(2005) 07 AP CK 0018

Andhra Pradesh High Court

Case No: CCCA No. 35 of 1995

P.L. Raju		APPELLANT
	Vs	
Dr. Nandan Singh		RESPONDENT

Date of Decision: July 14, 2005

Acts Referred:

- Contract Act, 1872 - Section 39, 64, 65, 66, 67
- Hindu Minority and Guardianship Act, 1956 - Section 8(2)
- Urban Land (Ceiling and Regulation) Act, 1976 - Section 26

Citation: (2005) 5 ALD 402

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

Bench: Single Bench

Advocate: M.R.K. Choudary, for the Appellant; Rama Krishna Reddy, for A. Anantha Reddy, for the Respondent

Judgement

P.S. Narayana, J.

Introduction:

1. Dr. Nandan Singh, respondent in this Appeal/plaintiff in O.S. No. 899/86 on the file of I Additional Judge, City Civil Court, Hyderabad had instituted the suit for refund of part payment amount paid towards agreement of sale dated 22-5-1985, Ex.A-1, with interest thereon against P.L. Raju, appellant herein/defendant in the suit. The suit was decreed for Rs. 1,75,000/- with interest of 6%. Aggrieved by the same, the present Appeal had been preferred by the unsuccessful defendant.

2. Submissions of Sri M.R.K. Choudary:

Sri M.R.K. Choudary, the learned Senior Counsel representing the appellant/defendant made the following submissions. The learned Senior Counsel would contend that the Court may have to decide in a matter of this nature who is the defaulter and a person who had cancelled the agreement of sale cannot take

advantage of his own wrong and also cannot claim refund of the amount having committed breach of contract. The learned Counsel also in detail explained Sections 39, 64, 73 and 74 of the Indian Contract Act in this regard. The learned Counsel also had taken this Court through the conditions specified in Ex.A-1 in general and Condition No. 11 in particular. The learned Senior Counsel while further elaborating his submissions had explained about the suit said to have been pending and the relevancy thereof and would contend that this has nothing to do with the defect of marketable title or any other similar reason whatsoever so as to avoid the contract and hence this ground cannot be taken as a ground by the respondent/plaintiff in the suit. The learned Counsel also placed reliance on certain decisions and further had distinguished the decisions on which reliance was placed by the other Counsel.

3. Submissions made by Sri Rama Krishna Reddy:

Sri Rama Krishna Reddy, the learned Counsel representing Sri A. Anantha Reddy, Counsel for the respondent/plaintiff, had taken this Court through the correspondence between the parties, the series of notices, the contents thereof, the conditions specified in Ex.A-1 and had explained that in the facts and circumstances the cancellation made and refund prayed for cannot be said to be an unjustifiable one. The learned Counsel also had drawn the attention of this Court to the obligations to be complied with by a seller and also would comment that the defect in title or the marketable title especially in the light of the pendency of some litigation may have to be viewed not only in the point of view of the seller but also in the point of view of the buyer. The learned Counsel also had taken this Court through the respective pleadings of the parties, evidence available on record and the findings recorded by the trial Court and would submit that both in law and also in equity, the decree passed by the trial Court is fair and just and the same need not be disturbed. The learned Counsel also placed reliance on certain decisions.

4. Pleadings of the parties :

Plaint filed by the respondent herein/ plaintiff in the suit : The respondent herein/plaintiff in the suit had pleaded as hereunder:

The plaintiff submits that under agreement of sale dated 22-5-1995 executed between him and the defendant he agreed to purchase house site plot of land admeasuring 1000 sq. yards from the defendant which plot of land is demarcated as plot No. 1/1, situate at Erra Manzil colony, Somajiguda locality, Hyderabad city at the rate of Rs. 700/- per sq. yard. In pursuance of the said agreement of sale the plaintiff paid a sum of Rs. 1,75,000/- towards the part payment of the agreed sale consideration soon after the execution of the said agreement of sale. The defendant admitted and acknowledged the receipt of the said sum of Rs. 1,75,000/- in the said agreement of sale. The plaintiff submits that the payment of the said sum of Rs. 1,75,000/-by him to the defendant is not in dispute. The defendant agreed and understood to apply for and obtain No Objection Certificate from the Special Officer

and competent Authority, Urban Land Ceilings, Hyderabad as required u/s 26 of the Urban Land (Ceiling and Regulations) Act 33 of 1976 and as noted in Clause (3) of the said agreement of sale. The defendant through his Counsel informed through letter/notice dated 18-11-1985 to the plaintiff about obtaining the said No Objection Certificate from the Special Officer and Competent Authority, Urban Land Ceilings, Hyderabad. Thus the defendant had taken a period of about six months in informing the plaintiff that he obtained the No Objection Certificate from the Urban Land Ceiling Authority to enable him to transfer the said piece of land of 1000 sq. yards. It was further pleaded that the after obtaining the said No Objection Certificate from the Urban Land Ceiling Authorities, the defendant through his lawyer notice dated 18-11-1985 asked the plaintiff to prepare and send the draft sale deed to file it before the Income Tax Department for obtaining Income Tax clearance certificate. The plaintiff sent the draft sale deed to the defendant on 2-12-1985 as per notice dated 18-11-1985. The plaintiff decided to obtain the sale deed in favour of his uncle as his nominee and therefore in the draft sale deed the name of the uncle of plaintiff had been typed as the purchaser of the said land. It was further pleaded that in stead of typing the amount as Rs. 7,00,000/-, the typist typed it as Rs. 2,00,000/- and the plaintiff without noticing the said mistake sent the draft sale deed to the Counsel for the defendant for approval on 2-12-1985 as per his notice dated 18-11-1985. The Counsel for the defendant through his notice dated 13-12-1985 brought to the notice of the Counsel for the plaintiff about the discrepancy in respect of the sale consideration in the draft sale deed and about the change of the name of the purchaser. It was further pleaded that the Counsel for the defendant issued a notice to the plaintiff personally dated 13-2-1986 wherein he stated that he received the letter dated 2-12-1985 of the plaintiff''s Counsel and also the draft sale deed and further pointed out about the change of the purchaser''s name and the discrepancy in respect of the sale consideration occurred in the draft sale deed. Strangely enough the defendant through his said lawyer notice dated 13-2-1986 demanded the plaintiff for completing the sale transaction within ten days by paying the balance sale consideration and threatened that if the plaintiff fails to comply with the said demand of completion of the sale transaction within ten days by paying the entire sale transaction the sale agreement shall stand cancelled and the plaintiff will not be entitled to claim for refund of the suit claim amount. The defendant himself took about six months time in informing the plaintiff that he obtained the No Objection Certificate from the Urban Land Ceiling authorities and that he asked for supply of draft sale deed only after expiry of six months from the date of agreement of sale. Till that time the plaintiff was not at fault and the plaintiff supplied the draft sale deed as demanded within the reasonable time. As a matter of fact nothing prevented the defendant from getting prepared the draft sale deed through his lawyer as per the terms of the agreement of sale for obtaining the Income Tax Clearance Certificate. There is no stipulation in the agreement of sale that the plaintiff has to supply the draft sale deed to the defendant. As such the defendant not having obtained the Income Tax Clearance Certificate was neither

justified nor entitled in demanding the plaintiff for the payment of the balance sale consideration and for completion of the sale transaction. In the absence of Income Tax Clearance Certificate the registering authority will refuse to register the sale deed. In the agreement of sale it had been specifically agreed that the plaintiff is obliged to offer and pay the balance sale consideration at the time of registration of the sale deed. Therefore the said threat of cancellation of the agreement of sale and forfeiture of the entire advance amount of Rs. 1,75,000/- is unilateral, arbitrary and illegal.

