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**(1999) 09 BOM CK 0080**  
**In the Bombay High Court**  
**Case No : Suit No. 677 of 1997**

M/s. Hira Mistan

APPELLANT

Vs

Rustom Jamshedji Noble and Others

RESPONDENT

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**Date of Decision :** 20-09-1999

**Acts Referred:**

Bombay Land Requisition Act, 1948 — Section 6  
Contract Act, 1872 — Section 10, 23, 32  
Evidence Act, 1872 — Section 61, 62, 64, 67, 91  
Specific Relief Act, 1963 — Section 15, 16, 20  
Transfer of Property Act, 1882 — Section 65(1)

**Citation :** (2000) 2 ALLMR 618 : (2000) 1 BomCR 716

**Hon'ble Judges :** F.I. Rebello, J

**Bench :** Single Bench

**Advocate :** Mahendra Ghelani instructed by Law Charter, for the Appellant;  
Milind Vasudeo, Mrs. Heena Bilawala Engineer instructed by y Bilawalla and Co.,  
Navnit A. Shah instructed by y Thakore Jariwalla and U.J. Makhija, Sailesh Shah  
instructed by y Hiralal Thakkar and Co., for the Respondent

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## **Judgement**

F.I. Rebello, J.—Plaintiffs a partnership firm has filed the present suit for specific performance of the contracts for sale of Immovable and moveable properties respectively. There is also a relief by way of damages. The suit arises thus. It is the case of the plaintiffs that in February, 1976 defendant Nos. 1 to 10 represented by the defendant No. 1 and one Mr. Nicholson represented to the partner of the plaintiff Mr. Suresh Agarwal through a broker Mr. Kirti Tijoriwala of their intention to sell their Immovable and moveable properties as set out and/or described in para 1 of the plaint. The plaintiff, through their partner showed their willingness to discuss and negotiate the matter. A meeting was held between plaintiffs' partner Suresh Agarwal, the defendant No. 1 and Mr. Nicholson representing the defendant Nos. 1 to 10 at which meeting Mr. Tijoriwala was present, it was agreed that the Immovable property would be sold for the price of Rs. 6,81,000/ and moveable properties for the price of Rs. 30,000/-. The plaintiffs were to deposit with the Attorneys of defendant Nos. 1 to 10 earnest

money being Rs. 68,000/- towards price of Immovable property and Rs. 3,000/- towards the sale price of the moveable property. Defendants had to hand over possession of the entire ground floor of the main building, the whole of the factory premises, stable and shed and all other open spaces. A regular Agreement for Sale would be prepared and would be executed. The agreement was not to contain express provisions as regards vacant possession and that a separate letter signed by each of the defendants was to be handed over to the plaintiffs, on the amounts of earnest money being deposited with the defendants' Attorneys. There were some other conditions which I need not advert to as they are not the subject matter of the present controversy. It is submitted that under these circumstances a valid and binding contract came about between the plaintiffs and defendants for sale of Immovable and moveable properties. It is averred that the Agreement is subsisting and the plaintiffs are ready and willing to fulfil the obligations thereunder and to complete the sale.

2. Pursuant to the oral agreement Solicitors for the defendants submitted drafts of the Agreements by letter of 3rd March, 1976 with a request that the same be returned duly approved. Thereafter, there has been exchange of correspondence between the Solicitors representing the plaintiffs and defendants. On 6th May, 1976 a meeting was convened between the parties in the office of the Attorneys for defendant Nos. 1 to 10. Present at the meeting were the defendant No. 1 and Mr. Nicholson representing the defendants along with their Attorneys and plaintiffs were represented by partner Mr. Suresh Agarwal along with Attorney. The broker was also present. The draft Agreements were finalised and it was agreed that they would be engrossed by the Attorneys for the plaintiffs and would be executed by the plaintiffs and forwarded the next day along with the cheques for Rs. 68,000/- and Rs. 3,000/- being earnest money to Attorneys for defendant Nos. 1 to 10. As regards the Agreement to give vacant possession of certain portion of the property, at the instance of defendants it was inter alia agreed that the separate letter signed by all the defendant Nos. 1 to 10 would be given to the plaintiffs representative next day after the cheques as aforesaid were given. It is averred that it was also agreed and arranged that prior to the Attorneys for the plaintiffs forwarding the signed Agreements and the cheques, representative of the defendant Nos. 1 to 10 would inform the plaintiffs about defendants Nos. 1 to 10 having executed the said letter. The plaintiffs accordingly deposited on 7th May, 1976 Rs. 72,000/- with their Attorneys and as arranged, Attorneys for plaintiffs kept the Agreements, Cheques and letters dated 7th May, 1976 ready to be sent to the Attorneys of defendant Nos. 1 to 10. As no confirmation was received from the defendants about execution of the letter on enquiry by plaintiffs defendant No. 1 and Mr. Nicholson informed on 10th May, 1976 that only seven out of the ten co-owners were readily available and had executed the letter. They assured the plaintiffs that remaining signatures would be obtained at the earliest and suggested to the plaintiffs to forward the documents and cheques to Attorneys for defendant Nos. 1 to 10. On 10th May, 1976 letter dated 7th May, 1976 along with stamped engrossment of both the

agreements duly signed by the plaintiffs and two cheques for the earnest money were forwarded to the Attorneys of the defendant Nos. 1 to 10 to be signed by defendant Nos. 1 to 10 and to forward the original to the plaintiffs. After delivery of the cheques, defendant No. 1 and Mr. Nicholson produced letter dated 7th May, 1976 stating inter alia that defendant Nos. 1 to 10 will hand over vacant possession of entire ground floor of the building, stable and factory premises. The letter was signed by defendant Nos. 1, 2, 3, 5, 6, 8 and 10 only. Defendant No. 1 and Mr. Nicholson represented and assured the plaintiffs that they would get the signatures of defendant Nos. 4, 7 and 9 at the earliest. The original letter was taken back. However, photocopy was furnished to the plaintiffs. On 11th May, 1976 Attorneys for the plaintiffs received a letter dated 10th May, 1976 from the Attorneys for the defendants wherein it was alleged that there were some material alterations on comparison of the stamped engrossment of the approved drafts. The said two cheques were also returned. There were some discussions wherein it was agreed to make some minor alterations to clause 12. On 17th May, 1976 after re-engrossment of pages 7 and 8 the same were forwarded to the Attorneys for the defendant Nos. 1 to 10 along with the two cheques for the earnest money with the request that the original be signed and returned to the Attorneys for the plaintiffs. On 20th May, 1976 the engrossments were returned unsigned together with two cheques. It was set out in the letter that there were certain further questions which required to be discussed. Thereafter, various discussions took place between the parties. On 10th September, 1976 at the request of the plaintiffs and in part performance of the agreement the defendant Nos. 1 to 10 put the plaintiffs in possession of a portion of the stable as the same was required urgently by the plaintiffs for their own purpose. On being put in possession, the plaintiffs carried out the work of manufacture of furniture, etc. By letter of 21st September, 1996 Attorneys for defendant Nos. 1 to 10 forwarded the two agreements signed by defendant Nos. 1 to 10 and requested Attorneys for the plaintiffs to forward fresh cheque for Rs. 3,000/- and Rs. 68,000/- respectively being the earnest money payable under the said two agreements. It is averred that in the letter, it was set out that the said two agreements were to be held in escrow until the plaintiffs' cheques were encashed. The said letter was received by the Attorneys for the plaintiffs on 23rd September, 1976. Accordingly two cheques for the earnest money were prepared and were about to be forwarded. Before the cheques could be despatched the defendant No. 1 and Mr. Nicholson informed the plaintiffs that defendant Nos. 4, 7 and 9 had not yet signed the letter confirming the agreements to hand over possession and they were having some dispute about their shares relating to the said vacant possession and as such the plaintiffs should withhold sending the cheques till they hear from defendant No. 1 and/or Mr. Nicholson. The said persons informed the plaintiffs that if the said cheques are withheld it will strengthen their hands in dealing with the defendants who have not signed the letter and who were taking unfairly adamant attitude. It is in these circumstances that the cheques were not sent.

3. Plaintiffs thereafter received letter dated 14th October, 1976 from the Attorneys for the defendants that as the cheques for earnest money had not been received they had decided to put an end to the negotiations for sale of the Noble Building, plant, machineries, etc. and called on the plaintiffs to return the said engrossments. During the period the plaintiffs' Attorneys were taking instructions from the plaintiffs to send a reply. Another letter dated 30th October, 1976 from Attorneys of the defendants was received to return the engrossments. After receipt of this letter efforts were made to amicably settle the matter but they could not fructify on account of the peculiar, adamant and unreasonable attitude of not executing the said possession letter. Under these circumstances, letter dated 8th March, 1977 was sent in reply to the letters sent on behalf of the defendants wherein the true and correct facts were stated. Thereafter, there was correspondence exchanged between the parties. The plaintiffs it is averred were shocked to read a notice in Bombay Samachar dated 16th May, 1977 that defendant Nos. 1 to 10 had agreed to sell the said Immovable property to the clients of Shri D.N. Kapadia, Advocate and inviting objections to the same. The plaintiffs accordingly informed the said Mr. Kapadia by their Advocates' letter dated 16th May, 1977 that there was a subsisting agreement between the plaintiffs and defendant Nos. 1 to 10. There has been further exchange of correspondence. In spite of the correspondence, the defendants have failed to comply with the agreements. Plaintiffs had also published a public notice in the news papers about the subsisting agreement between the plaintiffs and defendants Nos. 1 to 10.

