**(2005) 11 AP CK 0002**

**Andhra Pradesh High Court**

**Case No:** AS No. 1613 of 1989

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| Koganti Basava Sankara Rao | APPELLANT |
| Vs | |
| Ravi Sambasiva Rao | RESPONDENT |

**Date of Decision:** Nov. 8, 2005

**Citation:** (2006) 1 ALD 727

**Hon'ble Judges:** P.S. Narayana, J

**Bench:** Single Bench

**Advocate:** M.V. Durga Prasad, for the Appellant; C. Ramachandra Raju, for the Respondent

**Final Decision:** Dismissed

**Judgement**

P.S. Narayana, J.

The appeal is filed by the unsuccessful first defendant in O.S. No. 38/82 on the file of Subordinate Judge, Gudivada, aggrieved by the Judgment and Decree dated 8-3-1989. The respondent is the plaintiff in the suit. The plaintiff filed the suit for specific performance of the agreement of sale directing the first defendant to perform his part of the contract by forming a 30 feet width of road on the south of the entire Ac.1-69 cents in R.S. No. 293/2 of Gudivada upto the plots sold to A. Lalitamba and connecting the same to the Pamarru road on the west through the sites of B. Rama Mohana Rao and Sastrulu by negotiating with them for forming a road on the south of their sites or alternatively by forming a 30 feet width of road to the west of the schedule property in the other Ac.0-30 cents of the defendants in R.S.No. 293/2 connecting the same to the road on the west formed by Rammohana Rao and Sastrulu and from there to Pamarru road, measuring the schedule land and certain in the actual extent arrived at by after measurement and direct the defendants to execute the sale deed for the schedule land with proper terms in favour of the plaintiff and register the same and alternatively for a decree for Rs. 42,000/-towards damages with subsequent interest at 12% per annum personally against the first defendant and with a charge against the schedule property. On the

respective pleadings of the parties, the evidence of P.W.1 to P.W.3 and D.Ws.1 and 2 had been recorded and Ex.A.I to Ex.A. 10 and Ex.B.l to Ex.B.3 were marked and on appreciation of evidence, the suit was decreed partly with proportionate costs directing the 1st defendant to pay Rs. 8,900/- to the plaintiff along with interest at 12% per annum from 28-2-1982 till the date of decree and at 6% per annum from the date of decree till the date of realisation and the suit against the 1st defendant in other respects is dismissed with proportionate costs and the suit against D.3 to D.9 is dismissed without costs. Hence, the appeal.

2. Sri M. V. Durgaprasad, the learned Counsel representing the appellant had taken this Court through the respective pleadings of the parties, the evidence available on record and would point out that having recorded findings that the breach was not committed by the appellant, ordering refund cannot be sustained. The learned Counsel also had pointed out that this is earnest money and when the breach is on the part of the other side only, the same can be forfeited and hence ordering refund is bad. The learned Counsel also pointed out to the respective findings recorded by the learned Judge and placed strong reliance on Chiranjit Singh v. Har Swarup AIR 1926 PC 1 and Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, .

3. On the contrary, Sri C. Ramachandra Raju, the learned Counsel representing respondent - plaintiff would contend that merely because for want of evidence some findings had been recorded, that doesn''t mean that the plaintiff is not entitled to the refund. Even otherwise instead of granting the relief of specific performance the suit for refund also was partly decreed taking the facts and circumstances into consideration. The learned Counsel also would contend that even otherwise on appreciation of evidence, at the best, it can be said to be advance amount only and not earnest money and hence, both in law and equity, the refund ordered by the learned Judge, on appreciation of both oral and documentary evidence, need not be disturbed by the Appellate Court.

4. Heard the Counsel on record.

5. In the light of the contentions advanced by both the Counsel, the following points arise for consideration in this appeal:

(1) Whether refund ordered by the trial Court can be said to be justified in the facts and circumstances of the case ?

(2) If so, to what relief the parties would be entitled to ?