It was further pleaded in the plaint that after receiving the said notice dated 13-2-1986 the plaintiff''s Counsel personally had a talk with the Counsel of the defendant in the High Court and explained and clarified about the change of the name of the purchaser and about the typing mistake crept in the draft sale deed and the Counsel of the defendant was satisfied with the said explanation. This factum of personal discussion between the two Counsel after 13-2-1986 had been admitted by the Counsel of the defendant in his notice dated 22-4-1986. It was also further pleaded that the defendant sent a notice through his lawyer dated 1-4-1986 to the plaintiff personally reiterating the substance of the notice dated 13-2-1986. In this notice also the defendant did not inform the plaintiff that he applied for and obtained Income Tax Clearance Certificate. Yet the defendant through his lawyer notice ventured to state that he was ready and willing to perform his obligation as per the agreement of sale and that as the plaintiff failed to comply with the demand made in the notice dated 13-2-1986. The agreement of sale dated 22-5-1985 was to be considered as cancelled and the plaintiff shall not be entitled for any refund of the amount paid by him on 22-5-1985 to the defendant and further the plaintiff shall not be entitled to claim any interest on the advance amount. It was also further pleaded that the plaintiff sent a reply dated 8-4-1986 through his lawyer in reply to the notice dated 1-4-1986 sent by the defendant to him. In the reply notice it had been stated that there was a personal discussion between the Counsel of the plaintiff and the defendant after receiving the notice dated 13-2-1986 and that the matter was clarified about the change of the name of the purchaser and about the type mistake occurred in the draft sale deed and this clarification is stated to have been made during the personal discussion of the Counsel. It had been stated in the said reply notice dated 8-4-1986 that the plaintiff did not receive the Income Tax Clearance Certificate or any written intimation about the issuance of the Income Tax clearance certificate. It had been clearly stated in the said reply notice that without the Income Tax Clearance Certificate the registration authority will not accept and register the sale deed. In view of the said circumstances the plaintiff stated that he was never at fault in fulfilling his obligation nor he was able to suffer the forfeiture of his advance amount. In the said reply notice it had been further stated that the defendant had filed an injunction suit against third parties in respect of the land covered by the agreement of sale and the same is pending. In the said agreement of sale the defendant agreed to convey the said piece of land unencumbered.

Therefore the plaintiff informed the defendant that the defendant is not entitled either to revoke the agreement of sale unilaterally or to forfeit the advance amount paid by the plaintiff to the defendant. The plaintiff lastly in the said reply notice dated 8-4-1986 called upon the defendant to return the entire advance amount at the earliest.

It was further pleaded by the plaintiff that the Counsel of the defendant having received the reply notice dated 8-4-1986 admitted that the plaintiff''s Counsel had personal talk and discussion with the Counsel of the defendant in the High Court. It was further stated incorrectly that the plaintiff did not meet the defendant and therefore the defendant felt that there had been no response from the plaintiff to the notice dated 13-2-1986 and so the Counsel of the defendant stated in his notice dated 1-4-1986 that there as no response from the plaintiff. It was further pleaded that it had been stated further that the defendant had no objection for executing the sale deed in favour of the person named as purchaser in the draft sale deed sent on 2-12-1985. It was alleged without any basis that the plaintiff did not approach the defendant to materialize the transaction. It was further stated in the said notice dated 22-4-1986 that the plaintiff failed to rectify the type mistake in respect of the sale consideration crept in the draft sale deed sent on 2-12-1985. In view of this alleged inaction on the part of the plaintiff it had been alleged that the defendant could not apply for the Income Tax Clearance Certificate. It was pleaded that it is an admitted fact that on behalf of the plaintiff it had been clarified after receiving the notice dated 13-2-1986 about the said typing mistake in respect of the sale consideration. Therefore the defendant could have got rectified the draft sale deed as per the clarification and would have applied for the issuance of the Income Tax Clearance Certificate. When the draft sale deed was already with the defendant since December 1985 with clarifications, there was no question of demanding for the supply of another draft sale deed from the plaintiff in the month of April 1986. In the said notice dated 22-4-1986 the plaintiff was cleared all the allegations of default on the part of the plaintiff. It was pleaded that it was baselessly alleged that the plaintiff was not having funds to complete the sale transaction within the stipulated time. It was specifically agreed between the plaintiff and the defendant that the sale transaction shall be completed within one month after obtaining necessary permissions and certificates or within the period extended by mutual consent. It was further pleaded that the defendant failed to obtain the Income Tax Clearance Certificate even upto 22-4-1986 and it remains a fact that the defendant did not fix any date for asserting the actual extent of the piece of land covered by the agreement of sale as had been agreed under Clause 6 of the agreement of sale for determining the balance sale consideration to be paid, did not obtain the Income Tax Clearance Certificate and did not terminate the suit litigation involved in the injunction suit O.S. No. 827 of 1985 filed by the defendant pertaining to the land covered by the agreement of sale and the said civil suit is still pending. In the notice dated 22-4-1986 again a demand was made for sending a draft sale deed when it

had been supplied to the defendant and had been clarified in respect of the doubts entertained by the defendant. The said demand was made only to blame the plaintiff frivolously for not obtaining the Income Tax Clearance Certificate by showing the total sale consideration of Rs. 7,00,000/- as per the agreement of sale because he had to pay huge capital gain tax out of the said sale consideration of Rs. 7,00,000/-. In the notice the plaintiff was demanded to get the sale deed registered within one week from the date of the intimation of the fact of obtaining the necessary certificates from the Income Tax authorities. But it had been further stated that the plaintiff had to send another draft sale deed. The plaintiff further pleaded that this demand is frivolous because the draft sale deed had already been sent and that there is no statement on behalf of the defendant that the said draft sale deed was misplaced or lost. It was further pleaded that the plaintiff sent a further reply notice to the Counsel of the defendant on 3-5-1986 wherein the plaintiff denied that he never tried to speak with the defendant. The plaintiff pleaded that all his efforts to contact the defendant on phone failed. The plaintiff brought to the notice of the defendant that the defendant in his injunction suit is very adamant in continuing the litigation in respect of the land covered by the agreement of sale dated 22-5-1985 and the defendants in the injunction suit through their Counsel clearly stated that if the defendant for the purpose of selling the land stated in the sale deed that no litigation is pending, they will file suit claiming their title and their possession in and over the land covered by the agreement of sale. Therefore the plaintiff informed the defendant that he was not prepared to purchase the land covered by the agreement which is encumbered or enburdened with pending litigations and third party claims and demanded to refund the advance amount of Rs. 1,75,000/- paid to the defendant by the plaintiff. It is pertinent to note that the defendant did not inform material fact to the plaintiff either at the time of negotiations or at the time of execution of the agreement of sale that there is a third party claim in respect of the land in question or in respect of any part thereof. It was pleaded that it is also true that the defendant went on demanding the completion of the sale transaction pending litigation and without obtaining Income Tax Clearance Certificate. Therefore, the plaintiff was justified in informing the defendant that he was not prepared to invest huge amount of Rs. 7,00,000/- in acquiring the property which is burdened with pending litigation. The plaintiff was also justified in demanding the return or refund of the advance amount of Rs. 1,75,000/- when the defendant went on issuing "notices after notices arbitrarily revoking the agreement of sale without obtaining the Income Tax Clearance Certificate. It was further pleaded that the Counsel of the defendant having received the reply notice dated 3-5-1986 issued on behalf of the plaintiff finally informed the plaintiff through notice dated 28-5-1986 that the defendant is not prepared and ready to return the advance amount of Rs. 1,75,000/-to the plaintiff.

The plaintiff further pleaded that he had not committed any default in fulfilling any of his obligations arising under the written agreement of sale dated 22-5-1985 and he performed all his obligations and he was not responsible for not obtaining the Income Tax Clearance Certificate by the defendant.

The plaintiff is under no legal obligation to purchase the land covered by the said agreement of sale investing huge sum of Rs. 7,00,000/- when there is pending litigation in the Civil Court in respect of the property covered by the agreement of sale. Therefore in the circumstances the defendant is not entitled to forfeit the huge amount of Rs. 1,75,000/- or any part thereof as intimated by the defendant finally through his last notice dated 28-5-1986. The plaintiff is entitled to claim and recover the said advance amount of Rs. 1,75,000/-from the defendant who received the said amount from the plaintiff on 22-5-1985 under the contract of sale with interest from 1-6-1986.

