note that in his examination-in-chief appellant has not deposed to the effect he had transferred ownership of the plot in Punjabi Bagh in favour of his son Ved Prakash before the execution of the perpetual sub-lease deed Ex.DW1/1 whereas in the replication appellant has emphatically averred to said effect.

28. As regards show cause notice Ex.DW1/2 dated 26.3.1980 allegedly served upon him appellant deposed as under:-

“I cannot say whether I received letter date 26.3.80 from DDA. The address on the notice dated 26.3.80 has been correctly mentioned. (Vol. This firm was closed about 15-16 years ago). I do not remember the date when it was closed. No letter was received by me at the address of the shop during the period is lying closed.”

29. On behalf of DDA Durga Dass, Superintendent, CS Cell, DDA was examined as DW-1. DW-1 proved the perpetual Sub-Lease Deed dated 3.12.1966 as Ex.DW1/1, show cause notice dated 26.3.1980 allegedly served upon the appellant as Ex. DW1/2, envelope bearing endorsement 'refused to receive' as Ex.DW-1/3 and cancellation letter dated 21.1.1981 as Ex.DW-1/4.

30. After noting the provisions of Clause-III of the perpetual Sub-Lease Deed dated 3.12.1966 learned Trial Court has held that the appellant obtained allotment of the suit property and got executed perpetual Sub-Lease Deed dated 3.12.1966 in respect of the suit property on the basis of mis-representation of facts and thus

committed a breach in terms of Clause-III of the perpetual Sub-Lease. In this regard decision of the Trial Court reads as under :-

“11. ....Ex.P-1 was the copy of the perpetual sub-lease executed between the defendant, Punchsheel Coop. House Bldg. Society and the plaintiff dated 3<sup>rd</sup> December, 1966 in respect of plot No.N.77, Punchsheel Coop. House Building Society. As per clause-III if it was provided that it was discovered that the sub-lease had been obtained by suppression of fact or a mis-statement, misrepresentation or fraud in the opinion of the lessor or the lessee and the decision of the lessor shall be final. Any breach by the sub-lessee or any person claiming through or under him then it shall be lawful for the lessor or the lessee (with the prior consent in writing of the lessor) to re-enter upon and take possession of the residential plot and the building and fixtures thereon and there upon the sub-lease and every thing herein contained shall cease and determine in respect of the residential plot so re-entered upon. The expressed terms of this clause says it in no uncertain words that the lessor had the right to determine the sub-lease in case it discovered subsequently that the sub-lease had been obtained by suppression of any factor mis-statement, misrepresentation or fraud. The defendant has alleged that the Plaintiff had misrepresented to the defendant in as much as it had given an affidavit that he or his wife or any dependent relation did not own any other plot/flat or house or portion thereof in Delhi. Ex. PW2/D1 is the affidavit of the plaintiff dated 16.6.1966 duly sworn before the Oath Commissioner wherein the plaintiff has sworn to this effect that he or his wife or any dependent relation was not the member of any other society nor did they own any other flat/plot or house in Delhi. Rather in clause-III of the affidavit, the plaintiff has specifically deposed that he had noted the conditions and the bye-laws of the Cooperative House Building Society that he was required to inform the society as well as the Chief Commissioner within one month if any plot or land or house was acquired by him or his wife or any department relation during the period of his membership in the society. The contents of the affidavit go to show that the plaintiff was very

much in the knowledge of the fact that his allotment of the said plot was restricted and was made on the basis of his declaration that he or his wife or dependent relations did not own any plot or land or house on free hold or lease hold basis in Delhi/New Delhi/Delhi Cantt. The affidavit is dated 11.6.1966- whereas the sub-lease is dated 3<sup>rd</sup> December, 1966, that means that the plaintiff was required to give this affidavit prior to the execution of the sub-lease by the defendant.

12. It is, thus, seen that the lease hold rights in the said plot were transferred to the plaintiff only on his filing the said affidavit i.e. only on his giving declaration that he or his wife or dependent relations did not own any other property in Delhi or lease hold rights or free hold rights in Delhi.”

