

(1980) 12 BOM CK 0012

In the Bombay High Court

Case No : Letters Patent Appeal No. 44 of 1976 in First Appeal No. 172 of 1974

Association of Commerce House Block Owners Ltd.

APPELLANT

Vs

Vishandas Samaldas and Others

RESPONDENT

Date of Decision : 08-12-1980

Acts Referred:

Contract Act, 1872 — Section 56
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 4, 7, 7(1)
Registration Act, 1908 — Section 23, 24, 25, 26, 28

Citation : (1981) 83 BOMLR 339

Hon'ble Judges : R.S. Bhonsale, J; M.N. Chandurkar, J

Bench : Division Bench

Advocate : Arvind S. Bobde, -General, Mohini N. Mirchandani and N.H. Mirchandani, instructed by Eastley Lam and Co, for the Appellant; D.S. Parikh and Sheela S. Balsara, for the Respondent

Final Decision : Allowed

Judgement

M.N. Chandurkar, J.—This Letters Patent appeal filed by defendant No. 1 arises out of a suit for specific performance of an agreement dated 31st October, 1964 in respect of certain property, the identity of which is in dispute, entered into by original defendant No. 1 in favour of the plaintiff who is respondent No. 1 in this appeal. The suit was decreed by the City Civil Court and that decree has been confirmed by a learned Single Judge of this Court while dismissing an appeal filed by the present appellant who was defendant No. 2 in the suit.

2. Most of the material facts relating to the building in question are not now in dispute. The present appellant, which is a limited company under the Indian Companies Act, described itself as the Association of the Commerce House Block Owner Ltd. "Commerce House" is the building in question, which has godowns, basement, shops on the ground floor and office premises on the first to the sixth floor. The Commerce House was constructed by defendant No. 1, who is the promoter, and the construction was completed finally in 1961, though most of

the part of the construction was completed in 1959. Prior to the owners of the Blocks in the Commerce house constituting themselves into the appellant-company, they functioned as Association of Block Owners formed in the year 1959 and were known as the Commerce House Owners, Association to whom the possession and management of the building was handed over by defendant No. 1. The Association continued to be in possession till 31st December, 1964 and the management came into the hands of the present company with effect from 1st of January, 1965. Admittedly since then, the appellant-company has been in management. The ownership of the building was transferred in favour of the appellant by a regular transfer deed dated 11th March, 1967. The completion certificate was issued by the Corporation on 14th January, 1963. At this stage, it may be mentioned that the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to the "Ownership Flats Act") came into force on 10th February, 1964.

3. The plaintiff-respondent No. 1, who was admittedly in the employment of defendant No. 1, promoter and, on his own admission, was attending to the matters of defendants No. 1 in connection with the Municipal Corporation and other legal matters, claimed to have entered into an agreement to purchase premises which were described in the agreement (Ex. A) as "Office No. 516 on the 5th floor of the said building including the open terrace facing Rope Walk Lane." The consideration for the sale was to be Rs. 10,000/- and on the date of the agreement Rs. 5000/- were shown to have been paid as earnest money and the balance of Rs. 5000/- was agreed to be paid within six months from the date of the agreement is signed by the plaintiff and by defendant No. 1 who is the son of one Ishwardas Bhatia, who is examined in this case as a witness for defendant No. 1. According to the plaintiff, on the day on which he had entered into this agreement, he was delivered possession of what admittedly was on open terrace. It was the case of the plaintiff-respondent No. 1, that the present appellant by letter dated 15th February, 1965 had alleged that there was no such agreement as contended by the plaintiff and that there were no premises bearing room No. 516 on the fifth floor in the Commerce House at all and that the alleged agreement if any, was sham and bogus and incapable of the creating any interest, right of claim in favour of the plaintiff. According to the plaintiff, after he had addressed a letter to the Chairman of the appellant-company intimating to him about the agreement entered into between the plaintiff and defendant No. 1, the Chairman of the appellant-company informed the father of defendant No. 1 about the alleged agreement on which the father of defendant No. 1, promised to look into the matter and he latter informed the appellant by letter dated 17th February, 1965 that the plaintiff had obtained the said agreement on a representation that he had good relations with the Chairman and the Directors of the appellant-company and that some Directors had assured the plaintiff that the appellant would have no objection to the construction of a room which was referred to as room No. 516 in the said agreement on the terrace on the fifth

floor and relying on such assurances and representations, the said agreement was entered into. The plaintiff alleged that the said agreement was cancelled by defendant No. 1 by the letter dated 30th March, 1965. That was how the plaintiff filed a suit in the Bombay City Civil Court praying for a declaration that the said agreement was valid and subsisting and for specific performance of the said agreement against defendant No. 1 and further for recovery of vacant and peaceful possession of the said premises from the present appellant or defendant No. 1 or either of them. In the alternative, the plaintiff claimed refund of the earnest money of Rs. 5000/- with interest.

4. The plaint shows that the case sought to be made out by the plaintiff in the plaint was that he had agreed to purchase open space bearing No. 516 and not any office premises as described in the agreement. The dimensions of the said open space which was the terrace were given as 56" x 14" situated between office rooms Nos. 516 and 522 on the fifth floor and bounded by a parapet wall towards Rope Walk Lane towards West and a full wall up to coiling abutting on the passage in the East with an opening on the northern side for putting up a door. The immediate cause for the suit, according to the plaintiff, was that defendant No. 1, had put up a door in the opening on the northern side and the plaintiff had put his own lock which, however, he found removed on or about 17th February, 1965 after the Chairman of the appellant-company had replied to the plaintiff's letter dated 6th February, 1965. That is how the claim that the plaintiff was wrongfully dispossessed was made.

5. The suit was mainly contested by the present appellant on the ground that there did not exist any room No. 516 or office premises bearing No. 516 in the building Commerce House. The appellant's case was that the open terrace was never numbered as 516 and that the alleged agreement was sham and colourable document brought about collusively to deprive the appellant of its right over the said terrace and was not binding on the appellant. The appellant's case was that the F.S.I. had been fully utilised and under the rules and regulations of the Bombay Municipal Corporation, the said terrace had to be left open. The jurisdiction of the City Civil Court was also challenged as, according to the appellant, the value of the subject-matter was beyond the pecuniary jurisdiction of the City Civil Court. In addition to the plea of the agreement being sham and bogus, the agreement was alleged to be in contravention of the provisions of sections 4 and 7 of the Ownership Flats Act. The appellant had denied that defendant No. 1, had put up any door in the side wall on the northern side. According to the appellant, since the year 1960-61, there was a barricade of 9" in height running from south to north between office premises Nos. 51 and 522 abutting on the passage, but when it was found that the rain water flowed over this barricade, a 3" high wall over the beam of the fourth floor from the south end to the north end with no opening left was constructed in 1964. It was also alleged that the said 3" high wall was further raised to the beam of the sixth floor between 20th January, 1965 and 6th February, 1965 and it was at that time that the door in the northern end of the wall was fixed and

locked by the appellant.

6. Defendant No. 1 in his written statement also denied that there was any office No. 516 on the fifth floor. He denied that the open space was No. 516. He also denied that he had agreed to sell and the plaintiff had agreed to purchase open space alleged to be No. 516. The subject-matter of the alleged agreement was stated to be neither certain nor definite but vague and the agreement was, therefore, alleged to be void for uncertainty. The agreement was also alleged to be void on the ground of non-existence of the alleged premises. Defendant No. 1 had alleged that the agreement was got executed by the plaintiff on a misrepresentation that he would get the consent of the Directors of the appellant and, therefore, according to defendant No. 1, he was entitled to cancel the agreement which he did and tendered the sum of Rs. 5000/- to the plaintiff which he declined to accept wrongfully. Defendant No. 1 supported defendant No. 2 appellant when he had taken the plea that the door was provided by the appellant-company who had put up its lock.