It has been pleaded that the plaintiffs had performed and have always been ready and willing to perform and are ready and willing to perform their obligations under the said two agreements. The plaintiffs, it is contended, were and have always been and are ready and willing to pay the earnest money but it is the defendants Nos. 1 to 10 who have repeatedly caused the cheques for the earnest money to be returned. It was at the instance of representative of defendant Nos. 1 to 10 who had instructed the plaintiffs not to forward the cheques though they were ready, that the cheques for the earnest money were not sent. It is, therefore, contended that the plaintiffs are entitled for specific performance of the agreement for sale of the Immovable property and moveable property as orally arrived at and subsequently reduced to writing as recorded in the agreements. It is contended that damages would not be an alternative and adequate remedy as in the area where the properties are situated there is no comparable property available for sale and with vacant possession. Hence the suit and the reliefs. Apart from the final reliefs, interim reliefs were sought for in terms of prayer clauses (e) and (f).

4. A written statement has been filed on behalf of defendant Nos. 1 to 10. In so far as the disputes which are subject matter of the present controversy is concerned, the defendants in paragraph 2 have denied that it was agreed that they would give vacant possession of the ground floor of the main building, the whole of the factory premises, stable or shed or of other open spaces. There is a

denial that there was any valid contract. The plaintiffs, it is contended failed to pay the earnest money payable and to carry out necessary repairs of the terrace and roof of the building, It is denied that it was ever agreed at any meeting that the separate letter signed by the defendants would be given to the plaintiffs' representative for handing over possession as alleged. Defendants denied having agreed to execute any letter as falsely alleged or at all. On 6th May, 1976 it is contended defendant Nos. 4 and 7 were out of Bombay and this was known to the plaintiffs. Defendants have set out that they were not aware of any money being deposited by plaintiffs with their Attorneys. It is specifically denied that defendant No. 1 or Mr. Nicholson informed the plaintiffs about execution of any letter. The defendants have pleaded their version of the case as to why the draft agreements were returned and the alterations therein. It is set out that there were difference of opinion between the defendants themselves with regard to the name of the tenants to be recognised by the purchasers in terms of clause 14 of the intended agreement as some of the defendants were unwilling to sign the said engrossments unless the plaintiffs agreed that they would be recognised as tenant, of the respective portion of the premises in their occupation. It is further contended that the defendants were unwilling to execute the engrossments since plaintiffs had not carried out the undertaking to commence and complete the water proofing of the roof before onset of the monsoon. In these circumstances that the engrossments were returned along with the cheques. The defendants have denied that they have put the plaintiffs in possession of a portion of the stable. It has been explained that prior to 10th September, 1976 the plaintiffs' broker Mr. Tijoriwala and the partner Shri Suresh Agarwal informed the defendant No. 1 that they intended to open a new shop elsewhere on or about the forthcoming Dussehra Day and were in urgent need of some space to prepare furniture for the said new shop and requested defendant No. 1 to permit the plaintiffs' workmen to occupy a portion of the shed for making the said articles for a short period. Defendant No. 1 permitted them to do so. The articles prepared were removed in due course when completed. The defendants have stated that they are not aware of and do not admit that the plaintiffs' Attorneys instructed their cash department to prepare cheques for the earnest money as alleged. The averment in the plaint and the case of loss or hardship as stated by the plaintiffs have been denied. It is contended that there was no valid, concluded or binding contract between the parties and in these circumstances, it is contended that the suit be dismissed. The defendant Nos. 1 to 10 in their written statement had also contended that the plaintiffs were not a registered partnership firm and hence could not have maintained the suit.

The defendant Nos. 11 and 12 are the defendants with whom subsequent agreements have been entered into. I will not deal with the averments therein as the said defendants have not led any evidence. It may also be mentioned that no oral evidence has been led on behalf of defendant Nos. 1 to 10.

5. Based on the pleadings the following Issues have been framed :--

1) Whether the plaintiffs firm is registered under the Indian Partnership Act, 1932 as alleged in para 1 of the plaint ?

2) Whether the original defendant Nos. 1 to 10 orally agreed to sell the Immovable property and moveable property being the subject matter of the suit to the plaintiffs as set out in the plaint and in particular in para 2 thereof and as subsequently reduced to writing as averred in para 7 of the plaint?

3) Whether the plaintiffs have performed and/or were at all relevant and material time ready and willing to perform their part of the agreements referred to in Issue No. 2 above?

4) Whether the plaintiffs are entitled to specific performance of the said agreements with or without damages in addition thereto and if so, of what amount ?

5) If not, whether the plaintiffs are entitled to any relief of damages and if so of what amount?

6) Whether the defendant Nos. 11 and 12 are bona fide purchasers for value without notice?

7) What relief?

6. At the outset it may be mentioned that Issue No. 6 will not arise as there is no concluded sale between the defendant Nos. 1 to 10 on the one hand and defendant Nos. 11 and 12 on the other. Defendant Nos. 11 and 12 have also not led any evidence on the said Issue. At any rate in my opinion the said Issue does not arise and also is not material for deciding the Issues in controversy in the present suit and is accordingly struck off.

7. In so far as Issue No. 5 is concerned, no evidence has been led in so far as the damages are concerned and that Issue consequently will have to be answered in the negative.

8. In so far as Issue No. 1 is concerned, plaintiffs through their witness. Shri Agrawal, evidence of which I will be subsequently dealing with, have produced a certificate from the office of the Registrar of Firms being Exhibit "G". The said document shows the firm as a registered partnership. In view of that Issue No. 1 is answered in favour of the plaintiffs.

9. Considering the above, the Issue Nos. 2, 3 and 4 as set out earlier may be answered.

10. At the outset I may also mention about various orders that have been passed in the matter of production of documents. This requires to be adverted to as there are disputes and controversies between the parties that several documents though produced in evidence, their contents have not been proved. On 10th January, 1995 the Court was pleased to take on record two compilations which were marked as Exhibits "A" and "B" respectively subject to proof of

contents of the documents therein. On 18th January, 1995 xerox copy of the letter dated 7th May, 1976 was marked as "X" for identification. On 9th February, 1995 after hearing objections on the part of the defendants the said document was marked as Exhibit "K". On 11th February, 1997 plaintiffs' documents were marked as Exhibits L-1 to L-26 and of the defendants' documents the Index was marked as Exhibit No. 1 and other documents were marked as Exhibit No. 2 to Exhibit No. 25. Apart from this the other documents exhibited are Exhibits "C", "D", "E", "F", "G", "H" and "J".

Whether the said documents stand proved will be dealt with after perusing the oral evidence led on behalf of the parties.

11. On behalf of the plaintiffs, their learned Counsel has contended firstly about oral agreement and subsequent agreements in writing Exhibit "H" and "J" respectively. Learned Counsel points out that substantial controversy arose between the parties about handing over vacant possessions of the ground floor of the residential Noble Building and entire factory premises including stable and shed and subsequent handing over of possession of factory premises, etc. in part performance. It is submitted that the issue pertaining to possession in terms of the oral agreement was to be separately recorded by a letter and not in the formal agreement to that effect Mr. Captain, Attorney for the defendants had drafted letter of 5th May, 1976 to hand over vacant possession and had handed over to the representative of the vendors in the presence of Mr. Agarwal and Mr. Tijoriwala. It is contended that this evidence is not controverted and in fact defendant in para 4 of the written statement have admitted about meeting which took place on 6th May, 1976 in which the drafts were to be engrossed immediately for execution and that on 7th May, 1976 they received the stamped engrossed draft agreement with Attorneys' cheque for earnest money. Exhibit "K" it is contended have been signed by seven out of the 10 co-owners. Drafts of the Agreement recording handing over vacant possession were prepared by Attorneys of the Defendant Nos. 1 to 10. In so far as the earnest money is concerned, it is contended the plaintiffs had deposited a sum of Rs. 72,000/- with their Attorneys being Rs. 68,000/- and Rs. 3,000/- as earnest money of the two agreements and Rs. 1,000/- towards expenses. The cheques were first sent and delivered on 10th May, 1976. These cheques were returned on 10th May, 1976 being Exhibits "C" and "D" respectively. Cheques were once again sent to the Attorneys for the defendants on 17th May, 1976. The cheques were returned by the Attorneys for the defendants on the ground that there were differences inter se between the defendants. Stamped signed engrossments were however retained. This is proved by Exhibits 5, L-4, 6 and 7, L-5 and 7 and L-6 and L-8 and two cheques by Exhibits "C" and "D". It is then contended that by letter of 21st September, 1976 Exhibit L-7 the stamped engrossments were duly executed and were sent to the purchasers' Attorneys with the request to forward the two cheques. It is contended that defendants have not proved the contents of the said letter. In so far as the earnest money is concerned, it is submitted that two fresh cheques for earnest money were kept ready on 21st September, 1976

