

(2008) 02 AP CK 0084

In the Andhra Pradesh High Court

Case No : Company Application No. 237 of 2003

The Andhra Pradesh Industrial Infrastructure Corporation
Limited

APPELLANT

Vs

A.P. Refractories Limited and Others

RESPONDENT

Date of Decision : 26-02-2008

Acts Referred:

Companies (Court) Rules, 1959 — Rule 9
Companies Act, 1956 — Section 125, 126, 446, 446(1), 446(2)
Constitution of India, 1950 — Article 299
Land Acquisition Act, 1894 — Section 44A
Limitation Act, 1963 — Article 112, 137, 65, 15(2)
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 2, 5(1),
5(2), 8A
Registration Act, 1908 — Section 17(2)
Transfer of Property Act, 1882 — Section 11, 32, 5, 68, 73

Citation : (2008) 146 CompCas 399

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : G. Maloji Rao, A.A.G., M. Anil Kumar, V.S. Raju, M.V.S. Suresh Kumar, K.S. Murthy and Deepak Bhattacharjee, for the Appellant;

Judgement

V.V.S. Rao, J.—These two applications are filed u/s 446 of Companies Act, 1956 and Rule 9 of the Companies (Court) Rules, 1959. Company Application No. 237 of 2003 is filed by Andhra Pradesh Industrial Infrastructure Corporation Limited (hereafter, APIIC) seeking leave of this Court to initiate proceedings and take necessary steps to resume possession of land admeasuring Acs. 60.72 situated at Duvvada, Sanivada and Talarivanipalem villages of Gajuwaka Mandal of Visakhapatnam District (hereafter, Schedule "A" lands) from A.P.Refractories Limited. Government of Andhra Pradesh in Revenue Department filed C.A. No. 428 of 2003 praying similar relief in respect of land admeasuring Acs. 97.71 in Agnampudi, Talarivanipalem and Sanivada villages (hereafter, Schedule "B" lands). This common order shall dispose of both the company applications.

2. The fact of the matter in brief as pleaded by Government may be noticed. A.P. Refractories Limited (in liquidation) (hereafter, APRL) approached applicants for allotment of land for establishing a medium scale industry for manufacturing refractories - highly fire resistant, lining bricks used in steel industry, as an ancillary to Visakhapatnam Steel Plant (VSP). Government initiated acquisition proceedings. A draft notification under Visakhapatnam Steel Project (Acquisition of Land) Act, 1972 (hereafter, VSP Act) was issued on 29.06.1978 proposing to acquire lands in four villages. Another notification, dated 14.12.1978 was also issued for other extents of land. It was proposed to acquire an extent of Acs.60.70 under Part II of Land Acquisition Act, 1894 (LA Act, for brevity) in favour of APIIC and to acquire an extent of Acs. 74.84 under Part VII of LA Act for the benefit of A.P. Refractories. Awards were passed during March to July, 1981. By an order, dated 15.09.1983, an extent of Acs. 173.43 (Acquired land - Acs.97.91 and Government land - Acs. 37.87) was allotted to APRL. Government also issued a letter, dated 22.03.1983 permitting them to mortgage lands to financial institutions for raising loans. In 1985, Government having come to know that only an extent of Acs. 15.00 was utilized by APRL, sought information. In response thereto, General Manager, APRL, sent a letter, dated 19.04.1985. Government was informed that the land allotted is proposed to be used by the end of implementation of fourth phase.

3. The District Collector, Visakhapatnam issued show cause notice, dated 20.02.1986 asking for explanation as to why transfer of land to them should not be declared null and void, unutilized land be taken back by Government, and effect forfeiture of one-fourth amount and refund balance amount paid for land. On 20.03.1986, APRL sent explanation informing that it completed first phase of project and that as per schedule, second, third and fourth phases are to be completed in 1987, 1989 and 1991. While matter was pending before District Collector, Government through its Secretary issued show cause notice vide Memo No. 1608/K2/ 86-11, dated 21.11.1988. APRL was asked to show cause why an order declaring the alienation as null and void should not be passed duly refunding the amount paid after forfeiting one-fourth of the amount. They sent a detailed explanation on 30.11.1988 inter alia stating that company became sick, that it was referred to Board for Industrial and Financial Reconstruction (BIFR) under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA Act, for brevity) and that M/s. Associated Cement Companies are likely to take over sick company. It was also brought to notice of Government that Government lands allotted to M/s. Visakhapatnam Port Trust, Bharat Heavy Plates and Vessels, and Hindustan Zinc Limited were not resumed as they were under process of expansion. APRL requested Government not to resume land.