Written statement filed by the appellant herein/defendant in the suit: The defendant in the suit filed written statement denying allegations in the plaint. It was pleaded that as per Clause 3 of the agreement of sale the defendant shall obtain necessary permission for alienation from Special Officer and Competent Authority under Urban Land Ceiling. On 18-11-1985 notice was addressed by defendant''s Counsel to plaintiff''s Counsel and it does not communicate anything about obtaining of No Objection Certificate from the concerned authority. There was no occasion for the defendant to get a lawyer''s notice issued till he came to know about the bilsted tactics resorted to by the plaintiff and he was constrained to put it on paper by issuing notice to the plaintiff. In fact, defendant informed immediately after obtaining necessary permission from time to time and it was the plaintiff that had been postponing the issue necessitating the defendant to get a lawyer''s notice issued. The plaintiff was requested to send necessary draft sale deed within a reasonable period of two weeks to enable the defendant to obtain Income Tax Certificate. A reply dated 2-12-1985 was given by the plaintiff to the notice dated 18-11-1985 and the plaintiff instructed the defendant that no litigation should remain pending by the time the sale deed is executed. The defendant got issued a reply that draft sale deed was not found on consonance with the concept of terms and conditions of sale agreement. The defendant further pleaded that the litigation referred to is only a suit filed by him against third parties for permanent injunction and he also sought clarification from the plaintiff whether the defendant should withdraw the suit and in which case the defendant also expressed his interest to withdraw the same in order to go ahead with the agreement of sale and there would be no pendency of any litigation. The fact that plaintiff''s uncle was his nominee for the purpose of obtaining Income Tax Clearance Certificate is contrary to the terms of agreement of sale and the explanation given by the plaintiff about the typing mistake crept in draft sale deed is invented for the purpose of the suit. The notice dated 13-2-1986 was got issued by the defendant demanding the plaintiff for completing the sale transaction within ten days and there is nothing strange and

the plaintiff is not justified in postponing the balance sale consideration and the plaintiff is not justified in blaming the defendant about the delay in informing about obtaining No Objection Certificate from Urban Land Ceiling authorities and it is the plaintiff that delayed the matter and protracted the matter. It was further pleaded by the defendant that the plaintiff had knowledge of obtaining No Objection Certificate and there are no bona fides on the part of the plaintiff. It is for the plaintiff to get his sale deed drafted and show his own interest in the terms of sale agreement. If there is a change with reference to parties or of sale consideration, the defendant would be held responsible by various authorities and he will be constrained to face various types of enquiries which the defendant does not wish to undergo. Therefore the defendant insisted that the plaintiff should furnish the correct draft sale deed. In view of the conduct of the plaintiff, the defendant did not choose to take the risk of correcting the draft sale deed by himself. It is the duty of the plaintiff and he is bound under law to purchase the land in question within reasonable time and oblige to co-operate with the defendant in obtaining necessary permission and failure to cooperate is in violation of terms and conditions of agreement of sale. There are no bona fides on the part of the contract under the sale agreement. It is the plaintiff who committed default in obtaining registered sale deed from the defendant who is always ready and willing to execute the sale deed. The defendant admitted that he has filed suit against third parties in respect of the land covered by the sale agreement and the said suit is still pending and it was further pleaded that it is the duty of the defendant to protect his possession and enjoyment of the land from third parties in case any third parties attempt to trespass. The plaintiff was never bona fide to get the sale deed and he wanted the sale deed to be executed for two lakhs in stead of Rs. 7,00,000/-. There is no reason for the plaintiff to demand for return of the advance amount. It is the plaintiff who was trying to avoid the sale. The plaintiff was not having enough funds to complete the sale transaction within the stipulated time under one pretext or the other and had been postponing the sale transaction. The defendant could not obtain the Income Tax Clearance Certificate upto 22-4-1986 for want of co-operation from the plaintiff.

5. Issues settled by the trial Court:

The following Issues were settled by the trial Court :

1. Whether the plaintiff is entitled to the recovery of a sum of Rs. 1,75,000/-which he paid to the defendant under an agreement of sale dated 22-5-1985 ?

2. Whether the plaintiff is entitled to past and future interest on the amount of Rs. 1,75,000/-?

3. Whether the plaintiff failed to perform his obligation under the agreement of sale dated 22-5-1985 ?

4. To what relief ?

6. Evidence available on record : The plaintiff was examined as PW-1 and Exs.A-1 to A-10 were marked. Likewise, defendant was examined as DW-1 and Exs.B-1 to B-3 were marked.

7. Findings recorded by the trial Court : The trial Court appreciated the evidence available on record and ultimately arrived at a conclusion that the plaintiff is justified in cancelling the agreement of sale and claiming refund of Rs. 1,75,000/-and accordingly 6% interest had been granted from 1-6-1986 to 5-8-1986 and also future interest at 6% till the date of realization.

8. Points for consideration :

In the light of the respective pleadings of the parties, the Issues settled, the findings recorded by the trial Court, the submissions made by both the Counsel at length before this Court, the following Points arise for consideration :

1. Whether the findings recorded by the trial Court and ordering refund of the amount claimed by the plaintiff to be disturbed in any way by this Court or to be confirmed?

2. To what relief ?

9. Point No. 1 :

As already referred to supra, the plaintiff was examined as PW-1 who deposed about the contents of the plaint. Ex.A-1 is the agreement of sale dated 22-5-1985. Certain submissions were made by both the Counsel pointing out certain of the Clauses under the agreement of sale aforesaid and hence it would be appropriate to have a look at the agreement of sale Ex.A-1 and the same reads as hereunder :

"Agreement of sale was made and executed this the Wednesday the 21st May, 1985 at Hyderabad by Sri P.L. Raju son of late Rajam Raju aged about 55 years, occupation business, Resident of Sundernagar, Hyderabad hereinafter called the Vendor'' which expression wherever the context and meaning there so requires shall mean and include their respective heirs, successors, legal representatives, executors, administrators and assignees

IN FAVOUR OF

Sri Dr. Nandan Singh, son of Chotam Singh, aged about 47 years, resident of Tilak Road, Hyderabad, hereinafter referred to as the Purchaser which expression wherever the context and meaning so requires shall mean and include their respective heirs, successors in interest, legal representatives, executors, administrators, assignees, nominees etc.

WHEREAS the Vendor is the absolute owner and possessor of a piece of house site known as Plot No. 1/1, of an extent of 1000 sq. yards (914 Sq. Mtrs.) in layout No. 8/Open-6/66/1547/73, dated 1-11-1973 situated at Erramanzil, Somajiguda,

Hyderabad by virtue of sale deed executed by Sri K. Mohan Rao, son of K. Ramkotaiah, under Doct.No. 1354/80, dated 5th May 1980 and hereinafter called the Schedule property.

WHEREAS the Vendor in view of his personal necessities is now desirous of parting the said open land by way of sale.

AND WHEREAS the Purchaser being in need of a house site like this intends to purchase the same.

WHEREAS THE VENDOR desired to sell the open land admeasuring about 1000 sq. yards for a consideration of Rs. 700/-(Rupees Seven Hundred only) per sq. yard and whereas the vendee has accepted and agreed to purchase the said property for the mutually agreed amount of Rs. 700/-(Rupees Seven Hundred only) per sq. yard on the following terms and conditions.

TERMS AND CONDITIONS OF AGREEMENT

1. It is agreed that the consideration for sale shall be Rs. 700-00 per sq. yard on actual measurement.

2. That in pursuance of the above and simultaneously with the execution of this agreement, the purchaser today has paid a sum of Rs. 1,75,000/- (Rupees One Lakh and seventy Five thousand only) to the Vendor, and the vendor hereby acknowledges the receipt of the same.

3. That since the schedule land is within the Urban Agglomeration, the Vendor shall obtain the necessary permission for alienation from the special officer and competent authority under the provisions of the urban land Ceiling and Regulations Act, 1976.

4. That the vendor after obtaining the necessary permission for alienation as above shall execute and register a sale deed in favour of the purchaser or his nominees within one month or within the period extended by mutual consent and on receipt of the balance of sale consideration to be paid by the purchaser at the time of presentation of the sale deed for registration.

5. That the vendor hereby covenants that he shall obtain all other necessary certificates and permission if necessary to complete the sale transactions.

6. That the Vendor before the registration of the sale deed shall get the land surveyed and measured for the purpose of determining the consideration for sale.

7. That the vendor hereby declares and assures that he holds marketable tide of ownership in respect of schedule land and entitled to convey the property by way of sale and also declares that the schedule land is free from all encumbrances, charges and demands whatsoever.

8. That the vendor shall deliver the vacant possession of the said land to the purchaser on the date of execution of sale deed.

9. That the purchaser shall bear all the expenses necessary for stamp duty and registration fees etc., for the purpose of registration of the sale deed.

10. Should the vendor fails to comply the terms of Agreement, the purchaser shall be entitled to specifically enforce the terms of the agreement by way of specific performance.

11. Should the purchaser fail to comply the terms of agreement, the amount of advance paid today shall stand forfeited and the agreement stand cancelled.

SCHEDULE OF THE PROPERTY

All the piece of parcel of land of plot No. 1/1 admeasuring 914 Square meters (1000 Square yards) vide M.C.H. No. 8/Open/6/66/1547/73, dated 1-11-1973, situated at Erramanzil, Somajiguda, Hyderabad bounded by :

NORTH	Plot Nos. 2 & 3
SOUTH	Plot No. 1(2)
EAST	30 Feet wide existing road
WEST	Proposed 30 feet wide road

IN WITNESS whereof the above named parties be signed on and here mentioned above."

