

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ AS No.998 of 1995, Tr.AS No.3464 of 2003
and Cross Appeal in Tr.AS No.3464 of 2003

% 10-09-2018

AS No.998 of 1995

The Andhra Pradesh Industrial
Infrastructure Corporation Ltd., rep.by
its Law Officer, Hyderabad,
and another

... Appellants/
Plaintiffs

Vs.

\$ M/s. Rama Tubes Co., rep.
By its Sri Maniklal Gulab Rai,
Secunderabad and 9 others.

... Respondents/
Defendants

! Counsel for the appellants: Sri L. Prabhakar Reddy

Counsel for the Respondents : Sri Vedula Venkata Ramana,
Senior counsel on behalf of
Sri M.P. Chandramouli.

< Gist:

> Head Note:

? Cases referred:

¹ (1999) 2 SCC 37

² (1995) 5 SCC 115

³ (2015) 7 SCC 241

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

AS No.998 of 1995, Tr.AS No.3464 of 2003
and Cross-Appeal in Tr.AS No.3464 of 2003

COMMON JUDGMENT:

The appeal AS No.998 of 1995 is filed by the Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC) and another against the judgment and decree dated 27.03.1995 passed in OS No.151 of 1987 by the Additional Subordinate Judge, Ranga Reddy District. The said suit is filed by APIIC and another against Rama Tubes Company and 9 others claiming reliefs of delivery of vacant possession, mesne profits etc.

Transfer AS No.3464 of 2003 is filed by APIIC against the judgment and decree dated 27.03.1995 passed in OS No.267 of 1993 by the Additional Subordinate Judge, Ranga Reddy District. This suit was filed by Rama Tubes Company. The cross-appeal in Tr.AS No.3464 of 2003 are filed by Rama Tubes Company against APIIC aggrieved by certain findings in OS No.267 of 1993.

The case of the plaintiffs in OS No.151 of 1987 in a nutshell is that on 09.12.1976 they have entered into agreement with the first defendant-Rama Tubes Company and had given possession of the suit schedule property to the said company. As the first defendant

company did not adhere to the terms and conditions, the allotment was cancelled by letter dated 19.12.1977. After a long time due to protracted correspondence, a fresh offer of re-allotment was given but as the same was not accepted, the suit was filed for delivery of vacant possession and mesne profits, as the plaintiffs state that the defendants let out the suit schedule property to others.

The defendants contested the suit on various grounds and also brought to the notice of the lower Court that a suit in OS No.267 of 1993 was filed for specific performance of the very same agreement of sale dated 09.12.1976.

OS No.267 of 1993 is filed by Rama Tubes Company for enforcing the agreement of sale dated 09.12.1976. The case of the plaintiff in the said suit is that they were given possession of the property and that the cancellation of the same is not correct. They state that they are always ready and willing to get the sale deed executed. Therefore, they state that they are entitled for specific performance. In reply thereto, APIIC states that there was failure on the part of the plaintiff and that the agreement was cancelled. Therefore, there is no agreement to be enforced. A fresh offer for re-allotment did not also

fructify and they have also raised a plea that the case is barred by limitation.

The issues in OS No.151 of 1987 are as follows:

1. Whether the agreement of sale dated 09.12.1976 is true and valid and binding on the plaintiffs?
2. Whether the leasing of the property to D.2 to D.10 is contrary and illegal?
3. Whether the plaintiff is entitled for possession of the property?
4. Whether the plaintiff is entitled for mesne profits? If so how much quantum?
5. To what relief?

The issues in OS No.267 of 1993 are as follows:

1. Whether the suit is barred by limitation?
2. Whether the contract between the parties is no more in force?
3. Whether the plaintiff is entitled for the specific performance of the agreement of sale?
4. To what relief?

It transpires that both the suits were tried together and evidence was let in OS No.267 of 1993. For the plaintiff, one witness was examined as PW.1 and Exs.A.1 to A.28 were marked. For the defendant, one witness was examined as DW.1 and Exs.B.1 to B.23 were marked. By a common judgment that was passed on 27.03.1995, the lower Court decreed the suit OS No.267 of 1993, which was filed for specific performance and dismissed the suit OS No.151 of 1987, which is filed for eviction.