4. In 1986, BIFR forwarded its opinion to this Court that it is just and equitable to wind up APRL. In the meanwhile, M/s. Dalmia Cements (Bharat) Limited filed company petition being C.P. No. 40 of 1986 for winding up. By order, dated 30.12.1991, this Court ordered winding up of company. Within ten days thereafter, Government issued G.O. Ms. No. 24, dated 08.01.1992 declaring

alienation of unutilized land to APRL admeasuring Acs. 158.43 as null and void. Government also ordered to forfeit one-fourth of the amount paid by beneficiary duly refunding balance amount. The District Collector, Visakhapatnam was requested to take action to resume land. It is alleged that in pursuance of Government Order, Mandal Revenue Officer took possession of land on 08.03.1992. In 1999, A.P. Refraction Land Losers Welfare Society filed W.P. No. 26189 of 1999 seeking direction to Government, APIIC, District Collector and Official Liquidator to reconvey lands acquired from the members of petitioner society. The writ petition was dismissed by this Court on 25.08.2000. This Court also observed that unless Government obtains permission to remain outside winding up proceedings as contemplated u/s 446(2) of Companies Act, resumption order passed by Government in G.O. Ms. No. 24 cannot have any effect on winding up proceedings.

5. APIIC supports its application pleading as follows. On a request by APRL to acquire Schedule "A" lands, an agreement, dated 17.12.1980 was entered into between the parties. Land was acquired as per the provisions of LA Act. After taking possession on 15.03.1981, land was handed over to APRL subject to conditions in agreement pending execution of sale deed in favour of allottee. As per Clauses 8 and 9 of agreement, land shall be used for the purpose for which it is acquired. It shall not be appropriated for any other purpose and that APRL shall not alienate or transfer or create charge in favour of others without prior permission of applicant Corporation. APIIC retained its right to resume land for any violation by APRL. An extent of Acs. 173.43 including land acquired by Government was allotted to APRL on condition of fulfilling terms of alienation. Out of total extent of Acs. 173.43, an extent of Acs. 60.72 belongs to APIIC. APRL set up an industry utilizing an extent of Acs. 15.00, they failed to implement expansion proposals even after lapse of five years, and thus committed breach of conditions of agreement. As APIIC was under bona fide impression that entire land would be utilized for the industry, action under the provisions of A.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1968 (Public Premises Act, for brevity) was not initiated. APIIC is entitled to resume the land as per Clause 9 of agreement, dated 17.12.1980.

Liquidator of APRL (Official Liquidator attached to this Court) filed reports separately opposing Government and APIIC raising following contentions. The application filed by Government for resumption of land is not maintainable. Government cannot take possession of land without obtaining leave of this Court when properties are vested in company Court. The action was initiated by Collector in 1986 for resumption of land, but Government kept quiet and moved this application with considerable delay when winding up proceedings commenced before this Court. Government and APIIC are not clear as to who are claiming rights over land because Government is seeking resumption of land to the extent of Acs. 97.71 and APIIC is seeking resumption of land to the extent of Acs. 60.72. The land has not been separately demarcated and particulars of land are not given. The ground on which land is sought to be taken back is irrelevant

for resuming land. The company has partially constructed buildings, sheds and erected machinery on property. Loans were raised from different institutions by mortgaging properties on the land. The entire land can never be used at one stretch and establishment of entire unit will be in phased manner. Government by themselves have not thought of resuming land. After this Court declared resumption G.O. Ms. No. 24 as ineffective, they filed company applications.

6. Land was handed over to company in 1981. The company was wound up in 1991. For past seven years, Government or APIIC have not raised objection while liability to secured creditors mounted to crores of rupees. Now, as value of property is escalated, Government is trying to resume land. If only Government had initiated steps at the earliest, APRL would not have suffered so much of liability and financial institutions would not have released money. The liability of company stands at Rs. 30 crores (as on the date of report), and therefore, interest of third parties cannot be penalized. Government allowed company to use land and granted permission to mortgage properties to financial institutions, who lent crores of rupees, and therefore, resuming land would prejudice financial institutions. The restrictions imposed by Government in the matter of mortgage are unreasonable and cannot be enforced. Allegation that possession was taken is denied. It is asserted that possession of property of company is with OL. Official Liquidator has further averred that by their letters, dated 22.03.1983, 09.08.1983 and 07.11.1983 permission was accorded to APRL to mortgage entire property in favour of respondent Banks. Even at the time of registration of charge, there was no condition imposed on mortgagees and therefore, conditions imposed by Government at the time of alienation have been waived and they cannot be enforced. All the mortgagees have right to sell lands and therefore, approval/sanction of Government u/s 44A of LA Act is unwarranted and not necessary. The allegation of APIIC that they had any title or ownership over the properties which stood vested in APRL is specifically denied. The locus standi of APIIC to file such application is also demurred.

7. Learned Special Government Pleader Sri A. Satya Prasad submits that Government allotted acquired land as well as poramboke land to APRL subject to conditions of alienation. Having accepted these conditions of alienation/allotment, the allottee is now bound by such binding conditions and cannot turn around and urge that such conditions are unreasonable. Keeping the land vacant without utilizing the same as stipulated in the conditions amounts to breach of conditions and therefore, Government is entitled to withdraw allotment and resume unutilized portion of the land. Lastly, he submits that even if the Government had permitted APRL to create charge in favour of respondents 2 to 8 for raising loans, the same does not render the covenant to resume the land ineffective. Therefore, learned Counsel submits that G.O. Ms. No. 24, dated 08.01.1992 is enforceable against allottee. Learned Counsel relied on State of Orissa Vs. Ram Chandra Dev and Mohan Prasad Singh Deo, and Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, .