7. The trial Court negatived the challenge to its jurisdiction and held that the suit was maintainable before it. With regard to the contention that the agreement was void because it was not registered as required by section 4 of the Ownership Flats Act, the trial Court held that section 49 of the Indian Registration Act could not be invoked and the agreement could not be said to be null and void. With regard to the issues relating to the agreement being void on the ground of uncertainty and non-existence of the subject-matter, the trial Court held that what was intended to be given to the plaintiff was merely the terrace and it was the plaintiff who was to construct on that terrace a portion which was to be numbered as 516. Thus, according to the trial Court, the agreement could not be said to be void on the ground of uncertainty or non-existence of the subject-matter. The trial Court further held that the Ownership Flats Act was not retrospective and section 7 of the said Act had, therefore, no application. Even otherwise, according to the trial Court, section 7 was not attracted because what was agreed to be sold by defendant No. 1 was only open terrace and there was no question of defendant No. 1 putting up any structure on the terrace. The trial Court found that since the building was constructed and the flats and the premises were sold much prior to the coming into force of the Flats Ownership Act, if at all defendant No. 2 wanted to establish that there was some kind of restriction on defendant No. 1 in dealing with the open terrace, that could be done only by a specific agreement between defendant No. 1 and defendant No. 2, which was not the case before the Court. On the issue of cancellation of the agreement, the Court found that defendant No. 1 could not avoid the contract on the ground misrepresentation because, according to the trial Court, defendant No. 1's father had admitted that he had agreed to enter into the agreement because the plaintiff was in his service and if he was going to get say benefit, he would not come in his way. The trial Court, however, negatived the plaintiff's claim that he was placed in possession of the terrace in part performance of the agreement dated 31st October, 1964. It negatived the claim of the appellant that

the transaction was sham and bogus. The trial Court found that it was not necessary for defendant No. 1 to obtain the consent of the present appellant for transferring the terrace to the plaintiff. The trial Court did not rule out the possibility of the plaintiff as also of defendant No. 1 thinking that in course of time, the plaintiff would also be able to build a small structure on the terrace such as other office owners had done. The plaintiff was thus hold entitled to a decree for specific performance and he was directed to deposit the balance of the purchase price of Rs. 5000/- the agreement being held to be binding on defendant No. 2. The decree further directed that the share money and other charges payable to the appellant should be informed to the plaintiff's Advocate within four weeks from the date of the judgment.

8. The appeal filed by the appellant against the judgment and decree of the trial Court was heard by a learned Single Judge of this Court and the learned Judge found that issues which were framed on the pleadings of the plaintiff and defendant No. 1 become conclusive because defendant No. 1 had not filed any appeal and the present appellant could not challenge the findings on those issues in the appeal filed by it. The learned Judge restricted the scope of the appeal only to those issues which were raised between the plaintiff and the appellant-second defendant. The judgment of the learned Judge shows that only four contentions were raised before him namely :

(1) that the trial Court had no jurisdiction to try the suit as the value of the subject-matter of the suit was over Rs. 25,000/-

(2) that the agreement being in contravention of the provisions of the Maharashtra Ownership Flats Act was illegal and not bind on it;

(3) the said agreement being not genuine and being bogus and collusive was not binding on it; and lastly

(4) that the plaintiff was not entitled to specific performance of the agreement.

9. The learned Judge upheld the finding of the trial Court on the issue of jurisdiction and the correctness of that finding is not now challenged in this appeal.

10. The learned Judge confirmed the view of the trial Court that section 7 of the Ownership Flats Act was not attracted because the Act was not retrospective and even otherwise, according to the learned Judge, the agreement itself did not speak of any construction or any intended construction against or in addition to the sanctioned municipal plan so as to contravene the provisions of the Ownership Flats Act. The learned Judge also negatived the contention that the agreement was sham and bogus. He referred to the three grounds on which the agreement was alleged to be sham and bogus, namely; (1) that the plaintiff was an employee of defendant No. 1; (2) that the payment of Rs. 5000/- was not genuine and inadequate; and (3) that the premises could not have been sold under the municipal by-laws. Certain other circumstances such as non-payment

of the share amount and the ground rent and maintenance charges by the plaintiff were also considered. These, according to the learned Judge did not affect the genuineness of the agreement. The learned Judge found that there was no prohibition in law for transferring or selling the terrace to the plaintiff, nor was any contractual prohibition brought to the notice of the learned Judge, according to him. It appears that it was contended before the learned Judge that the plaintiff cannot make out a case for specific performance different from the one found in the agreement. This contention was obviously with reference to the fact that the premises agreed to be sold were office No. 516, while, according to the plaintiff, in the suit, he claimed a right to purchase the open terrace. The learned Judge found that it was permissible for the trial Court to consider the evidence as to what was intended to be sold because, according to the learned Judge, there was in fact no office No. 516 on the fifth floor when the agreement was made. The learned Judge took the view that it was permissible for the Court to determine by extrinsic evidence, such as acts done under the agreement, the true meaning of the agreement and the intention of the parties. Relying on the correspondence between the parties, which undoubtedly was subsequent to the agreement, the learned Judge found that the agreement was in respect of open terrace and not the office premises. On the view which the learned Judge took, he dismissed the appeal. This decree is now challenged by the appellant in this appeal.

11. The learned Advocate-General appearing on behalf of the appellant has at the outset proceeded to argue the appeal on the footing that the agreement was not a sham or a bogus agreement for the purposes of the contentions raised by the appellant based on the provisions of the Ownership Flats Act, though it may be pointed out that the question with regard to the sham and bogus nature of the transaction was also later argued. The learned Advocate-General contended that the correspondence between the parties clearly referred to a sale of room No. 516 or office No. 516 and according to the learned Advocate-General, in view of the fact that definition of "promoter" under the Act is modified in respect of buildings which are complete on the date on which the Act comes into force, the bar u/s 7 will be attracted in the present case.

11-A. Mr. Parikh appearing on behalf of the plaintiff has drawn our attention to the agreement (Ex. A) and according to the learned Counsel, it is no body's case that under the agreement any construction was to be made. It was pointed out by the learned Counsel that the agreement refers to construction of a building and it does not refer to any new construction in addition to what is already constructed. The learned Counsel pointed out that it was common ground between the plaintiff and defendant No. 1 that the agreement was in respect of open space only. Consequently, according to the learned Counsel since no construction was intended by the promoter under the agreement, the bar of section 7 of the Ownership Flats Act would not be attracted in the present case.

12. In order to decide whether the provisions of section 7 of the Ownership Flats

Act would be attracted, it is first necessary to consider the scope of the provisions of section 7 and then consider the rival contentions between the parties as to whether what is agreed to sold under the agreement was an office room or only an open terrace.

13. Now, as already, pointed out, the Ownership Flats Act came into force on 10th February, 1964. Admittedly the Commerce House in question was a completed construction in the year 1961, that is, long before the Act had come into force. At the same time, the agreement (Ex. A) the specific performance of which is now sought by the plaintiff, was entered into after the Act had come into force. The preamble of the Ownership Flats Act shows that the legislation became necessary because of the abuse and malpractices indulged in and difficulties faced in the promotion of construction and the sale and management and transfer of flats taken on ownership basis. The Legislature found it necessary to make provision during the period of shortage of housing "for the regulation of the promotion of the construction sale and management and transfer of flats taken on ownership basis in the State of Maharashtra". There can hardly be any dispute that the Act was intended to regulate the activities of a promoter who has been defined in Clause 2(c) of the Act as meaning a person who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of person, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both. Therefore, a builder and a seller of flats, whether he is the same person or they are different persons, are included in the definition of a promoter in section 2(c) of the Ownership Flats Act.

14. Section 3 of the Ownership Flats Act prescribes general liabilities of the promoter and these provisions will show that they are intended to safeguard the interest of the potential flat owners in all its aspects such as the title to the land, any encumbrance on the land on which the building is to be constructed, the exact nature of the accommodation which the potential buyer is to buy and the quality of the construction such as the fixtures, fitting and amenities which are intended to be provided. The promoter has to specify the date by which possession of the flat is to be handed over. As a matter of fact all the necessary details, disputes with respect to which normally arise in respect of property, have to be disclosed by the promoter.

15. Section 4, which we shall discuss in detail later, requires the promoter to enter into a written agreement before any payment is accepted and the agreement has to be registered.

