
(2005) 04 AP CK 0015
In the Andhra Pradesh High Court
Case No : AS No. 843 of 1988

Kota Rama Rao

APPELLANT

Vs

Kolli Rajeswaramma

RESPONDENT

Date of Decision : 13-04-2005

Acts Referred:

Contract Act, 1872 — Section 64

Citation : (2005) 3 ALD 822

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : M.V. Suresh Kumar, for the Appellant; K.V. Subrahmanya Narsu, for the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—This is an appeal filed by the defendant against the judgment and decree dated 15-12-1987 passed in O.S. No. 273 of 1982 by the II Additional Subordinate Judge, Kakinada in a suit brought by the plaintiff to enforce specific performance of agreement of sale dated 9-7-1979 upon a site approximately 500 square yards after getting the area measured and the septic tank in item No. 2 of the plaint schedule is removed.

Pleadings:

2. It is admitted that the appellant/ defendant entered into an agreement of sale dated 9-7-1979-Ex.A1 with the respondent/ plaintiff, agreeing to sell 500 square yards of house site adjacent to his building, which is purchased under a registered sale deed dated 21-6-1978-Ex.B4, for a sale consideration of Rs. 48/- per square yard and received a sum of Rs. 1,500/- towards advance on the said date and the balance of sale consideration has to be paid within three months i.e. on or before 8-10-1979 after giving credit to the advance amount paid and the sale deed has to be executed in favour of plaintiff or her nominee and possession should be delivered. Whereas the plaintiff asserts that she is always

willing and ready to perform her part of the agreement but some time after agreement, plaintiff and her husband noticed that in the joint site described as Item No. 2 in the schedule defendant constructed a septic tank for his newly constructed latrines which was not there at the time of agreement. Plaintiffs husband met the defendant and asked to get the tank removed in the joint site for which defendant agreed to do so but failed to get the tank removed and postponing the same on one pretext or the other. Therefore, the plaintiff got issued suit notice-Ex.A2 dated 28-6-1982 calling upon the defendant to remove the septic tank, get the site measured and get the sale deed registered after receipt of balance sale consideration and also deliver possession of the property. But the defendant failed to comply with or reply to the same. Plaintiff is, therefore, entitled to claim specific performance of agreement of sale. If it is held that plaintiff is not entitled to specific performance, she is entitled to alternative claim of refund of Rs. 1,500/- with interest at the rate of 18% per annum from 9-7-1979. Though it is averred in the plaint, but there is no alternative claim of refund of the amount in the prayer portion.

3. It is the case of the defendant that the plaintiffs husband entered into sale agreement with him and he was not aware of the fact that the said agreement was obtained in his wife's name till the suit notice is received. The alleged construction of septic tank in the joint site in Item 2 of the schedule is not correct and the same was constructed prior to entering into the agreement. When the defendant demanded the plaintiff's husband to obtain sale deed, he postponed the same from time to time and he came to know that the plaintiff's husband has no money to purchase the same and he obtained the sale agreement with an ulterior motive to sell the same to third parties for profit and get the sale deed executed in the name of intending purchasers without himself investing the money. In view of the same, defendant got issued a registered notice-Ex.B1 dated 25-7-1981 to the husband of the plaintiff with the above facts informing that he is liable to pay interest at 18% per annum on the balance of sale consideration due to the defendant from the due date till the date of obtaining sale deed making time is the essence of the contract for getting the sale deed within one week from the date of such notice. Failure to do so the agreement stands cancelled and earnest money will be forfeited and further damages, if any. Plaintiffs husband having received the notice under Ex.B2-postal acknowledgment has not evinced any interest to get the sale deed registered as demanded and the said agreement stood cancelled. The same was also informed to the plaintiff by way of reply-Ex.A4 dated 15-7-1982. Further it was stated by him that he agreed to sell the suit property for discharging all his debts and has been pressing the plaintiff's husband to obtain the sale deed, but he was postponing the same. The averment in the suit notice and in the plaint that the defendant constructed septic tank and latrines subsequent to the agreement of sale and he is agreeing to remove the same is only a ruse for non-performance of contract on her part and the plaintiff has no right to ask him to remove the said tank, as the said site was not agreed to be sold nor septic tank was

constructed subsequent to the sale agreement. Only a right of passage was given through the defendant's site along with defendant. When the sale agreement stood cancelled in July, 1981 itself and in the absence of its subsistence, issuance of suit notice one week before lapse of three years is speculative and plaintiff is not entitled to any decree for specific performance.