being Exhibits "E" and "F". These cheques were not sent on instructions of the representatives of defendant Nos. 1 to 10 until the signatures of the remaining three vendors were obtained on the letter. It is contended that though defendant Nos. 1 to 10 purported to terminate the Agreement by letter dated 14th October, 1976 plaintiffs replied to the letter by letter of 8th March, 1977 explaining the matter regarding possession and non-despatch of the two cheques. The plaintiffs by the said letter expressed their readiness and willingness to proceed with and complete the transaction. Cheques for the earnest money were thereafter sent by the Advocates' letter dated 21st May, 1977 being Exhibit L-8. It is contended that in part performance of the agreement the defendants have put the plaintiffs in occupation of the factory, shed, etc. and had handed over possession which is proved by Exhibit L-11 which is the letter written on behalf of the defendants by their Advocate. Reference to possession can also be evidenced by the averments in para 5 of the written statement of defendant Nos. 1 to 10. It is, therefore, contended that the contract has been acted upon and as such is specifically enforceable. In so far as the Agreement is concerned, it is contended that earnest money was not to be parted with to the Vendors until completion of the sale but was to remain with the Attorneys for defendant Nos. 1 to 10 and invested in fixed deposit and interest thereon was to be given by the plaintiffs. Time for completion of the contract it is contended was not essence of the contract. It is submitted that the amount deposited by the plaintiffs with their Attorneys remained so deposited until the suit was filed. In so far as clause 14 is concerned, it is contended that the said clause is sought to be co-related with the statement of outgoings which was not signed by the plaintiffs. The same has not been proved as the defendants have led no evidence in respect of the said statement and that clause 14 by itself cannot be read to mean that it refers to the statement annexed to the agreement. In substance, therefore, it is contended that the plaintiffs have performed their part of the contract and were ready and willing to perform their obligations under the contract. Learned Counsel refers to various averments in the written statement to contend that these averments would tantamount to admission in view of the averments in the plaint made on behalf of the plaintiffs. In so far as the proof of documents is concerned, it is contended that the documents were marked as Exhibit without formal proof subject, however, to the proof of correctness of the contents thereof. The plaintiffs have proved their documents through P.W. 1, the defendants have failed to prove their documents as no evidence has been led on their behalf to prove the correctness of the contents of the documents relied upon by them. The plaintiffs have proved their case through evidence of P.W. 1 and P.W. 2 who corroborate the evidence of P.W. 1. Evidence have not been shaken in cross-examination and in these circumstances in the absence of any evidence on behalf of the defendants the preponderance of evidence is in favour of the plaintiffs and as such suit for specific performance ought to be succeeded. It is also contended that apart from proving the two agreements Exhibits "H" and "J" the plaintiffs have already proved those agreements by examining P.W. 1 whose version has been corroborated by P.W. 2. In so far as escrow is concerned,

it is contended has not been proved as the essential terms by letter dated 21st September 1976 and Exhibit L-17 have not been proved. Regarding possession, it is contended that oral evidence of the two witnesses establishes the agreement to give vacant possession. At any rate it is contended by virtue of section 65(1) (f) of the Transfer of Property Act, it would be a term of the contract for the Vendors to put the plaintiffs in possession. It is contended that sections 91 and 92 of the Indian Evidence Act are not attracted.

On behalf of the defendants, their learned Counsel contend that the suit is for specific performance of oral terms as recorded in agreement Exhibit "H" and even if plaintiffs prove their case they are only entitled to that relief and nothing more as no specific performance of the alleged agreement to send and hand over of the letter of possession have been asked for and as such cannot be given. It is then contended that on reading clauses 1, 10 and 14 of the Exhibit "H" the claim of vacant possession is untenable and at any rate the same is inconsistent with the written agreement Exhibit "H" and no evidence of alleged oral agreement concerning giving of vacant possession or making payment of earnest money can be led to vary the terms of the oral agreement either to contradict, vary, add or subtract from the terms of Exhibit "H". It is then submitted that though Exhibits "H" and "J" were signed by the parties nonetheless they were to be held in escrow. Once they were held in escrow the agreement did not come into force and as such agreements cannot be specifically enforced. It is contended that considering clause 14 and table annexed to the agreement Exhibit "H" there was no agreement to give vacant possession of the ground floor and at any rate the same would be in violation of the provisions of Bombay Land Requisition Act, 1948. It is then contended that the alleged agreement to give vacant possession is without consideration. This argument need not be dealt with by me as no evidence has been led by the defendants on that count. It is then contended that no proof is produced for vacant possession and/or part performance of the contract. The evidence it is contended is inconsistent and as such should not be accepted. For the purpose of granting specific relief it is contended that Court will have to answer the following questions: ---

- a) What was the agreement ?
- b) When was the agreement arrived at ?
- c) With whom was the agreement arrived at ?
- d) Whether the plaintiffs have proved their readiness and willingness to perform the obligation under the agreement according to its due construction ?
- e) Whether there are ground which would make the transaction inequitable and unsustainable ?
- f) Whether on the facts and circumstances of the case the Court can exercise its discretion to grant specific performance ?

12. While answering the Issues and dealing with the contentions that have arisen

to my mind the following will have to be considered :-

I) (a) Are the two Agreements in writing dated 21st September, 1976 valid, binding and subsisting ?

(b) What were the essential terms of the said Agreements ?

(c) Was it a term of the contract dated 21st September, 1976 to hand over vacant possession of the ground floor of Noble Building?

(d) Was there a previous or contemporaneous oral agreement before the agreement in writing of which one of the terms was to give a letter to hand over possession of the ground floor, factory premises, shed and other open spaces to the plaintiffs before the plaintiffs perform their part of the Agreement ?

(e) Assuming that there was a prior or contemporaneous oral agreement, can evidence be led in respect of the said agreement requiring handing over of possession of properties aforementioned, considering sections 91 and 92 of the Indian Evidence Act ?

(f) Was it a term of the oral contract that earnest money would only be deposited if the letter of possession was handed over and even if it be so would it not be contrary to the terms as contained in Exhibit "H" and whether the plaintiffs are permitted to lead evidence contrary to Exhibit "H" ?

(g) What is the effect of three co-owners not agreeing to append their signatures to the oral agreement, considering clause 10 of the Exhibit "H" ?

(h) What is the effect of the original Letter Exhibit "L-7" and Exhibit "K" not being handed over to the plaintiffs ?

(i) Could the defendants terminate the contract for failure to pay/deposit earnest money in terms of the written Agreement ?

(j) Was the earnest money not deposited by the plaintiffs on account of the request of the defendant No. 1 and Mr. Nicholson and whether the plaintiffs were always ready and willing to send the earnest money in terms of the agreement ?

II) Do the defendants prove that Exhibit "H" and Exhibit "J" were to be held in escrow and as such incapable of being acted upon ?

III) Have the plaintiffs pleaded and proved their readiness and willingness to comply with the terms of the real agreement ?

#### AGREEMENTS, ORAL - WRITING

13. With that background, the pleadings, the documentary evidence and the oral evidence may now be considered before I deal with the authorities and proposition advanced and argued at the Bar.

14. In so far as the Agreements in writing are concerned the necessary averments are set out in paragraph 8 of the plaint. On 21st September, 1976

Attorneys for defendant Nos. 1 to 10 forwarded both the Agreements duly signed by all the defendants to the Attorneys for the plaintiffs with a request to hold them in escrow until two fresh cheques for the earnest money were deposited and the cheques encashed. The Agreement in respect of the Immovable property has been tendered in evidence and marked as Exhibit "H", the Agreement in respect of the moveable property has been tendered in evidence and marked as Exhibit "J". I will now refer to some of the terms of Exhibit "H" as they would be relevant for the purpose of deciding the matter in controversy.

"Clause 10.

Upon payment of the purchase money at the time and in the manner aforesaid the Vendor and all other necessary parties if any shall make and execute in favour of the purchaser a proper conveyance to be prepared by the purchaser's Attorneys and to be approved by the Vendor's Attorneys and the Vendors shall (Save as is provided herein below) thereupon put the purchaser in possession of the said property."

"Clause 13.

It is hereby agreed by the purchaser that the payment in consideration for the sale of the said premises shall be made by the purchaser to each of the Vendors separately in proportion to their respective shares mentioned in the 2nd Schedule hereunder written."

"Clause 14.

The purchaser hereby agrees and will covenant with the Vendors that on the completion of the sale the Vendors and co-owners shall become the contractual tenants of the purchaser paying the monthly rent therefore at the rates recorded separately and all permitted increases thereto. The purchaser shall further covenant that the Vendors and co-owners shall not at any time be made to vacate their respective premises after the completion of the sale so long as they observe and perform the terms of tenancy and provisions of law. On the death of any of the Vendors and co-owners, his or her heirs or executors shall be entitled to be substituted as tenants in their place in accordance and compliance with the Bombay Rent Act and this condition is expressly binding on the heirs, executors, administrators and assigns of the purchaser."

"Clause 16.

The said property shall until completion of the sale and delivery of possession thereof to the purchaser remain at the risk of the Vendors."

There is an annexure to the Agreement which was forwarded along with Agreement as part of the Agreement by letter dated 21st September, 1976 wherein the name of occupier, the portion occupied, the rent, Municipal taxes and repair cess has been set out respectively against their names. Important in so far as the present controversy is concerned is under the caption co-owners, where

the portion occupied as shown is as ground floor (whole) and rent, Municipal Tax and repair cess as Rs. 332.68. Similarly, are shown the portions occupied by the Vendors on the first floor, 2nd floor, 3rd floor and 4th floor along with their rent, Municipal Taxes and repair cess. I will not advert to the terms in so far as Exhibit "J" is concerned as in my opinion while answering Exhibit "H" Exhibit "J" also will be answered accordingly.