16. Section 5 requires a promoter to maintain separate accounts of sums taken as advance or deposit and to be trustee therefore and disburse them for purposes for which they are given.

17. u/s 6 the responsibility for payment of outgoings till the property is

transferred is placed on the promoter.

18. Then comes section 7(1) with which alone we are concerned. It reads as follows :--

7(1) "After the plans and specifications of the buildings, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make---

(i) any alterations in the structure described therein in respect of the fat of flats which are agreed to be taken, without the previous consent of that person or

(ii) make any other alterations in the structure of the building, or construct any additional structures, without the previous consent of all the persons who have agreed to take the flats".

Under section 7 there is a prohibition against the promoter from making any alterations in the structures described in the plans and specifications of the building sanctioned by the local authority. This cannot be done without the previous consent of the person who takes one or mere flats. Sub-clause (i) thus prohibits the promoter from making any alteration in the flat once the flat owner has agreed to purchase that flat. Sub-clause (ii) deals with the alteration in the structure of the building or construction of any additional structures and section 7 has the effect of prohibiting the promoter from constructing any additional structures or alternating the structures of the building unless previous consent of all the persons who have agreed to take the flats is taken.

19. Normally a law made by the legislature operates prospectively but it is also well established that when a law operates on some thing which exists on the date of which the Act has come into force, such operation cannot be termed as retrospective operation of the law. It operates in the future. Apart from this, though normally the Ownership Flats Act is intended to regulate the conduct of promoters after the Act has come into force and the provisions show that it will positively apply in respect of buildings which the promoters are to put up after the Act has come into force, there is clear indication given in section 17 of the Act that the Act would also operate in respect of buildings which have been constructed and are complete on the date on which the Act has come into force. Section 17 of the Act in so far as is material reads as follow :---

17. "As respect flats which on the commencements of this Act have already been constructed, or converted, the provisions of sections 2, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16 apply with the following modifications, that is to say---

(a) in section 2, in Clause (c), the words "means a person who constructs" shall be read as if the words "means a person who has constructed" had been substituted;

(b)

(c)

(d)

(e)

The provisions of section 17 will show that except the provisions of section 3, 4, 5, and 7, the other provisions have been expressly mentioned as being applicable in respect of flats which have already been constructed or converted. The reason is obvious. Section 3 deals with the liability of a person who intends to construct or constructs block. It would, therefore, be applicable to a case where a block or building of flats is to be constructed after the coming into force of the Act. The specific mention of section 3 in section 17 would be necessary because even if an additional construction is to be made in the case of an existing block or a building of flats, the provisions of section 3 would be automatically attracted because such a promoter would specifically by the description in section 3 be one who intends to construct a block or a flat as contemplated by section 2(a). Clause (c) of section 2 defines the phrase "to construct a block or building of flats or apartments", a phrase which is to be found in the definition of a promoter in section 2(c) and this is said to include a conversion of a building or part thereof into flats or apartments. Therefore, wherever a building standing on the date of the coming into force of the Act new flats or apartments are to be constructed section 3 will be attracted. Consequently section 4 will also be attracted. The promoter will also have to comply with section 5. Now, when we come to section 7, the modification in the definition of a promoter in the case of flats which have already been constructed because relevant. The definition of "promoter" as modified by section 17 Clause (a) will mean that a person who has constructed a block or building of flats for the purpose of selling some or all of them to other persons or to the person specified therein will be described as a promoter. If the amended definition of promoter is read into the provisions of section 7, then it is obvious that even in respect of a building which is completed, if a person has agreed to take one or more flats after the coming into force of the Act, the promoter, that is, the person who has constructed the building will have the liabilities or the obligations specified in sub-clauses (i) or (ii) of section 7(1) fastened to him. In other words, if there is a building which is fully constructed on the date on which this Act has come into force, the promoter is disabled from making any alterations in the structure in respect of flat or flats which are agreed to be taken by a person or persons without the consent of that person or person. Similarly the promoter that is the person who has constructed the building is disabled from making any other alterations in the structure of the building or from constructing any additional structure without the previous consent of all the persons who have agreed to take the flats. It was this construction of section 7 which the learned Advocate General canvassed when he contended that the alleged agreement between the plaintiff and defendant No. 1 being for the purchase of Office No. 516, defendant No. 1, who was a promoter in view of the modified definition in the Act, was not entitled to make any other alterations or construct any additional structure without the previous consent of all the persons who have agreed to make the

flats, which would mean that defendant No. 1 had to obtain the consent of the appellant defendant No. 2 company.

20. It was obviously with a view to get over the bar of section 7 that the agreement was sought to be constructed and put forth by the plaintiff as one in respect of the sale of an open terrace. The learned Advocate General pointed out that the agreement specifically refers to Office No. 516 on the fifth floor of the said building including the open terrace facing Rope Walk Lane and this, according to him, was also the case of the plaintiff in two letters addressed by him to defendant No. 2. These two letters are dated 6th February, 1965 and 14th June, 1965. The letter dated 6th February, 1965 is addressed by the plaintiffs Counsel to Kishinchand P. Bijlani as Chairman of the appellant company. This notice clearly states that the plaintiff had purchased the office premises from the said Shri Bhatia on ownership basis, more particularly known as Room No. 516, fifth floor, Commerce House 140, Medows Street, Fort, Bombay 1. The said office premises also include an open terrace facing Rope Walk Lane. The letter dated 14th June, 1965 is again a notice given by the plaintiffs Advocate to the appellant in which while describing the premise, of which the plaintiff is the owner as a portion of the building Commerce House, it is described as Office No. 516 on the fifth floor of the said Commerce House Building and which is located between Office Nos. 515 and 522 including an open terrace facing Rope Walk Lane. These two would thus show that even according to the plaintiff, what was agreed to be purchased under the agreement was what was described in the agreement as Office No. 516 including the open terrace facing the Rope Walk Lane. However, admittedly there is no office room bearing No. 516. What is, however, contended on behalf of the plaintiff by Mr. Parikh is that the agreement itself does not refer to any construction and since admittedly on the day of the agreement there was no office room, it would be open to the plaintiff to adduce evidence to show that though the premises are described as Office No. 516, what was intended by the parties was that the open terrace was to be transferred to the plaintiff. The learned Counsel for the plaintiff has contended that it will be open to the plaintiff to refer to the surrounding circumstances in order to show that what was intended by the parties was a transaction in respect of an open terrace.

21. Now, as already pointed out, the agreement is very specific and refers to an office Room No. 516 and the transaction is said to include the transfer of an open terrace. There is some dispute between the parties as to whether the plan, which has been exhibited as Exhibit B, was given by defendant No. 1 to the plaintiff. Exhibit B according to the plaintiff is a plan which forms part of the agreement and is attached to the agreement and was given by defendant No. 1 to the plaintiff, a position which is disputed by defendant No. 1. The plaintiff himself does not appear to be very sure as to what is his case about this plan. He has no doubt stated in the examination in chief that the plan was given to him by defendant No. 1 along with the agreement and further, according to him, when the plan was given to him, the red lines drawn on the plan were in existence. The