4. Upon these pleadings the trial Court framed six issues, and one additional issue on 2-11-1987, which read as under:

1. Whether the septic tank in the suit schedule site was constructed after the suit agreement dated 9-7-1979 as alleged by the plaintiff?

2. Whether Rs. 1,500/- was paid to the defendant by the plaintiff as earnest money or as part consideration?

3. Whether the time stipulated in the agreement dated 9-7-1979 is the essence of the contract and whether the sale agreement stood cancelled as alleged by the defendant?

4. Whether the plaintiff is entitled for the refund of Rs. 1,500/- paid at the time of the sale agreement dated 9-7-1979?

5. Whether the husband of the plaintiff Vara Prasada Rao is a necessary to the suit?

6. To what relief?

Additional issue framed on 2-11-1987

1. Whether the plaintiff is entitled for the specific performance of the suit agreement sale?

Findings of the Court below:

5. On appreciation of evidence adduced by the parties, to know whether the septic tank was constructed by the defendant in the suit site or not, a Commissioner was appointed, who submitted a report and plan under Exs.C1 and C2 and also deposed as P.W.3. But it is not possible from the evidence of Commissioner and Exs.C1 and C2 to know on what exact point of time the defendant constructed the septic tank and a reading of Ex.A1 and boundaries of Items 1 and 2 of plaint schedule reveal that there is no site left between Items 1 and 2 of schedule. In the absence of any contention in the notice-Ex.B1 or in the reply-Ex.A4 that the septic tank was constructed prior to the agreement and existence of the same was not mentioned in the agreement of sale-Ex.A1 and in Ex.B3-plan there was no proposal for construction of septic tank in the plaint schedule site and the septic tank was not constructed in the year 1978 but was constructed subsequent to Ex.A1, as contended by the plaintiff. On Issues 3 and 4 and additional issue the trial Court held that Ex.A1-agreement of sale stipulates that plaint schedule property was got to be measured within three months from the date of agreement and after ascertaining the actual extent, sale

deed has to be executed on payment of balance of sale consideration by the plaintiff at the time of execution of sale deed in the presence of Sub-Registrar. Time of three months stipulated is only for getting schedule property measured and sale deed has to be executed immediately. In the absence of any specific Clause that the sale deed has to be executed on or before 8-10-1979 and in the absence of default Clause in Ex.A1 time cannot be made as essence of contract. Even otherwise, the intention of the parties under Ex.A1 is to get the sale deed executed on or before 8-10-1979 and it is to be done only after getting the property measured. The defendant did not get the suit property measured within the time stipulated or any time thereafter before issuing Ex.B1 notice, which was measured by the Commissioner appointed by the Court. Under such circumstances, defendant cannot plead time is the essence of the contract as per the terms of Ex.A1 by issuing Ex.B1 notice on 25-7-1981 to the husband of the plaintiff, in the absence of notice followed u/s 64 of the Contract Act determining the contract as held by this Court in Tandra Venkata Subrahmanayam Vs. Vegesana Viswanadharaju and Another, . In the absence of fulfilling the conditions stipulated, namely, to get the suit schedule property measured before issuing Ex.B1 notice, defendant cannot make time as essence of the contract by notice or can terminate the contract that too after constructing septic tank detrimental to the interest of the plaintiff. Accordingly, decreed the suit of the plaintiff with costs granting two months time for execution of the sale deed and directed the plaintiff to deposit balance of sale consideration into the Court.

6. Aggrieved by the judgment and decree the defendant preferred this appeal and obtained stay of further proceedings on 10-10-1988 subject to depositing the entire costs within six weeks.