In so far as the oral agreement is concerned, the necessary pleadings are as set out in para 2, some of the terms of which have already been referred to in the earlier part of the judgment. In paragraph 4, it has been pleaded that the cheques constituting the earnest money deposit would be sent only after the representative of defendant Nos. 1 to 10 informed the plaintiffs about defendant Nos. 1 to 10 having executed the said letter. In paragraph 8 it has been further pleaded that the representative of the defendant Nos. 1 to 10 i.e. the defendant No. 1 and Mr. Nicholson informed the plaintiffs that defendant Nos. 4, 7 and 9 had not signed the letter confirming the Agreement to hand over possession and that they were having some disputes about their shares relating to the said vacant possession and the plaintiffs should therefore withhold sending cheques. In the written statement in para 4 the defendants have denied having agreed to execute a letter of handing over of possession. In para 8 of the written statement, defendants have denied that either defendant No. 1 or Mr. Nicholson informed the plaintiffs that defendant Nos. 4, 7 or 9 had not signed the alleged letter. It is further denied that defendant No. 1 and Mr. Nicholson ever informed the plaintiffs that if the cheques were withheld by the plaintiffs it would strengthen their hands.

In so far as the documentary evidence is concerned, apart from Exhibit "K" i.e. letter dated 7th May, 1976 in respect of which there is a dispute as also whether the contents have been proved, there is a letter dated 8th March, 1977 which has been produced on record as Exhibit "I-10" and proved through P.W. 1. In paragraph 3 of the said letter written by Attorneys for the plaintiffs, it was set out that in addition to the terms recorded in the Agreement for sale, it was also agreed between the respective clients that the defendants would hand over vacant possession of the entire ground floor of the main building, the whole of the factory premises, stable and shed and all other open spaces. It has further been set out that it was expressly agreed and understood between the parties that defendants would execute the said letter and only after receipt of the said letter duly executed by each of the defendants were the plaintiffs required to proceed further in the matter. It has been further averred that after receipt of the letter dated 21st September, 1976 Exhibit "L-7" the Attorneys for the plaintiffs had kept ready two cheques drawn in favour of Attorneys for defendant Nos. 1 to 10 and were about to forward the same. The monies were lying with them since May, 1976. The earnest money it is contended were not despatched as defendant No. 1 and Mr. Nicholson who represented the defendant Nos. 1 to 10 informed the plaintiffs that three of the co-owners had not yet signed the letter affirming to hand over possession as there was a dispute about their share

relating to vacant possession and that the plaintiffs should withhold sending a cheque until they hear from Mr. Nicholson and defendant No. 1. It was further contended that they were informed by defendant No. 1 and Mr. Nicholson that if the cheques were withheld they would strengthen the hands of Mr. Nicholson and defendant No. 1. Exhibit "L-11" letter dated 12th April, 1977, is the reply by the Attorneys for defendant Nos. 1 to 10 to the letter dated 8th March, 1977. In the said letter it was denied that there was any dispute between the defendants about their share in the matter of giving vacant possession of the premises. It is set out that the correct facts were that the defendants were unwilling to complete the proposed Agreement for sale until the water proofing of the terrace and roof were carried out which the plaintiffs were bound to do but had failed to carry out. The oral agreement regarding handing over possession is denied and more specifically of handing over the entire possession of the entire ground floor of the main building, etc. It is also denied that the issue of handing over vacant possession was not to be incorporated in the Agreement and would be done by a separate letter. There is another letter being Exhibit "M-A" dated 21st May, 1977 written on behalf of the plaintiffs by their Attorneys. The plaintiffs denied that there was any agreement for water proofing the terrace and/or roof before the Agreement for Sale was executed.

In the oral evidence P.W. 1 has averred that as regards the vacant possession defendant No. 1 and Mr. Nicholson informed P.W. 1 that it would be recorded by a separate letter and not in the Agreement and that Solicitors for original defendant Nos. 1 to 10 and for the plaintiffs would decide about the same. He has further deposed that in respect of the letter which he handed over there was a meeting between the witness defendant No. 1, Mr. Noble and Mr. Nicholson about three or four days from 23rd September, 1976 where the witness was informed that the signatures of three of the co-owners on the letters in respect of the possession were not subscribed. Original letter signed by seven of the original owners were shown to him. Witness asked them to hand over the original as signed by seven owners. He was informed by defendant No. 1 and Mr. Nicholson that signatures of other three of the co-owners would be required and that they would like to retain the original. They also informed him not to forward the cheques till the original letter pertaining to vacant possession was signed by the original owners and that only after forwarding of the letter should the cheques be forwarded to the Attorneys for the defendants. In his cross-examination, in the question put to him as to whether there were difference between the oral agreement as pleaded in para 2 of the plaint and two agreements dated 21st September, 1976, he has answered that there were some minor differences otherwise they were the same. To another question as to what were the differences between the oral agreement and written agreement, the answer is that there were no finalisation about repair and as such there was no mention about repairs in the oral agreement whereas in the written agreement dated 21st September, 1976 there was a mention of repair. About vacant possession, though it was in the oral agreement, it was not mentioned in the

written agreement. To another question as to the major difference in the agreement, he has answered the major difference was in respect of the vacant possession. His attention was invited to clause No. 1 of the Agreement dated 21st September, 1976 Exhibit "H". He has answered that there was no mention about vacant possession about the entire ground floor of the main building, etc. He has also added that it was agreed to incorporate all the terms and conditions settled under the oral agreement and written agreement except for giving vacant possession. He has answered that there was no legal impediment in incorporating clause 2(c) as set out in the plaint. Clause 2(c) pertains to handing over of vacant possession. He has further deposed that the condition to hand over vacant possession of the suit property was settled in the very first meeting when he visited the suit property. He was shown letter dated 7th May, 1976 addressed by Attorneys of the plaintiffs to Attorneys of defendant Nos. 1 to 10 he was asked as to why there was no reference to any letter of handing over vacant possession being executed or sent to him. He has answered that separate letter incorporating the terms of handing over vacant possession was to be sent by plaintiffs to defendants and that is why there is no reference in the letter dated 7th May, 1976. He has further stated that letter incorporating terms of handing over vacant possession along with draft agreement was to be first sent to his Solicitors. He has further set out that the talks between him, defendant No. 1 and Mr. Nicholson about handing over of vacant possession was not recorded in any letter as he trusted them. He has asked a question whether after 6th May, 1976 in the meetings between Solicitors of plaintiffs and Solicitors of defendants was the matter of giving a separate letter of possession and/or defendant Nos. 1 to 10 having failed to send such a letter was discussed. The answer is he did not remember. The next question put to him was whether alleged oral agreement to execute the separate letter of handing over possession discussed between respective Solicitors prior to 6th May, 1976, the answer is he did not remember any such talk had taken place prior to 6th May, 1976.

P.W. 2 Kirti Tijoriwala has deposed that it was stipulated by defendant No. 1, Mr. Nicholson and agreed to by the partner of the plaintiffs Mr. Suresh Agarwal that the Deed of Agreement would not contain a provision for delivery of vacant possession but would be separately recorded by a letter. He has further deposed that Mr. Captain from M/s. Mulla & Mulla told Mr. Nicholson that he would get letter regarding possession from the 10 co-owners by evening and made it over to Mr. Rustom and Mr. Nicholson and told them to collect, get it signed and bring it to the office by evening. Mr. Captain prepared a memo containing minutes of the meeting. The draft agreement was settled therein. This transpired on 6th May, 1976. The witness has deposed that Mr. Captain informed that he would also get letter regarding vacant possession by the Vendors. He has deposed that after two or three days subsequent to 23rd September, 1976, Mr. Agarwal complained to defendant No. 1 and Mr. Nicholson that the letter recording possession had not been handed over whereupon the original letter bearing seven signatures was produced and Agarwal was informed that he would get the

signatures of the others. His attention was invited to a tabular statement attached to Agreement Exhibit "H". His answer is that he knew nothing about the said statement and that the said statement was not attached to the Agreement when signed on 7th May, 1976. He deposed that Mr. Agarwal telephoned him about the statement to Exhibit "H" as it was not there when he had signed the Agreement and to enquire about the same and let him know. He checked with Mr. Rustom about the statement. He was informed that the statement was made only for the purpose of annual letting value and tax purposes and ground floor was in possession of the co-owners and there are no tenants. He has deposed in cross that area of the ground floor is approximately 3,000 sq.ft. and when they first visited the site there were locks on the flats and Mr. Rustom had opened the locks and showed the flats. He has further deposed that the Agreement did not contain anything about vacant possession of the ground floor as the same was not to be incorporated in the Agreement. He has further deposed that the transaction would be complete only after all the co-owners handed over letter of vacant possession. He agreed that till date all the co-owners have not signed the letter of handing over vacant possession. He has denied the suggestion that co-owners had not signed the letter handing over vacant possession as the same was not part of the Agreement. He has further deposed that Mr. Agarwal informed his Solicitors that because of the internal problem amongst the co-owners, the question of vacant possession being handed over was not to be recorded in the Agreement but by a separate letter. He has denied the suggestion that his evidence to the effect that letter of possession was signed by seven co-owners was false. He has answered that the xerox copy of the said letter was given to Mr. Agarwal after the original was shown to him.