Sri D. Prakash Reddy, learned Senior Counsel appearing for APIIC, made the following submissions. As per Clause 8 of agreement, dated 17.12.1980 between APRL and APIIC, the former is under obligation to use the land allotted by APIIC exclusively for setting up of refractories plant and shall not create any charge over it without prior permission of latter. APIIC did not grant any permission to create mortgage or charge in favour of respondents 2 to 8. APRL utilized an extent of Acs. 15.00 of land out of Government allotted property. APIIC allotted Acs.60.72, which was acquired at their request, but same was not put to use and therefore, they are entitled to resume the land by invoking provisions of Public Premises Act in accordance with clause 9 of agreement referred to hereinabove.

8. Sri S.R. Ashok, learned senior counsel for respondents 2 to 8 and Sri M. Anil Kumar, learned Counsel for Official Liquidator opposed applications. They would contend that (i) applications are barred by limitation; (ii) Government and APIIC have no right or prerogative to cancel allotment of land and resume the land under Public Premises Act, which has application; (iii) the plea that APRL has not utilized the land is not correct. Admittedly, an extent of Acs. 15.00 was utilized and even according to project report, development of APRL is to be taken up in four phases in tune with phased development of VSP. The reason, therefore, is non-existent and does not confer any power of resumption; (iv) with the permission and consent of Government, land was mortgaged for securing loans advanced by them. A charge as per Section 125 of Companies Act, having created in favour respondents 2 to 8, applicants cannot cancel allotment or resume land; (v) the agreement, dated 17.12.1980, allegedly executed by APRL with APIIC is not conclusive and valid as it is not executed in accordance with Section 46 of Companies Act. Even if it is valid, there is no right reserved to APIIC to resume the land, because time is not stipulated for utilization of land; (vi) G.O. Ms. No. 24, dated 08.01.1992, is void for want of notice to APRL; (vii) APIIC has not even issued notice of resumption before filing the application, and therefore, application is not maintainable; (viii) APIIC has no proprietary interest in the land and it is only a facilitator as the land was acquired by Government for APRL through APIIC who collected 10% service charges at the time of acquisition; (ix) APIIC did not show any interest from 1988 to 2007, and therefore, application after twelve years is barred by limitation u/s 66 of Limitation Act, 1963. Learned Counsel relied on *Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd.*, *State of Punjab Vs. Nestle India Ltd. and Another*, *Mahabir Vegetable Oils Pvt. Ltd. and Another Vs. State of Haryana and Others*, *Harihar Nath and Others Vs. State Bank of India and Others*, and *Jagjit Rai Maini v. Punjab Machinery Works (P&H) (2001) 103 Com Cas 979 (P&H)*.

9. Admitted facts of the case

Before dealing with the points that arise for consideration flowing from rival submissions, the admitted factual position may be noticed. APRL is an assisted unit of A.P. Industrial Development Corporation. Government of India gave a letter of intent for manufacturing of 80,000 Metric Tonnes (MT) of refractory

products. Project was taken up in backward area. As per its master plan, project was to be developed in four stages, ultimately achieving 80,000 MT capacity. The annual production capacity of 15,000 MT in first phase, 20,000 MT in second phase, 25,000 MT in third phase and 20,000 MT in fourth phase is to be achieved. After completion of first phase, production commenced in January, 1985. Government also paid subsidy of Rs. 10,00,000/-. APRL was set up as ancillary to supply refractories to VSP, which itself was to be taken up phasewise. Secondly, conditions of alienation and alleged agreement with APIIC provide that APRL shall obtain prior approval for mortgaging assets to financial institutions by creating a charge. Government of Andhra Pradesh granted approval to create charge in favour of respondents 2 to 8. It is also a fact that agreement, dated 17.12.1980 was not signed by APIIC nor any material is placed before this Court to show that both APIIC and APRL, two juristic persons invoked contract in the manner provided u/s 46 of Companies Act. Lastly, though District Collector gave notice on 20.02.1986 followed by Government's notice on 22.11.1988, Government did not issue any notice at the time of issuing G.O. Ms. No. 24 (ineffective order as held by this Court in W.P. No. 26189 of 1999) cancelling allotment. Indeed, APIIC did not issue any notice of resumption nor initiated any such action as per Clause 9 of agreement.