Condition No. 1 specifies the consideration for sale to be Rs. 700/- per sq. yard on actual measurement. Condition No. 6 specifies that the vendor before registration of the sale deed shall get the land surveyed and measured for the purpose of determination of consideration for sale. Condition No. 7 refers to marketable title. Condition No. 11 is yet another essential condition on which strong reliance was placed by the Counsel for the appellant which specifies that in case the purchaser fails to comply with the terms of agreement the amount of advance shall stand forfeited and the agreement stands cancelled. PW-1 also deposed that the defendant agreed to execute a regular sale deed after obtaining No Objection Certificate from the Urban Land Ceiling authority and Income Tax Clearance Certificate and no doubt the defendant informed that he obtained No Objection Certificate under letter Ex.A-2 and he gave draft sale deed also. Ex.A-2 is dated 8-11-1985 which reads as hereunder :

"Under the instructions of my client Sri P.L Raju, S/o. Rajan Raju (late), R/o. Sundarnagar, Hyderabad, I send this information.

That you have entered into an agreement with my client on 22nd May, 1985 at Hyderabad and you have agreed to purchase 1000 square yards in Plot No. 1/1 in lay out No. 8/0-PAN-6/66/1547/73, dated 1-11-1973 situated at Erra Manzil and by virtue

of this sale agreement with my client he is under obligation to obtain necessary permission for alienation from the Special Officer and Competent Authority under the provisions of the Urban Land Ceiling Act, 1976. In pursuance of this obligation my client has approached the authorities and obtained necessary clearance certificate and you were informed to this effect orally some time ago but in view of the written clause incorporated into the agreement, he is now obliged to send this information in writing by this letter.

You are aware that on receiving this information within a month, therefore you must be in a position to get the document registered after execution of the regular sale deed by my client. You are therefore requested to send a draft sale deed for necessary approval by my client and also for obtaining all necessary income tax clearance certificates for conveying the same in your favour. This is for your information and you are requested to make necessary arrangements to see that a draft sale deed is sent to my client or to me within a reasonable period of two weeks so as to enable my client to obtain necessary income tax clearance certificate and to execute the conveyance deed thereafter within two weeks."

PW-1 also deposed in detail about Exs.A-3, A-4, A-5, A-6, A-7, A-8, A-9 and A-10 Auditor''s Certificate. Exs.A-3 to A-9 is the correspondence between the parties and the contents of this correspondence may be relevant for better appreciation of the facts of the case. Ex.A-3 dated 13-12-1985 reads :

"After having received your letter along with the draft sale deed, I have informed my client. While examining the contents of the sale deed with reference to the agreement, I found considerable variance both in terms and in contents. Why it was so drafted could not be explained by my client. In fact, under the agreement, the total consideration is Rs. 7 lakhs. But in the draft deed, it is shown as Rs. 2 lakhs only. Further the agreement was entered into between my client and Dr. Nandan Singh S/o. Chotam Singh, whereas the draft deed is shown to have been in favour of one Mr. Kishan Singh S/o. late Ramsingh. This has not only lead to considerable confusion, but also to weighty misunderstanding. Therefore, my clients are unable to reconcile in the matter.

You have further stated in your letter, requesting me to instruct my client to see that no litigation remains, pending by the time the sale deed is executed by my client. I could not realize what sort of litigation you have kept in view in referring the word ''litigation''. You are very much aware that this land is free from litigation and you have got more touch with the problem, than what I am. With reference to the suit that was filed by my client against somebody, it is only an injunction suit and this suit can always be withdrawn, whenever we wish and desire and that is not desirable and pendency of such suits cannot be considered as pendency of litigation. If you wish and advise that my client should withdraw that suit, my client has no objection to show that there is no pendency of litigation. Please be specific with reference to the above matters after ascertaining the views of your clients. You

are also requested to kindly instruct your client to see that this issue is materialized within two weeks, so as to enable my client to obtain necessary certificate and other permissions to proceed with the sale transaction in question. Any delay is detrimental to the interest of my client."

Likewise, Ex.A-4 dated 13-2-1986 specifies as hereunder :

"Under the instructions of our client Sri P.L. Raju s/o. (late) Sri Rajam Raju, R/o. Plot No. 5, Sundernagar, Hyderabad we issue this notice to you.

That you have entered into an agreement of sale on 21-5-1985 to purchase a piece of land in plot No. 1/1 of S.V. Narasaiah lay out admeasuring 914 Sq. meters (1000 Sq. yards) situated at Erram Manzil, Hyderabad bounded by North : Plot Nos. 2 and 3, South : Plot No. 1, East : 30'' wide road; West : Proposed 30'' wide road in the said lay out. In pursuant to this agreement you have allegations paid an amount of Rs. 1,75,000/- (Rupees one lakh and seventy five thousand only) as a part payment of the sale consideration.

Under the said agreement, our client is under obligation to obtain necessary permission from the Special Officer and Competent Authority under the provisions of the A.P. Urban Land Ceiling Act, 1976 and accordingly our client has obtained necessary clearance from the said Competent Authority and you were informed of the same. In spite of this information laid with you orally, you did not choose to pursue the matter further and as a result our client was obliged to send the same information in writing by another letter through his Counsel on 18-11-1985. You were requested to get the sale deed executed and registered in your favour by my client. You were also requested to send a draft sale deed for necessary approval by our client, basing on which our client was to obtain Income Tax Clearance Certificate for conveying the same by way of execution of the regular sale deed in your favour. In pursuant to this letter, your Counsel Sri Ananta Reddy, Advocate, has been pleased to send a letter requesting us to instruct our client to apply for and to obtain the Income Tax Clearance Certificate on the basis of the draft sale deed sent along with the letter by him, and we were also requested to inform him of the fact of obtaining Clearance Certificate etc., for completion to sale transaction in question. This letter was dated 2-12-1985. In pursuant to this letter, on behalf of our client, we were to send a letter to Sri Ananta Reddy on 13-12-1985 bringing to his notice certain discrepancies that had occurred in the draft sale deed. It was also brought to his notice that the draft sale deed was not in consonance with the terms and conditions of the sale agreement dated 21-5-1985.
You are requested to make a note in this connection that the total sale consideration in the sale consideration was Rs. 7 lakhs. But in the draft sale deed, it was shown only as Rs. 2 lakhs. Therefore, the draft sale deed which is to be approved by our client was not under the terms and conditions of the sale agreement. In spite of repeated oral demands to convince you to pay the sale transaction, you are not

willing to complete the sale transaction and on the order hand my instructions are that you have been persistently postponing the sale transaction on one pretext or the other and as a result our client is now constrained to issue this notice.

You are, therefore, requested to get the sale deed executed by our client in your favour in pursuant to the terms and conditions of the sale agreement dated 21-5-1985 within 10 days from the date of receipt of this notice. Our client is also willing to perform his part of the performance under the sale agreement to perform his part of the performance under the sale agreement and it does not appear that you are willing to comply with the terms and conditions of the sale agreement. If the sale transaction is not completed within 10 days from the date of receipt of this notice as demanded in this notice, you are informed that the amount paid by you as advance would be forfeited and you will not be entitled to claim for refund of the same. You are, therefore, finally informed that if the sale deed is not obtained on payment of the full sale consideration within 10 days from the date of receipt of this notice, the sale agreement stands cancelled and you will not be entitled to claim for refund of the amount paid by you towards advance at the time of execution of sale agreement dated 21-5-1985."

In Ex.A-5 dated 1-4-1986 it had been stated as hereunder :

"Under the instructions of our client Sri P.L. Raju son of (late) Sri Rajam Raju R/o. Plot No. 5, Sundernagar, Hyderabad, we issue this notice to you :

We request you to refer to our notice dated 13-2-1986, which was received and acknowledged by you on 17-2-1986. After receipt of the said notice, there has been no response from you so far. In the said notice you are informed about the facts that have transpired between yourself and our client and after having stated the true facts of the case, you are also requested to get the sale deed executed by our client in your favour in pursuant to the terms and conditions of the sale agreement dated 21-5-1985, within ten days from the date of receipt of the said notice. We have also informed you through our notice dated 13-2-1986 that our client is willing to perform his part of the performance under the sale agreement and we have also expressed our concern that you are not willing to comply with the terms and conditions of the sale agreement. It is also informed that if the sale deed is not completed within ten days from the date of receipt of the notice, it was informed that the sale agreement stands cancelled and you are also informed that you shall not be entitled to claim for any refund of the amount paid by you towards advance at the time of execution of the sale agreement dated 21-5-1985.

In spite of this Registered Notice, you did not take steps as required in the notice. As a result you are now informed that the agreement dated 21-5-1985 is to be considered as cancelled and you are not entitled for any refund of the amount which was paid to our client by way of part of the sale consideration, at the time of agreement, in pursuant to the agreement dated 21-5-1985. Our client is free now to

deal with this property in the matter in which he likes and you are not entitled to claim any interest in pursuant to the agreement dated 21-5-1985. Therefore, you are informed."