31. As regards the contention of the appellant that consideration for the plot in Punjabi Bagh was paid by his son Ved Parkash and thus he was only a benami owner of the said plot and that he transferred the ownership of the said plot in favour of his son Ved Parkash before the execution of the perpetual sub-lease Ex.DW1/1 dated 3.12.1966 the learned Trial Court has held as under:-

“12. ....Admittedly, the plaintiff was owner of half share of property no.25/41, Punjabi Bagh, Delhi measuring 2209 sq. yds vide registered sale deed dated 22.10.1964. Thus, the plaintiff was holding approximately 1100 sq. yds. of property no.25/41, in Punjabi Bagh, Delhi when he swore this affidavit dated 11.6.1966. The plaintiff had alleged that he had subsequently transferred his share in the said property in Punjabi Bagh in favour of his one son. However, the plaintiff has failed to prove any valid document on record to establish this fact. He is holder of ½ share in property no.25/41, Punjabi Bagh, Delhi by virtue of a registered sale deed and the share in the same cannot be transferred unless by written and valid registered document. It is, thus, seen that when the plaintiff filed this affidavit, he was

holding shares in property no.25/41, Punjabi Bagh, Delhi, and thus, had sworn in a false affidavit which was submitted to the DDA by the society. The plaintiff had, thus, obtained the allotment of plot No.77, Panchseel Co. House Bldg. Society on the basis of misrepresentation of facts and as per terms of Clause-III of the perpetual sub-lease Ex. P-1, the defendant/DDA had a right to cancel the sub-lease on this ground."

32. As regards the next contention of the appellant, i.e. he was not given a show cause notice as required under Clause-IV of the perpetual Sub-Lease Deed the learned Trial Judge has held as under :-

"The plaintiff has also challenged the cancellation on the ground that the said cancellation was done without offering him an opportunity of hearing or of remedying the breach. In my opinion, the breach was not capable of being remedied. The breach committed by the plaintiff was receiving the allotment of the plot No.77 on the basis of a false affidavit. In any case, as per deposition of DW-1, the show cause notice was sent to the plaintiff which was received back with the remarks "refused". The envelope of the same is Ex.DW1/3 which is an envelope from DDA to the plaintiff at the address given by him in the sub-lease deed. It bears the postal stamp dated 2.4.1980 and also remarks "refused". Letter dispatched is in the usual course of the business of the defendant/DDA and the remarks of the postal authorities amount to a sufficient service of its contents of the addresses. It, thus, cannot be said that the plaintiff was denied the opportunity of bearing before the sub-lease was determined vide letter dated 21.1.1981 communicated to him.

14. I, thus, hold that the action of the DDA in cancellation of the sub-lease of the plaintiff was just, illegal and proper and as per procedure laid down by the law. This issue is accordingly decided against the plaintiff and in favour of the defendant/DDA."

33. On the basis of the afore-noted discussion vide

judgment and decree dated 22.8.1996 the learned Trial Court has dismissed the suit filed by the appellant.

34. Aggrieved by the judgment and decree dated 22.8.1996 appellant preferred an appeal before the court of Additional District Judge.

35. Learned Appellate Court agreed with the decision of the Trial Court and vide impugned judgment and decree dated 3.11.2000 affirmed the judgment and decree dated 22.8.1996 passed by the learned Trial Court dismissing the suit filed by the appellant. Reasoning given by the Appellate Court reads as under :-

“First of all, I shall deal with the contention of the appellant that no Show Cause Notice was served upon him. According to DDA it had sent a Show-Cause Notice dated 26.3.1980 which is Ex.DW.1/2 to the appellant calling upon him to show cause as to why the sub lease be not cancelled and possession be not resumed. According to the appellant, the notice was sent to his shop which was lying closed from many years. However, he admits receipt of final notice of cancellation dated 21.1.1981, which is Ex.DW.1/4. Appellant had claimed that the initial Show Cause Notice dated 26.3.1980 was sent at his shop which was lying closed from many years. If we take a look at the envelope in which the said notice was sent, we find that it was endorsed by postal authorities that the appellant had refused to accept. If a person refuses to accept the registered envelope then he is deemed to have knowledge of its contents. In this regard, I am supported by the judgment delivered by Hon'ble Supreme Court of India which is reported in AIR 1981 SC, 1284, Harcharan Singh Vs. Shiv Rani. Their lordships had held as under :-

“When a registered envelope is tendered by a postman to the addressee but he refused to accept it, there is due service effected upon the

addressee by refusal, the addressee must, therefore, be imputed with the knowledge of the contents thereof."