10. Validity of Allotment Instrument and Role of APIIC

Though learned Special Government Pleader refers to proceedings of District Collector, dated 15.03.1983, whereunder Acs. 97.71 was allotted to APRL, in spite of giving a direction, the same is not produced nor records are placed before this Court. A true copy of order of alienation is placed before the Court. As per this, Government allotted land for construction of factory building, office buildings, quarters etc. A period of three years was stipulated for fulfilling the purpose, for which it is allotted. Government reserved the right to cancel allotment, forfeit the amounts and resume the land if there is any breach of conditions. Clause (g) of Order of Alienation is relevant and reads as below.

g. If the company commits a breach of any of the conditions provided for in the agreement, the Government may make an order declaring the transfer of the land to the company null and void whereupon the land shall revert back to the Government and directing that an amount not exceeding one fourth of the amount paid by the company to the Government as the cost of acquisition shall be forfeited to the Government as damages and the balance shall be refunded to the company, and the order so made shall be final and binding.

There is no serious dispute that the land acquired for APRL and Government land admeasuring Acs. 135.56 was allotted to industry. The order of alienation in its preamble contains a statement of fact that land was acquired for public purpose, namely, construction of APRL. There is also no dispute that land was acquired under five land acquisition cases under VSP Act, presumably to avoid the cumbersome procedure under Part VII of LA Act and Land Acquisition (Companies) Rules, 1963 (hereafter, LA Rules), which provide for special

procedure for acquisition of land for companies. The amounts were paid by APRL for acquisition and therefore, order of alienation is not a grant in the sense contemplated under Government Grants Act, 1895. It was the alienation of land by Government for a market value and it was a transfer of property as per Section 5 of Transfer of Property Act, 1882 (TP Act, for brevity). Be it noted, as per Section 17(2)(vii) of Registration Act, 1908, any grant/alienation of immovable property by Government does not require registration.

When transfer of property is effected, by reason of Section 11 of TP Act, a covenant in the transfer deed that the property conveyed shall be enjoyed or applied in the particular manner cannot be given effect to. Insofar as this aspect of the matter is concerned, learned Counsel for applicants/learned counsel for respondents have not made any submission and therefore, it is not necessary to go deep into this aspect. Order of alienation issued by Government in 1983 also contemplates that APRL shall not be entitled to mortgage or transfer of property without previous sanction of Government. Government granted such sanction, as a result of which, admittedly charge was created u/s 125 of Companies Act. However, order of alienation does not provide for enforcement of right of chargeholder/mortgagee in the event of purported cancellation of grant and resumption of land. In such an event, equity steps in, and it is always presumed that any grant or agreement under which the Sovereign has alienated/granted land to incorporated company, is subject to rights of third party mortgagee, who in this case are public sector banks/financial institutions. Therefore, while considering the right, if any of Government of Andhra Pradesh, the chargeholders cannot be ignored as it would jeopardize larger public interest.

The agreement of APIIC, dated 17.12.1980, though contains resumption clause for non-compliance of setting up of factory unit, no time is stipulated therein. Admittedly, said agreement or schedule thereto is not signed by any unauthorised signatory representing APIIC and only one witness signed the agreement. This gives rise to two questions. Whether the agreement is validly executed and binding on the parties to it and whether can it be enforced in law. Learned senior counsel does not dispute that APIIC or its authorized signatory did not subscribe signature at the time of execution or thereafter. For the last more than twenty five years, the agreement remained unsigned agreement. When a company registered under the Companies Act enters into contract and such instrument remains unsigned, can it be enforced? Section 46 of Companies Act provides for a method and manner of contracting on behalf of a company. It reads as below.

46. (1) Contracts on behalf of a company may be made as follows:-

(a) a contract which, if made between private persons, would by law be required to be in writing signed by the parties to be charged therewith, may be made on behalf the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;

(b) a contract which, if made between private persons, would by law be valid although made by parole only and not reduced into writing, may be made by parole on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) A contract made according to this section shall bind the company.

(emphasis supplied)

Unless the contract in writing is signed by any person acting under the authority of the company, express or implied, is not binding on the company. It is not the question - as contended by learned senior counsel for APIIC - of either party signing agreement. The circumstances of this case do not warrant an inference of valid agreement merely because APRL got the land and complied with the terms of alleged agreement. When APRL requested for land, the same came from three sources, namely, acquired land, Government Poramboke land and land acquired by APIIC for APRL. Non-compliance of signing or not signing agreement by APRL would have left adverse effect on its enforceability. Equally, if APIIC has not signed the agreement, a valid agreement cannot be inferred especially when drastic action of cancelling allotment and resumption is proposed. Therefore, this Court finds force in the submission of learned senior counsel for financial institutions and learned Counsel for OL in this regard.

Whether APIIC has any role at all? The agreement signed by APRL on 17.12.1980 stipulates that APRL should deposit a sum of Rs. 2,75,000/-, that it should bear escalation costs as well as legal costs for the land and also pay ten per cent service charges as compensation to land owners. This only shows that, whatever be the reason, the Government desired to acquire land for APRL through APIIC. The latter was only a facilitator. The revenue officials handing over possession to APIIC, and they handing over the land to APRL may be for complying with legal requirements. Indeed acquiring authority for all purposes was Government of Andhra Pradesh through APIIC. Therefore, APIIC has nothing to do with the question of cancellation of allotment or resumption of land. When the District Collector and Government issued show cause notices, they proceeded as if the entire land belongs to Government. Even G.O. Ms. No. 24 proceeds as if entire extent of land was allotted/alienated by Government. APIIC received their service charges as well as land costs, which APRL deposited with Government. There was no contract as such between APIIC and APRL except lending name for the purpose of acquisition.

