

(1940) 09 BOM CK 0013
In the Bombay High Court
Case No : First Appeal No. 62 of 1939

The New Mofussil Co. Ltd.

APPELLANT

Vs

Shankerlal Narayandas Mundade

RESPONDENT

Date of Decision : 03-09-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 2 Rule 4, 16(a), 16(d), 99

Citation : AIR 1941 Bom 247 : (1941) 43 BOMLR 293

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Broomfield, J.—This is an appeal by the defendants from a decree of the First Class Subordinate Judge at Dhulia allowing the plaintiff-respondent's suit for specific performance of a contract for sale of a cotton factory at Dhulia. The factory was one of several belonging to defendant No. 1, a limited company with its registered office in Bombay which was in liquidation.

2. The plaintiff's case is that the agreement was finally concluded in Bombay on July 7, 1936, when as the result of a conversation between one Nandurdikar, a broker acting for the plaintiff, and Sir Shapurji Billimoria, one of the liquidators, and of a further conversation between Nandurdikar and the company's solicitor Manekshaw the terms of the bargain were all settled and a draft agreement containing these terms was drawn up which was engrossed on the following morning. Neither the draft agreement nor the engrossment was signed by either party, and after several more meetings between Nandurdikar and Manekshaw, the latter, acting under instructions from Sir Shapurji, declined to proceed further and said that the negotiations were at an end. This happened on July 10 according to the defendants and on July 11 according to the plaintiff. On July 13 an agreement was entered into to sell the factory and another factory to defendants Nos. 2 and 5 and a conveyance in their favour was executed on July 29. The plaintiff claimed to be entitled to specific performance of the agreement

contained in the draft agreement and the engrossment thereof. Among other reliefs he asked for possession of the factory. The subsequent purchasers were made parties u/s 27(b) of the Specific Relief Act.

3. The defendants challenged the jurisdiction of the Dhulia Court to try the suit as against the company and also alleged misjoinder of causes of action. On the merits their case was that there was no concluded agreement and that the matter never went beyond the stage of negotiations. In the alternative they said that if there had been a concluded agreement, it had been re-opened by the plaintiff.

4. The trial Court made the following decretal order:--

(1) It is declared that the plaintiff is entitled to specific performance of the contract mentioned in the plaint.

(2) The plaintiff do deposit in Court Rs. 56,000 within a fortnight and recover possession of the suit factory.

(3) Defendants Nos. 1 to 5 do execute a conveyance in favour of the plaintiff in respect of the suit factory as claimed within a month from to-day.

(4) The plaintiff do recover interest at six per cent. per annum on Rs. 7,000 from defendant No, 1 from the date of the suit to the date of depositing Rs. 56,000 into Court provided he pays the requisite Court-fee in execution proceedings.

(5) The plaintiff is entitled to get mesne profits from the date of depositing Rs. 56,000 in Court to the date of obtaining possession of the suit property. An inquiry to be made about it on the application of the plaintiff.

(6) Defendant No. 1 do pay half costs of the plaintiff. Defendants Nos. 2 to 5 do pay the remaining half costs of the plaintiff. Defendants shall bear their own costs,

(7) The plaintiff is entitled to be paid the costs awarded from defendants Nos. 2 to 5 out of the money which he will deposit in Court. The balance of the money to be paid to defendants Nos. 2 to 5.

5. I will deal first of all with the question of jurisdiction. The trial Judge held that the case fell u/s 16, clauses. (a) and (d), of the Civil Procedure Code. That section provides that subject to the pecuniary or other limitations prescribed by any law, suits (a) for the recovery of Immovable property with or without rent or profits and (d) for the determination of any other right to or interest in Immovable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. There is a proviso that a suit to obtain relief respecting, or compensation for wrong to, Immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant resides or carries on business. Learned

counsel for the appellants has argued that as against defendant No. 1 this is a suit for specific performance and nothing more. That is to say, it is a suit in personam and does not come under either Clause (a) or Clause. (d) of Section 16. In that connection he cited *Hunsraj v. Runchordas* (1905) 7 Bom. L.R. 319 and *Velliappa Chettiar v. Govinda Dass* (1928) ILR 52 Mad. 809, in which the nature of a suit for specific performance is explained. But those were not cases in which possession was or could have been asked for. In our case the question of jurisdiction has to be determined on the footing that specific performance and possession of the property are both asked for.

6. It is conceded that the plaintiff is entitled to pray for possession and that the suit, so far as it is a suit for possession, was only triable in the Dhulia Court, But it is urged that there should have been two suits, one against defendant No. 1 in Bombay, where the contract was entered into and was to be performed, and another against defendants Nos. 2 to 5 in Dhulia where the property is situated. There is no doubt I think that separate suits would have been permissible. The learned trial Judge's view that the plaintiff's cause of action for this suit was one and the same and that he could not split it up by bringing one suit against defendant No. 1 at Bombay and another against the other defendants at Dhulia, in view of the provisions of Order II, Rule 2, of the Code, seems to be clearly untenable. The cause of action is not the same in respect of specific performance of the contract and possession of the property. The trial Court's view is clearly contrary to *Nathu valad Pandu v. Budhu valad Bhika* (1893) ILR 18 Bom. 537, and numerous cases in which that decision has been followed. The cause of action for specific performance is on the contract; the cause of action for possession is on the conveyance resulting from the contract.