In Ex.A-6 dated 8-4-1986 it had been specified as hereunder :

"Under the instructions of my above named client Dr. Nandan Singh, I am issuing this reply notice to you as under :

It is true that my above named client received your office notice dated 13-2-1986 and instructed me to give reply by way of clarification. I request you to recollect my personal discussion with you in the High Court in respect of your notice dated 13-2-1986. Therefore it is not correct to state that there has been no response from my client in respect of your office notice dated 13-2-1986. I clarified that instead of obtaining sale deed in his name my client desired to have the sale deed in his father''s name as his nominee. So far as your client is concerned, it is immaterial for him. You explained to me during our personal conversation that your client already applied for Income Tax clearance certificate but without enclosing the draft sale deed the Income Tax clearance certificate will not be granted. In the draft sale deed sent on behalf of my client the sale consideration figures were wrongly typed. I have personally explained about the type mistake to you during our personal discussion at High Court. So far my client did not receive either the copy of the Income Tax clearance certificate or any intimation in writing about the issuance of Income Tax clearance certificate and without Income Tax clearance certificate the question of presentation of the sale deed and its registration is not permissible. Therefore through this notice my client states that he is not at fault. Therefore he will not suffer the forfeiture of earnest of advance amount paid to your client. It is also a fact that some injunction suit is pending in the city civil Court, Hyderabad in respect of the site covered by the agreement of sale dated 21-5-1985. Your client is not authorised under the said agreement of sale either to revoke and cancel the agreement of sale in question unilaterally nor he is entitled to forfeit any part of the earnest amount received from my client.
In view of the peculiar situation created by your client, please advise your client to return the entire earnest amount to my client at the earliest."

Ex.A-7 dated 3-5-1986 reads as hereunder :

"Received your above referred notice on 25-4-1986. My client Dr. Nandan Singh was not readily available to me either to comply with the requirements of your above referred notice or otherwise. My client states that your client''s statement that my client did not turn upto speak with your client is not a correct statement because as per my advise my client tried to contact your client on telephone to have an appointment for personal discussion but my client always got the reply on phone that your client was not available. It is not correct to state that your client intimated no objection for executing the sale deed in favour of the father of my client. My

client once again states that he made attempts on telephone to contact your client after our personal discussions in the High Court but your client always remained non-available to my client for the reasons known to your client.

With regard to the draft sale deed this is to state that except type mistake in respect of the total agreed sale consideration no further correction was required and your client could have corrected it as per the agreement of sale and even our clarification about the type mistake nothing remained on the part of my client to do. That apart the draft sale deed will also be prepared by your client as per the agreement but in the name of the nominee of my client as indicated in the draft sale deed sent by my client to your client. Your client agreed in Clause (4) of the agreement of sale to execute the sale deed in favour of my client or his nominees. Therefore nothing prevented your client from submitting the draft: sale deed to the Income Tax Department. It is not correct that my client has been delaying in completing the sale transaction for want of funds. If the letters or notices sent on behalf of my client once again looked into it will be clear that my client did not seek any excuses or protect. My client visited the site of plot No. 1/1 and also visited the office the advocate of the defendant in the suit filed for injunction by your client, the said defendant in the said suit is adamant in finalizing the sale transaction with my client and to recite in the sale deed that there are no litigations pending in respect of the piece of land in question the defendant in your client''s suit told my client that he would file suit for injunction and that he will not allow my client to make any construction on the plot No. 1/1 of Erram Manzil, Hyderabad covered by the agreement of sale if my client purchase the said plot even after having notice and knowledge of his claim in respect of some piece of land. My client in these circumstances is not prepared to purchase the said piece of land with the present and future litigation by paying a huge sum of Rs. Seven lakhs (Rs. 7,00,000/-). In the agreement of sale dated 22-5-1985 it was declared under Clause (7) that the land in question will be free from charges and demands whatsoever but since after the agreement, the suit is filed by your client for injunction and the same is continuing. Your client''s offer through the notices issued from your office for withdrawing the said suit does not put on to the litigation and 3rd party claim in respect of the piece of land in question and does not allow my client to enjoy peacefully the seven lakhs worth property. That apart the defendant in your client''s suit warned my client personally in respect of the piece of land in question as stated hereinabove. My client always has been mentioning about the pendency of the litigation. The claim of the defendant in your client''s suit is based on registered deeds of conveyance in his favour. It is a different matter whether the said defendant in your client''s suit succeeds or fails ultimately, but my client has to suffer the said litigation. Therefore my client is justified in law as well as on equitable principles not to purchase your client''s property in question tainted with 3rd party claims of tide and possession and subject to the present litigation and threatened litigation in future by the 3rd party.

Therefore in view of these circumstances it cannot be said that my client committed any default of any of the terms and conditions of the written contract of sale out of his own volition and that in view of the above stated existing and threatened litigation hereinabove stated my client is justified in informing your client through this notice that the terms of the completion of sale transaction by paying the balance sale consideration by my client became unenforceable by your client against my client. Therefore my client is entitled under law and on the principles of equity in demanding for the refund of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand only) from your client who enjoyed that huge sum almost for an year and that my client suffered on the other hand.

Therefore please advise your client for the refund of Rs. 1,75,000/- (Rupees One Lakh Seventy Five Thousand only) to my client within a month from the date of receipt of this final reply notice in view of the existing circumstances stated hereinabove."

Ex.A-8 dated 22-4-1986 reads as hereunder:

"I am in receipt of your reply notice dated 8-4-1986. In this reply notice, you have desired me to recollect our personal discussion in the High Court in respect of my notice dated 13-2-1986. I remember that you have desired me to instruct my client to speak to your client personally and to settle the issue feasibly. I have promised you to instruct my client to see that your client is received respectably and also to make every effort to see that the sale is materialized. Pursuant to my instructions, my client also informed me that your client did not turn upto speak to him at all. That silence made my client to feel that there has been no response from your client to the notice dated 13-2-1986. That is why in my letter dated 1-4-1986, I have stated that there is no response from your client. It is also true that you have requested my client to agree to execute the sale deed in the name of your client''s father instead of in the name of your client. My client also has expressed no objection for such execution of sale deed in favour of your client''s father. But your client did not approach my client to materialize the transaction.

You are aware that before seeking clearance certificate from the Income Tax Department, it is necessary that a Draft sale deed is to be furnished. Your client did not choose to rectify the typing mistakes that are said to have crept into the earlier draft sale deed furnished by him and as such the question of obtaining clearance certificate by my client did not arise. Whatever the order or certificate that is to be obtained from the Income Tax Department would be obtained immediately after your client furnishes the draft sale deed in accordance with the terms and conditions of the sale agreement executed between the parties. In any event, if your client is inclined to have the sale deed executed by my client, you are requested to advise your client to send the draft sale deed with a covering letter requesting my client to obtain necessary orders or certificates from the Income tax Department by submitting that draft sale deed to the Income Tax Department and on receipt of this

draft sale deed with the covering letter, my client would take all steps that are necessary for the purpose of obtaining permission, order or certificate from the Income Tax Department as per rules. Whether your client is at fault or not is not the question. My client never intends to blame your client. But what he wants is that the sale should be materialized without any further delay.

It appears that your client does not have funds to meet the situation and to get the sale deed executed within stipulated time and on this count, it appears that your client has been postponing it on one pretext or the other. This would be very detrimental to the interests of my client. Therefore, there should be a time limit for materializing the issue. You are, therefore, requested to see that your client comes forward to send the draft sale deed under the terms and conditions that are incorporated in the agreement and the same may be sent with a covering letter as requested above and my client would be obliged to comply with the request thereafter without any further delay. If your client does not come forward to resort to it within 10 days from the date of receipt of this notice, it would be presumed that your client is not inclined to get the sale deed executed in his favour after obtaining necessary permission from the Income Tax Department in which case, your client is not justified to claim return of the amount in full or part that was paid to my client by way of part payment of the sale consideration and my client is entitled to forfeit the said amount which is paid to him. My client emphatically denies that my client is creating or has created any peculiar situation as explained by you in your notice and your client is alone responsible for all the circumstances with which my client is confronted with. In fact my client is proceeding with the construction of the compound wall by investing huge amounts and if your client is to get the sale deed executed in his favour, he may immediately inform my client either to proceed with the construction at his cost or to stop it.
You are also requested to instruct your client to get the sale deed registered in his favour within one week from the date of the intimation of the fact of obtaining of necessary permission or certificate from the Income Tax Department after your client sends the above said draft sale deed with a covering letter addressed to my client"

Likewise, Ex.A-9, dated 28-5-1986, specifies as hereunder :

"I am in receipt of the above referred reply notice. I am instructed to inform you that your client is not entitled for the refund of Rs. 1,75,000/- as demanded by you in your notice dated 3-5-1986. On the other hand, my client is entitled for the resultant losses in case of the re-sale of the land. If such price falls short of the amount of agreed sale consideration under the agreement executed by your client to my client. As your client is not inclined to get the Sale Deed executed in his favour or in favour of his nominee in accordance with the terms and conditions of the Agreement executed by your client, there is no necessity for any further correspondence in this matter. There are no bona fides on the part of your client and your client is not

justified in approaching the defendants in the suit filed by my client and that conduct itself shows that your client is not interested in purchasing the land in question, but he is only interested in using the litigation as a ruse and this conduct makes it manifest that he has never acted bona fide. Your client is neither entitled for any refund as claimed by you nor my client is liable to pay such amount."