APIIC also cannot invoke provisions of Public Premises Act for evicting APRL. Supreme Court in *Express Newspapers Private Limited* (supra) held when an allottee raised construction on allotted land, such premises cannot be treated as Public Premises within the meaning of Section 2(e) of Central Public Premises (Eviction of Unauthorized Occupants) Act, 1971, which is in pari materia with the provisions of A.P. Public Premises Act. It was held:

The Express Buildings constructed by Express Newspapers Pvt. Ltd., with the

sanction of the lessor i.e. the Union of India, Ministry of Works and Housing on Plots Nos. 9 and 10, Bahadurshah Zafar Marg demised on perpetual lease by registered lease-deed dt. March 17,1958 can, by no process of reasoning be regarded as public premises belonging to the Central Government u/s 2(e). That being so, there is no question of the lessor applying for eviction of the Express Newspapers Pvt. Ltd., u/s 5(1) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 nor has the Estate Officer any authority or Jurisdiction to direct their eviction under Sub-section (2) thereof by summary process. Due process of law in a case like the present necessarily implies the filing of suit by the lessor i.e. the Union of India, Ministry of Works and Housing for the enforcement of the alleged right of re-entry, if any, upon forfeiture of lease due to breach of the terms of the lease.

(emphasis supplied)

Whether APIIC can file suit? This is an academic question and needs to be decided by appropriate forum as and when such suit is filed for eviction and recovery of possession.

The agreement contemplates execution of sale deed by APIIC. It was not done and thus mutual obligations are not completely performed. When the enforceability of an agreement depends on performance of mutual obligations, a unilateral agreement - not signed by one party; would not be binding on other party to agreement. Secondly, as per clause 9 of the agreement, any violation of condition would result in extreme step of resumption of land. If the violation of condition is with respect to utilising land fully, it is necessarily with reference to time limit. There is no condition in the agreement stipulating time schedule for implementation of APRL project. Lastly, in the affidavit accompanying their application, APIIC admits that Government issued alienation orders for Acs. 173.43 in favour of company, and that the company utilised an extent of Acs. 15.00 to set up industry. Thus, APIIC cannot have any say in the matter and it is not necessary to consider other related questions in company application No. 237 of 2003.

11. Validity of Resumption

The core question is whether Government can resume the land ignoring mortgagee rights of financial institutions, who hold irrevocable charge over land. Whether order of alienation empowers the Government to declare transfer nullity and forfeit one-fourth amount paid is different question. Indeed, with regard to such power of the grantor, there is not much controversy nor an issue is raised by financial institutions. What remains to be considered is whether proposed resumption is valid.

The land was handed over to APRL in 1981. Formal orders of alienation were communicated vide office letter No. 3983/83-G4, dated 15.09.1983. On 20.02.1986, District Collector, Visakhapatnam asked APRL to furnish particulars of financial institutions from which company borrowed funds. On the same day,

District Collector also issued show cause notice proposing to take back the land. APRL sent a reply on 20.03.1986 informing that Punjab National Bank, Andhra Bank, Canara Bank and Bank of Baroda extended term loans and working capital loan, and that Industrial Development Bank of India (IDBI), Industrial Credit and Investment Corporation of India (ICICI) and Industrial Finance Corporation of India (IFCI) extended long term loans. They also sent another communication on the same day informing that the project is being implemented in phases with technical collaboration of M/s. Gibbons France, and that project has to be completed in four phases. Government was also informed that factory commenced production from January, 1985. The Collector then sent a report vide letter, Rc. No. 2388/86-G4, dated 23.05.1986. In the said report, Collector informed that an extent of Acs. 15.00 was utilised, that loans were obtained from seven banks/financial institutions and that company cannot be allowed to retain unutilised land till the project is completed in phased manner.

In the meanwhile company became sick. On reference to BIFR, winding up was recommended in 1986. After winding up order was passed by this Court, Government issued show cause notice on 21.11.1988. A reply was sent by APRL on 30.11.1988 informing about the pendency of proceedings before BIFR and requested to extend the same treatment as was given to Visakhapatnam Port Trust, Bharat Heavy Plates and Vessels Limited, and Hindusthan Zinc Limited etc, who are allowed to retain unutilised lands for future expansion. APRL asserted that they did not commit any breach of conditions stipulated and that delay in implementation of project was due to circumstances beyond their control. The Government then issued G.O. Ms. No. 24, for resumption of Schedule "A" and "B" lands, but the contentions raised by APRL in their explanation, dated 30.11.1988 were not adverted to. Though it was informed that proceedings under SICA Act are taken, not even mention of the same was made in Government order. The interest of the financial institutions was not adverted to. The fact that the company petition for winding up on the recommendation of BIFR is pending adjudication was not in the knowledge of the Government. It is for these reasons, this Court in W.P. No. 26189 of 1999 declared that G.O. Ms. No. 24 cannot have any effect on winding up proceedings.)