As mentioned at the outset, AS No.998 of 1995 is filed against the decree in OS No.151 of 1987 and Tr.AS No.3464 of 2003 is filed against the judgment and decree in OS No.267 of 1993. In this Tr.AS No.3464 of 2003, there is a cross-appeal also.

This Court has heard Sri L. Prabhakar Reddy, learned standing counsel for appellant/APIIC in AS No.998 of 1995 and Sri Vedula Venkata Ramana, learned senior counsel appearing on behalf of Sri M.P. Chandramouli, learned counsel for the respondents. Both the learned counsel relied upon a compilation of pleadings and documents, which are prepared by Sri M.P. Chandramouli, learned counsel for the respondents. This compilation consists the grounds of appeal in AS No.998 of 1995, the grounds of Transfer Appeal in Tr.A.S.No.3464 of 2003 and the cross-appeal filed in Tr.A.S.No.3464 of 2003. In addition, all the documents which are marked in the lower Court viz., Exs.A.1 to A.28, Exs.B.1 to B.23 are filed along with the depositions of the witnesses. Both the learned counsel agreed that on the basis of this volume of compilation, the arguments in AS No.998 of 1998, in Tr.A.S.No.3464 of 2003 and in Cross-appeal in Tr.A.S.No.3464 of 2003 could be heard altogether.

The facts which are admitted and not in controversy in these cases are a) that there is an agreement of sale/allotment dated 09.12.1976, which is marked as Ex.A.1/B.5 in between the present appellant and the first respondent; and b) possession of the property is also delivered to the first respondent, pursuant to the said agreement of sale.

The appellant/APIIC states that as the first respondent did not comply with the terms and conditions of Ex.A.1/B.5-agreement of sale, they had to revoke/cancel the same. After the revocation in view of the long correspondence, a fresh offer was given to the first respondent in Ex.A.8/B.19 for restoration of possession, but the defendant-first respondent did not comply with the terms and conditions of the fresh offer also. The first respondent on the other hand states that the agreement of sale dated 09.12.1976 (Ex.A.1/B.5) is not cancelled and that they are entitled to specific performance. Hence, the points that arise for consideration in this appeal are follows:

- i) Whether the first respondent committed any breach of the terms of the agreement (Ex.A.1/B.5); if yes, whether the appellant rightly terminated the same?

- ii) Whether the cancellation of Ex.A.1/B.5 has been revoked; and
- iii) Whether Ex.A.8/B.19 is a fresh offer or the continuation of Ex.A.1/B.5. If Ex.A.8/B.19 is a fresh offer, whether the first respondent complied with the new terms.
- iv) As a consequence of the decision on the first point, is the appellant entitled to a decree for eviction and mesne profits or is the first respondent is entitled to specific performance.

As mentioned earlier, both the parties introduced oral and documentary evidence. The crux of the matter is the agreement dated 09.12.1976 and its terms and conditions. The said agreement is marked as Ex.A.1/B.5. The important terms and conditions which have bearing on these cases are:

Clauses (2): The Company shall, as a condition precedent to being placed in possession of the plot allotted, make an initial payment of not less than Rs.4,840/- per acre.

(3) The Company hereby agree to execute a promissory note in favour of the Corporation for the balance of unpaid cost of the land plus development charges allotted to them on the basis of the cost tentatively arrived at Rs.9,680/- per acre.

(5) The date and time of payment is essence of the contract.

(6) Only on the completion and full payment of the entire consideration amount, the sale deed shall be executed and registered in the name of the company.

(10) The Company undertakes and agrees to pay the Corporation proportionate to the property allotted to

the company and further amount in case the Corporation is finally obliged to pay any high sum towards development charges and enhanced compensation towards the cost of acquisition of the land. This will be without prejudice to the right of the financing agency approved by the Corporation as first mortgagees.

(11) The Company expressly agree to execute a promissory note to cover any further amount, when called for, to cover the entire sum determined towards development charges and enhanced compensation towards the cost of the acquisition of the land, within fifteen days from the date of receipt of such communication from the Corporation.

(c) The Company shall, within six months of being put in possession of the said land, commence construction of the factory buildings after securing necessary clearance from the Corporation authorities and complete them in not later than 18 months.

(f) That the land shall not be transferred or conveyed to any other person or persons within ten years after the unit starts functioning.

(m) Not to assign, underlet, sub-let, or part with the possession of the land or any part thereof without first obtaining the written consent of the Corporation till a proper registered sale deed is executed.