#### POSSESSION :

15. In so far as possession is concerned, the pleadings are as contained, in paragraph 7. It is averred that on 10th September, 1976 at the request of the plaintiffs and in part performance and in furtherance of the agreement for sale the defendant Nos. 1 to 10 also put the plaintiffs in possession of a portion of the stable as the same was urgently required by the plaintiffs for their own purposes. Upon being put in possession thereof, the plaintiffs carried out work of manufacture of furniture, etc. for being installed at another outlet of sale of their products which they had acquired in the meanwhile. In the written statement in answer to that defendant Nos. 1 to 10 have denied the said averments. They have explained that the plaintiffs' broker Mr. Tijoriwala and Mr. Suresh Agarwal informed the defendant No. 1 that the defendants (plaintiffs) intended to open a new shop elsewhere on or about forthcoming Dussehra Day and as such were in urgent need of some space to prepare certain articles of furniture and requested that workmen of the plaintiffs should be permitted to occupy a portion of the shed for making the said articles for a short period. The defendant No. 1 permitted them to do so. The said articles on preparation were removed in due course when completed.

Exhibit "H" which is already extracted earlier in clause 10 it has specifically be set out that on execution of proper conveyance and payment of the purchase money, the purchaser would be put in possession of the property. To similar effect is clause 16 already reproduced. A similar clause is there in Exhibit "J" being clause 7. Reference to possession is also set out in Exhibit I-10 that is letter dated 8th March, 1977. In para 2 of the said letter, it is set out as under :-

"In the meanwhile your clients were good enough to give possession to our clients of the ground floor to enable and facilitate our clients to carry out certain furniture and other work."

Exhibit M-3 is a letter dated 5th February, 1981. This is a letter addressed to the Attorneys for the defendants wherein Attorneys for the plaintiffs informed the Attorneys for the defendants that the defendants had started work on the Southern side wall of the property in question and work was being carried out just near the under ground water tank. It is set out that the apparent idea seems to be to open up the property leased to our clients to the adjoining property held by defendants. Exhibit M-4 is letter dated 20th August, 1986 from the Attorneys for the defendants Nos. 1 to 10 to the Attorneys for the plaintiffs wherein Attorneys for the defendants have informed the Attorneys for the plaintiffs that their clients' factory premises were broken open recently by thieves who had made a big hole in the roof and removed several parts from two old and disused electric motors and from the gasometer. Exhibits "M-2" and "M-4" are after filing of the suit. In the prayer clause, it may be mentioned that relief was also sought at the interim stage to restrain the defendants from parting with possession of the property. An interim relief was granted by this Court in favour of the plaintiffs. We may now turn to the evidence on that score.

P.W. 1 in his cross-examination had agreed that in the written agreement there is no mention of the fact that the plaintiffs were put in part possession of the suit property. A question was put to him whether it was his case that he was put in possession of the portion of the suit property before payment of earnest money. His answer is that he was put in possession without making payment as there was an understanding that the monies were always available for making payment. In cross, he has further deposed that after 10th September, 1976 and before 21st September, 1976 he had not informed his Solicitors in writing to inform the Solicitors of the defendants in writing that the Agreement should contain the clause that he had been put in part possession of the property in part performance of the Agreement. He has deposed that he was given complete possession of stable. He was asked to explain that in letter of 8th March, 1977 reference was made to possession of the ground floor. His answer is that this was in reference to stable from which he had an access to the shed and factory. He has then explained that by ground floor he means the complete stable, shed and factory excluding the ground floor portion of Noble Building. He then has deposed that even on the date of his deposition he was in possession of the stable, shed and factory and that it was under his lock and key but it is kept open. Confronted

with Exhibit "K" he maintained that possession was handed over to him on 10th September, 1976. He was then asked as to why in the public notice Exhibit "B" Colly. (Page 123) he had not stated that he was given possession and he was still in possession. The answer was it was not felt necessary to mention the fact in the public notice and so it was not given though possession was already with him. In Exhibit "B" Colly, (Page 123) he has stated that there is a mention that the Vendors are bound to give vacant possession of ground floor and this mention is there although they were in possession because part of the ground floor was not given in their possession.

P.W. 2, the Broker Mr. Tijoriwala in his examination-in-chief stated that on 10th September, 1976 the defendants gave possession of all vacant area except all vacant area and flats on the ground floor in the main building. He has further deposed that defendant No. 1 and Mr. Nicholson stated that a delay in getting letter recording delivery of possession signed by all co-owners was due to internal problem and they would see to it and there is nothing to worry "since the possession was already delivered". In his cross-examination he has deposed that he was not present when the possession was delivered to Mr. Agarwal. He has further deposed that he did not remember personally the possession was delivered to Mr. Agarwal.

#### READINESS AND WILLINGNESS AND ESCROW :

16. In para 12 of the plaint, plaintiffs have pleaded that a valid and binding contract came about between the plaintiffs and defendants on the oral agreement being arrived at as set out in para 2. The agreement was between Shri Suresh Agarwal on behalf of the plaintiffs and defendant No. 1 and Mr. Nicholson representing defendant Nos. 1 to 10 in the presence of the broker Mr. Tijoriwala. The plaintiffs have expressed their readiness and willingness to fulfil their obligation thereunder and to complete the sale. In para 12 the plaintiff has further averred that they have performed and have always been ready and willing to perform and are ready and willing to perform their obligation under the said agreement. The Agreements referred to are of 21st September, 1976. It is further averred that the plaintiffs were and have always been and are ready and willing to pay the earnest money but it is the defendant Nos. 1 to 10 who have repeatedly caused the cheques for the earnest money being returned. In para 14 of the plaint, the plaintiffs have again averred that they are entitled for the specific performance of the contract and that damages would not be an adequate alternative relief. The area in which the said properties are situated do not have any comparable property available for sale with vacant possession. To the knowledge of defendant Nos. 1 to 10 the said properties had been agreed to be acquired for the purpose of plaintiffs' business and it was absolutely necessary for the plaintiffs to have such premise in the area in which the same is situated. The said properties are specially suitable to the need and requirement of the plaintiffs.

In their written statement defendant Nos. 1 to 10 have averred that the plaintiffs

failed to pay the earnest money being an essential term of the contract. It is also averred that the plaintiffs failed to carry out necessary repairs of the terrace and roof of the building to render it water proof as agreed by them. In so far as their contentions in para 12 are concerned, the defendants have denied the averments in para 12 of the plaint. Similarly, in para 13 the contents of para 14 have been denied.

In so far as the documentary evidence is concerned, reference need to be made to Exhibit "H". Clause 1 of the said Agreement requires the plaintiffs to pay an amount of Rs. 68,000/- as earnest money immediately on the execution of the agreement. In terms of clause 2, the said sum of Rs. 68,000/- were to remain deposited with Attorneys for defendant Nos. 1 to 10 pending completion of the sale. In clause 14 the purchaser i.e. the plaintiffs agreed and covenanted that on the completion of the sale the Vendors and co-owners shall become contractual tenants of the purchaser paying the monthly rent therefore at the rates recorded separately and all permitted increased thereto.

In the statement annexed to the agreement, the tenants are shown as Ardeshir H. Udwadia and Dina A. Udwadia on the 2nd floor (West): Viraf A. Udwadia, Rusi A. Udwadia and Noshir A. Udwadia on the 2nd floor (East): A. T. Savant on the 3rd floor (East): and Savak B. Guzdar on the 4th floor (West). Against their names are shown the portion occupied, the rent, Municipal tax, repair cess and the total amount. The portion in occupation of co-owners/ Vendors are shown as under :

- 1) Ground Floor (Whole) :
- 2) 1st Floor (West) :
- 3) 3rd Floor (West) :
- 4) 4th Floor (West) : and
- 5) 4th Floor (East).

Reference may also be made to clause 10 which has been referred to earlier wherein the Vendors were to put the plaintiffs in possession of the said property upon payment of the purchase money as earlier set out in the Agreement. Exhibit L-7 dated 21st September, 1976 is the letter written by the Attorneys for the plaintiffs forwarding duplicate of the agreements for sale of Noble Building and of plant and machinery and requesting the Attorneys for the defendants to forward fresh cheques for Rs. 3,000/- and Rs. 68,000/- respectively being earnest money payable under the said two agreements. Attorneys for the plaintiffs were asked to hold the said two agreements in escrow until the cheques which were to be forwarded were encashed. The time for completion was fixed as 15th December, 1976. Exhibit L-8 is a letter dated 14th October, 1976. By this letter Attorneys for the defendant Nos. 1 to 10 informed the Attorneys for the plaintiffs that more than three weeks had passed since the proposed Agreements were executed and sent to them and that they have not received their clients"

cheques for earnest money of Rs. 3,000/- and Rs. 68,000/-. In these circumstances, Attorneys for the plaintiffs were informed to put an end to negotiations for sale of Noble Building, plant and machinery with a request to return the signed engrossments which accompanied their letter of 24th ultimo. Exhibit L-9 is a letter dated 30th October, 1976 wherein again Attorneys for the defendants called on the Attorneys for the plaintiffs to return the engrossment of the Agreement for sale which were sent under escrow by letter of 24th ultimo. Exhibits L-10 and L-11 are the letters written by Attorneys for the defendants to Attorneys for the plaintiffs. Exhibit L-11 is the reply to plaintiffs' Attorneys' letter dated 8th March, 1977. Reference to these exhibits are found in the averments in the plaint in paragraphs 8 and 9. Exhibit L-15 is a letter dated 30th May, 1977 written by Attorneys for the defendants Nos. 1 to 10 to Attorneys for the plaintiffs returning two cheques for Rs. 68,000/- and Rs. 3,000/- respectively.