6. Point No. 1:--The suit O.S.No. 38/ 82 was instituted by the plaintiff pleading in the plaint as hereunder:

The first defendant represented to the plaintiff that he purchased Ac. 1-30 cents out of Ac. 1-69 cents in R.S. No. 293/2 of Gudivada including the land covered by the said agreement dated 19-11-1981 from the defendants 2 to 8 and obtained delivery - of possession from the vendors after paying the entire sale consideration and that he

intended to divide the said land into plot, ten cents each, after formation of the roads and to sell the plots to the purchasers. He also represented that he could form road of 30 feet wide on the south of the land upto the eastern plots connecting the Pamarru road and that he would also form two roads of 30 feet wide each from North to South and that in between the said roads he would form 8 plots consisting of 4 plots in each column. The first defendant offered to sell the schedule land of 0-30 cents in 3 plots to the plaintiff and the plaintiff accepted to purchase them. It was agreed that the first defendant should sell the schedule property for a total consideration of Rs. 42,000/- at Rs. 1,400/- per cent on 6-12-1981 and received Rs. 9,000/- from the plaintiff towards part of sale consideration. It was agreed that the plaintiff should pay the balance of sale consideration to the first defendant by 28-2-1982. The first defendant informed that he would get the sale deeds executed directly from the defendants 2 to 8 to the plaintiff. The plaintiff and the first defendant informed about the suit agreement to the defendants 2 to 6 on the same date who promised to execute the sale deed in pursuance of the said agreement. The defendants 2 to 6 also undertook to get the sale deed executed by defendants 7 and 8. With the above terms and other terms the first defendant executed an agreement of sale in favour of the plaintiff. It was agreed that the first defendant should form roads, from the plots, measure the plots, ascertain the actual extent and then receive the balance of consideration before 28-2-1982. Though time was fixed for performance of the contract time was not intended to be the consence of the contract. Though the first defendant formed the plots and 2 roads from north to south, he did not form the southern road of 30 feet width, the first defendant represented that he would negotiate with B. Ramamohana Rao and Sastrulu who are the owners of the land on the west and got a road formed in their lands also on the south so as to reach Pamarru road on the west. The plaintiff has always been ready and willing to perform his part of the contract at all times. The plaintiff also deposited the amount towards the balance of consideration in bank. The plaintiff got registered notice issued to the first defendant, for which the first defendant got issued reply with false allegations stating that he did not agree to form a road on the south of the entire land. It is learnt subsequently that the first defendant also purchased the remaining Ac.0-39 cents in R.S.No. 293/2. The first defendant is now attempting to sale the land on the south in which he agreed to form the southern road, sell it away to others for monetary gain. It is false to say that the plaintiff signed on the sketch prepared by the first defendant on the respective plots. The prices have been increasing in the locality of the plaint schedule property and in fact by February, 1982, each cent in the said locality was selling at Rs. 3,000/- and by now it is increased to Rs. 5,000/-. So, the first defendant wanted to evade execution of the sale deed in favour of the plaintiff. The first defendant did not perform his part of the contract. The first defendant is not entitled to cancel the contract unilaterally when time was not intended to be essence of the contract. The plaintiff came to know that the first defendant intended to sell away the schedule land to others and got sale deeds executed by defendants 2 to 8, avoiding execution of the sale in

favour of the plaintiff. Though increasing price of the schedule property is not less than Rs. 3,600/- per cent the plaintiff is confining her claim for a total amount of Rs. 33,000/-towards increase in price for the entire schedule property. The plaintiff is also entitled for refund of Rs. 9,000/- paid towards advance along with interest alternatively. There is no default of the plaintiff to perform his part of the contract. Since the first defendant defaulted, he is liable to pay damages for breach of contract which the plaintiff estimates at Rs. 33,000/-.