(s) That if the Company commits a breach of any of the covenants herein contained its shall be lawful for the Corporation to re-enter upon the said land and take possession thereof and also of the buildings standing thereon; the transfer made in favour of the company in the said land and in any building thereon shall alone cease and determine.

15. If the instalment hereby restored or any part thereof shall be unpaid on the date it become payable or if any contract on the Company's part herein contained shall not be performed or observed, there in any of the case it shall be lawful for the Corporation at any time thereafter, to re-enter upon the premises in the name of the whole and thereupon this agreement shall absolutely be determined without prejudice to the right of the Corporation to seek such remedy in respect of breach of the Company's covenant is herein contained.

17. The Corporation shall have right to resume the land, if the Company do not use the land for the purpose for whom it was allotted within the period specific above, the period to be reckoned from the date

on which the company was placed in possession of the land.

22. All payments due to the Corporation under this agreement shall carry interest at 12%. All payments made/instalments paid after the due dates carry penal interest at 18% per annum.

A reading of these clauses makes it clear that the initial advance paid is Rs.4,840/- and the balance costs tentatively estimated was an equal amount of Rs.4,840/-. Clause-6 clearly states that they only on completion of the full payment, the sale deed shall be executed. Clauses-10 and 11 say that extra amounts can be demanded by APIIC. Clause (e) clearly stipulates that the factory to be constructed in the suit schedule property shall be started within six months and completed not later than 18 months. Clause (f) prohibits the transfer of land within a period of 10 years after the unit starts functioning. Clause (m) prohibits the assignment; underletting and subletting or parting with the possession of the land or any part thereof. Clause (s) states if the first respondent commits a breach of the agreement or the covenants, it is lawful for the appellant to re-enter the land and take possession thereof. Clause-15 also states that if any instalment is unpaid or if any covenant on the part of the first respondent is not performed or observed, then the appellant can determine the contract. Clause-17 also states that if the company does not use the land for

the purpose for which it is given, the first respondent can resume the land.

These clauses are being highlighted at the very outset, in view of the fact that there is a serious dispute about the breach of contract. If the appellant is successful in proving the breach of contract, then their actions in seeking eviction, mesne profits are justified. If on the other hand, it is proved that there is no breach condition, the first respondent is entitled to protection.

This Court has heard Sri L. Prabhakar Reddy, learned standing counsel for the appellant/APIIC. He draws the attention of this Court to the terms and conditions of the contract. According to the learned counsel, the first respondent did not adhere to any of the terms and conditions of the contract. He points out about Ex.A.3 in which it is clearly admitted in para-1 that the construction could not be commenced for the last three years because of the recession conditions in the market. He also pointed out that in para-6, the first respondent admits that they have approached APSFC for a loan. He points out even in Ex.A.6 dated 15.02.1983, which is more than six years after Ex.A.1, the same averment is made.

The learned counsel draws the attention of this Court to clause (e), which states that the company shall within six months of being put in possession commence the construction of the factory building after obtaining permission from the appellant and complete the construction within 18 years. He also draws the attention to Clauses-3 and 15 wherein right is reserved by the Corporation to cancel the agreement in case of breach of any of the conditions. It is the contention of the learned counsel for the appellant that there is virtually no evidence from the appellant's side to show that the construction commenced and was completed within the said period of 18 months. The learned counsel points out that the cancellation was done by Ex.B.12-letter dated 19.12.1997. He draws the attention of this Court to the fact that in the agreement it is clearly mentioned that the construction of factory building must be completed within 18 months and argues that as the said construction was not completed, the allotment was cancelled by Ex.B.12. The learned counsel draws the attention of this Court to the immediate reply given to this letter, which is marked as Ex. B.12 in which the first respondent clearly admits that they are applying the Gram Panchayat for 'starting' the construction. The

company also requests for 'revocation' of the cancellation. Even in Ex.B.4 letter, the appellant clearly points out that in 1980 the respondent is yet to commence the construction. Hence, the learned standing counsel justifies the cancellation of the argument.