The contention of the appellant that Show Cause Notice was never served upon him is false on the fact of it for another reason. Appellant had admitted that final notice Ex.DW.1/4 had been served upon him. The said notice is dated 21.1.1981. It was to the effect that Lieutenant Governor has cancelled the sub lease of plot no. N-77, Panch Shila Park, New Delhi. But the notices were sent at the same address. If the shop had been lying closed for many years then how did it mysteriously got re-opened when final notice Ex. DW.1/4 was sent by DDA. Thus it is clear that notice asking the appellant to show cause indeed was served upon him and he chose not to respond to it. He is thus liable for all the consequences which emerged thereafter.

Now I shall take up the next plea of appellant that he never signed the affidavit and he did not know how to read and write English. The said affidavit was sworn on 11.6.1966. It was to the effect that he did not own any other property. The perpetual sub-lease deed of the plot at Panch Shila Park was executed on 17.8.1966. If we take a look at the copy of Sale Deed regarding property no.25/41, Punjabi Bagh, New Delhi, we find that the sale deed was executed on 22.10.1964. It was regarding the property measuring 2219.26 sq. yds half of it was in the name of appellant Kanshi Ram and remaining half was in the name of his two sons. Thus it is clear that on the day appellant had sworn the affidavit, he already possessed plot/house at Punjabi Bagh, New Delhi. Then the present appeal has been signed by him in Hindi language. Needless to add the Vakalatnama of his earlier counsel Shri D.P.Jain and Vakalatnama of his later counsel Shri R.K.Verma were again signed by appellant in Hindi language. The plaint filed before the Id trial court was also signed in Hindi but the perpetual sub lease deed by virtue of which he became owner of property no.N-77, Panch Shila Park, New Delhi was signed by him in English language at many places. He had also signed the site plan in English as is evident from

the perusal of the said documents which are on the trial court record. Probably he was not aware of the consequences, otherwise he would have signed the perpetual sub lease deed and the site plan in Hindi but unfortunately for him, he did not do so.

Thus it is apparent that he has been blowing hot and cold according to his own convenience. He had sought discretionary relief of injunction from the learned trial court. No discretionary relief of injunction is to be granted to an individual who approaches to the court with un-cleaned hands. In this regard, I am supported with the judgment delivered by my lord Mr.Justice Sultan Singh which is reported in 1979 RLR Note 40. He had held as under :-

“A plaintiff who suppresses material facts from court is not entitled to interim relief as for discretionary relief one must come to court with clean hands.”

In this background, he was rightly declined relief by the learned trial court. The appeal deserves dismissal and I dismiss it with costs.”

36. In these circumstances, appellant has filed the present appeal directed against the judgment and decree dated 3.11.2000 passed by the learned Additional District Judge.

37. The core issue on which parties were litigating was whether appellant had obtained allotment of the suit property by misrepresenting facts.

38. Alleged misrepresentation was the declaration in the affidavit Ex.PW2/D1 allegedly submitted by the appellant deposing that he did not own any land in Delhi. Whereas DDA asserted the same to be false, appellant asserted that he did not submit the affidavit.

39. Misrepresentation means a false representation of facts made by a party in relation to an essential or incidental term to a contract. (See Section 18, Indian Contract Act, 1872, 'Law of Contract' by Cheshire, Fifoot & Furmston (XIIIth Edition) and 'Law of Contract' by Anson (XXVIth Edition).

40. Burden of proof of proving the misrepresentation is upon the person who alleges the same.

41. To establish that the said false representation allegedly made by the appellant amounts to 'misrepresentation of facts' it was essential for DDA to first establish that there were restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from plots allotted to them by the Society.

42. It was urged by learned counsel for the appellant that in the written statement filed by DDA there is no averment to the effect that there were restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from plots allotted to them by the Society. Thus counsel urged that the very foundation of the defence was missing.