12. Whether the applications are barred by limitation

The counsel opposing the applications contend that a suit for recovery of possession of property filed beyond a period of twelve years is barred by limitation as per Article 65 of Limitation Act, 1963. It is also their contention that these applications u/s 446(1) of Companies Act are barred by limitation. According to them when first show cause notice was issued on 20.02.1986, Collector did not take any action and even though the Government issued orders on 08.01.1992 possession was not taken, and therefore these applications seeking permission to resume the land are not maintainable.

Whether period of limitation would apply to applications filed u/s 446(1) of Companies Act, to go out of liquidation proceedings. The question is no more res

Integra. In Harihar Nath (supra), Supreme Court considered question of applicability of Article 137 of Limitation Act to an application u/s 446(1) of Companies Act. Their Lordships laid down that, "question of period of limitation would not arise in respect of application seeking leave to file a suit or commence legal proceedings against a company after an order of winding up is made". As long as the suit is within time as on the date of application u/s 446(1) of Companies Act, application can be entertained. But, if the suit or legal proceeding to be initiated is itself barred by limitation, no purpose would be served by granting leave to file a suit or legal proceeding. The relevant observations made by the apex Court are as below.

Sub-section (1) of Section 446 of the Act contemplated two categories of applications for leave being filed before the Company Court. They are:

- (i) Applications seeking leave to file a suit or commence a legal proceeding against the company, after an order for its winding up has been made.
- (ii) Applications seeking leave to proceed with a pending suit or legal proceeding against a company, filed or initiated before the order for winding up of such company.

...Insofar as the first category of applications u/s 446(1) of the Act is concerned, there is no question of any period of limitation. The period of limitation is to be calculated, not with regard to the application seeking leave to file a suit or proceeding, but in regard to the suit/proceeding itself. An illustration may clarify. If the proposed suit is to enforce payment of money secured by a mortgage by the Company, the period of limitation for such suit is 12 years. Surely an application seeking leave to file such suit, cannot be rejected by applying Article 137 on the ground that three years have elapsed from the date of the order of winding up, even though the 12 years' period for filing the suit has not expired. So long as the suit is within time as on the date of filing the application for leave, the application will be entertained. While computing the period of limitation for the suit/proceeding, the time spent in obtaining leave to file the suit/proceeding will have to be excluded by applying the principle underlying Section 15(2) of the Limitation Act, 1963....We may note that the Company Court may not examine the question of limitation for the suit or proceeding, leaving it to be dealt with by the court where such suit/proceeding is to be initiated.

In this case, action was initiated for declaring the allotment nullity and resuming the land in 1986 and ultimately Government order in G.O. Ms. No. 24 was passed on 08.10.1992, which was declared ineffective. These company applications are filed in 2003. As per Article 112 of Limitation Act, period of limitation for filing any suit by Government is thirty years and limitation would begin to run against a like suit by a private person. As per order of alienation, APRL was required to utilise the allotted land for the purpose of construction of refractories project, office buildings, quarters etc., within a period of three years from the date of transfer of land. After completion of three years period, Collector issued show

cause notice and from that date, Government has thirty years time to file a suit. Therefore, the application cannot be said to have been barred by limitation.

13. Whether APRL committed breach

The background leading to filing of these applications has been adverted to supra. Even before these applications came to be filed, Government issued G.O. Ms. No. 24 accepting proposal of District Collector for resumption of land. The said order was declared to be ineffective and inoperative by reason of Section 446 of Companies Act. Therefore, questions, whether Government Order in G.O. Ms. No. 24 is validly issued or whether such order can be sustained, are not relevant for consideration. In these company applications, therefore, this Court has to consider whether permission can be granted to Government to cancel allotment made to APRL in 1983 and permit resumption ignoring claims of banks/ financial institutions. This again falls in two distinct parts. The first part is whether there are grounds for the Government to take such extreme step of cancelling allotment and resuming the land. The second part of the question is whether secured creditors having a charge over the property can be denied equity?

A re-look at the facts would show that the Government acquired the land only to enable APRL to set up refractories factory as an ancillary unit for Steel Plant at Visakhapatnam. It is an assisted unit of Andhra Pradesh Industrial Development Corporation - a Government of Andhra Pradesh undertaking to give fillip to industries. Even as per approved project/master plan report of APRL, the refractories unit is to be fully grounded in four phases. The implementation of each phase requires incremental extents of lands to cater to various operations. It is the case of APRL that as and when the VSP is implemented in phases, APRL would also take up further expansion. They completed first phase by 1985 and commenced production. They tried for a tie-up with Associated Cement Companies, in vain. The unit, therefore, got referred to BIFR and all operations came to a standstill. By that time, they utilized an extent of Acs. 15.00 for phase-I. They had also well worked out plan for utilizing the balance of land in three phases to be implemented. In the meanwhile, the company was directed to be wound up by this Court. Strictly speaking it is not a case of not utilizing the land at all. Admittedly, Acs. 15.00 was utilized and unit also commenced production. The recommendation made by BIFR for winding up was pending consideration in C.P. No. 40 of 1986 till 30.12.1991, when this Court passed orders of winding up. Therefore, asking APRL to take up the completion of the project within three years is asking them to perform impossible.