red lines on Exhibit B show the area of the open terrace between office premises No. 515 of 522. The plaintiff had, however, to admit that neither in the plaint nor in the correspondence, had he disclosed that defendant No. 1 had given him any plan. It may be pointed out that the plan (Exhibit B) is sought to be used by the plaintiff in order to show that 516 was the number given to the open terrace by defendant No. 1 and that when the argument refers to office Room No. 516, the reference into the area indicated by the figure 516 on the plan (Exhibit B). It was suggested to the plaintiff that this plan was not given to him by defendant No. 1 and that it was only an additional copy of the plan prepared by the plaintiff himself to be annexed to the plaint. The plaintiff admitted that "In plan exhibit B, the block numbers are written by me." He has stated that he wrote the number of the block before the copies were made of Exhibit B, but he did not remember who prepared the copies of the plan. The admission made by the plaintiff that the numbers of the blocks in the plan (Exhibit B) are written by him would clearly indicate that prior to these numbers being written by the plaintiff, there was nothing to indicate which part of the premises of the Commerce House could be identified as having No. 516. It has to be noted that at on stage the plaintiff Counsel himself had informed the trial Court that the plan (Exhibit B) was not given to him by defendant No. 1. A part of the cross-examination of the plaintiff was completed on 23rd January, 1974. When it was continued again on the next day, the plaintiff admitted in cross-examination that before he left the Court on 23rd January, 1974, his Advocate had informed the Court under his instruction that the plan (Exhibit B) was not the plan given to him by defendant and that was only a copy of the plan given to him by defendant No. 1 and that he would produce the other plan. Thus on plaintiff's instructions the Court was informed that Exhibit B was not the plan given by defendant No. 1. This statement, according to the plaintiff, was made by mistake and he denied that the plan (Exhibit B) was not given to him by defendant No. 1. The plaintiff also admitted that Exhibit B does not show that the suit premises as an office and when asked as to how the number 516 was given, he stated that the whole of the area between office Nos. 516 and 522 would be 516. When he was further asked as to who was meant by the words "including the open terrace" he stated that he meant the whole terrace. When the father of defendant No. 1 was examined as a witness, he was asked about the plan and he stated that at the time the agreement was signed, no plan was given to the plaintiff by him. On being shown Exhibit B he stated, "I have not given this plan to the plaintiff. He might have taken it from the office when he was working with me". These statements were made in examination in chief and it does not appear that the matter was pursued further in cross-examination.

22. Exhibit B does not bear signature of any person, either the plaintiff or defendant No. 1. It does not even show as to who had made the plan. On the plaintiff's own showing, the numbers on this plan are put by him. Admittedly, the plaintiff was in the employment of defendant No. 1 and was attending to all legal matters as well as matters connected with Municipal Corporations. It is not,

therefore, improbable that the plan could have come into his possession otherwise than in normal course. The evidence shows that this plan was not a part of the alleged agreement and it cannot, therefore, be used to identify the premise which were now, according to the plaintiff, only open terrace which was to be transferred to defendant No. 1. The plain must, therefore, be left out of consideration.

23. It is at this stage necessary to consider the argument of the learned Counsel for the plaintiff that it was never intended that defendant No. 1 was to construct any structure. Leaving for the moment the question as to whether other evidence could be considered to really appreciate what was meant by the premises described in the agreement, such a construction would be wholly inconsistent with the agreement itself. The agreement on the face of it is an agreement between a builder and another person who claims to be a buyer of certain premises. In such an agreement where the persons to be transferred are described as an office room alone with the adjoining open terrace, it is obvious that if the agreement was intended to be genuine, it could be only in respect of a structure which could be called an office room. The words in the agreement clearly refer to an office room and merely because it now suits the plaintiff and defendant No. 1 both to say that nothing was intended to be constructed by defendant No. 1, that cannot ignore the terms of the agreement with regard to the premises intended to be transferred. It is no doubt true that both the plaintiff and defendant No. 1 have been changing their stands from time to time with regard to the premise. We have referred earlier to the two letter dated 6th February, 1965 and 4th June, 1865 where a positive case is made out by the plaintiff that the agreement is in respect of an office room and the adjoining part of the terrace. The plaintiff has stated that defendant No. 1 was not to construct anything in the suit premises except the door and then he added, "I was to construct". D.W. 1, Ishwardas Bhatia, who was really the person who used to manage the affairs of defendant No. 1 who is his son and in whose hand in the hand written portion on the alleged agreement with regard to the earnest consideration and the time of payment of the balance of the purchase price, has expressly stated that "possession of the premises was to be given to the plaintiff after the construction was put up with the consent of defendant No. 2 and the Municipal Corporation". (para 13) We fail to see what other meaning these words can convey except that the office room was to be constructed by defendant No. 1 and after the construction was complete, the possession was to be given. If according ton the plaintiff he was to construct, then the question of defendant No. 1 giving possession after the construction was put up would not arise at all. D.W. 1 Ishwardas Bhatia has clearly stated that it was he who had negotiated with the plaintiff in respect of the premise which the plaintiff was to take on ownership basis. He has stated that there was no negotiation as such as between a buyer and a seller because the plaintiff was in his office and he had only discussions with him. He has also stated that the plaintiff told him that in the terrace on the fifth floor, there was a possibility constructing six office premises

and the witness Ishwardas had told him that since "we had constructed completely and since there was no further F.S.I. available, it would not be possible for any one to construct that terrace". According to Ishwardas, the plaintiff told him that he would manage with the Municipal Corporation and members of defendant No. 2 and "That is how he induced me to enter into this agreement". Ishwardas has also stated that there are no office premises or premise bearing No. 516 or 518 or 519 or 520 or 521. In cross-examination he has stated that apart from signing the agreement, his son had not taken any part at the time of negotiation in respect of the agreement. Ishwardas has further stated, giving reasons as to why he cancelled the agreement, that it was not possible for him to give possession because possession was already with defendant No. 2 and that it was not possible for any one to put up any structure as possession was with defendant No. 2. The evidence, therefore, show that so far as the construction was concerned, the question of possession being transferred to the plaintiff would have arisen only after the construction was made by defendant No. 1. There is thus no substance in the contention of the plaintiff that it was he who was to construct the office premises.

24. The plaintiff had also admitted that he wanted to buy this space for the purpose of using "that is to say, for storing or even for using it as an office". It is difficult for us to imagine how unless the open terrace was built upon, it could be used as an office. If the agreement is read as it is, it appears to us to be unambiguous and it clearly indicates that what was intended to be purchased was not open space of the terrace but an office room which had to be constructed by defendant No. 1.

25. We must now deal with the contention raised that since at the site there was no construction at all, parties really intended to purchase open space and that to establish this, oral evidence contrary to the terms of the agreement was permissible. This contention found favour with the learned Single Judge who relied on a decision of the Supreme Court in *Abdulla Ahmed Vs. Animendra Kissen Mitter*, , where while dealing with the provisions of section 92 of the Evidence Act, it was held by the Supreme Court that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and it was observed that evidence of Acts done under it is a guide to the intention of the parties in such a case and particularly when Acts are done shortly after the date of the instrument. Now, there can be no doubt about the principle laid down in this decision. One of the prerequisite for considering extrinsic evidence is that there must be a doubt as to the true meaning of a document. In the present case, there was no question of any Acts done under the agreement in question. Notices issued by parties to each other are not Acts done under an agreement. It is only when the parties act according to the terms of the agreement, as they understood it, in implementation of the agreement that it can be said that the parties have acted under the agreement. The later part of the dictum of the Supreme Court, therefore, is not of any assistance so far as the present case is concerned.

26. Mr. Parikh appearing on behalf of the plaintiff has extensively quoted before us from Halsbury's Laws of England and has referred us to certain decisions. But before we go to these authorities, it is necessary to point out that Mr. Parikh has heavily relied on proviso 6 to section 92 of the Evidence Act and on section 95 of the Evidence Act. u/s 92 of the Evidence Act when the terms of any contract, grant or other disposition of property are reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to any such document for the purpose of contradicting, varying, adding to or subtracting from its terms. Proviso 6 to section 92 provides that any fact may be proved which shows in what manner the language of a document is related to existing facts. Now, it is well established that unless there is any doubt about the meaning of the words used in the document, oral evidence would not be permissible. The sixth proviso to section 92 has to be read to be read along with the provisions of section 94 and 95 of the Evidence Act. u/s 94 it is clearly provided that when language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. Now, when section 94 refers to the language applying to existing facts, it refers to facts existing at the time of the agreement and merely because on the date of the agreement between a builder and a purchaser, the premises intended to be purchased are not in existence, no doubt is thrown on the language of the document which in the light of the then existing facts was clear and unambiguous. The crucial facts in the instant case are that defendant No. 1, was a builder. Any agreement with a builder, if it is Act in respect of a flat which is exiting would be in respect of a flat which is to be constructed. But merely because a builder agrees to construct a flat or a potential purchaser of a flat agrees to purchase a flat to be constructed, no ambiguity is introduced in the agreement and such a case would, therefore, not fall within section 94 of the Act. Equally inapplicable would be the provisions of section 95 which provides that when language used in a document is plain in itself, but is un-remaining in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. It is difficult for us to appreciate how the language of the agreement in question can be said to be un-remaining in any respect. The document is clear and unambiguous that the agreement is to purchase office premises. Indeed that has been the case of the plaintiff in the two letters dated 6th February 1965 and 14th June, 1965.