43. It is well settled that a party can be permitted to adduce evidence on the basis of the case pleaded by him in his pleadings. As in the decision reported as (1995) 5 SCC 612 Abubakar v Harun the Supreme Court observed as under:-

“No amount of proof can substitute pleadings which are the claim of a litigating party”.

44. The purpose of this principle is two-fold:- (i) to appraise the opposite party, distinctly and specifically, of the case he is called upon to answer so that he may properly prepare his defence and is not taken by surprise; (ii) to maintain an accurate record of the cause of action as a protection against a second or subsequent proceeding founded upon the same allegations.

45. However each and every variance between the pleading and proof is not fatal. Where parties are aware of the controversy and go to trial with full knowledge that a particular question is at issue, absence of specific pleading is a mere irregularity.

46. In the decision reported as AIR 1966 SC 735 Bhagwati Prasad v Chandramaul the Supreme Court observed as under:-

“There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. The same principle was laid down by this Court in Sheodhar Rai & Others v. Suraj Prasad Singh & Others AIR 1954 SC 758. In that case, it was held that where the defendant in his written statement sets up a title to the disputed lands as the nearest reversioner, the Court cannot, on his failure to prove the said case, permit him to make out a new case which is not only made in the written statement, but which is wholly inconsistent with the title set up by the defendant in the written statement. The new plea on which the defendant sought to rely in that case was that he was holding the suit property under a shikmi settlement from the nearest reversioner. It would be noticed that this new plea was in fact not made in the written statement, had not been included in any issue and, therefore, no evidence was or could have been led about it. In such a case clearly a party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by in its pleadings.

But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and had had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

47. In the decision reported as AIR 1989 SC 1531 Kali Prasad Agarwalla (Dead) by LR's & Ors. v Bharat Cooking Coal Ltd. & Ors. the Supreme Court observed as under:-

"It was, however, urged for the appellants that there is no proper pleading or issue for determination of the aforesaid question and the evidence let in should not be looked into. It is too late to raise this contention. The parties went to trial knowing fully well what they were required to prove. They have adduced evidence of their choice in support of the respective claims. That evidence has been considered by both courts below. They cannot now turn round and say that the evidence should not be looked into. This is a well accepted principle."

48. In the decision reported as AIR 1969 MP 110

J.B.Mangharam & Co. & Anr. v ESI Corporation Division Bench of the

Madhya Pradesh High Court observed as under:-

“So far as the instant case is concerned, the question, therefore, is whether the die of the power press is a dangerous part of the machinery within the meaning of the aforesaid provision. We have to look to the substance and not the form of the pleading. Even if a plea is not properly worded, it would make no difference if the substance is clear and the other side is not likely to be misled thereby. The whole object of the pleadings is to bring the parties to an issue and if a pleading fulfils this object no objection can be entertained merely on the ground that it is not expressed in particular terms. We may here quote the following observations of their Lordships of the Supreme Court regarding the construction of pleadings in *Kedar Lal v. Hari Lal*, AIR 1952 SC 47:

“The Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded.”

49. In the decision reported as AIR 1969 MP 241 Smt.

Hirabai Chauhan v Mst. Bhagirathibai Madhya Pradesh High Court

observed as under:-

“There was, it will be seen no specific plea that the plaintiff's predecessors had, at some time in the past, migrated from any State or region where the Bombay School of Hindu Law was in force or that they had carried with them their personal law. No issue was, therefore, framed on this particular aspect of the matter. Even so, it may well be regarded as covered by the general issue whether the parties are governed by the Bombay School of Hindu Law. The point is that both parties fully knew and understood what the real issue was and also led evidence in support of their contentions. That being so, none of them could be regarded as having been taken by surprise or prejudiced in any manner. In this situation, there was, even in the absence of a specific issue on the point no

mis-trial such as might vitiate the decision: Nagubhai v. B. Shama Rao, AIR 1956 SC 593, Kame-shamma v. Subba Rao, AIR 1963 SC 884 and Kunju Kesavan v. M. M. Philip, AIR 1964 SC 164. Indeed even when there is no specific plea but the matter is covered by an issue by implication and the parties go to trial with full knowledge that the plea is involved in the trial and adduce evidence thereon, the absence of the plea is a mere irregularity which did not cause any prejudice to the parties, AIR 1956 S C 593 and Bhagwati Prasad v. Chandramaul, (1967) 1 SCJ 666: (AIR 1966 SC .735)......”