In show cause notice issued by District Collector as well as Government for resumption of land, support is drawn from clauses (f) and (g) of Order of Alienation. A careful reading of two clauses as above would show that in case APRL fails to utilize the land for the purpose of acquisition, it amounts to breach of conditions enabling the Government to take back the land. In this case, as rightly submitted by learned senior counsel for financial institutions, such

eventuality did not arise. When the Government allotted an extent of about Acs. 173.00, it was never intended that the entire extent of land would be used for construction. The use of land would certainly be subject to Municipal Laws, where adequate open areas, spaces for parks, warehouses and godowns, quarters etc., are to be provided. When admittedly APRL used Acs. 15.00 of land, it cannot be said that there was a breach of conditions of allotment or acquisition. The very exercise of the power under Clause (g) of order of alienation cannot be sustained. Interpreting the terms and conditions of order of alienation as empowering the Government to resume the land, such a drastic step is not warranted. In this context, a reference may be made to *Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd. and Another, and Teri Oat Estates (P) Ltd. Vs. U.T., Chandigarh and Others*, .

In *Indu Kakkar (supra)*, Supreme Court considered the question whether Haryana State Industrial Development Corporation Limited (HIDC) could have validly resumed the land for non-compliance with the conditions of allotment. Industrial plot of 450 Sq. mts situated in industrial complex at Dundahera in Gurgaon District, was conveyed by HIDC under registered deed dated 10.12.1992. The allottee was M/s. York Printers, who did not establish the industrial unit. Clause 7 provided that the allottee shall commence construction of building within six months and complete the same within two years, and complete installation of machinery within 3 years failing which HIDC is entitled to cancel agreement and resume possession. HIDC resumed land on 16.3.1984. A suit was filed by allottee for declaration that resumption is illegal and void. When the suit was pending, Indu Kakkar purchased property under registered sale deed dated 27.12.1989. He got impleaded in suit. The suit was decreed but the first appellate Court as well as High Court in Second Appeal reversed the trial Court Judgment. The High Court in its judgment observed that, "no indulgence of any kind can be shown by the Court to claim which is not bona fide nor can the Court come to the aid of a person trying to resile from the express obligation undertaken by him with the State or its Agencies." A SLP came to be filed. As a finding of fact, the apex Court came to the conclusion that allottee did not take any steps towards implementation of proposed industrial unit and therefore Clause 7 would be attracted. The next question was whether Clause 7 of the agreement is unenforceable in view of Section 11 of TP Act. Dealing with this, Supreme Court ruled as under.

All that Section 32 of the Transfer of Property Act provides is that "in order that a condition that an interest shall cease to exist may be valid, it is necessary, that the event to which it relates be one which could legally constitute the condition of the creation of an interest." If the condition is invalid it cannot be set up as a condition precedent for crystallization of the interest created. The condition that the industrial unit shall be established within a specified period failing which the interest shall cease, is a valid condition. Clause 7 of the Agreement between the parties, is therefore, valid and is binding on the parties thereto....

....Here the Agreement was entered into between the Corporation and the allottee as a sequel to the request made by the allottee to give him an industrial plot for the purpose of setting up an industry. Corporation reciprocated to the request on being satisfied that the allottee was able to carry out the obligations so as to accomplish the purpose of allotment. The assurance given by of the allottee that he shall start construction of the building for setting up the industry within a period of six months and complete the construction thereof within two years from the date of issue of allotment letter was verified and found acceptable to the Corporation and then only the Corporation has chosen to enter into the agreement with the allottee. It is a matter of confidence which the Corporation acquired in the promise made by the allottee that the latter would perform such obligations.

In Teri Oat Estates (supra), Union Territory of Chandigarh allotted lands on leasehold basis. Such allotment is regulated by the Capital of Punjab (Development and Regulation) Act, 1952; Chandigarh Leasehold of Sites and Buildings Rules, 1973 and Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Clause 8-A of allotment letter empowered estate officer to cancel allotment if amount is not paid within stipulated period or within the delayed period with interest. Teri Oat Estates constructed six storeyed building but could not market built up space for various reasons. They did not pay balance amount. Estate officer, therefore, issued notice under Public Premises Act and passed cancellation and resumption orders on 21.12.1995. Allottee's appeal was dismissed by Chief Administrator, Chandigarh. This was confirmed by Punjab and Haryana High Court. The case, therefore, landed in apex Court. Supreme Court did not consider question whether such a clause is enforceable or such a clause is unconscionable in case of absolute alienation. What was considered by Supreme Court was the question whether estate officer could invoke the drastic power of resumption and forfeiture while initiating proceedings under Clause 8-A. It was also a question before Supreme Court whether applying doctrine of proportionality, the action of estate officer can be sustained when allottee paid interest for delayed payment. While disposing of allottee's appeal granting time for payment within stipulated time, it was observed as below.