10. DW-1 no doubt deposed in detail about his stand and had taken a specific stand that the breach was committed by the plaintiff though he was ready and willing to perform his part of the contract and hence he is not liable for refund of the amount in question. Ex.B-1 is the permission of U.L.C. Ex.B-2 dated 12-12-1985 reads as hereunder:

"On behalf of my client Sri Dr. Nandan Singh/Kishan Singh S/o. Ram Singh, I am addressing this letter to you enclosed with draft sale deed.

Please instruct your client to apply for and obtain Income Tax Clearance Certificate on the basis of the draft sale deed and as soon as your client obtains the said Income tax Clearance Certificate the same may be intimated in writing to my client so that my client may take all further necessary steps for the completion to sale transaction.

Please instruct your client to see that no litigation remains pending by the time the sale deed is executed by your client in favour of my client."

11. Ex.B-3 is the draft sale deed. No doubt there is some mistake relating to the sale consideration relating to which also PW-1 deposed. The parties entering into the agreement of sale is not in controversy. The appellant/defendant obtaining U.L.C. Clearance Certificate, though a bit late, is also not in serious controversy. The preparation of the draft sale deed and some mistake which had been typed i.e., Rs. 2,00,000/- in stead of Rs. 7,00,000/- also is not in serious controversy. Ex.A-1 and the conditions specified therein already had been referred to supra. The correspondence between the parties also clearly reflect the respective stands taken by the parties. On a careful reading of Condition No. 1 and Condition No. 7, though schedule was mentioned, the land was to be measured and the sale consideration to be determined and further the seller/vendor had specifically declared relating to the marketable title free of encumbrances, and relating to correspondence between the parties, both the parties deposed the aspects in detail. Apart from this aspect of the matter, there is no serious dispute between the parties relating to the pendency of a litigation, may be as against third parties in relation to the property in question. Pendency of a mere suit for injunction as against third parties to protect possession filed by the vendor may not fall under the suppression of any material fact or defect in marketable title so as to avoid the contract, is the specific stand taken by the appellant/ defendant. The concept of consensus ad idem in the case of entering into a contract need not be further emphasized. Whether the defect in title is of such a serious nature or not is a question which may have to be viewed not only from the

vendor''s point of view but also from the vendee''s view. The mere fact that the seller/vendor was willing to withdraw such litigation would not alter the situation in any way since it is not in serious controversy that this was not disclosed to the purchaser at the relevant point of time. Apart from this aspect of the matter, no doubt an attempt was made by both the Counsel to substantiate their respective stands on the aspect who in fact committed the breach. It is no doubt true that U.L.C. Clearance had been obtained and the respondent/plaintiff was put on notice. Condition No. 11 in Ex.A-1 cannot be read in isolation and Condition No. 11 may have to be read along with Condition Nos. 1, 6 and 7 and the other conditions as well. In V. Lakshmanan Vs. B.R. Mangalagiri and Others, the Apex Court held :

"The facts of the case and the conduct of the appellant lead us to conclude that the appellant is not justified in seeking to nor is he entitled to recover from the appellants Rs. 50,000.00 paid by him. No doubt in the agreement it was stated that the amount was advance and not earnest money. Earnest money is a part of the purchase price. The nomenclature or label given in the agreement as advance is not either decisive or immutable. The appellant, after he had entered into the agreement, admittedly, had taken possession of the land and levelled the land for the purpose of making it into plots for sale to the third parties, in terms of the agreement. Admittedly, the appellant failed to obtain the sanction of the layout plan as the Gram Panchayat refused to sanction it. Thereafter, the appellant having found it difficult to effectuate the sales to third parties, he invented an excuse to get over the agreement and pitched upon the plea of oral request said to have been made to the respondents to obtain sanction of the Court to alienate the share of the minor and of their refusal. Thereby, they were not willing to perform their part of the agreement and had refused to execute the sale deed. There is no truth in it. The agreement of sale fell through due to the default committed by the appellant It is not the case that the appellant had issued notice to the guardian to obtain sanction of the Court and that the mother had refused to get it nor is she willing to execute the sale deed. The amount paid is only by way of earnest money as part of the sale transaction and that the appellant failed to perform his part of the contract.

It is true that in the written statement filed by the defendants, defendants 1 and 2, brothers and 4 being the mother representing defendant 3 minor, as a natural guardian, had pleaded in paragraph 12 that the agreement to the extent of the share of the minor, is void. u/s 8(3) of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) (for short ''the Act'') it is only voidable at the instance of the minor or any person claiming under him. The guardian has to obtain permission from the Court u/s 8. In this case, admittedly, during the pendency of the suit, the third respondent minor after becoming major on 31-7-1975, was duly declared as major and the mother was discharged from guardianship. Thereafter he filed a memo adopting the written statement filed by defendants 1 and 2, his brothers. In their written statement and also in the reply notice got issued by them. Respondents 1, 2 and 4 expressly averred and it was testified in the evidence of the

first defendant that they are "ready and willing to perform their part of the contract". When the minor became major, he had adopted their written statement, it would certainly mean, as rightly pointed out by the High Court, that the minor was also willing to perform his part of the contract along with his brothers. He thereby elected to abide by the terms of the contract. It is not the case that the appellant had called upon the respondents in writing to obtain permission from the Court as required under Sub-section (2) of Section 8 of the Act and that they refused to obtain such a sanction. In the suit notice also he did not call upon them to get the sanction of the Court. On the other hand, he asked them to return the advance amount. When the minor had attained majority pending the suit and had elected to abide by the terms of the agreement of sale, the need to obtain sanction from the Court became unnecessary. Under these circumstances, the necessity to obtain permission from the Court under Sub-section (2) of Section 8 of the Act became redundant. It is seen, from the conduct of the appellant, that he is not willing to perform his part of the contract and he wants to wriggle out of the contract. It is also seen that time is the essence of the contract. Sale deed was required to be executed on or before 23-2-1973. The appellant is the defaulting party and he has not come to the Court with clean hands.

The question then is whether the respondents are entitled to forfeit the entire amount. It is seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the enure amount. In this case even otherwise, we find that the respondents had suffered damages, firstly for one year they were prevented from enjoying the property and the appellant had cut off 150 fruit-bearing coconut trees and sugarcane crop was destroyed for leveling the land apart from cutting down other trees. Pending the appeal, the respondents sought for and were granted permission by the Court for sale of the property. Pursuant thereto, they sold the land for which they could not secure even the amount under contract and the loss they suffered would be around Rs. 70,000.00. Under those circumstances, their forfeiting the sum of Rs. 50,000.00 cannot be said to be unjustified. The appeal is accordingly dismissed with costs."