27. In Afshar M.M. Tacki Vs. Dharamsey Tricamdas, it was pointed out that while construing a contract the Court is entitled and bound to take into consideration the surrounding circumstances which must have been present to the minds of the parties at the time of catering into the contract, but this rule as to surrounding circumstances cannot be extended to enable a party to prove that when he wrote one thing, he meant and should be understood to mean something totally different. To allow such evidence in a suit other than a suit for rectification would be a plain violation of the Evidence Act. It is no doubt true, as contended by the learned Counsel for the plaintiff on the basis of paragraph 1460

from Halsbury's Laws of England, 4th Edition, Volume 12, that the intention must be gathered from the written instrument read in the light of such extrinsic evidence as is admissible for the purpose of construction and it is the function of the Court to ascertain what the parties meant by the words which they have used. But these observations themselves point out that the extrinsic evidence which can be looked into must be such as is admissible for the purpose of construction of the document and the matter will, therefore, have to be governed by the provisions of sections 92, 94 and 95 of the Evidence Act which, as we have already pointed out, rule out any consideration of extrinsic evidence which can be looked into must be such as is admissible for the purpose of construction of the document and the matter will, therefore, have to be governed by the provisions of section 92, 94 and 95 of the Evidence Act which, as we have already pointed out rule out any consideration of extrinsic evidence in the instant case. Even in Halsbury's Laws of England, it is clearly stated that extrinsic evidence will be admissible only in the case of latent ambiguity which cannot otherwise be resolved. Paragraph 1490 at page 622 reads as follows :---

"The object of interpretation is, as already stated, to ascertain the intention of the parties to the instrument as expressed by the words they have used ; and, since the words are the sole guide to the intention, extrinsic evidence of that intention is not admissible save in the case of latent ambiguity which cannot otherwise be resolved.

Extrinsic evidence is, however, admissible both to ascertain where necessary the meaning of the words used, and to identify the persons or objects to which they are to be applied, for example to connect the language of a deed with the property conveyed, and since the meaning and the application will depend upon the circumstances surrounding the author at the time when the words used, the same principle requires that evidence of such circumstances should be admitted".

The kind of cases of latent ambiguity in order to resolve which oral evidence is admissible are specifically dealt with by section 94 and 95 of the Evidence Act unless a case falls squarely within those provisions, oral evidence will be inadmissible.

28. It was contended by Mr. Parikh that having regard to the meaning of the word "flat" in the Act, the case must be treated as one of inaccurate description in the agreement and, therefore, the agreement must be construed as one in respect of the terrace. A flat has been defined in section 2(a) of the Ownership Flats Act as meaning "a separate and self contained set of premises used or intended to be used for residence, or office, or show room or shop or godown and includes a garage, the premises forming part of a building and include an apartment". It is not the plaintiff's case that the open terrace is an apartment. The inclusive portion of the definition has, therefore, to be left out of consideration. It is, however, difficult for us to appreciate how the definition of a flat which is self contained can even remotely be constructed as taking in an open terrace by itself. We are not dealing with a case of a terrace which is

appurtenant to a flat. What the learned Counsel wants to argue is that the flat contemplated by section 2(a) of the Ownerships Flats Act need not have walls or roofs, a contention which must be rejected on the words of the definition of flat. The definition of flat contemplates premises in the context of their use or intended use. A terrace cannot be used for residence nor for office or as a shown room nor as a shop nor a godown nor as a garage. Indeed the premises contemplated by "flat" obviously refer to a structure which can be used for any of the purpose specified in the definition.

29. The learned Single Judge has observed in paragraph 44 of the judgment that the finding recorded by the trial Court that the agreement was for the while of the open terrace was recorded on the issue which arose on the pleasing between the plaintiff and the defendant No. 1 and defendant No. 1 had not challenged that finding because he had not filed any appeal. The learned Judge holds that the finding is conclusive against defendant No. 2 also and the appellant was not entitled to agitate the correctness of that finding was not challenged by the present appellant in the memo of appeal. The grounds of appeal in the first appeal which have been reproduced in extenso in the judgment under appeal to us to have clearly objected to that finding. Ground No. 9 clearly raised a contention that the trial Court ought to have considered that the case of the plaintiff about the subject matter of the suit was inconsistent inasmuch as in the agreement, the suit premises were described as Office No. 516. Then in ground No. 25, the ground raised is that the trial Court had erred in holding that what was intended to be given to respondent No. 1 plaintiff was the whole of the terrace. Ground No. 28 also raised the same controversy. The observations made by the learned Single Judge that the correctness of the finding that the agreement was in respect of an open terrace was not challenged in the first appeal are not borne out by the record.

30. Now, so far as the right of the appellant to challenge the finding which was given in respect of tan agreement which is now held to b binding on the present appellant is concerned, it is difficult for us to see how the appellant can be prevented from challenging that finding on the ground that defendant No. 1 had not filed any appeal. The appellant was the owner of the property, the property was constructed at the instance of the appellant, the possession was handed over to the appellant, and it could hardly be disputed that if a finding is to bind a party to a suit, that party would be entitled to challenge the finding notwithstanding the fact that defendant No. 1 had not challenged that finding. The present appellant had denied the agreement wholly. It was the case of the plaintiff that the agreement was only in respect of the terrace. The question as to whether the agreement was valid at all and if so, to what property it related was not in issue which arose only between plaintiff and defendant No. 1. It very much arose between the plaintiff and defendant No. 1 2, also and, therefore, the failure of defendant No. 1 to challenge the decision of the trial Court could not prevent defendant No. 2 appellant from challenging that finding.

31. Mr. Parikh for the plaintiff has referred us to the correspondence on which reliance was placed by the learned Single Judge for coming to a finding that the agreement should be constructed as being in respect of the terrace. It consisted of various letters dated 6th February, 1975, 16th February, 1975, 17th February, 1975, 18th February, 1975, 4th March, 1975 and 30th March, 1975. The letter dated 30th March, 1975 is the letter by which the contract is purported to be cancelled by defendant No. 1. Heavy reliance was placed by Mr. Parikh on the letter dated 1st March, 1965 which is addressed by the plaintiffs Advocate to defendant No. 1 in which it was mentioned that defendant No. 1 had sold to the plaintiff "a portion of the said building which consisted of and was numbered by you as office No. 516 on the fifth floor and which is located between office Nos. 515 and 522, including an open space i.e. terrace facing Rope Walk Lane". The learned Counsel wanted to point out that this letter shows that the plaintiff has understood the agreement to be in respect of an open terrace. Now, apart from the fact that as already pointed out, no extrinsic evidence in this case would be admissible because there is no ambiguity whatsoever in the terms of the agreement and, as also pointed out, the correspondence prior to the suit when dispute between the parties arose could be no struck of imagination fall within the term "surrounding circumstances". It is apparent that having once taken the stand in the two letter dated 6th February, 1965 and even the letter dated the 14th June, 1965, the only way we can read the correspondence between the plaintiff and the two defendants is that the plaintiff is trying desperately to convert an agreement which is expressly in respect of an office into one in respect of an open terrace, an effort which is wholly impermissible under the law of evidence.

32. Mr. Parikh has relied on a decision of the Supreme Court in *The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another*, That was a case dealing with the construction of a notification issued under the Electricity Act, 1912, granting a licence to an electrical undertaking. The date of the notification of the grant of the licence was 16th November, 1922. The licence was, however signed by the licenser on 17th November, 1922 and the notification was published in the Gazette of 23rd November, 1922. The licence as for 50 years and one of the clauses of the licence was said that "the date of the notification in the Gazette that the licence has been granted was to be the date of the commencement of the licence". In the notice to purchases the undertaking served by the Government on 8th November, 1971, the date of the expiry of the 50 years, period was specified as 15th November, 1972 obviously because the licence was assumed to have concerned from 16th November, 1922. It appears that it was contended on behalf of the Electric Co. that the date of the commencement of the licence should be taken as 23rd November, 1922 on which date the notification was published and, therefore, the notice of purchase was invalid. In that context the Supreme Court pointed out that when both the parties subsequently say that by the word or phrase which in the context is ambiguous they meant a particular thing, it only supplies a glossary as to the

meaning of the word or phrase and the enquiry is to be as to what the intention of the parties was from the language used. It was then observed as follows :---

"If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible".