The first defendant filed written statement denying the allegations in substance and pleaded as hereunder:--

The suit is bad for misjoinder of parties. The suit is also bad for non-joinder of parties. The representations said to have been made by the first defendant to the plaintiff as alleged in the plaint are false. The first defendant purchased Ac. 1-69 cents from the defendants 2 to 8 under an agreement of sale dated 19-11-1981 and obtained delivery of possession from the said vendors after paying the entire sale consideration to them. He intended to divide the suit land into plots of 10 cents each after formation of roads to connect the roads in R.T.C. colony. It is false to state that the first defendant represented that he would form a road of 30 feet wide on the south of land upto eastern plots connecting Pamarru road. The first defendant stated that deducting Ac.0-39 cents in the west out of Ac. 1-69 cents he would divide the remaining Ac. 1-30 cents into 12 plots in 3 columns with two roads of 30 feet wide in between. He never represented that he would negotiate with B. Ramamohana Rao and Sastrulu for the formation of road of 30 feet wide in their lands. In the agreement no boundaries are given and the location of the plots was also not given. After the suit agreement this defendant divided Ac. 1-30 cents coupled with Ac.0-14 cents belonging to Alladi Venkateswara Rao into 12 plots and two roads leaving a small strip of land on the south. A sketch was prepared showing the division of lands into plots and road. The plaintiff was present at that time and he signed on the plots which he wanted on the sketch. There is no identify between the plaint schedule property and the property to be sold to the plaintiff as per the said sketch. Time is the essence of the contract dated 16-12-1981. If the plaintiff failed to perform his part of the contract by 28-2-1982, the plaintiff has to give up the claim for the earnest money. The amount of Rs. 9,000/- was not intended to be a part of the sale consideration, but was intended to be earnest money to be forfeited on the failure of the plaintiff performing his part of the contract. The agreement in favour of the plaintiff is cancelled because the plaintiff failed to perform his part of the contract by the due date and so the earnest money is forfeited. The first defendant or the plaintiff never approached defendants 2 to 6 and they never promised that they would execute sale deed in favour of the plaintiff. There is no privity of contract between the plaintiff and the first defendant on one hand and defendants 2 to 8 on the other hand. Since the plaintiff failed to perform his part of the contract the first defendant obliged to give up his contract with defendants 2 to 8 foregoing the amounts paid to the vendors. The defendants 2 to 8 sold away all

the 12 plots to various people. The said alienes 12 plots are in possession and enjoyment of the respective plots. The alienees are not impleaded as defendants. According to the plots in the plaint schedule Chalasani Nageswara Rao is the alienee in respect of the Eastern half and Adusumilli Suryanarayana is the alienee in respect of the western half. The immediate northern plot to the common piece of land is in possession of Kasaraju Prasunamba and all the said 3 persons are necessary parties to the suit. There is no clause that a road will be provided for connecting the plots with Pamarru road on the west. There is no clause that Ac. 1-30 cents will be divided into 8 plots only. After the suit agreement, near the land of Ac. 1-30 cents a lime kiln was set up from which huge quantity of smoke is emanating. Therefore, the surroundings become useless for habitation. The plaintiff wanted to come back and avoid the contract and get back the earnest money. In these circumstances, the value of the land has gone down very much. The plaintiff is not entitled for any damages. The plots formed out of Ac. 1-30 cents were actually sold at the rate of Rs. 500/- per cent. The allegation that the plaintiff has always been ready and willing to perform his part of the contract at all the relevant times is false. The allegations that the way through R.T.C. Colony as circuitous one is not correct. The first defendant clearly informed that two roads would be formed to connect the roads in the R.T.C. Colony and that the site will be divided into 12 plots, if necessary by annexing another extent of Ac.0-14 cents. The distance between Ac. 1-30 cents of plot and Pamarru road is more than 300 yards and as area of more than 0-60 cents will be required for formation of the alleged road in the lands of other and another extent of Ac.0-20 cents will be required to form the alleged road on the south of Ac. 1-30 cents. It is absurd to say that as additional extent of about Ac.0-80 cents of land will also be used for formation of the alleged road. The allegation that the value of one cent of land is Rs. 3,000/- in February, 1982 and Rs. 5,000/- by the time of filing of the suit is false. The first defendant was always ready and willing to perform his part of the contract according to the terms of the agreement. The plaintiff is not entitled for even return of earnest money.