P.W. 1 in his evidence was put a question whether he was willing to take the property for the sum as set out in clause 1 and whether he was ready and willing to perform the same. His answer is I am willing to perform, rest I leave it to the Court. The next question is relevant and I am reproducing the same.

Q. In the oral agreement pleaded in the paragraph 2-C of the plaint, you are stated that the original defendants 1 to 10 would also give vacant possession of the entire ground floor of the main building the whole of the factory premises stable and shed and all other open spaces. Are you willing to give up your claim in respect of vacant possession of the premises as mentioned in paragraph 2-C of the plaint ?

Ans. I am not willing to give up the claim for vacant possession.

In his further cross-examination the witness was asked about the statement annexed to the Agreement. The witness has answered that the statements came to his notice on 23rd September, 1976 and after 3 or 4 days he made enquiries from Mr. Rustom, Mr. Nicholson and Mr. Tijoriwala. His explanation is that he was told by the aforesaid persons that the statement has been annexed just like that to show who is in occupation of what premises. He has further deposed that he does not accept the co-owners as tenants of the ground floor and that the statement annexed to the agreement is not binding on him. He has further stated that the statement annexed to the Agreement is not the statement which is referred to in clause 14 of the Agreement Exhibit "H" and that no statement was made in writing as mentioned in clause 14 of the Agreement. When asked about clause 14, the witness has deposed that clause 14 is binding on him as it is. He has further deposed that his Solicitors did not call for any list of tenants from the Solicitors of the defendants and that he did not object to clause 14 of the Agreement and it was there from the beginning except the corrections made therein. He also did not object to clause 14 as it is and finally recorded in the Agreement. He has deposed that he has instructed his Solicitors that under the oral agreement it has been agreed that vacant possession would be given to him and that clause 14 of the Agreement is in accordance with the oral agreement

which he had with the defendants in February, 1976.

17. After having now considered the pleadings, the documentary evidence in support thereof and the oral evidence as led, regarding written agreement, the oral agreement, the handing over of possession and actual possession before I proceed further it would be essential to consider the judgments cited at the Bar for the purpose of effectively deciding the issue that has arisen herein, considering the law as already laid down. It may be mentioned that authorities have been cited both by the plaintiffs and the defendants. They are not being dealt with separately but are being considered for the propositions as contained therein.

I will first deal with the authorities in so far as marking of a document and the proof of the contents of the document.

A learned Single Judge of this Court (Bharucha, J. as His Lordship then was) in the case of Om Prakash Berlia and Another Vs. Unit Trust of India and Others, , had occasion to discuss and consider the law in so far as the marking of the document, the proof of the document and of the proof of the contents therein. On considering sections 61 and 62 the learned Judge observed that it is obvious that the truth of the contents of the document, even prima facie, cannot be proved by merely producing the document for the inspection of the Court. Then relying on the judgment of the Apex Court in the case of Bishwanath Rai Vs. Sachhidanand Singh, and a judgment of the Division Bench of this Court in Madholal Sindhu v. Asian Assurance Co. Ltd., AIR 1954 Bom. 305, as also a judgment of a learned Single Judge of this Court in Mohammed Yusuf and Another Vs. D. and Another, , the learned Judge observed that the writer of the document is required to depose to the truth of its contents. The learned Judge then observed as under :

"The Act requires, first, the production of the original document. If the original document is not available, secondary evidence may be given. This is to prove what the document states. Upon this the document becomes admissible, except where it is signed or handwritten, wholly or in part, in such a case the second requirement is, u/s 67, that the signature and handwriting must be proved. Further, where the party tendering the document finds it necessary to prove the truth of its contents, that is, the truth of what it states, he must do so in the manner he would prove a relevant fact."

In Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, , the Apex Court observed that mere marking of an exhibit does not dispense with its proof. In P.C. Purushothama Reddiar Vs. S. Perumal, , in a matter arising under the Representation of the People Act, the Apex Court observed considering section 64 of the Evidence Act that once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.

18. We then come to the judgment in so far as sections 91 and 92 of the Indian

Evidence Act are concerned. In the case of *Hitchings & Coulthurst Company v. Northern Leather Company of America and Doushkess*, 1914 K.B. 907, the issue before the Court was considering the existence of a contemporaneous oral agreement in contradiction to the written agreement. In that case the defendants were sued on a promissory note made by the defendants company endorsed at the request of the plaintiffs by the defendants. The defendant company did not appear at the trial, but the endorsee defendant D. appeared and set up an oral agreement made by him with the plaintiffs, contemporaneous with the promissory note, that he was not to be called upon to pay if the goods supplied to the defendant company should be unequal to sample. The Court held that the oral agreement relied upon by D. not being an agreement suspending the coming into force of the contract contained in the promissory note, but being an agreement in defeasance of that contract, evidence in support of it was inadmissible, and, therefore, that D. was liable on the promissory note. In *Pattle v. Hornibrook*, 1 Chancery Division 1897, the facts were that the plaintiff, a spinster, signed an agreement for the lease of a house to her by the defendant. The defendant subsequently signed it, and handed it to his solicitor with instructions not to part with it except on condition that the plaintiff obtained some responsible person to join in the lease a condition which the plaintiff declined to fulfil. The Court held that evidence was admissible to show that no agreement had been arrived at between the parties, and that the true effect of the transaction was that the defendant declined to enter into an agreement on the terms of the written document, but at the same time made a counter offer which was rejected, and that there was no agreement. In *Ramjibun Serowgy v. Oghore Nath Chatterjee*, 25 Cal. 401, a learned Single Judge of the Calcutta High Court was considering the proviso 3 to section 92 of the Evidence Act. The learned Single Judge held that the contemporaneous oral agreement to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may he proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, i.e., that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso 3 to section 92 of the Evidence Act. Chagla, J., (as the learned Chief Justice, as he then was) speaking for the Division Bench in *Dinkerrai Lalit Kumar and others v. Sukhdayal Rambilas and others* AIR (34) 1947 Bom 293, in the matter of leading parole evidence once a written agreement was entered, observed as under:-

"Once the parties reduce the terms of their contract into writing, the Court can only look at the writing alone in order to construe what the terms of the contract were. It is hardly necessary to say that what the terms of the contract between the parties were cannot be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract."

In *Jahuri Sah and Others Vs. Dwarka Prasad Jhunjhunwala and Others*, , the question was of leading oral evidence in respect of existence of the Deed of Adoption. The Apex Court allowed oral evidence to be led. The Apex Court considering section 92 held that where a party admits the existence of a deed of adoption and of its non-production in the Court, the admission would not render oral evidence inadmissible because it is not by virtue of deed of adoption that a change of status of a person can be effected. Such a deed cannot be likened to a document which by sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible. In the case of *(Nawab Major Sir) Mohammad Akbar Khan v. Attar Singh and others* AIR 1936 PC 171, the question was of interpretation of a document as to whether it is a receipt and not a promissory note. The Privy Council held that oral evidence to show that amount was paid by way of loan or deposit or for some other purpose was not barred by virtue of section 92. In *Balaram Agasti and Others Vs. Ramesh Chandra Mohanty and Others*, , a learned Judge of the Orissa High Court held that oral evidence to prove some other terms which have been agreed and which constitute a condition precedent to the obligation under, and not inconsistent with written agreement, is admissible. A Full Bench of the Patna High Court in the case of *Mt. Ugni and another v. Chowa Mahto and others* AIR 1968 Pat 302, held section 91 only excludes other evidence of terms of a document but not of existence of the contract or the relationship of landlord and tenant brought about by possession and payment of rent.

19. The next set of authorities is in respect of when a Court should exercise its discretion to grant specific performance of a contract. In *Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others*, the question was whether the defendant had denied the contract as alleged and the evidence proved that there was contract but different from that alleged by the plaintiff. The Apex Court held that under such circumstances, the Court should refuse to exercise its discretion for grant of decree for specific performance. In *Prakash Chandra Vs. Angadlal and Others*, while considering section 20 of the Specific Relief Act, the Apex Court observed that ordinary rule is that specific performance should be granted and it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. In *R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others*, , the Apex Court held that the readiness and willingness cannot be treated as a strait jacket formula and have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In *Sethu Parvathy Ammal Vs. Bajji K. Srinivasan Chettiar and Others*, , the question was whether an agreement of sale made by several persons, some of whom did not sign it, is binding at least on those who signed it, depends on the intention of parties, that they wanted to leave the agreement incomplete and unenforceable against the executing parties. This intention has to be established by those who signed it, by showing that they would not have executed the agreement, if the person not

signing it had not joined.