On a careful scrutiny of the facts of the case, the said case is distinguishable from the case on hand. The agreement of sale Ex.A-1 and also the evidence of PW-1 and DW-1 and the correspondence between the parties would clearly go to show that the material fact relating to pendency of the litigation had not been disclosed by the appellant/defendant. Apart from this aspect of the matter, the other conditions also have to be considered and hence relying upon Condition No. 11 only it cannot be said that the right can be exercised by the appellant/defendant to forfeit the amount. In State of A.P. v. Singam Setty Yellamanda, (Appeal No. 1513 of 1984, dated 2-9-2002), 2003 (6) ALD (NOC) 125, I had observed :

"It is not in dispute that the respondent/plaintiff had not furnished his permanent address as specified in the bid conditions incorporated in Ex.B-3 and hence the stand taken by the respondent/plaintiff that since he is an old contractor, it should be taken that his address will be available with the Department, cannot be said to be a reasonable stand. In Ex.B-3, under Condition No. 30, a confirmation may be made within 30 days from the date of auction. But however, in the present case, within four days the confirmation orders had been made and they were communicated. After recording several facts and circumstances and correspondence between the parties, the trial Court had recorded a fact that the object of the contract in the peculiar facts and circumstances should be taken, as failed. No doubt, the trial Court after elaborately discussing the bid conditions in Ex.B-3 had arrived at the conclusion that the respondent/plaintiff can be said to be the defaulter. But however, at paragraph-7 of its judgment, the trial Court had recorded the reasons why the refund of the amount has to be ordered. It is needless to mention that the Government is the appellant and no doubt it is throwing the whole blame on the respondent/ plaintiff and inasmuch as the respondent/ plaintiff is the defaulting party, the stand taken by the Government is that the respondent/plaintiff is not entitled to the refund of the amount at all. The trial Court had recorded detailed reasons that if any damages had been suffered in view of the breach of the contract, only the quantum of damages to such an extent alone can be claimed and not exceeding it and hence the total forfeiture of the amount cannot be justified, especially in the light of Sections 73 and 74 of the Indian Contract Act. No doubt, serious stress was laid on Clause 19 of the agreement Ex.A-4 and a contention had been advanced that under no circumstances, the respondent/plaintiff is entitled to claim the refund. As can be seen from the material available on record and also the findings which had been recorded by the trial Court, it is clear that the appellant/ Government had not suffered any serious prejudice and even otherwise for omission of the quantum of damages, if any resulting out of the breach of the conditions, liberty was given to institute a separate suit, if they are so advised. But, for the reasons best known, the appellant/ Government had not proceeded to initiate any action in this regard. Apart from this aspect, the trial Court after recording detailed reasons at paragraph- 10 had arrived at the correct conclusion that in the peculiar facts and circumstances, especially in the light of the fact that whatever may be the circumstances, in view of the default, the respondent/plaintiff is entitled to the refund of the actual amount only, that too without interest and also without costs, and this approach of the trial Court, is a proper approach, both in the light of the peculiar facts and circumstances and also in law and in equity too. No interference warranted with any of the findings recorded by the trial Court in this regard."

In Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd., , it was held that the party to a contract taxing security deposit from the other party to ensure due performance of the contract is not entitled to forfeit the deposit on ground of

default when no loss is caused to him in consequence of such default. In Krishnaji Gopinath Rele v. Ramachandra Kashinath Mastakar, AIR 1932 Bom. 51 , it was held that a Court of law will not ordinarily enforce a contract where there is reasonable and decent possibility that enforcing it would involve purchaser in litigation. Reliance was placed on Gurdial Singh Vs. Pearey Lal Malhan, , wherein it was held at para-5 as hereunder:

"Learned Counsel for the plaintiff submits that anticipatory breach of the contract was committed by the defendant and therefore the plaintiff was entitled to treat the contract as cancelled and claim the refund of the amount It is not disputed that the defendant cancelled the contract by the said telegram, Ext.P-4. Section 39 of the Contract Act reads as under :

"When a party to a contract has refused to perform or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

Under this section, the defendant refused to perform his part of the contract and therefore the plaintiff was entitled to put an end to the contract. The plaintiff did so by demanding the refund of the sum of Rupees 10,000/- paid in advance. On the cancellation of the contract the plaintiff had two remedies; to institute a suit for specific performance or to bring an action for the breach i.e., for the refund of amount paid by him. When the defendant cancelled the contract the plaintiff is discharged from the obligations of the contract. He was not required to perform conditions after (sic) the defendant cannot demand the plaintiff to perform any part of the contract In District Board, Jhelum v. Hari Chand, AIR 1934 Lah. 474, it is observed that a party to a contract who commits a breach of the contract cannot require the other party to perform his part of the contract. Thus it is clear that after the cancellation of contract on 6th September, 1965 there was no obligation on the part of the plaintiff to do any act for the completion of the contract. On the other hand, u/s 64 of the Contract Act the plaintiff is entitled to receive back the amount paid by him to the defendant Section 64 of the Indian Contract Act reads as under :

"When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

In the present case the defendant cancelled the contract and he had received Rs. 10,000/- under the contract. He is therefore liable to refund this amount to the plaintiff. In AIR 1943 34 (Privy Council) it was held that Section 64 of the Contract Act applied to cases of rescission of contract u/s 39 and that a liability to make restitution attaches to the party putting an end to a contract u/s 39 of the Contract Act. Thus under Sections 39 and 64 of the Contract Act on the cancellation of the

contract by the defendant the plaintiff became entitled to the refund of the amount received by the defendant without proving anything more. The trial Court, as already stated, held that the plaintiff was ready and willing to perform his part of the contract and that the defendant committed the breach and therefore a decree was passed. But in the present case when the defendant himself cancelled the contract, I am of the view that it is not necessary to decide whether the plaintiff was ready and willing to perform his part of the contract. Learned Counsel for the appellant, however, submits that the plaintiff is not entitled to the refund of the said amount on the ground that he was not ready and willing to perform his part of the contract As already stated, this question does not arise when the defendant himself cancelled the contract on 6th September 1965 while the last date for completion of the contract was 7th September 1965. Under Sections 39 and 64 of the Contract Act the defendant, as already stated, is liable to pay the amount. In any case the parties have taken me through the evidence on record and there is no reason to reverse the finding of the trial Court holding that the plaintiff was ready and willing to perform his part of the contract There is sufficient oral and documentary evidence on record that the plaintiff was in a position to pay Rs. 65,000/- to get the sale deed executed in his favour on or before the agreed date. The plaintiff was not required to perform any other act under the agreement. It was the defendant who committed the breach. He did not obtain the clearance certificate for the execution of the sale deed. No intimation was ever sent by the defendant to the plaintiff about any clearance certificate. The trial Court on an appreciation of the evidence on record has rightly concluded that the document Exhibit D-2 was not a genuine document. Moreover, the document Ext.D-2 was not proved in accordance with law. The Income Tax Inspector who appeared before the Court as DW-2 could not decipher the signatures of the alleged Income Tax Officer on the said certificate. There was also no proof to show that any certificate was issued by the Income Tax Department before the crucial date."

In Makkala Narsimlu Vs. Gunnala Raghunandan Rao, , the Division Bench while dealing with Sections 73 and 74 of the Indian Contract Act 1872 held:

"Sri G.V.R. Mohan Rao for the appellant raises three contentions. The first contention is in regard to Rs. 2,000 allowed by our learned brother by way of compensation. The learned Counsel pointed out that the sum of Rs. 4,000/- provided in the contract between the parties as damages was considered by penalty. Therefore, that sum could not be granted. He also refers to the observation of the learned Judge that there was no evidence regarding the reasonableness of the amount of Rs. 4,000/- as damages. In these circumstances, the learned Counsel urges that the fixation of Rs. 2,000/- as compensation is arbitrary and cannot be sustained. It should be noted that the learned Judge awarded Rs. 2,000/- as reasonable damages for compensation for the breach of the contract. This is what the learned Judge stated in this connection:

"I, therefore, partly allow the appeal and direct that the respondent shall further pay a sum of Rs. 2,000/- to the appellant by way of damages for the breach of contract"

That leads to the necessary inference that the learned Judge was of the opinion that the defendant committed breach of contract. We have no hesitation in agreeing with this basis of the learned Judge''s conclusion. The defendant agreed to get his title perfected by getting another document from the co-owner. He did not do that, nor did he succeed in giving vacant possession of the premises within the stipulated time of nine months. Thus the failure to perform these two important clauses of the contract was on the part of the defendant. He committed the breach and therefore he was liable to pay damages. In this view the learned Judge is right

Then the question is whether the learned Judge is right in fixing a sum of Rs. 2,000/-as the quantum of damages. Section 74 of the Indian Contract Act provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in the case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Therefore, from the statute it is clear that where there is a broken contract and an amount is named as compensation, the Court can grant a reasonable portion of that amount or the entire amount as the case may be, whether or not actual damage or loss is proved to have been caused thereby. In Union of India (UOI) Vs. Raman Iron Foundry, , Bhagwati, J., speaking for the Supreme Court observed while construing Section 74 at page 1273 :

"...even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit."

In an earlier case in Maula Bux Vs. Union of India (UOI), , the Supreme Court laid down that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation the sum named by the parties, if it be regarded as a genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party

claiming compensation must prove the loss suffered by him. It is unnecessary to cite more decisions on this aspect. It is now the well settled construction of Section 74 that when there is a breach of contract and when the contract itself has provided that an amount of compensation has to be paid, the Court has power to award either the entire amount so fixed or a reasonable portion thereof, whether or not the actual loss is proved. In this case, undoubtedly the plaintiff lost interest on the amount of advance he paid. Further he had to wait for the implementation of the contract by the defendant. He had to issue a notice and then could not get the house which he wanted to purchase. In these circumstances, though there is person proof of the actual loss, the sum of Rs. 2,000/- awarded by the learned single Judge cannot be said to be unreasonable by way of compensation. We are, therefore, not inclined to interfere with the decree passed by the learned Judge awarding Rs. 2,000/- as reasonable compensation for breach. We have already noted that he has not awarded interest on this sum of Rs. 2,000/- and there is no appeal or cross-appeal in respect thereof. So, this part of the decree for Rs. 2,000/-is affirmed."