50. In the instant case appellant was fully conscious of the fact that whether there were restrictions on the members of the Society their spouses and dependents from owning any residential property in Delhi apart from plots allotted to them by the Society or not was a 'question involved in the suit' as evident from the fact that the appellant in his replication averred to the effect that at the time when the perpetual sub-lease Ex.DW1/1 dated 3.12.66 was executed there were no restrictions on the members of the Society or their dependents from owning any residential property in Delhi apart from plots allotted to them by the Society (portion underlined in 19 above). Not only this, appellant also led evidence in support of said averment by deposing in his examination-in-chief that there were no restrictions on the members of the Society and their dependents from owning any residential property in Delhi apart from plots allotted to them by the Society (portion underlined in para 26 above).

51. In view of the ratio laid down by the Supreme Court in Bhagwati Prasad and Kali Prasad's cases (supra), the absence of the averment that there were restrictions on the members of the

Society or their dependents from owning any residential property in Delhi apart from plots allotted to them by the Society in the written statement of DDA is of no effect for the reason appellant was fully aware that the said question was at issue in the suit.

52. Thus in order to decide whether the appellant obtained the allotment of the suit property by misrepresenting facts and thus committed a breach in terms of Clause-III of the perpetual sub-lease deed Ex.DW1/1 dated 3.12.66 the learned Trial Court was required to consider following 5 questions:-

A. Whether there were restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from plots allotted to them by the Society?

B. Whether the appellant was a benami/ostensible owner of the plot bearing No.25/41, Punjabi Bagh, Delhi?

C. Whether the appellant transferred the ownership of the plot in Punjabi Bagh in favour of his son Ved Prakash before the execution of perpetual sub-lease ex.DW1/1 dated 3.12.66?

D. Whether the appellant has sworn a false affidavit Ex.PW2/D1 dated 11.6.1966 as alleged by DDA?

E. Whether the show-cause notice Ex.DW-2 dated 26.3.1980 was duly sent to the appellant as claimed by DDA?

53. As regards question 'A' suffice would it be to note the 'Large Scale Acquisition and Development and Disposal of Land in Delhi Policy, 1961' (hereinafter referred to as the Policy) notified by the Government of India on 2.5.1961. Clause 10(a) of the said policy

reads as under:-

“No plot should be allotted to any person, who whose wife/husband or any his/her dependent relations including unmarried children owns a house or residential plot of land in Delhi, New Delhi or Delhi Cantonment. The question of making an exception in the case of persons living in a congested locality or whose family has out-grown should be considered after some experience has been gained in the working of the scheme.”

54. Though said policy was not filed by DDA before the trial court yet this court can take judicial notice of the said policy in view of Section 57(1) of the Indian Evidence Act which provides that the Court can take judicial notice of the laws in India.

55. The said policy has been noted in number of judicial pronouncements. For instance, in the decision reported as 66 (1997) DLT 713 Rashmi Nagrath v M/s Sarva Priya Cooperative House Building Society Ltd Division Bench of this Court noted Clause 10(a) of the Policy by observing as under:-

“Apart from that, Ministry of Home Affairs, Government of India vide its circular dated 2.5.1961 regarding allotment of land had directed that no plots should be allotted to any person, whose wife/husband or any of his/her dependent relation including unmarried children own a house or residential plot of land in Delhi/New Delhi/Delhi Cantt.”

56. At this stage, it is necessary to note following three dates:-

- a) 6.5.1961 ..... Admission of the appellant as a member of the Society
- b) 19.7.1964 ..... Allotment of the suit property by the Society in favour of the appellant.
- c) 3.12.66 ..... Execution of perpetual sub-lease

deed Ex.DW1/1.

The Policy was notified on 2.5.1961. Thus, on all the afore-noted three dates there were restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from the plots allotted to them by the Society.