The 5th defendant filed written statement which was adopted by defendants 2, 4 and 6 to 8 wherein it was pleaded as hereunder:

These defendants are not necessary parties to the suit. These defendants executed an agreement of sale on 19-11-1981 in favour of the first defendant agreeing to sell Ac. 1-69 cents belonging to them for consideration of Rs. 80,000/- after receiving advance amount of Rs. 10,000/-. As per the terms, the balance of sale consideration was to be paid by the end of February, 1981, failing which the agreement shall stand cancelled and the advance amount of Rs. 10,000/- shall stand forfeited. On account of the inability of the first defendant to perform his part of the contract these defendants sold away the said land in plots to several persons under registered sale deeds and the said purchasers are in possession and enjoyment of the said plots. So these defendants ceased to have any interest in the schedule property. All the said alieness are proper parties to the suit. It is false to say that the first defendant and

the plaintiff approached the defendants 2 to 6 and that they promised that they would got the sale deed executed by defendants 7 and 8 also along with them, is not correct. Except the 5th defendant other defendants are not residents of Gudivada. There is no privity of contract between the plaintiff and these defendants.

The 2nd defendant died and 9th defendant was impleaded as his legal representative, who remained ex parte. The 3rd defendant did not file any written statement.

7. On the strength of the pleadings, the following issues were settled:

(1) Whether the plaintiff is entitled to the specific performance prayed for ?

(2) Whether the suit is bad for nonjoinder of necessary parties as alleged by defendants 2 to 8?

(3) To what relief ?

8. On behalf of plaintiff P.Ws. 1 to 3 were examined and Ex.A.I to Ex.A. 10 were marked and on behalf of defendants, the 1st defendant examined himself as D.W.1 and further examined D.W.2 and Ex.B.l to Ex.B.3 were marked. It is not in controversy that the plaintiff had agreed to purchase three plots out of Ac. 1-30 cents in R.S.No. 293/2 from the 1st defendant measuring Ac.0-10 cents each at the rate of Rs. 1400/- per cent and paid a sum of Rs. 9,000/- to the 1st defendant and obtained Ex.A.1 - Agreement of sale dated 6-12-1981. It is also not in serious controversy that by that time the land was not divided into plots and there was no formation of roads and hence to the agreement - Ex.A.1 no schedule as such had been annexed. Hence, in Ex.A.1 no specified plot as such had been shown. The suit is filed for specific performance of the agreement of sale in question. The main relief prayed for is in relation to the formation of 30 feet road on the south of Ac. 1-69 cents in R.S.No. 293/2. The execution of Ex.A. 1 agreement is not in serious controversy between the parties. Even as per the recitals of Ex.A.1 it appears that the 1st defendant had not purchased the entire Ac. 1-69 cents from defendants 2 to 8 but had purchased only Ac. 1-30 cents under an agreement dated 9-11-1981. Hence, it is needless to say that the first defendant cannot form a road of 30 feet wide in relation to Ac. 1-69 cents inasmuch as even as per the agreement, referred to supra, he is entitled to the lesser extent. The case of the plaintiff is that the 1st defendant represented at the time of entering into Ex.A.1 that Ac. 1-30 cents would be divided into 8 plots, 4 plots in each row from north to south by forming 2 roads of 30 feet wide running North to South connecting the roads in R.T.C. Colony. The details relating thereto had been dealt with by the learned Judge. P.W.1 - the plaintiff deposed about all these aspects and also what had transpired while entering into Ex.A.1. But, however, in cross-examination, this witness deposed that this aspect was not mentioned in the agreement but however such representation was made to him and that even before the agreement was executed they were informed about the roads on 3 sides but however he was unable to explain the