The Supreme Court has pointed out in that case that in the process of interpretation of the terms of the contract, the Court can frequently get grant assistant from the interpreting statements made by the parties themselves or from their conduct under it. On facts it was held that in that case that the date of commencement of the licence was 16th November, 1922. Now, when the Supreme Court referred to the "interpreting statement", these observations did not mean that a notice issued by one party to another after the disputes with regard to the contract had already commenced should be taken as giving an indication as to what the parties intended. It was found in that case that on earlier occasion when an amendment to the licence was made the date of the licence was taken as 16th November, 1922 in a Gazette notification by which the amendment was introduced. It was that kind of interpretation of the notification that was intended to be referred in Godhra Electricity Co.'s case as being permissible to be looked into for the purpose of removing the latent ambiguity. This decision will not, therefore, be of any assistance to the plaintiff.

33. Mr. Parikh has also relied on the decision in *Abdulla Ahmed v. Animendra Kissen*, AIR 1952 S.C. 15, which is also relied on by the learned Judge in order to hold that extrinsic evidence was admissible to show that the agreement between the parties was in respect of an open terrace. In *Abdulla Ahmed's* case, the Supreme Court pointed out that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument. We have already pointed out that so far as the terms of the agreement are concerned, there is no doubt at all having regard to the manner in which the premises agreed to be sold are described. We have also pointed out that subsequent correspondence between the parties cannot fall within the description of acts done under the instrument. The decision in *Abdulla Ahmed's* case is, therefore, not of any assistance and, with respect, we may point out that the learned Judge was not justified in relying on that decision.

34. The learned Counsel for the plaintiff cited two other decisions before us. In *Balvant Vishnu v. Mishrilal Shivnarayan*, AIR 1925 Bom 115, the question was whether the contract was a wagering transaction and in that context, this Court held that while construing a contract, the Court should land towards a construction favouring the validity of a contract rather than its illegality. In *Sethurama v. Ramchandra*, AIR 1936 Mad 528, the Madras High Court had observed that in interpreting a document the Court should place itself in the

position of the parties to ascertain in the best way what was the intention of the parties when they entered into the transaction. Both these decisions, in our view are wholly inapplicable to the facts of the present case where we are called upon to construe a contract, the terms of which are expressed clearly and in no ambiguous language and such a contract must be construed on the plain meaning to be given to the words used by the parties.

35. The next argument of the learned Advocate General was based on the provisions of section 4 of the Ownership Flats Act. Section 4 of the Act read as follows :---

"Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum or money as advance payment or deposit, which shall not be more than 20 percent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Indian Registration Act, 1908 and such agreement shall contain the prescribed particulars; and to such agreement there shall be attached such documents or copies thereof, in respect of such matters, as may be prescribed."

The learned Advocate-General contended that in order that an agreement in respect of a purchase of a flat on ownership basis is valid, it is imperative that the agreement should be registered as such registration has been made mandatory by the provisions of section 4. The learned Advocate-General contended that non-compliance with the provisions of section 4 of the Act will make the agreement unenforceable as it will be in breach of section 4. Such an agreement, according to the learned Advocate-General, was not a valid and legal document at all and no claim for specific performance of such an agreement would be maintainable in law. At one stage the learned Advocate-General contended that the effect of providing that the agreement should be registered under the Indian Registration Act was to add one more item to the list of documents specified in section 17 of the Registration Act and, therefore, the provisions of section 49 of the Registration Act will be attracted. Later on, however, the learned Advocate-General did not pursue his argument that to an agreement which is not registered as required by section 4 of the Ownership Flats Act, the provisions of section 49 of the Registration Act would be attracted.

36. Mr. Parikh for the plaintiff has objected that the contention that an agreement which is not registered in compliance with the provisions of section 4 of the Ownership Flats Act is not a valid and legal document at all is being raised for the first time in this Letters-Patent appeal because, according to the learned Counsel, what was urged before the learned Single Judge was that the agreement was inadmissible because of the provisions of section 49 of the Registration Act. Mr. Parikh has invited our attention to paragraph 20 of the judgment of the learned Single Judge where the learned Judge has observed that

the contention that the agreement was inadmissible in evidence by reason of section 49 of the Registration Act was rightly negated by the trial Court and that the Counsel for the second defendant has rightly not pressed the contention at the hearing. Mr. Parikh has relied on these observations of the learned Judge and contended that the contention now raised before us by the learned Advocate-General cannot be allowed to be raised.

37. Now, it is no doubt true that what was argued before the learned Single Judge was that for want of registration as required by section 4 of the Ownership Flats Act, the agreement in question could not be received in evidence as required by section 49 of the Registration Act. It is also no doubt true that Mr. Parikh has pointed out to the proviso to section 49 of the Registration Act which enables an unregistered document to be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act. That question, however, does not now arise because the learned Advocate-General has not pressed his contention based on the provisions of section 49 of the Registration Act and, in our opinion, rightly so because the provisions of section 49 of the Registration Act specifically refer to a document which is required by section 17 of the Act or by any provision of the Transfer of Property Act to be registered and admittedly the requirement in section 4 of the Ownership Flats Act is a requirement independent of the provisions of section 17 of the Registration Act or the provisions of the Transfer of Property Act. It is, however, difficult for us to see how the appellant can be prevented from arguing that the requirement of section 4 of the Ownership Flats Act is a mandatory requirement and that if this mandatory requirement of registration is not complied with, the document cannot be looked at as a valid or a legal document at all. This is a pure question of law based on the construction of section 4 of the Ownership Flats Act. The contentions raised by the learned Advocate-General will, therefore, have to be considered on merits.

38. So far as the merits of the contention are concerned, Mr. Parikh has argued that the Ownership Flats Act does not itself lay down a consequence of non-registration of the agreement registration of which is required by section 4 of the Act. The learned Counsel contended that having regard to the scheme and object of the Ownership Flats Act, it was clear that the provisions in section 4 of that Act were made for the benefit of the purchaser of the flats. It was pointed out that the obligation to have the document registered is on the promoter and the penalty for breach of the provisions of section 4 is also to be levied on the promoter u/s 13 of the Act. The learned Counsel, therefore, contended that since there is no obligation u/s 4 of the Act on the purchaser to have the document registered, the document cannot be treated as void. The learned Counsel further contended that holding the agreement for sale of a flat to be void because it is not registered would defeat the very object of the Act which is to protect the purchaser of flats. It was argued by the learned Counsel that treating the

document as void would really place a premium on the negligence of the promoter and it will be he who will stand to benefit by not getting the agreement registered if it is treated as void. The learned Counsel, therefore, contended that as between the parties, the agreement must be treated as good and binding.

39. A careful reading of the provisions of section 4 of the Ownership Flats Act will show that it begins with a non obstante clause. Section 4 requires the promoter to enter into a written agreement of sale each of the persons who are to take a flat or flats on ownership basis before the promoter accepts any money as advance payment or deposit. By enacting section 4 the Legislature has also restricted the quantum of advance payment or deposit and a promoter cannot advance payment or deposit of more than 20% of the sale price. Section 4 of the Ownership Flats Act further provides that "the agreement shall be registered under the Indian Registration Act, 1908." It further prescribes details of the particulars which the agreement is to contain. Section 4 also requires that such documents or copies thereof as may be prescribed shall be attached to the agreement. Rules have been made under the Act and Rule 5 of the rules which are described as "The Maharashtra Ownership Flats Rules, 1964" specific the particulars which are to be stated in the agreement. Rule 5 reads as follows :---

5. "Particulars to be contained in agreement for sale.---The agreement for sale referred to in section 4 shall, inter alia, contain the following particulars namely :---

(a) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;

(b) the date by which the possession of the flat is to be handed over to the purchaser;

(c) the price to be paid by the flat purchaser and the intervals at which instalments thereof may be paid;

(d) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats".