In reply to this, the learned senior counsel for the first respondent argues that the land that was delivered was not ready for construction. He also points out that the building was constructed and completed and states that the prayer in the suit itself is for recovery of possession and mesne profits on the ground that the factory is let out to others. He also points out that the efforts of the first respondent were not appreciated and that a hyper technical view was taken by the appellant-Corporation. It is his case that the suit for eviction is filed after the suit for specific performance and as a counterblast. He argues that unless the reciprocal obligations are offered, the first respondent cannot be called upon to offer its part of the bargains. He also argues that the conditions in Ex.B.12 are vague and a term like 'usual interest' is introduced without any clarity.

After hearing both the counsel on this point, this Court is of the opinion that there is no documentary

evidence available to show that the first respondent commenced the construction as required under the agreement under Ex.A.1/B.5 dated 19.12.1977. Even after possession was granted, the first respondent did not commence the construction. Ex.B.12 letter dated 19.12.1977 was given exactly one year after Ex.A.1. The termination/cancellation was on the basis of the failure of the first respondent to commence and complete the construction of the building. It is clearly mentioned that the appellants have not taken any steps for starting the industry and for paying the balance sale consideration. The learned counsel for the appellant is right in pointing out that the balance sale consideration of Rs.4,840/- was due and payable within six months from Ex.A.1's date, as can be seen from clause-4. There is no evidence to show the payment or the tender of the same within six months.

The immediate reply of the first respondent does not in any way contradict the averments in the letter of cancellation. The further correspondence of the first respondent as can be seen Ex.B.17 talks of 'revocation' and 're-allotment' of the land only. The learned counsel for the appellants also points out that other letters like Ex.A.6 dated 15.02.1983 also talk of revocation of the cancellation. Even in Ex.A.7 dated 25.07.1983, there was

a prayer for revocation of the cancellation. Therefore, it is clear that the first respondent was fully conscious of the cancellation of the agreement. No positive evidence has been introduced to show that the construction of factory had actually commenced within a period of six months. No extenuating circumstances are also proved to excuse the delay. No proof is filed to show that the balance sale consideration was tendered within six months as per clause-4. The parties entered into the realm of a concluded contract and they cannot avoid the terms unless they can plead and establish a failure on the part of the appellant. In the case of ***Indu Kakkar v. Haryana State Industrial Development Corporation Ltd.***¹, similar clauses and the action taken thereunder were upheld by the Hon'ble Supreme Court of India.

The terms and conditions of Ex.A.1 agreement are clear and there is also a clear violation of the terms and conditions, which would justify the action taken by the appellant/ APIIC in issuing Ex.B.12 letter of cancellation. Therefore, this Court is of the opinion that the agreement Ex.A.1/ B.5 was cancelled rightly by the appellant/APIIC.

The second question that arises for consideration is- whether Ex.A.8/B.19 is a fresh offer or is the agreement

¹ (1999) 2 SCC 37

dated 19.12.1976 continued? Ex.A.8 is a letter dated 10.08.1983 in which the appellant as pointed out certain breaches and said that there is a violation of various clauses. There is a reference to Ex.B.17/18-letter dated 09.03.1981 and the reply thereof dated 03.04.1981.

In Ex.B.17-letter dated 09.03.1981 the appellant clearly specifies that in case of the first respondent is interested in re-allotment of the land already cancelled, the same can be re-allotted at a cost of Rs.13/- per square yard. The first respondent was requested to give their consent. The reply dated 03.04.1991 states that the issue would have brought to the notice of the concerned person who was not available readily. There was a lot of correspondence on these issues, as can be seen from Ex.A.18. Clauses-4 and 5 of Ex.A.8 are as follows:

4. However, to settle this long pending and vexatious issue and enable you to secure the SFC loan it has been finally decided to consider restoration of allotment by charging. Rs.13/- per square yard as indicated by you earlier. However, restoration will be conditional upon your paying 50% land cost at Rs.13/- per square yard less the amount already paid within fifteen days of the receipt of the letter and balance 50% cost within six months thereafter at usual interest rates.

5. Your willingness or otherwise should be communicated to us within ten days from the date of receipt of the letter. A copy of this letter is being sent to the Andhra Pradesh State Financial Corporation also. It may also be noted that the above decision is final and irrevocable.