Submissions of the appellant:

7. Mr. M.V. Suresh, learned Counsel for the appellant/defendant made the following submissions.

1. Trial Court granted a decree for specific performance only on circumstantial evidence without properly appreciating the evidence on record particularly, when the defendant issued Ex.B1 notice making time is the essence of the contract and calling upon the plaintiff to pay the balance of sale consideration within one week and obtain registered sale deed as per the terms of sale agreement, failing to do so agreement stands cancelled by forfeiting the earnest money and further damages for the loss sustained by the appellant.

2. In spite of the same, plaintiff has not complied with the same but issued notice just one week before expiry of three years period which will disentitle the plaintiff to obtain a decree for specific performance.

3. Granting of decree for specific performance is discretionary relief and the lower Court ought not to have exercised the discretion in favour of the plaintiff particularly, when she failed to pay the balance of sale consideration within the period of three months as agreed.

4. In the process, there is an increase of the land value, which has to be taken into consideration by the appellate Court and can modify the decree for refund of earnest money. In support of his submissions he placed reliance on the following judgments:

1. Abdul Shaker Sahib v. Addul Rahiman Sahib AIR 1923 Mad. 284.
2. Munir Mohammad v. Rama AIR 1920 Nag. 173.
3. G. Rosaiah Vs. C. Balarami Reddy and Another, .
4. Subbayya Chowdary v. Veerayya, 1955 ALT 713.
5. A.C. Arulappan Vs. Smt. Ahalya Naik, .
6. K.S. Vidyanadam and Others Vs. Vairavan, .

Submissions of the respondent :

8. Repelling the above submissions and in support of the judgment under appeal Sri K.V. Subrahmanya Narsu learned Counsel for the respondent/plaintiff contended that lower Court after considering the oral and documentary evidence gave a finding that the plaintiff is entitled to a decree for specific performance and it is obligatory on the part of defendant to get the land measured and inform the plaintiff the actual extent available for registration. On such information only plaintiff has to pay the balance of sale consideration and get the sale deed executed. Once it is admitted about execution of agreement of sale-Ex.A1, which do not prescribe time is the essence of contract, and when the plaintiff specifically pleaded in the plaint and deposed in the Court that her husband approached the defendant several times for removing the septic tank and get the suit land measured for enabling her to perform her part of contract, defendant cannot make time is the essence of contract by issuing Ex.B1 notice. In the absence of any pleading with regard to increase of the land value from the date of agreement of sale till the date of filing of the suit and in the absence of any evidence let into the said effect, it is not open for the defendant to plea that due to escalation of land value, plaintiff is not entitled to specific performance but he fairly submitted that if at all there is any escalation of prices from the date of agreement of sale till the date of filing of the suit defendant is entitled to such escalation of prices. Granting of specific performance is discretionary and it is for the Court to take note of the same, if any. When the defendant failed to perform his part of the contract it is not open for him to plea that the plaintiff is not entitled to decree for specific performance.

Points for consideration:

9. In view of the above rival submissions, the points that arise for consideration in this appeal are as under:

1. Whether the stipulation in the agreement for payment of balance of sale consideration within three months i.e., on or before 8-10-1979 and obtain sale

deed for the actual extent of land arrived after due measurement is the essence of contract?

2. Whether the lower Court is justified in giving a finding that defendant constructed the septic tank after the agreement of sale Ex.A1 in a part of land agreed to be sold and there is no such lane in between Items 1 and 2 of Ex.A1 schedule?

3. Whether the plea of the plaintiff that unless the defendant removes the septic tank constructed amounts to repudiation of contract?

4. Whether the lower Court rightly exercised the discretion in granting the decree for specific performance ignoring the fact of plaintiff approaching the Court just one week before expiry of three years period.

Analysis of Pleadings and Evidence:

10. It is admitted by the appellant/ defendant that they have entered into an agreement of sale for sale of 500 square yards approximately subject to the actual measurement at the rate of Rs. 48/- per square yard and received the advance amount of Rs. 1,500/- and the balance of sale consideration has to be paid within three months i.e., on or before 8-10-1979 on measurement and fixing the boundaries. Since the entire agreement is centers round, it is also relevant to notice that portion of the agreement, which reads as under:

Purchaser offered to purchase the land at the rate of Rs. 48/- and no other person has offered more than the same. The vendor accepted to sell the same as the price offered is reasonable in the market and accordingly received an amount of Rs. 1,500/- as advance under agreement Ex.A1; within three months i.e., on or before 8-10-1979 the schedule property get measured and fixed the boundaries and the balance amount should be paid after taking the land available as per the said measurement at the rate of Rs. 48/- after deducting Rs. 1,500/- paid before the Sub-Registrar at the time of registration of the sale deed and expenses of which will be borne by the purchaser (vendee).