57. Appellant has merely raised a bald averment that at the time of the allotment of the suit property and execution of perpetual sub-lease deed Ex.DW1/1 there were no restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from the plots allotted to them by the Society. No material has been placed on record by the appellant in support of this contention.

58. In view of Clause 10(a) of the Policy I hold that at the time of admission of appellant as a member of the Society, allotment of the suit property in favour of the appellant and execution of the perpetual sub-lease deed Ex.DW1/1 there were restrictions on the members of the Society, their spouses and dependents from owning any residential property in Delhi apart from plots allotted to them by the Society.

59. Before proceeding to consider questions 'B', 'C', 'D' and 'E' I would like to note following judicial pronouncements:-

I *Haryana State Industrial Development Corporation V. Cork Manufacturing Company* (2007) 8 SCC 120:- In said decision, the Supreme Court observed as under:-

“Let us now consider whether the three courts below were justified in decreeing the suit of the respondent. Before we consider the findings of the courts below, it may be kept on record that in the second appeal, the High Court held that no question of law much less any substantial question of law arose in the same. On a perusal of the judgment of the High Court in the second appeal, we also do not find that any substantial question of law, as enumerated in Section 100 of the CPC was in fact raised before the High Court. So far as the trial court is concerned, it came to a finding of fact that the respondent was found to be in possession of the suit plot in spite of resumption notice having been issued by the appellant. The trial court also came to a finding of fact that it was due to inaction on the part of appellant to remove the electric wires and poles from the suit plot and the explanation given by the respondent for not being able to take any step to raise construction in compliance with Clause 8 of the agreement must be accepted and therefore a decree for permanent injunction should be granted in favour of the respondent. These findings of fact were echoed by the appellate court as well. It is well settled that in a second appeal High Court is not permitted to set aside the findings of fact arrived at by the two courts below until and unless it is shown that such findings of fact are either perverse or arbitrary in nature. Mr. Mohan learned Additional Solicitor General, however, could nor satisfy us that the findings of the courts below which were also accepted by the High Court in the second appeal were either perverse or arbitrary. Accepting this position, the High Court in second appeal found that the appellant had failed to satisfy it that the findings recorded by the courts below suffered from any infirmity or that they were contrary to the record. The High Court also concluded that there was no question of law much less any substantial question of law which arose in the second appeal. Before we part with this judgment, we keep on record that Mr. Mohan appearing for the appellant substantially argued before us on the issue that the High Court was not justified in rejecting the application for acceptance of additional evidence. We have already discussed this aspect of the matter herein before and after such discussion, we have already held that there was no infirmity in that part of the judgment by which the High Court had rejected the application for acceptance of additional evidence.(underlining emphasised).

II                      G. Mahalingappa v G.M. Savitha (2005) 6 SCC 441:- In

said decision the Supreme Court observed as under:-

“As held herein earlier the High Court had set aside the concurrent findings of fact not on consideration of the evidence adduced by the parties but set aside the concurrent findings of fact on the basis of findings contrary to the evidence on record and without considering the findings of fact arrived at by the appellate court and the trial court. From the judgment of the High Court we further find that the concurrent findings of fact were set aside not on consideration of the findings of fact arrived at by the courts below but only on the basis of the arguments of the learned Advocate of the respondent. This was also not permissible to the High Court in Second Appeal to come to a contrary findings of its own only on the basis of the arguments of the learned counsel for the respondent without considering the findings of the trial court as well as the appellate court. (See 2002 (9) SCC 73, Gangajal Kunwar (Smt.) and Ors. v. Sarju Pandey (Dead) by LRs and Ors.). It is equally settled that High Court in second appeal is not entitled to interfere with the concurrent findings of fact arrived at by the courts below until and unless it is found that the concurrent findings of fact were perverse and not based on sound reasoning. We ourselves considered the evidence on record as well as the findings of fact arrived at by the two courts below. From such consideration we do not find that the concurrent findings of fact arrived at by the appellate court as well as the trial court were either perverse or without any reason or based on non-consideration of important piece of evidence or admission of some of the parties. We are therefore of the view that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the appellate court as well as the trial court which findings were rendered on consideration of the pleadings as well as the material (oral and documentary) evidence on record.”