The restoration was conditional as can be seen from clauses-4 and 5. The time of 15 days was given for payment of the balance sale consideration and the balance 50% cost within six months. The willingness was also requested to be communicated within 15 days from the date of receipt of the said letter. A plain language interpretation of this letter shows that a decision was taken to restore the allotment on two conditions. 'Restoration' also clearly implies a prior cancellation and the undoing of what was done. It clearly implies an action of returning something to a former condition. The reply to Ex.B.8 is Ex.A.9. The offer made Ex.A.8 was not accepted by the first respondent. They agreed to pay the balance 50% of the cost in the names of three different companies. The payment of 50% of the land cost within 15 day as stipulated in Ex.A.8 was also not done. In fact, as per the respondent, Ex.A.8 was delivered in November 1984 only. Even if 15 days is reckoned from this date, it is clear that the payment made under Ex.A.11 is way beyond the 15 days period stipulated. Ex.A.11 is dated 04.12.1985 and even the date of cheque is 04.02.1985. The payment, which should have been effected in early December 1984 after the receipt of Ex.A.8, was made only in early February

1985. The cheque was also returned by the appellants' letter dated 26.02.1985 under Ex.A.12. The subsequent cheque from another third party which was sent, vide Ex.A.13 was also returned on 23.03.1985 by Ex.A.14. Therefore, the letters filed by the plaintiff/first respondent himself clearly shows that there was a negotiation for re-allotment of the land. The same was also conditional. The conditions were not met. It is settled law that an offer should be accepted as stipulated and must be absolute. Section 7 of the Indian Contract that clearly states that a proposal can be offered into an acceptance if a) the acceptance is absolute and unqualified; b) if the proposal prescribes the manner in which it is to be accepted and the acceptance was made in such manner, the proposer may insist that the proposal should be accepted in the prescribed manner and not otherwise.

In the case on hand, the offer of the re-allotment stated that it would be restored on payment of 50% of the land costs at Rs.13/- per square yard only within 15 days from the date of receipt of the letter. In addition, the willingness was also to be communicated within 10 days from the date of receipt of the letter. In the case on hand, it is clear that even if the delivery of the letter was

only on 22.11.1984, the acceptance is not in terms of Section 7 (2) of the Contract Act. Immediately after letter dated 28.11.1984 Ex.A.9 was sent. In addition, subsequent correspondence also discloses that the amounts were refunded vide Exs.A.12 and A.14 on the ground that the requirements mentioned in the letter dated 10.08.1983 (Ex.A.8) were not fulfilled.

Therefore, on a review of the facts and after considering the submissions made by both the learned counsel, this Court is of the opinion that the proposal under Ex.A.8 is a fresh proposal for restoration of the earlier allotment that was cancelled on 19.12.1977. It was conditional and the first respondent did not fulfil the conditions stipulated. Therefore, it is clear that there is no consensus ad idem between the parties. The terms which are stipulated were not adhered to. In this view of the matter, this Court answers the points framed for consideration as follows:

- a) There is a breach of terms and conditions of Ex.A.1/B.15 by the first respondent.
- b) The revocation by letter dated 09.12.1977 (Ex.B.12) is correct.

- c) Ex.A.8/B.19 is a fresh offer for allotment of the land at a new rate. The same was not accepted within the time.
- d) This Court holds that there is no acceptance of the proposal nor is there any consensus ad idem amongst the parties, which would lead to a conclusion that there is an acceptance of Ex.A.8 proposal.

The next point that survives for consideration is the relief claimed in OS No.267 of 1993; wherein specific performance of Ex.A.1/B.5 agreement of sale is sought for.

It is the contention of the learned counsel for the appellant that Ex.A.1 agreement was already revoked and cancelled. He points out various letters addressed by the first respondent wherein they sought for 'revocation' of the proposals. The offer dated 10.08.1983 in Ex.A.8 is an offer for revocation proposals on certain conditions. These conditions were not fulfilled. The reply of the learned senior counsel is that the cancellation itself is wrong and that the APIIC never acted in time or seriously. Even the alleged letter of cancellation was delivered one year later. This Court notices that even if the same is correct, the failure of the respondent to

comply with the conditions is clear. Therefore, this Court holds that the earlier agreement of 19.12.1976 was not restored in order to enable the first respondent to seek specific performance of the same in OS No.267 of 1993.