In the entire agreement it is nowhere stipulated that it is the responsibility of the defendant/vendor after getting the land demarcated has to inform the plaintiff about fixation of boundaries and on such fixation the plaintiff/vendee has to pay the amount; whereas the condition mentioned therein clearly stipulates payment of balance of sale consideration within a period of three months i.e. on or before 8-10-1979 after getting the land measured. It is also an admitted fact that the defendant issued a notice under Ex.B1 on 25-7-1981 to the husband of the plaintiff informing him that he agreed to sell the said property as he was in dire need of money and as per the undertaking given by him to obtain the sale deed without any delay, but he is unnecessarily prolonging the matter without completing the sale transaction by paying balance of sale consideration, whenever the defendant happened to meet him and demanded he was informed that he is trying to sell the property to others. In view of sale agreement he is

not in a position to dispose of the suit property for his needs and accordingly called upon the plaintiff to pay the interest on the unpaid purchased money at the rate of 18% per annum from the due date till the date of obtaining sale deed without any further postponing, and obtain sale deed within one week from the date of receipt of notice failing to do so agreement stood cancelled and earnest money should be forfeited. The plaintiff's husband received the said notice but the same has not been replied stating that it is the responsibility of the defendant to get the land measured and fix the boundaries and so far the amount has not been paid.

11. Learned Counsel for the respondent/plaintiff tried to justify in not issuing reply to the notice-Ex.B1 contending that notice has not been issued to the plaintiff as such no reply was given. But the plaintiff in her evidence stated that herself and her husband participated in the negotiations and no measurements were taken at that time, extent was noted approximately and did not measure the land in their presence, plaintiff and her husband demanded the defendant to measure the site within three months and execute the sale deed, and when they used to visit the site there is a septic tank which was not there previously. At the time of Ex.A1, they are residing in Yellavari Street, Jagannaikpur, which is of their own house. The vacant site is about one or two furlongs to their house. In the cross-examination she admitted that herself and her husband participated in the negotiations and Ex.A1 was written in the house of M. Somayajulu which was one month after the negotiations and they noticed septic tank in the site agreed to be sold at a distance of 15 yards to the Sandhu (lane) to the defendant's house, he will not have any right in the Sandhu (lane), after the agreement they have asked the defendant to remove the tank. Subsequently also she visited the site and insisted the defendant to remove the tank till the suit is filed. But the defendant did not remove the said tank and she is always ready and willing with the balance of sale consideration and admitted that she has not issued any notice calling upon him to remove the septic tank and execute the sale deed after getting the land measured but her husband asked the defendant directly. In the chief, she stated that defendant did not inform her husband when he got the construction of septic tank in the said land and they asked to remove Item No. 2 of the plaint schedule. She denied the suggestion that the tank was constructed in the site detained by the defendant which was not agreed to be sold.

12. The husband of the plaintiff who examined as P.W.2 stated in the chief examination that by the time of agreement -Ex.A1 there was no construction in the suit site, but two months after Ex.A1 himself and his wife went to the suit land and demanded the defendant to get arrangement to measure the land for execution of the registered sale deed. He also stated that money is ready and admitted about defendant giving notice to him two years after Ex.A1. After receiving the notice he approached the defendant and defendant promised to remove the septic tank and register the sale deed but he did not execute the sale deed. Therefore, P.W.1 got issued suit notice-Ex.A2 demanding for execution of the sale deed and denied the suggestion that the septic tank was in existence on

the date of the agreement. In the cross-examination he stated that after 11/2 months they noticed septic tank was constructed in the suit site without their knowledge and they have protested and demanded to remove the same. Defendant promised to remove the tank but he did not remove the same and denied the suggestion that he agreed to purchase under Ex.A1 in order to sell the site for higher rate and he admitted that he has not given any reply to the notice given by the defendant.