Rule 6 prescribes the documents copies of which are to be attached to the agreement. These copies are :---

(a) the certificate by an attorney-at-law or Advocate under Clauses (a) of sub-section (2) of section 3;

(b) the plans and specifications of the flat to be sold.

Section 3(2)(a) referred to in Rule 6 requires that the promoter shall "make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed; such title to the land as aforesaid having been duly certified by an attorney-at-law, or by an Advocate of not less than three years standing." If the requirements of section 4 are thus looked at, it will

be clear that the object of the Legislature in enacting the provisions of section 4 is to ensure that there are genuine agreements or sale in respect of flat or flats to be taken on ownership basis and the further object appears to be that there will be notice to any prospective purchaser of flats of any earlier agreement of sale of the flat which he intends to purchase because registration of an agreement will be sufficient notice to an intending purchaser who would want to ensure that the flat which the promoter is agreeing or contracting to sell to him is not already the subject-matter of any agreement for sale with any of the purchaser. The requirement as to the particulars specified is Rule 5 and to the documents which are attached to the agreement also will show that the Legislature was anxious to protect the interests of the purchasers. Once the plans are attached to the agreement and a certificate as to the title of the promoter to the land on which the building is to come up is ensured, the promoter will be bound to construct according to the plans attached to the agreement and it will be ensured that the purchaser will be delivered possession of some premises which he had contracted to purchase. The particulars refer to the date by which the possession of the flat is to be handed over as also the price which is to be paid by the flat purchaser and the intervals at which instalments thereof may be paid.

40. If we carefully read the provisions of section 4, it will be noticed that a negative language is used in respect of the amount of advance payment or deposit which the promoter is entitled to receive. At other places, the Legislature has used the word "shall" and so far as the agreement is concerned the provisions will read that "a promoter.....shall.....enter into a written agreement for sale....." and "the agreement shall be registered under the Indian Registration Act" and "such agreement shall contain the prescribed particulars."

41. Normally when in a statutory provision the word "shall" has been used, it would be construed as a mandatory provision, but there may be cases where even though the word "shall" has been used by the Legislature, on a proper construction the provision may be found to be directory in nature. It is true that so far as section 4 is concerned, there is no provision which sets out the consequence of non-compliance with the provisions of section 4. Section 13, which deals with the penalty for failure to comply with or contravention by a promoter of the provisions of the Act, provides as follows :---

13. "Any promoter who, without reasonable excuse, fails to comply with or contravenes any provisions of this Act, or of any rule made thereunder shall where no other penalty is expressly provided for, on conviction, be punished with imprisonment for a term which may extend to one year or with fine which may extend to two thousand rupees, or with both; and a promoter who commits criminal breach of trust of any amount advanced or deposited with him for the purposes mentioned in section 5 shall, on conviction, be punished with imprisonment for a term which may extend to four years, or with fine, or with both."

By this provision non-compliance or contravention of any provision of the Ownership Flats Act or any rule made thereunder shall make the promoter liable, on conviction, to punishment with imprisonment for a term which may extend to one year or with fine which may extend to Rs. 2000/- or with both where no other penalty is expressly provided for. Though section 13 creates non-compliance or contravention of a provision of the Act a penal offence, there does not appear to be any provision in the Act itself which provides that the agreement, if it is not in compliance with the provisions of section 4, shall be void.

42. Mr. Parikh was relying on this circumstance of the absence of any provisions specifying the effect of non-compliance in order to contend that as between the plaintiff and the promoter-defendant No. 1, the agreement must still be treated as valid and enforceable.

43. It is no doubt true that section 4 uses an affirmative language and is not couched in negative language which normally is used in a mandatory or imperative provision. There is, however, enough evidence in the section itself to indicate that the provision of section 4 is mandatory in character. An agreement for sale of immovable property need not necessarily be in writing nor is it one of the documents which u/s 17 of the Registration Act is required to be registered. Notwithstanding the law that an agreement in respect of immovable property need not be registered, section 4 provides that the agreement shall be a written agreement and the agreement shall be registered. Section 4 appears to us to be really in four parts and the non obstante clause will govern the first three parts of the section. The first part of the section omitting the positive prohibition of not accepting more than 20% of the sale price requires that notwithstanding anything contained in any other law, a promoter shall "enter into a written agreement of sale" The second part with regard to the registration will show that "notwithstanding anything contained in any other law,.....the agreement shall be registered under the Indian Registration Act, 1908." These are the two principal parts of the section which will be governed by the non obstante clause. Thus inspite of the fact that under the general law an agreement of sale of immovable property is not required to be registered, under the Ownership Flats Act it is specifically required to be registered.

44. It will be proper at this stage to deal with the argument of Mr. Parikh that the obligation is on the promoter alone and that the purchaser may not be able to get the agreement registered. It is no doubt true that primarily it is for the promoter to have the agreement registered. But if the provisions of section 4 are read with the provisions of the Registration Act, it does not appear to us that the purchaser is helpless in a case where the promoter declines to have the agreement of sale registered. Section 4 uses the words "the agreement shall be registered under the Indian Registration Act." By the use of the words "under the Indian Registration Act" it is clear that the mechanics of registration or the procedure for registration as provided by the Registration Act will automatically

be attracted. The provisions which will be attracted will be those in Part IV to Part VII of the Registration Act. Part IV (sections 23 to 26) deals with the time of presentation. Part V (sections 28 to 31) deals with the place of registration. When we come to part VI of the Registration Act, we find that u/s 32(a) a document can be presented for registration by a person executing a document or a person claiming under the document. Therefore, if a promoter declines or avoids to get a document registered, it will be perfectly permissible for the person claiming under the document, namely, the purchaser to present it for registration.

45. Now the question which has to be decided is whether merely because no provision as to the consequence of non-compliance with section 4 of the Act is made in the Ownership Flats Act, the provisions of section 4 should be construed as directory and not mandatory.

46. It is well established that no general rule can be laid down to decide whether a provision is directory or mandatory. "No universal rule," said Lord Campbell L.C., "can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." (See Maxwell on The Interpretation of Statutes, 12th edition, page 314). The learned author has further pointed out that where the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition on doing it in any other manner, no doubt can be entertained as to the intention. (See Maxwell on the Interpretation of Statutes, 12th edition, pages 315-316).

47. Dealing with absolute and directory enactments, Craies has observed as follows :---

"When a statute is passed for the purpose of enabling something to be done, it may be either what is called an absolute enactment, or a directory enactment, the difference being, as explained in *Wood-Word v. Sarsons* 1875 L.R. 10 C.P. 733, that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially"; i.e. that the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission."

(See Craies on Statute Law, 17th Edition, page 260). The learned author dealing with the inference to be drawn from affirmative language used in a statute has quoted the following rule at page 264:

"Every statute limiting anything to be in one form, although it be speak in the affirmative, yet includes in itself a negative;.....if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no-negative words, be done in any other way."

At page 269 the learned author observes :---

"If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable."

Where, therefore, there is no provision laying down a consequence of non-compliance with another provision, we must look at the policy of the act and the intention of the Legislature in enacting a particular provision.

48. The tests referred to above have also been laid down by the Supreme Court in a series of cases and it is sufficient for our purpose to refer to the decision in *State of Mysore and Others Vs. V.K. Kangan and Others*, . In paragraph 10 of the judgment, the Supreme Court has observed as follows :---

"In determining the question whether a provision is mandatory or directory, one must look into the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. No doubt, all laws are mandatory in the sense they impose the duty to obey on those who come within its purview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law-maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other."