In *Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan*, , the question before the learned Single Judge of the Calcutta High Court was as to what would be readiness and willingness to perform his part of contract on the part of the plaintiffs. The learned Single Judge held that readiness and willingness to perform the agreement must be readiness and willingness to perform not as the plaintiff wished it, nor in the way plaintiff evinced it before the suit, nor in the way plaintiff wanted to fashion it at the trial, but according to the real agreement between the parties. "Real agreement" mean either the true agreement between the parties or which the Court finds to be real agreement. In *Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. Vs. Hindusthan Petroleum Corporation Ltd. and Others*, , a Division Bench of this Court was considering section 16(c) Second Explanation to the Specific Relief Act and the expression ready and willing to perform agreement. The Division Bench speaking through Bharucha, J. (as his Lordship then was) in paragraph 17 observed as under:-

"Undoubtedly, in the ordinary suit for specific performance where the parties are ad idem about the interpretation of the agreement it is not necessary that the plaintiff should adopt any particular set of words to indicate that he was and is ready and willing to perform the agreement. What we are considering here, however, is not the ordinary suit for specific performance where the parties are ad idem about its interpretation. We are considering a case where parties are not ad idem. The Madras High Court judgment referred to by the Law Commission in its 9th Report was a specific performance suit in which the parties were not ad idem about the interpretation of the agreement. It was there held that the plaintiff had to aver in some way that he was ready and willing to perform the agreement howsoever the Court interpreted it. This view found favour with the Law Commissioner and it was upon the strength of this view that the second Explanation to section 16(c) was incorporated in the Act. It is, therefore, that section 16 requires that the plaintiff must aver performance of or readiness and willingness to perform the contract according to its true construction. In a case where parties are not ad idem about the interpretation of an agreement and a suit to specifically perform it is filed, the plaintiff must aver readiness and willingness to perform the contract according to the interpretation the Court places upon it. If he does not, and the Court does not accept his interpretation of the agreement, his suit for specific performance must fail."

To the similar effect is the judgment of a learned Single Judge of the Allahabad High Court in the case of *Rahat Jan v. Hafiz Mohammad Usman* AIR 1983 All 343. The learned Single Judge observed that the plaintiff is duty bound to aver and prove his readiness and willingness to perform contract according to real agreement. He cannot add any additional condition for performance of his part of contract. In *Raj Rani Bhasin and Others Vs. S. Kartar Singh Mehta*, , the Division Bench of the Delhi High Court sought to bring about the distinction between readiness and willingness to perform the contract. The Division Bench observed

that while readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial ability to pay the purchase price but for determining his willingness to perform his part of the contract his conduct has to be properly scrutinised.

20. I may at this stage also refer to another judgment in so far as contention which was raised that the Agreement to hand over vacant possession of premises on the ground floor would be hit by the provisions of the Bombay Land Requisition Act, 1948. To my mind an Agreement whereby a relationship is created of Lessor and Lessee and Licensor and Licensee in contravention of the provision of the Act would not make the Agreement void between the parties. At the highest the Agreement would be void qua the Authority whose permission was required before premises were let out. This interpretation finds support in the judgment of the Division Bench of this Court in *Mohamed Husain Kasambhai Mansuri v. J. K. Trivedi*, 1952 Bom.L.R. 659. A Division Bench of this Court held that if a landlord creates a tenancy in favour of a tenant without giving intimation to or getting the permission from Government as required by section 6 of the Bombay Land Requisition Act, 1948 such a tenancy is not thereby rendered void.

21. We may now consider the case law on Escrow. In *Thompson v. Mc Cullough*, 1947(1) K.B. 447, the issue was whether the document is delivered as an escrow or as a Deed. The Court after considering the matter held that question is a matter of fact and for that purpose all the facts attending the execution: all that took place at the time and to the result of the transaction must be: and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow. In fact what escrow contemplates is the 3rd proviso to section 92, namely that evidence can be led that the agreement was not to come into being until happening of certain events.

22. Having set out the pleadings, the documentary and oral evidence and having considered the various judgments, the Issues which remained to be answered namely Issue Nos. 2, 3 and 4 will now have to be answered.

23. The Issue regarding damages will have to be answered in negative as no evidence has been led on behalf of the plaintiffs proving damages. Issue No. 4, therefore, will only be whether the plaintiffs are entitled to specific performance of the said Agreement.

24. The first question therefore will have to be answered is as to what is the agreement in respect of which specific performance is claimed. The relief as prayed for in the plaint is for specific performance of the oral agreement as set out in para 2 of the plaint and recorded in two agreements for sale each dated 21st September, 1976 Exhibits "H" and "J". Therefore, the first question is whether when there are two agreements in writing can the Court consider the oral agreement that has been arrived at earlier, In other words are the plaintiffs permitted to prove the oral agreement which has been subsequently reduced in

writing. There is no dispute that between the oral agreement pleaded in para 2 of the plaint and Exhibits "H" and "J", the terms are substantially the same except as to the clause regarding possession of the vacant ground floor of Noble Building. The said clause therefore would require a true and correct interpretation for the purpose of the Court considering whether there was a distinct oral agreement regarding possession of the ground floor of Noble Building which was not referred to in the Agreement in writing. This is because considering sections 91 and 92 of the Indian Evidence Act once parties have reduced their agreement into writing then by virtue of section 92 no evidence either contemporaneous, subsequent or earlier can be permitted to be led except either for the purpose of invalidating the agreement or evidence to hold that the agreement had not come into force or to proving a condition precedent for the agreement coming into force. By virtue of proviso 4 to section 92 existence of any distinct subsequent oral agreement can be proved to rescind or modify any contract, grant or disposition of property. We will not be covered by this proviso as it is not the case of the parties that there was a distinct subsequent oral agreement. What is pleaded and sought to be proved is the existence of a previous and/or contemporaneous oral agreement. Proviso 3 to section 92 also would not be attracted as under proviso 3 evidence can only be led in respect of existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property. However, in so far as defendant Nos. 1 to 10 are concerned, this proviso will have to be considered as to whether Exhibit L-6 i.e. the letter dated 21st September, 1976 by which two agreements were forwarded to the Attorneys for the plaintiffs with a condition that they be held in escrow can be examined. Of course, subject to the contention raised on behalf of the plaintiffs that the contents of the said documents have not been proved. However, oral evidence can be considered, considering proviso 2 to section 92 of the Indian Evidence Act which permits leading of oral or parole evidence regarding the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its term. Question, therefore would be whether the document Exhibit "H" is silent in so far as the issue of possession of the ground floor is concerned. Bearing that in mind, the question can now be answered.

Exhibit "H" is a document which is sought to be specifically enforced in so far as the Immovable property is concerned. Clause 10 of the said agreement as reproduced earlier is clear that possession of the said property would be given on the plaintiffs making payment of the purchase money as set out in the Agreement. Clause 10 refers to two things, one a proper conveyance and secondly possession. Clause 16 expressly provides that the property until completion of the sale and delivery of possession thereof to the purchaser remains at the risks of the Vendors. In other words the clause itself contemplated that possession would remain with the Vendors until completion of the sale. The Vendors and co-owners were to become the contractual tenants of the purchaser paying the monthly rent thereof at the rate recorded separately

and all permitted increases thereto. It is an admitted position that apart from co-owners and Vendors there are other tenants. Clause 14 expressly does not refer to these other tenants as by operation of law these tenants by attornment would become the tenant of the purchaser. Clause 14, however, makes the Vendors and co-owners tenants. The co-owners and Vendors would become contractual tenants of the purchaser paying the monthly rent. A co-joint reading therefore of clause 10, clause 14 and clause 16 would make it clear that it was the express intention of the parties to the agreement that possession of the premises would be handed only on payment of the purchase money. This clause is express. It is, therefore, difficult to accept the contention raised on behalf of the plaintiffs that there was a separate oral agreement pertaining to vacant possession of the ground floor of Noble Building. It is not possible to reconcile clause 10 to the construction sought to be given by the plaintiffs in support of the oral agreement. This oral agreement would also not be in conformity with clause 16. Both the clauses are clear that possession would not be parted with except on the completion of the sale which include payment of the purchase price as set out in clause 10. To my mind therefore, it is not possible to accept the contention that there was a separate oral agreement in respect of possession of the ground floor of Noble Building. The statement to the agreement was forwarded by letter dated 21st September, 1976 Exhibit L-7. Until the letter of 8th March, 1977 Exhibit No. 9 there has been no correspondence either by the plaintiffs or their Attorneys that the statement annexed to the agreement was not referable to clause 14 and/or what was contemplated by clause 14. Clause 14 contemplated that the Vendors and co-owners became contractual tenants of the purchaser on paying monthly rent recorded separately. The annexure is clearly referable to clause 14. It is no doubt true that no evidence has been led on behalf of the defendants to that extent. However, Exhibit "H" has been marked in evidence and produced by the plaintiffs along with the statement. In oral evidence all that P.W. 1 says is that he only accepted the explanation given on behalf of the defendant No. 1, Mr. Nicholson and Mr. Tijoriwala that statement was only prepared to reflect the charges and taxes payable. If that be the case from the oral statement of the plaintiff himself and as no other separate statement was preferred or forwarded by any of the parties except the statement annexed to the agreement itself, it is impossible to accept the contention as raised on behalf of the plaintiffs. It will have to be held proved that the statement which form a part of the agreement though not signed by the plaintiffs is clearly the rent recorded separately as referred to in clause 14 of the agreement. If that be the case, it is impossible even to hold that there was some ambiguity in so far as the possession referred to in clause 10. If that be the case the ratio of the Division Bench of this Court in the case of Dinkarrai Lalit Kumar & others (supra) will have to be applied. Once parties have reduced into writing the terms of any contract, it is a document in writing that will have to be considered and parole evidence cannot be permitted to prove the existence of a distinct oral agreement. In view of that proviso 2 to section 92 will not be attracted and oral evidence in contradiction of Exhibit "H" and Exhibit "J" cannot be permitted to be led. The document has to be read by

itself. Apart from not looking into the antecedent oral agreement, even otherwise Exhibit "H" itself provides for possession on the Sale Deed been entered into. From the Agreement Exhibit "H" it is also clear that handing over possession of the ground floor of Noble Building was not a term of the contract.