reasons in relation thereto. P.W.2 deposed that the 1st defendant represented that he would form 2 roads from south to north of a width of 30 feet but in cross-examination he deposed that he does not know the reason why the laying of roads in the site of the first defendant was not mentioned in Ex.A.1. P.W.3 also deposed to the same effect and in cross-examination he had admitted that the same was not mentioned in the agreement and he had given certain further details in relation thereto. The evidence of these witnesses was appreciated in detail by the learned Judge. Prior to the filing of the suit, the notice -Ex.A.2 was issued to the 1st defendant and the 1st defendant, issued Ex.A.3 and these were also marked as Ex.B.2 and Ex.B.3 respectively. In Ex.A.2 notice it is mentioned that the 1st defendant promised to form 30 feet wide road but however the 1st defendant denied the same in reply notice. This fact had been discussed in detail by the learned Judge. Ex.A.4 - Photostat copy of the approved lay out plan, Ex.A.5 - the registration extract of the sale deed dated 26-4-1982, Ex.A.6 - registration extract of the sale deed dated 25-2-1982, Ex.A.7 - registration extract of sale deed dated 26-4-1982, and Ex.A. 8 - registration extract of sale deed executed by V. Sitaramamma in favour of N. Tripurasundaram dated 26-4-1982. Likewise, sale deeds in favour of Lylakumari and Ramakrishna dated 25-2-1982 - Ex.A.9 and Ex.A. 10 also had been appreciated. As against this evidence, the evidence of D.Ws.1 and 2 is available on record. Ex.B.l is the plan; Ex.B.2 is the registered notice issued by the plaintiffs Advocate to D.I; and Ex.B.3 is the office copy of the reply notice. The case of the defendant is that the plaintiff marked three plots in Ex.B.l sketch at the time of agreement and the same was mentioned in Ex.A.3 reply notice also and the same was not denied by giving a rejoinder notice. In substance, the evidence of D.Ws.1 and 2 coupled with Ex.B.l to Ex.B.3 is to the effect that no such assurance or promise had been there relating to the formation of 30 feet wide road. Taking the overall facts and circumstances into consideration, the learned Judge recorded a finding that the plaintiff is not entitled to the relief of specific performance. The main contention is that inasmuch as a finding had been recorded that there was no breach on the part of the 1st defendant - appellant, the refund cannot be ordered. Strong reliance was placed on the decision in Chiranjit Singh''s case (supra) and also the decision of the Privy Council in Shri Hanuman Cotton Mills and others''s case (supra). There cannot be any quarrel about the proposition of law. A finding had been recorded by the learned Judge relating to the fact that the plaintiff is guilty of breach of contract and not the 1st defendant. But, however, on a careful scrutiny of all the facts and also the reasons which had been recorded by the learned Judge, commencing from Paras 19 to 25 and also in the light of the clear oral evidence of P.Ws.1 to 3 in one voice that assurance had been made by the 1st defendant relating to the formation of the road, merely because the said fact was not mentioned in Ex.A.1, such oral evidence cannot be totally discarded and in that view of the matter, the findings recorded by the learned Judge in this regard cannot be said to be not in accordance with law. Hence, in the light of the same, even on the ground of vagueness in Ex.A.1, since the plots were not located, specific performance was refused and hence,

ordering of refund cannot be said to be unjustified. Though the principles laid down in the decisions referred to supra cannot be in controversy, the same are not applicable to the present facts of the case both on the ground of law and equity especially in the light of the evidence of P.Ws.1 to 3 who deposed in one voice about the assurance made in this regard, ordering of refund of the amount is well justified.

9. Point No. 2:--In view of the findings recorded above, the appeal is bound to fail and accordingly the same shall stand dismissed but however inasmuch as only refund had been ordered with some interest, the parties to bear their own costs.