49. We must, therefore, bear these tests in mind while deciding the question as to whether section 4 is mandatory in character or not. The very purpose of the act is, as already pointed out, to prevent malpractices rampant in the business of construction of flats which were sold to intending purchasers on ownership basis. In order to prevent such malpractices which were increasingly being practised, according to the Legislature, the Ownership Flats Act was made to regulate the activities of promotion of the construction of, the sale and management and transfer of flats taken on ownership basis. If this be the object of the Legislature in enacting the provisions of the Ownership Flats Act, then it is obvious that section 4 is a salutary provision intended to prevent any bogus sales and it was also intended to safeguard the interests of the purchasers. As a matter of fact, it was a part of public policy to see that people are not cheated has been specifically required to be made in writing, the amount of the advance deposit has been restricted, the agreement is required to be registered and the agreement has to contain such details as are necessary to ensure that the purchaser gets a flat in accordance with what he had bargained for and with a clear title in respect of the property. If section 4 is not held to be mandatory, one of the important purpose of the act will be defeated inasmuch as the purchasers will be at the mercy of the promoter, if he cannot insist upon all the necessary details with regard to the intended purchase of flat and if he wants to avoid any

further disputes, he cannot insist upon a written agreement of sale which has to be registered. On a careful scrutiny of the provisions of section 4 of the Ownership Flats Act, therefore, we are inclined to take the view that section 4 contains an absolute enactment which must be obeyed absolutely. If such absolute enactment is not obeyed, the consequence will be that the agreement between the promoter and the purchaser will be wholly invalid and altogether void creating no rights between the parties. It is no doubt true that in a given case, it will be the intending purchaser who might suffer if he connives at the failure of the promoter not to have the agreement registered, but for that, the intending purchaser will himself have to be blamed because there is enough provision in the Registration Act which will enable the intending purchaser to have the document registered.

50. Once section 4 is held to be mandatory and the consequence of non-compliance with the provisions of section 4 will be to invalidate the transaction, there is no question of such a transaction being binding between the parties. It is not, therefore, necessary to refer to two decisions which Mr. Parikh has relied upon in support of the contention that the agreement must be treated as binding between the parties. These decision are Bhikanbhai v. Hiralal, ILR 24 Bom 622, and Nazaralli Sayed Imam v. Babamiya Duroyatimaba, ILR 40 Bom 64.

51. In the view which we have taken, it is also not necessary to discuss the two decisions of the Supreme Court on which Mr. Parikh has relied in support of his contention that section 4 of the Ownership Flats Act should be construed as directory. In H.N. Rishbud and Inder Singh Vs. The State of Delhi, , the Supreme Court has observed that there is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. In State of U.P. Vs. Manbodhan Lal Srivastava, , it was pointed out that the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case, it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or outcome of the proceeding, would be invalid.

52. Having taken the view that the provisions of section 4 are mandatory and the agreement was, therefore, statutorily required to be registered the plaintiff cannot found any rights on such an agreement and the agreement must be treated as invalid and ineffective.

53. The next contention raised by the learned Advocate-General was that the agreement must be treated as void having regard to the provisions of section 56 of the Contract Act. The first paragraph of section 56 provides that an agreement to do an act impossible in itself is void. The learned Advocate-General contended that having regard to the fact that u/s 7(1) Clause (ii) of the Ownership Flats Act since an additional structure could not be constructed without the consent of the

other flat owners, that is, the appellant-company, the agreement to sell an office room was void. It is not necessary for us to consider this agreement in detail, but it does appear that at the time when the agreement was made, the consent of the other flat owners who had later constituted themselves into the appellant-company was not at all taken and defendant No. 1 could not have, therefore, constructed any additional structure at all. Indeed such a construction was impossible and the agreement would, therefore, be hit by section 56 of the Contract Act.

54. Strictly speaking the findings recorded by us are sufficient to decide the appeal. The learned Advocate-General has, however, argued that the facts in this case are much too eloquent to lend to any other conclusion except that the agreement was a sham and bogus one. Now, we have proceeded so far on the footing that the agreement was a genuine agreement to sell and we had already earlier mentioned that the plea of bogus and sham agreement was not given up. Normally, the finding recorded by both the courts below that the agreement was not a bogus or a sham agreement would have become a finding of fact. It, however, appears from the judgments of the two courts below that both the courts have negated the contentions of the appellant with regard to the requirements of section 4 and section 7 of the Ownership Flats Act. We have already hold that the appellant was entitled to plead the invalidity of the agreement in the light of the provisions of sections 4 and 7 of the Ownership Flats Act. Now, when these findings are recorded in favour of the appellant, the plea of bogus and sham transaction will have to be considered in that perspective. The learned Single Judge has no doubt given certain reasons which we have earlier referred to namely, with regard to the financial capacity of the plaintiff of the plaintiff as well as the relationship of master and servant between the plaintiff and defendant No. 1 and the failure of the plaintiff to pay either share amount or ground rent or maintenance charges in respect of the property in dispute. Notwithstanding the findings on these points, it appears to us that the view which we have taken on the provisions of sections 4 and 7 of the Ownership Flats Act will have a serious impact on the question as to whether the transaction in question was a genuine transaction or not. We have already referred to the admission of the plaintiff that he was in the employment of defendant No. 1 and that he was looking after legal matters as well as matters connected with Municipal Corporation of Greater Bombay. Ishwardas has deposed that he had told the plaintiff that there was no F.S.I. and that the entire F.S.I. had been exhausted. But, according to Ishwardas, the plaintiff had told him that he would manage with the Corporation. The fact that the plaintiff was dealing with the Corporation on behalf of defendant No. 1 would show that he was familiar with matters relating to construction of flats and buildings. It is difficult even to comprehend that a person who is so closely connected with the building in question that he would enter into an agreement of sale in respect of office premises for the construction of which there was no scope at all. The evidence of Ishwardas that he had told that there was no F.S.I. left has not been challenged,

nor it the case of the plaintiff in evidence that there was sufficient F.S.I. available to enable a construction of an office room. In these circumstances, it is difficult to hold that the transaction was a genuine transaction.

55. Mr. Parikh has, however, pointed out that the genuineness of the transaction was apparent from the fact that the defendant No. 1 had agreed to refund Rs. 5000/- which are shown to have been received as advance money in the agreement of sale. The contention appears to be that if the transaction was really not a genuine transaction, defendant No. 1 would not have gone to the extent of depositing that amount in Court.

56. Now, it is no doubt true that the when the notice of cancellation of the agreement was served on 30th March, 1965, defendant No. 1 sent a cheque of Rs. 5000/- along with the notice of cancellation. Now, it is difficult for us to see how this conduct of defendant No. 1 can be used against the appellant to meet the contention that the agreement was a sham and bogus transaction. Even if a sham and bogus transaction to create a difficulty in the way of the appellant had to be put up as between the plaintiff and defendant No. 1, each of them had to put forth the transaction as a genuine one. defendant No. 1 was a promoter and having taken a stand earlier with regard to the transaction that it was genuine, it would not have been possible for defendant No. 1 to take a somersault and take a stand that the transaction was a bogus one, which would clearly have landed him into difficulties. Therefore, the mere fact that defendant No. 1 volunteered to send the cheque for Rs. 5000/- by way of refunding the amount alleged to have been received was no guarantee of the genuineness of the transaction. Having record to the knowledge of the plaintiff in respect of the building which was fully constructed and to the fact that there was no further scope for construction, it is obvious that the plaintiff and defendant No. 1, who were closely associated with each other, had entered into a transaction which could not be called a genuine transaction.

57. In the view which we have taken, we must hold that the trial Court and the learned Single Judge were in error in decreeing the plaintiff's suit for specific performance. The judgment and decree passed by the trial Court as confirmed by the learned Single Judge is, therefore, set aside and the plaintiff's suit is dismissed with costs. The appeal is allowed with costs throughout.

58. The Counsel for the plaintiff-respondent No. 1 applies for leave to appeal to Supreme Court. We do not think that this is a matter in which a certificate of fitness under Article 133 of the Constitution of India can be granted. The provisions of sections 4 and 7 have been constructed on their plain terms and we do not think that any other construction is possible having regard to the subject of the Act. Application for leave is rejected.

59. The amount of Rs. 10,000/- in fixed deposits made at the instance of the appellant shall be refunded to the appellant.