In addition, it is the contention of the learned counsel for the appellants that the claim is hopelessly barred by time. The learned counsel for the appellants submits that the termination dated 19.12.1977 under Ex.B.12 has put an end to the contract dated 19.12.1976. The subsequent offer made on 10.08.1983 vide Ex.A.8/B.19 was also not accepted in time. Therefore, the learned counsel contends that the suit which is filed on 23.10.1986 is hopelessly barred by time. This Court held that the offer dated 10.08.1983 does not in any way restore Ex.A.1 agreement. The learned senior counsel appearing for the respondents states that the letter dated 10.08.1983 was only received in November 1984 (Ex.A.9) and that the cheques submitted by the first respondent was returned, vide Ex.A.12 dated 26.02.1985. Therefore, the learned counsel argues that the plaint in OS No.267 of 1993 which is presented on 23.10.1986 is within time. He states that the limitation under Article 54 of the Limitation Act commences from the date of refusal of the specific performance and the

suit that is filed within three years is within time. He therefore argues that the findings of the lower Court on issue No.1 that the suit is not time barred is correct.

In reply to this, the learned counsel for the appellants argued that the cancellation of the agreement of sale was in December 1977. Thereafter, there was only correspondence about the revoking the said proposal. He rightly points out that once time begins to run; it does not stop. He submits that the fresh offer which did not culminate into an acceptance cannot be used to save time. Therefore, the limitation cannot be reckoned from the date of the new offer. The cancellation of the allotment in 1977 should have been challenged within three years therefrom and failure of the first respondent to bring any action for enforcement of Ex.A.1 or to challenge the termination within three years debars them from claiming any relief on the basis of Ex.A.1. This Court also finds that issue No.1 that is framed in this suit was incorrectly decided. In the opinion of this Court, the suit is hopelessly barred by time.

Even issue No.2 in OS No.267 of 1993 is wrongly decided in the opinion of this Court. The agreement was terminated rightly. Even if time is not the essence of the

contract in case of sale of urban immovable properties, still failure of the first respondent to adhere all the terms and conditions of the allotment within a reasonable gives the right to the appellants to cancel the agreement. Time may not be the essence of the contract for the specific performance of the urban properties. But the conditions of allotment which are specified cannot be overlooked. The correspondence and contemporaneous understanding of the parties is also to the effect that the first respondent failed to commence the construction and complete the same. Hence, this Court holds that the contract is not in force any more.

Issue No.3 is whether the plaintiff is entitled for specific performance. This Court has already held that if the agreement is not in force, it is not capable of being specifically enforced. This Court also held that the claim is barred by time.

In addition, this Court also notices that the 'continuous readiness and willingness' which is required of the first respondent is not proved. In a number of cases, the Hon'ble Supreme Court of India held that they should be continuous readiness and willingness for the enforcement of the contract. Readiness has been interpreted as being ready with the money or having the

necessary financial resources to complete the transaction. Willingness has been interpreted showing the eagerness to get the contract completed, as per the decision of Hon'ble Supreme Court in ***N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao***² and other cases. In this case, Ex.A.1 agreement contemplated payment of the balance cost within six months from the date of Ex.A.1 i.e., six months from 09.12.1976. There is absolutely nothing in the evidence to show that this was complied with. Even Ex.A.6 letter shows that the cheques were issued for the balance costs from third parties, but the same were returned without considering the request for revocation. Even letter of revocation Ex.B.12-letter dated 19.12.1977 clearly speaks of the failure to pay the balance amount and also to start the factory work. In addition, after the offer was made to reallocate the land at Rs.13/- per square yard and to revoke the allocation also, the first respondent did not pay the money in time. The cheques were not paid/tendered as stipulated. The continuous readiness is therefore not proved.

Therefore, this Court is of the opinion that neither the readiness nor the willingness which are necessary for granting a decree of specific performance are pleaded or

² (1995) 5 SCC 115

proved in this case. Therefore, this Court holds that the plaintiff is not entitled to specific performance of the agreement of sale. Issue No.3 is therefore, held against the plaintiff. As a consequence the plaintiff in OS No.267 of 1993, the first respondent herein is entitled to any relief. In fact, in the case of **Andhra Pradesh Indl. Infrastructural Corporation Ltd. v. Shivani Engineering Industries**³, similar clauses of allotment were upheld. The present appellant is the appellant before the Hon'ble Supreme Court of India. The conduct of APIIC (present appellant) in not canceling the allotment and resuming the plot was commented upon strongly by the Hon'ble Supreme Court.

In view of the discussion made earlier, the following are the findings in respect of the issues that are framed in OS No.151 of 1987.