We may, however, hasten to add that we do not intend to lay down a law that the statutory right conferring the right of the respondent should never be resorted to. We have merely laid down the principle giving some illustrations where it may not be used. There cannot be any doubt whatsoever that if the intention of the allottee is dishonest or with an ill motive and if the allottee does not make any payment in terms of the allotment or the statute with a dishonest view or any dishonest motive, then Section 8-A can be taken recourse to.

(emphasis supplied)

The two decisions laid down the principle that though clause in conveyance deed executed by State providing for resumption of land, in the eventuality of allottee not complying with the conditions of such sale, is valid, such drastic power of

cancelling allotment/resuming land should be taken as a last resort. When the land allotted is used and constructions are made, mere nonpayment of amount or delay in non-payment of amount cannot be a ground for cancellation and resumption of land. Further, as laid down in *Teri Oat Estates* (supra), the test to be applied is whether the allottee has acted dishonestly or with an ill-motive.

APRL commenced production after first phase of completion, but became sick. Therefore, it is not a case of APRL acting dishonestly or with an ill-motive. Secondly, even before they could take up the second phase, this Court passed winding up order as a result of which, the entire property including right of the secured creditors over the properties have been brought under the purview of company Court. Therefore, the Government cannot be permitted to exercise the power of cancellation of allotment and resumption of land.

Equitable considerations also do not warrant permitting the Government to resume the land. There is no doubt nor it is disputed seriously that the Government permitted mortgage of land to financial institutions for raising the loans. A charge was also created u/s 125 of Companies Act. A charge was also registered with Registrar of Companies. As per Section 126 of Companies Act, Government shall be deemed to have notice of the charge from the date of registration with the Registrar of Companies. Unless the mortgage so created is discharged, the secured creditors are entitled to enforce their debt. Section 68 of TP Act gives right to mortgagees to sue for the mortgage money and u/s 73 thereof, a mortgagee has a right to claim payment of mortgage money as and when the mortgaged property is sold owing to failure to pay arrears of revenue or over other charges of public nature or rent due in respect of such property. Clause (b) of conditions of alienation provides that APRL shall pay to Government annually appropriate assessment or ground rent as the case may be. Section 73 of TP Act also applies when property is sold, owing to failure on the part of mortgagor (APRL) to pay other charges of public nature. If the land is to be resumed for failure on the part of APRL to utilize the land, it is certainly a matter, which gives rise to a cause of action to secured creditors in whose favour a mortgage is created under the provisions of Companies Act. Indeed u/s 73(2) of TP Act, even when mortgaged property is acquired, mortgagees shall be entitled to claim payment of the mortgaged money out of the amount of compensation. Ignoring all these, the Government cannot be permitted to resume the land, which is detrimental to interest of the banks/financial institutions, who advanced huge amounts to APRL on the implied assurance given by the Government of Andhra Pradesh that the property being mortgaged is unencumbered. Therefore, the Government cannot be permitted to cancel the allotment and resume the land.

14. Whether the Government is estopped

On the assurance given by the Government of Andhra Pradesh, the banks/financial institutions accepted land as a security on which a charge was created. Thus, the financial institutions altered their position by reason of the promise

made by Government. The Government cannot, therefore, be allowed to take such action, which would virtually defeat the rights of the mortgagee banks/ financial institutions under Sections 68 and 73 of TP Act to issue for mortgaged money. As the company is in liquidation, separate suits for recovery of mortgaged money cannot be filed and their rights have to be adjudicated and worked out only in liquidation proceedings.

The doctrine of promissory estoppel is now well settled in Indian Law. In *Nestle India Limited (supra)*, referring to *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, , Supreme Court elucidated the strength of the doctrines as below.

As for its strengths it was said that the doctrine was not limited only to cases where there was some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affect a legal relationship which would arise in future. The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made- contractual, administrative or statutory. To put it in the words of the Court:

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.

Equity will, in a given case where justice and fairness, demand, prevent a person from insisting on strict legal rights, even where they arise, not under any contract, but on his own title deeds or under statute

Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it.

(emphasis added)

On the principle of promissory estoppel, the Government cannot be permitted to resume the land while APRL is in liquidation. If such permission is granted, all the banks/financial institutions would not be able to recover their amounts either fully or in part. The Government in essence claims equity while purporting to enforce the resumption clause, and therefore, they are bound to do equity to the mortgages. Ignoring the interests of the mortgages/chargeholders, in whose favour the land is mortgaged, the Government cannot be permitted to resume the land.

In the result, for the above reasons, these applications must fail. The company applications are accordingly dismissed. In the circumstances of the case, there shall be no order as to costs.