A Division Bench of Delhi High Court in Kamal Rani Vs. Chand Rani and Another, , held that in the case of breach of contract by vendee earnest money should not be allowed to be forfeited where the vendor has not suffered loss but gained on account of frustration of contract. On the aspect of blameworthy conduct of the parties to a contract and the effect thereof reliance was placed on Lalit Kumar Jain and Another Vs. Jaipur Traders Corporation Pvt. Ltd., . In Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, , Sections 55 and 74 of the Indian Contract Act 1872 and the aspect of whether the time would be the essence of contract and the mode of determination thereof had been discussed. A Division Bench of Allahabad High Court in De-Smet (India) Private Ltd. Vs. B.P. Industrial Corporation (P.) Ltd., , while dealing with money paid towards part payment of price and not as earnest money and where the contract fell through, on the aspect of entitlement of buyer for refund of the amount and while dealing with the doctrine of unjust enrichment and the discharge of burden of proof, held :

"The decision in the cases of Ballabhdas v. Paikaji, AIR 1916 Nag. 104, Abas Ali v. Kodhu Sao, AIR 1929 Nag. 30(2) (FB) , Krishna Chandra Rudrapal Vs. Khan Mamud Bepari and Others, ;Madan Mohan v. Jawala Prasad, AIR 1950 East Punj. 278, Khuda-I-Tala through K.B. Qazi Mohammad Zafar Ahmad Khan Vs. Mt. Hamida Khatoon, , Jagdishpur Metal Industries and Others Vs. Vijoy Oil Industries Ltd., , Dasu Rattamma v. Krishnamurthi, AIR 1928 Mad. 326 show that the view taken by various High Courts in this country is that where the advance payment is not made by the purchaser as guarantee for fulfillment of the contract but is made merely as part payment of the purchase price agreed upon between the parties, it has to be, when the transaction falls through, refunded to the purchaser even though the purchaser himself may be responsible for committing breach of contract.

Learned Counsel for the appellant relied upon the following observations made by N.U. Beg, J., in the case of Kanpur Iron Brass Works and Flour Mills Vs. Banarsi Das and Others, :

"The contract was that the plaintiff would accept the entire total of 20 Kolhus. If the provide did not accept all the 20 Kolhus he must be held to have committed a breach of contract. Mere acceptance of eight Kolhus cannot therefore in my opinion relieve him from the legal liability of forfeiture which is incurred by the buyer once he is found to be guilty of breach of contract" and urged that according to this decision a party which commits breach of contract cannot retain the money paid to it. We are unable to accept this submission. A careful reading of the judgment shows that the learned Judge first of all discussed the nature and incidents of earnest money deposited by an intending purchaser with the seller, and held that in case the purchaser commits breach of contract the earnest money is liable to be forfeited. While making the observations relied upon by the learned Counsel for the appellant the learned Judge merely ruled that where a liability for forfeiture of the earnest money has been incurred the purchaser is not relieved of it merely because he accepts delivery of part of the goods contracted to be purchased by him. These observations have nothing to do with the money paid to the seller in advance which payment is not by way of earnest or as a guarantee for the performance of the contract.

As in this case there is nothing on record to indicate that the plaintiff had paid Rs. 1,00,000/- to the defendant by way of earnest money or as a guarantee for due performance of the contract and as admittedly the contract is not to be performed by the parties any further the plaintiff is entitled to its refund.

It is true that the doctrine that a person who has been unjustly enriched at the expense of another is required to make restitution to the other has been accepted in this country and has also found statutory recognition in Sections 65 - 70 of the Indian Contract Act. We may for purposes of discussion take it that the passages cited by the learned Counsel represent the correct legal position with regard to the extent to which the restitution is to be made by a party which is unjustly enriched and that the party is only bound to refund the difference between such benefit gained by him and the harm suffered by it on account of the default of the plaintiff. However, the observation that it is necessary for the plaintiff to show with reasonable degree of certainty that there is such an excess and its amount in order to get the judgment does not mean that it is for the plaintiff to establish by positive evidence a fact which is in the special knowledge of the defendant, namely the precise damage which has been suffered by him. In such cases the plaintiff discharges the burden by proving the benefit conferred by him and stating that to his knowledge the defendant has not suffered any harm. If he does so he succeeds in showing with a reasonable degree of certainty that there is an excess of benefit received over the harm suffered by the defendant and also its extent. However if the

defendant succeeds in showing that the extent of harm suffered by him was more than what had been admitted by the plaintiff he would be able to contest the plaintiff''s case for such restitution to the extent it is not in excess of the benefit over the harm suffered by him. It cannot be accepted as a proposition of law that the plaintiff has to prove by positive evidence a fact which cannot be in its knowledge and which is in the special knowledge of the defendant.

In the instant case we find that although the defendant alleged that it had fabricated equipments amounting to Rs. 1,26,380.30 but it did not adduce any evidence whatsoever to show as to what happened to that equipment thereafter. Whether it retained the same or it disposed it of to a third party and if so what was the amount realized by it on that account. Merely because the defendant manufactured equipment amounting to Rs. 1,26,360.30 as claimed by it does not mean that the defendant was entitled to recover that amount as also to retain the equipment. The defendant could on this account only recover the difference between the money spent by it on the manufacturing of those equipments and the price which those equipments would fetch if they were disposed of in the market in the ordinary course. There being nothing on the record to show either that such equipments were not disposable or as to what happened to them, it cannot be said that the defendant has succeeded in proving that it suffered any loss much less a loss to the extent of Rs. 1,26,380 by manufacturing those equipments. Similarly the plaintiff''s claim for recovering a sum of Rs. 59,700.90/- on account of the value of the material for which orders were placed on outside parties cannot be countenanced as there is no evidence on the record to show that the defendant paid this amount to the outside parties and did not receive the goods of that value from them. What happened to those goods, and whether the defendant suffered any loss on that account and if so, its extent is also known. The defendant claimed in the written statement a sum of Rs. 65,000/- on account of engineering charges and preparation of lay-out drawings, to prove what amount was spent by it under this head (sic). It is true that the defendant filed a number of documents showing that certain lay-out drawings etc., had been prepared by it but it did not adduce any evidence to show the extent of money spent by it over those drawings or that those drawings had become valueless for its purpose. In such circumstances the plaintiff''s claim for the said sum of Rs. 65,000/- can also not be countenanced. In short, there is no evidence to show that the defendant suffered any loss because of the breach of contract alleged to have been committed by the plaintiff and on the material on record it cannot be said that the excess of benefit received by the defendant over the harm suffered by it is less than the total benefit of Rs. 1,00,000/- received by it. The defendant is, therefore not entitled to deduct anything from the amount of Rs. 1,00,000/- which is refundable by it.

In this view of the matter it is not necessary for us to go into the question as to which of the two parties was guilty of committing breach of the contract in this case. As the sum of Rs. 1,00,000/- paid by the plaintiff to the defendant was not earnest

money, and as admittedly the transaction between the parties had fallen through the defendant has been rightly held to be liable to refund the said amount to the plaintiff."

In Sabina D''Costa Vs. Joseph Antony Noronha, , while dealing with Section 74 of the Indian Contract Act it was held that if what is contemplated in the agreement to be paid or forfeited in case of its breach is of the nature of penalty even if it be earnest money, Section 74 of the Indian Contract Act would come into play.

12. In the light of the aforesaid legal position and also in view of the findings recorded in detail by the trial Court on appreciation of the whole material available on record and in the light of the correspondence between the parties and also Condition Nos. 1, 6 and 7 read along with Condition No. 11 of Ex.A-1 and in the light of the fact of pendency of some litigation and also the other relevant aspects which are clear and categorical from the correspondence between the parties, Exs.A-2 to A-9, both in law and in equity the trial Court arrived at the correct conclusion in ordering the refund of the amount with 6% interest and thus these findings recorded by the trial Court do not suffer from any legal infirmity whatsoever and accordingly the said findings are hereby confirmed.

13. Point No. 2 :

In the light of the foregoing discussion, it is needless to say that the Appeal is devoid of merit and accordingly the same shall stand dismissed. Inasmuch as the parties are litigating for entitlement of the refund of the amount paid under Ex.A-1, this Court directs the parties to bear their own costs in this appeal.