- i) the first issue whether the agreement of sale dated 15.11.1987 is valid and binding on the defendant. The lower Court rightly held that the agreement dated 09.12.1976 is valid and binding.
- ii) Issue No.2 is to the effect whether the leasing of the property to defendants 2 to 10 is

³ (2015) 7 SCC 241

contrary and illegal. Defendants 2 to 10 are not contesting the suits. Ex.A.1 agreement clearly states that the land cannot be transferred or conveyed to other parties within 10 years. Similarly, the first respondent undertook not to assign, underlet, sublet or part with the possession of the land or in part thereof without obtaining the written consent of the appellant/APIIC. It was argued during the course of submissions that the said clause applies to the land only based on the admission of the witness for the respondent (DW.1).

It is the argument of the learned counsel for the respondents that as the witness himself admitted this, the sheds can be leased and there is no mistake committed by the lower Court.

This Court, however, notices that an overall interpretation of the terms and conditions of the contract shows that the land was allotted for a specific purpose namely to establish a factory in the same. The first respondent failed to establish and start production as required under Ex.A.1. He leased out the sheds which

were constructed therein. In the oral evidence of PW.1, he states that his son leased out a shed that is constructed thereon. Even in his cross-examination on 07.11.1999, PW.1 clearly admitted as “I have let out the infrastructure through my family members to third parties.” Similarly, a specific question was put in the further cross-examination stating that Jwalamukhi Packaging Industry is paying Rs.14,000/- per month towards the rent. The witness adds that the industry agreed to pay, but did not pay such amount. The said industry is not the tenant of PW.1, but it was let out through his son. He further agrees that because his son contributes some funds, he leased out the sheds. The witness also admitted that he has got proof to show that he raised loans from some third parties. Therefore, the evidence on record clearly shows that the property and the sheds therein were leased out. In para-9 of the plaint, the appellant herein has clearly spelt out the details of the rent being received in respect of four tenants viz., defendants 1 to 4 with regard to the period of lease and the amounts are specified. There is no denial of these facts and figures by the first respondent. In reply to this para-9 of the written statement, on the contrary, first defendant admits that he has leased out the portion so

constructed to recover some amounts spent by first defendant's infrastructure. There is no proof filed to show that the defendant borrowed any money from others. In addition, no documentary proof is filed to show that only the shed/superstructure and not the land was leased to defendants 2 to 10 in this suit.

In the light of this available evidence, this Court is of the opinion that the lower Court committed an error in failing to correctly decide issue No.2. The available evidence and the failure of the defendants to reply to the same in his written statement should have prompted the lower Court to award the damages, mesne profits as claimed. The lower Court committed an error in stating that the advocate commissioner was not appointed to decide the fact. The lower Court over looked the admissions in the written statement and in the oral evidence. If the land itself cannot be sublet or rented out the super structure constructed on the land (more so after the cancellation of allotment) cannot also be sublet or transferred. What cannot be done directly cannot be done indirectly. Therefore, this Court holds that the leasing of the property by the first defendant to defendants 2 to 10 is contrary to the agreed terms and that the plaintiffs are entitled to mesne profits as prayed

for. Therefore, issue Nos.2 and 4 are decided in favour of the plaintiffs. There shall be a decree for the sum of Rs.3,88,080/- as prayed for in the suit.

In view of the non-denial and the admissions in the oral evidence, the decree is passed for the said sum of Rs.4,88,080/- with interest at 18%. Permission is also accorded to the plaintiff/appellant to file an appropriate application for determination of future mesne profits.

In view of the fact that the terms and conditions of Ex.A.1 were violated and as the suit for specific performance is also dismissed, this Court is of the opinion that issue No.3 is also to be decided in favour of the appellant and against the first respondent. The plaintiff/appellant is entitled to possession of the property. Respondents 2 to 10 are directed to hand over the vacant peaceful possession to the appellant within a period of two months from the date of receipt of a copy of this order. Hence, this Court is of the opinion that the appeal AS No.998 of 1995 is to be allowed. Tr.AS No.3464 of 2003 is also to be allowed while the Cross Appeal filed by the defendant/ first respondent is to be dismissed.

Accordingly, AS No.998 of 1995 and Tr.AS No.3464 of 2003 are allowed and Cross-appeal in Tr.AS No.3464 of 2003 are dismissed. In the circumstances, there shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 10.09.2018
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Note: L.R. Copy marked.