13. The Commissioner who examined as P.W.3 filed a report-Ex.C1. As per the said report the septic latrines are in the defendant's house connected to the septic tank through a pipe outside. The distance between the defendant's wall and the septic tank is only 2" and on the slab of the septic tank which is depth of 1/2 cm it is mentioned as "1978" under a square line and no work memo was given by the plaintiff to measure the land available excluding the septic tank.

14. Defendant in his evidence stated that he obtained permission from the Municipality for effecting repairs under Ex.B3 and he made construction in the year 1978 itself and septic tank was constructed on the southern side beyond the wall adjoining the latrines. There is a lane on the southern side of the defendant's house to reach the backyard. The vacant site of his backyard will be of about six hundred square yards, which is 3 feet lower than his house in which there are coconut, palm and other trees and out of which he offered to sell 500 square yards at the rate of Rs. 48/- per square yard to P.W.2; he never asked by P.W.2 to measure the land which will not take more than one or 11/2 hours. No suggestion was made to D.W.1 that the land agreed to be sold is less than 500 square yards and that is the reason it is approximately mentioned as 500 square yards nor any suggestion that the vacant site in the backyard is less than 600 square yards as stated by D.W.1. Till he receives the suit notice-Ex.A2 he was not aware that Ex.A1 agreement was obtained in the name of P.W.1. In the cross-examination it is stated by him that permission was given on 7-10-1978 and he completed the construction by the end of December, 1978 and also denied the suggestion he has evaded to measure the suit land when demanded by P.W.2 and also about P.W.2 met him after Ex.B1 suit notice. He claims the interest under Ex.B1 as he has to pay interest to his creditors and he was ready to execute sale deed if the interest was paid to him.

15. D.W.2 who is said to have been mediated the sale transaction stated that septic tank was in existence on the date of Ex.A1 and denied the suggestion that septic tank was not in existence by the date of Ex.A1.

16. D.W.4 who owns a shop stated that his shop is situated in the house of defendant since 25 or 30 years. Originally the house belonged to Chekka people and later it was purchased by D.W.1 in the year 1978. After purchase D.W.1 converted the tiled back portion of the house into terraced roof and also constructed septic tank and bath rooms within two months after purchase of the property and got into the house.

In Re Point No. 1:

17. Having regard to the fact that the defendant got issued legal notice under Ex.B1 calling upon the husband of the plaintiff to obtain the registered sale deed within one week by paying balance of sale consideration, in the absence of the same, the agreement will be cancelled. Plaintiff-P.W.1 having admitted that herself and her husband participated in the negotiations and they have noticed construction of septic tank and demanded the defendant to remove the same but he postponed the same, what prevented the plaintiff in replying Ex.B1 notice, expressing her willingness to execute the sale deed after due measurement and fixing boundaries pointing out the failure on the part of defendant to get the land measured is not forth coming. The very fact that in Ex.A2 suit notice except stating that plaintiff's husband met the defendant and asked the defendant to get the septic tank removed from the joint site for which the defendant agreed, there is no whisper about notice to Ex.B1 issued by the defendant which clearly probablises that plaintiff was not ready and willing to pay the balance of sale consideration as per the terms and conditions of the agreement within the stipulated period of three months or to get the suit land measured and obtain sale deed after paying the sale consideration for the actual extent arrived on such measurement. When the defendant called upon the plaintiff's husband to obtain sale deed by making time is the essence of the contract, plaintiff has not even expressed her willingness to obtain sale deed till suit notice is issued with the plea that the sale deed could not be obtained for the reason that the septic tank was constructed in the land agreed to be sold, unless the same is removed and land is measured for obtaining sale deed.

18. Learned Counsel for the respondent/ plaintiff by placing reliance on the judgment of this Court in T. Venkata Subrahmanyam v. Viswanadharaju (supra), would contend that by mere issuing notice under Ex.B1 defendant cannot make time as essence of the contract and having not performed his part of the contract, namely, measuring the suit land and fixing the boundaries he cannot terminate the contract. Even otherwise notice making time as the essence of the contract does not automatically put an end of the contract unless the notice as contemplated u/s 64 of the Contract Act is issued.