III                    Hero Vinoth (minor) v Seshammali AIR 2006 SC 2234:- In said decision, the Supreme Court summarized the scope of the power of the High Court under Section 100 of the Code of Civil Procedure as under:-

“The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i).....

(ii).....

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

60. Keeping in mind the afore-noted law I shall now determine the correctness of the decision of the courts below on the questions 'B', 'C', 'D' and 'E'.

61. Pertaining to questions 'B' and 'C' the Courts below have noted that no evidence was led by the appellant to establish that he was a benamidar/ostensible owner of the plot in Punjabi Bagh and that he had transferred ownership of the said plot in favour of his son before the execution of the perpetual sub-lease deed Ex.DW1/1. On said reasoning the courts below have answered in negative on the questions 'B' and 'C'.

62. A perusal of the trial court record shows that the courts below have rightly held that no evidence was led by the appellant to establish that he was a benamidar/ostensible owner of the plot in Punjabi Bagh and that he had transferred ownership of the said plot in favour of his son before the execution of the perpetual sub-lease deed Ex.DW1/1.

63. The version of the appellant receives a further setback in light of the fact that appellant in his testimony as PW-2 did not depose to the effect that he transferred the ownership of the plot in Punjabi Bagh in favour of his son Ved Prakash before the execution of the perpetual sub-lease Ex.DW1/1.

64. Pertaining to question 'D' version of the appellant was that he never executed affidavit Ex.PW2/D1 dated 11.6.66. That he could not read or write English and could sign in English. That officials of Society obtained his signatures on certain papers. That he signed the said papers without reading or understanding the contents of the same.

65. Noting that the date of affidavit Ex.PW2/D1 is antecedent to the execution of the perpetual sub-lease Ex.DW1/1 the learned Trial Court has held that there is a strong presumption that a condition precedent of allotment of the plots of the Society was that members of the Society were required to submit an affidavit declaring that neither they nor their spouses and dependents own any residential property in Delhi and that in fulfillment of said condition appellant submitted affidavit Ex.PW2/D1.

66. The version of the appellant that he could not read or write English was noted and disbelieved by the appellate court.

67. Last contention advanced by the appellant that he did not receive show cause notice Ex.DW1/2 dated 26.3.1980 for the reason the shop to which show cause notice was sent was lying

closed since last 15-16 years was rejected by the Trial Court on the reasoning that there was no occasion for the postman to falsely endorse 'refused to receive' on the envelope Ex.DW1/3.

68. The learned Appellate Court went a step further and had noted that show cause notice Ex.DW1/2 dated 26.3.1980 and cancellation letter Ex.DW1/4 dated 21.1.1981 were sent to the same address 'M/s Jai Bharat Trading Co, Machinery Merchant, 4025, Naya Bazaar, Delhi' and that appellant admitted in his testimony that the cancellation letter dated 21.1.1981 was received by him at said address. After noting the said facts the learned Trial Court has held that version set up by appellant that shop M/s Jai Bharat Trading Co was lying closed since last 15-16 years cannot be believed in the teeth of the fact that the cancellation letter Ex.DW1/4 dated 21.1.1981 was received by him at the said shop Jai Bharat Trading Co.

69. On the basis of their decisions on questions 'B', 'C', 'D' and 'E' both the courts below have concurrently held that the appellant had obtained allotment of the suit property by misrepresenting facts and thus committed a breach in terms of Clause III of the perpetual sub-lease Ex.DW1/1 dated 3.12.66. These are findings of facts.

70. In view of judicial pronouncements noted in para 58 above it can safely be held that this Court has no power to interfere with the findings of the fact unless there is an error of law vitiating the findings of the fact. It has no power to reappraise the evidence

or to find out what is the weight attached to a particular evidence.

72. No error of law or perversity has been pointed out by the appellant in the reasoning or in the appreciation of evidence by the courts below in the arriving at the said findings of facts.

73. Circumstances of the case and evidence on record probablizes the view taken by the Courts below. Reasoning adopted by the courts below is sound.

74. In view of above discussion I do not find any merits in the present appeal.

75. The same is dismissed.

76. No costs.

January 18, 2008  
vg

(PRADEEP NANDRAJOG)  
JUDGE