25. The second contention is regarding escrow. Escrow would basically fall within proviso 3 to section 92 of the Indian Evidence Act. I may just refer to what some texts say and meaning as to what is meant by escrow. An escrow has been held to be a document deposited with the third person to be delivered to the person purporting to be benefited by it upon the performance of some condition, the fulfillment of which is only to bring the contract into existence. Oral evidence is admissible under this proviso to show that the Deed was executed or delivered conditionally as an escrow. Escrow has also been explained as an intended Deed after sealing and any signature required for execution as a deed, be delivered as an escrow, that is as a simple writing which is not to become the deed of the party expressed to be bound by it until some condition has been performed. Escrow has also been defined to mean that where an instrument is delivered to take effect on the happening of a specified event or upon condition that it is not to be operative until some condition is performed then pending the happening of that event or the performance of the condition the instrument is called an escrow. The doctrine has been applied in India. The earliest case being of the Single Judge of the Calcutta High Court in the case of *Ramjibun Serowgy v. Oghore Nath Chatterjee* (supra), wherein the learned Judge referred to proviso 3 of section 92 of the Indian Evidence Act. The only question is whether as contended by Counsel for the plaintiffs Exhibit L-7 is proved or not. Exhibit L-7 has been marked. Apart from that the plaintiffs in their pleadings at paragraph 8 of the plaint have referred to the document and the contents of the letter where the Attorneys for the plaintiffs have set out that the document should be held in escrow till the two cheques for the amount of earnest money were sent to them and encashed. Therefore, once the plaintiffs themselves have pleaded receipt of the letter and the contents of the letter, Exhibit L-7 must be held to be proved. Even otherwise once the document was marked the letter stands proved and did not require any further formal proof as the document was not denied by the plaintiffs. In his evidence at page 17, P.W. 1 admits receipt of the letter along with the two agreements. If that be the case then the law as set out in *Thompson v. Mc. Cullough* (supra) will have to be applied. The effect would be that though the Agreement was entered into and signed, it was not to be acted upon until the plaintiffs performed their part of the agreement namely sending the two cheques and their encashment.

What is, however, sought to be contended on behalf of the plaintiff is that the plaintiffs had deposited the money with Attorneys for the plaintiffs. That monies were lying with them and it is only at the instance of the defendant No. 1 and Mr. Nicholson that the earnest money was not sent. In support it is contended that it was the case of Mr. Nicholson and defendant No. 1 that the plaintiffs should desist from sending the earnest money as it will help them to obtain the

signature on the letter regarding possession. To my mind it is impossible to accept the said contention that there was any dispute between the parties in so far as clause 1 is concerned. Therefore, the plaintiffs cannot now be permitted to offer an explanation for non-performance of clause 1. It was a term of the contract signed by all co-owners that the plaintiffs would send the two cheques immediately on signing of the agreement. Even otherwise at this stage itself Exhibit "K" may be considered based on which the arguments have been raised. Exhibit "K" is the purported xerox copy of the original signed by seven owners and not signed by three owners. It is contended that this was to be a separate agreement between the parties. Firstly, if that be so then three parties had not signed the letter till the date the agreement dated 21st September, 1976. It is impossible to accept the contention that there was some agreement between the parties in July, 1976 and a letter was to be handed over to the plaintiffs separately. The defendants appended their signatures to the agreements which were forwarded by letter of 21st September, 1976 and Exhibit "H" provided the stage when possession would be given. Secondly, in the pleadings it is pleaded that the stable was handed over sometime on 10th July, 1976. In the letter dated 8th March, 1977 Exhibit L-10 reference is made to possession of ground floor. However, in the oral evidence the plaintiffs are clear that what was handed over to them on that day are all open spaces, factory shed, etc. except the ground floor. If this be the position, it is not possible to understand as to why a letter to hand over possession could be insisted upon even in respect of those areas which according to the plaintiffs had already been handed over to them. It is no doubt true that the defendants have denied the said letter. In their correspondence they have sought to explain it, however, no oral evidence have been led in support of that evidence. In the arguments it is however sought to be argued that Exhibit "K" was drafted by Mr. Captain, Attorney for the defendants. This is not found in the plaint. It is not found in the letter Exhibit L-10. It is not found in the evidence of P.W. 1. It is only P.W. 2 who deposes that it was agreed that Mr. Captain would get the letter signed by all the co-owners and handed over that evening. It is impossible therefore to accept that contention. It is, therefore, clear that the reason for non-payment of earnest money as claimed by the plaintiffs has not been proved. The purported oral agreement to hand over the letter is previous to Exhibit "H". That agreement would be contrary to clause 1 of Exhibit "H". No evidence can also therefore be allowed to vary it.

26. Once I hold that Exhibit "H" is an agreement between the parties and it was not to be acted upon till the two cheques were sent and encashed, the relief as prayed for by the plaintiffs for specific performance has necessarily to be rejected. However, as an issue has been raised namely whether the plaintiffs were ready and willing to perform their part of the obligation I may briefly advert also to that issue. In the plaint no doubt there are averments that the plaintiffs are ready and willing to perform their part of the contract. In the oral evidence, however, plaintiffs are clear that performance of the contract has to be coupled with the possession of the ground floor. The plaintiffs, therefore, are not seeking

specific performance of the contract or the real contract as arrived at by the Court but seek performance of the contract as understood and pleaded by the plaintiffs. If that be the case then clearly the judgment of the Division Bench of this Court will have to be applied namely in *M/s Bharat Barrel & Drum Mfg. Co. Pvt. Ltd. v. Hindustan Petroleum Corporation Ltd.* (supra). The Division Bench of this Court has held as earlier referred to that in so far as the suit for specific performance of contract is concerned, the plaintiffs must specifically aver that he is ready and willing to perform the contract as interpreted by the Court. There being no such pleading and also even if plea of pleading can be said to be dispensed with in his oral evidence P.W. 1 is clear that he wants performance along with ground floor of Noble Building. Such performance both on the authorities of *M/s Bharat Barrel & Drum Mfg. Co. Pvt. Ltd. v. Hindustan Petroleum Corporation Ltd.* (supra) and as held by the Apex Court in the case of *Ganesh Shet v. Dr. C. S. G. K. Setty* (supra) where the plaintiffs alleges contract and defendants denies the contract as alleged and the evidence proves the contract different from that alleged by the plaintiffs, the Court should not exercise its discretion to grant a decree for specific performance. Once I hold that handing over possession of the ground floor was not a term of the contract in view of the law laid down by the Apex Court in the case of *Ganesh Shet v. Dr. C.S.G.K. Setty* (supra) the relief as prayed for should be rejected.

27. Having so said, the only other Issue was whether the plaintiffs have performed and/or at all time ready and willing to perform their part of the contract. In view of my findings about the real terms of the contract as also on account of the failure to pay the earnest money the question of plaintiffs being ready and willing to perform does not arise. Incidentally, the question of part performance here does not arise as pointed out by me earlier it is impossible to accept the contention of the plaintiffs that they were in possession of any part of the property. Considering the documentary evidence namely letter of 8th March, 1977 Exhibit L-10, their pleadings and the oral evidence, it is not possible to accept the contention that plaintiffs were in possession. Apart from that plaintiffs sought an interim injunction to restrain the defendants from parting with possession. That injunction was not restricted only to the ground floor of Noble Building. The injunction was general when it was granted. In other words the Court at the prima facie stage accepted the contention of the plaintiffs themselves that they were not in possession. Secondly, the letter to the Municipal Corporation Exhibit M-3 would show that it was the defendants who were seeking to put up a construction and the plaintiffs were opposing the same. This could not have been done if the plaintiffs were in possession. Next is the letter pertaining to removing of the factory roof in respect of which the defendants have filed a complaint Exhibit M-4. If it was the plaintiffs who were in possession of the factory as sought to be contended by them the fact that they have kept silent and allowed the defendants to prosecute the complaint must be held against them. The only evidence regarding possession is of P.W. 1. P.W. 2 is clear that his evidence on possession is based on the information given to him by

P.W. 1. Therefore evidence of P.W. 2 cannot be said to be in corroboration of evidence of P.W. 1. No doubt in the civil suit it is preponderance of evidence that must be considered. However oral evidence must be consistent with the documentary evidence and actual act of possession. It is the case of P.W. 1 himself that no locks were put up to the premises and it was open. No evidence after September, 1976 has been led to show that they continued to be in occupation of the premises, except for the bare statement of P.W. 1. It is true that defendant had offered explanation that they had permitted plaintiffs merely to carry out some work of furniture and after this work was done the furniture was removed. However, this explanation in the absence of any evidence cannot be accepted. However, as pointed out earlier, in my opinion the plaintiffs have not produced either documentary evidence or parole evidence to show that they are in possession. Once that is so the Issue of part performance has also to be rejected.

28. In view of that Issue Nos. 2, 3 and 4 are answered in the negative.

29. In so far as the defendant Nos. 12 and 13 are concerned, the only issue which was framed has been struck out.

30. Suit accordingly dismissed. Costs by the plaintiffs to each set of defendants that is defendant Nos. 1 to 5 and defendant Nos. 6 to 10. Defendant Nos. 12 and 13 to bear their own costs.

31. Learned Counsel for the plaintiffs seeks continuation of interim relief granted earlier. Said relief to continue for the further period of eight weeks from today.

32. P.A. to furnish ordinary copy of this judgment to the parties.

33. Suit dismissed.