19. I do not see any force in the submission made by the learned Counsel for the respondent/plaintiff Since notice under Ex.B1 is a composite notice making the time as not only essence of the contract but failure to perform the contract agreement stands cancelled. Considering the notice issued in the above case this Court held that notice making time as the essence of the contract does not automatically put an end to the contract. For rescission of voidable contract notice u/s 64 is essential, but the same is not the case on hand. The pith and substance of the notice issued, on the contention if considered, it makes time as not only the essence of the contract, failure to do so further consequences were also indicated which result in put and end to the contract.

20. A Division Bench of this Court in P. Lazarus v. Johnson Edward AIR 1976 AP

243, categorically held that the wrongful repudiation of the contract by the defendant did not absolve the plaintiff from his duty of performing his part of the contract. The plaintiff had to discharge all the debts as stipulated and had to satisfy the Court that he had performed his part of the contract or that he was effectively prevented by the defendant from doing so even though he was ready and willing to perform the contract.

21. The agreement only stipulates payment of balance of sale consideration for the actual extent of land after it is being measured. If that be the case, it is implied that such measurement will be taken in the presence of both the parties to note the actual extent, as referred above. When the defendant specifically stated out of 600 square yards of his back yard available he is agreed to sell 500 square yards after retaining the balance area, plaintiff has not made any attempt till issuance of suit notice to get the land measured in the presence of defendant or demanded the defendant to fix the boundaries as undertaken and they are ready to participate on the day fixed for such measurement, hence the defendant alone cannot be faulted for not measuring the suit land or arriving the actual extent available. It is the responsibility of both the parties to get the suit land measured and pay the balance of sale consideration for the extent of land as per the measurement and fixing the boundaries on such measurement, more so, atleast when the defendant called upon to pay the balance of sale consideration under Ex.B1. In view of the same, it is for the plaintiff to express her ready and willingness to participate to have the schedule land measured or pay the balance of sale consideration for the extent of land available. In view of the same, Point No. 1 is accordingly answered in favour of the defendant.

In Re Point No. 2:

22. In the agreement of sale-Ex.A1 it is clearly mentioned in Item 2 of schedule that there is a joint lane. After mentioning the boundaries, which is also measured and reflected for the use and enjoyment. It is clearly stated on the West side: property agreed to be sold 3 feet; on the North side is property owned by the defendant in between the property, namely 48 feet length. In fact, in the suit notice-Ex.A2 it is clearly stated that it is a joint site; the defendant constructed septic tank for his newly constructed latrines, which were not there at the time of agreement and the plaintiff and her husband met the defendant and called upon him to get the septic tank removed from the joint site, in the cross-examination of P.W.1 admitted that Item No. 2 of schedule is only a passage and the rain water from the western side passes towards east from Item 2 of the lane, but stated that the tank was constructed in the land agreed to be sold which is at a distance of 15 yards to the Sandhu to the house of the defendant. Whereas the husband of the plaintiff stated that 2 months after the agreement under Ex.A1 when they visited the suit site and demanded to get arrange for measurement for registration of the sale deed, they found there is a change in the site and septic tank was constructed in the western side of second item in the schedule, and in the cross-examination it is stated that after 11/2

months they have noticed septic tank constructed without their knowledge. The evidence is contrary to the suit notice Ex.A2.

23. In view of the same, the finding arrived at by the Court below that septic tank was constructed in the land agreed to be sold and there is no joint lane in between the house of the defendant and the land agreed to be sold is contrary to the pleadings and agreement. When the defendant categorically establish that septic tank was constructed in the year 1978 at the time of remodelling of the house the lower Court simply brushed aside the evidence adduced by the defendant and accepted the evidence of the plaintiff who is not at all speaking truth which is evident from the suit notice and the evidence adduced in the Court and their evidence is not trust worthy. Point No. 2 is accordingly answered.

In Re Point No. 3:

24. As per the suit agreement plaintiff has to pay the balance of sale consideration within three months and get the sale deed registered after arriving the actual land available to obtain the sale deed. Admittedly when the land is back yard where there are number of trees and rain water passes through the lane and when it is specifically agreed that the lane will be kept as Sandhu in between the plaintiff and defendant after the sale deed, what prevented the plaintiff in issuing a notice to get the land measured before the suit notice is not forthcoming, when the defendant issued a notice to the husband of the plaintiff making the time as essence of the contract and failing to do so agreement shall stand cancelled. It is also admitted that such notice has been received by P.W.2. Both P.Ws.2 and 3 stated in their evidence that two months later to the agreement of sale the husband of the plaintiff asked the defendant to remove the septic tank, which was said to have been constructed in the land agreed to be sold, and execute the sale deed. If that be the case, what prevented the plaintiff in issuing a notice to the defendant to get the suit land measured after excluding the joint Sandhu and demand to execute the sale deed is not explained particularly when the defendant issued notice Ex.B1. It is also not known what prevented the plaintiff to reply to such notice calling upon him to measure the suit schedule land and fix up the boundaries. For the first time in the suit notice it is stated that the plaintiff's husband met the defendant and asked to remove the septic tank from the joint site and he agreed for the same itself improbably the stand taken by the plaintiff that the septic tank was constructed in the land agreed to be sold and demanded to remove the septic tank and measure the suit land to obtain sale deed amounts to repudiation of contract and invented as a ruse for their not performing their part of the contract, namely, payment of balance of sale consideration within three months and calling upon the defendant to participate in measuring the suit land. In view of the same, Point No. 3 is answered in favour of the defendant.

In Re Point No. 4:

25. It is well settled that grant of relief for specific performance is not only

discretionary but also equitable relief. The same has to be exercised judicially and according to the principles laid down in that behalf and such exercise should not be arbitrary or whimsical. Merely because it is lawful to grant relief, party cannot claim specific performance as a matter of right. It is also admitted by the plaintiff in her evidence in the cross-examination that defendant agreed to sell the suit property as he was in need of money, whereas the defendant in the notice under Ex.B1 clearly stated that he was obliged to sell the property at that time as he was in dire need of money and on the assurance that the sale transaction will be completed within a period of three months without there being any delay. Failure to pay the balance of sale consideration and obtain the sale deed causing immense loss to the defendant for the delay caused and demanded to pay the amount agreed to be sold with interest at the rate of 18% per annum within one week and obtain the sale deed. In spite of the same, plaintiff has not evinced any interest to obtain the sale deed expressing her willingness to pay the balance of sale consideration even assuming that the defendant is under obligation to measure the suit land and fix up the boundaries, plaintiff could have informed the same to the defendant that they are willing to obtain the sale deed after measuring the suit land. But silence of the plaintiff in not replying to the notice, and suppressing of receipt of Ex.B1 notice in the suit notice-Ex.A1 clearly indicates that the plea taken by the plaintiff that since the defendant failed to get the suit land measured and fix up the boundaries they have not paid the amount is only a ruse to cover up laches on her part. In view of the same, plaintiff is not entitled to any discretionary relief. Since the relief for specific performance is not only discretionary but also equitable, plaintiff cannot have unfair advantage over the defendant for the reason, it is common phenomena that value of the urban properties have substantially increased every year particularly prices at which offered in the year 1978 have enormously increased. Point No. 4 is answered accordingly in favour of defendant.

Conclusion:

26. In view of answering Point Nos.1 to 4 in favour of defendant, plaintiff is only entitled to refund of earnest money paid with interest at the rate of 12% per annum apart from balance of sale consideration deposited pursuant to the decree granted by the lower Court and the interest accrued thereon. As per the information from the lower Court plaintiff has deposited an amount of Rs. 31,550/- on 12-1-1988 which was kept in fixed deposit which is now matured to Rs. 1,46,755/- and she is entitled to withdraw the same or any further interest accrued on it.

27. In the result, appeal is allowed and decree of the lower Court for specific performance is modified to that of refund of earnest money with interest at the rate of 12% per annum till the date of payment apart from balance of sale consideration deposited, and parties are directed to bear their own costs through out.