7. However, it does not follow that the combination of the two suits in one is repugnant to any provision of the law. Order I, Rule 3, as well as Section 27 of the Specific Relief Act would permit the joinder of all these defendants provided that the Court has jurisdiction to try the suit as against them all. The Dhulia Court and that Court alone would have jurisdiction to try the suit against defendants Nos. 2 to 5. The only question is whether it had jurisdiction against defendant No. 1. It has been argued on behalf of the plaintiff that the suit against defendant No. 1 can be brought u/s 16(a) because, although the company has parted with possession, the effect of a decree in plaintiff's favour would be that the conveyance to defendants Nos. 2 to 5 would be annulled and the company would be in the same position as though possession had not been parted with. In other words it is said a suit to recover possession can be brought against defendant No. 1 even though possession has been parted with. But it must be admitted that this argument is not very convincing.

8. On the other hand the language of Section 16(d) seems to be wide enough to cover the case. Sir Jamshedji Kanga says that this clause means the determination of an existing right and not a right claimed. But *Sitabai v. Laxmibai* (1915) ILR 40 Bom. 337 is an authority which I think is inconsistent

with that view. That was a suit for maintenance together with a prayer for a charge on lands situated in the Poona District. The defendants were not resident in Poona. Nevertheless it was held that the Court had jurisdiction u/s 16(d). The argument put forward in that case to show that the Court had no jurisdiction was that a claim for maintenance is not a charge upon land unless expressly made so by a deed or decree. Therefore at the time of the suit there was no charge on Immovable property and for the purposes of Section 16 it is immaterial if the order of the Court would create a charge. However, the Court rejected that argument. Sir Basil Scott C.J. said in his judgment (p. 340):--

On the plaint as framed, the question which has to be decided before the Court will be enabled to pass a decree is whether or not the plaintiff is entitled to a right to, or interest in, Immovable property in the Bhimthadi Taluka by way of charge as security for the maintenance which may be decreed. That being the question to be determined, it is a question directly within the terms of section 16(d) of the Civil Procedure Code.

9. The learned counsel for the appellants seemed to rely mainly on the alleged misjoinder of causes of action. It is provided in Order II, Rule 4, that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of Immovable property, except (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof; (b) claims for damages for breach of any contract under which the property or any part thereof is held; and (c) claims in which the relief sought is based on the same cause of action. According to the trial Judge the case comes under (c). But this view seems to be clearly wrong. If the cause of action for specific performance and possession were the same, the reliefs could not be split up. Order II, Rule 2, would forbid it. But it is settled law that the cause of action for specific performance is distinct from that for possession and therefore a subsequent suit for possession is not barred by res judicata or Order II, Rule 2; *Nathu valad Pandu v. Budhu valad Bhikd* (1893) ILR 18 Bom. 537, *Kristnaji v. Sangappa* (1913) ILR 38 Mad 698, and *Krishnammal v. Soundararaja Ayyar* (1913) ILR 38 Mad 698. The latter case was doubted in *Sundara Ramanujam v. Sivalingam* (1923) ILR 47 Mad. 150, but our own High Court has followed it.

10. These same cases, however, show that though a separate suit for possession is not barred, the two causes of action may be joined in the same suit for the sake of convenience or to avoid multiplicity of suits. Learned counsel for the appellants says that the leave of the Court is necessary under Order II, Rule 4. But in none of the above cases was there any reference to this rule and there is nothing to show that the option to join the prayer for possession was held to be dependent on the leave of the Court. In that connection we were referred to some observations of Mr. Justice Barlee in *Bhagwandas Vrijbhukandas Shariff Vs. Naran Kanji*, . He thought that the joinder of the two causes of action was dependent upon the leave of the Court under Order II, Rule 4, but that, as the objection to misjoinder had been waived in that case, the point was immaterial.

However, Mr. Justice Patkar who delivered the leading judgment in the case said nothing to suggest that he thought that the leave of the Court was required.

11. As far as defendant No. 1 is concerned the suit seems to fall under Clause (d) of Section 16, as I have said, rather than Clause (a), and that being so, there is no difficulty. The rule in question does not apply to a suit u/s 16(d). But as against the other defendants the suit comes u/s 16(a) and undoubtedly the rule does cause a difficulty. The words "for the recovery of Immovable property" presumably mean the same in both cases. It is a possible view perhaps that the rule does not apply where the recovery of Immovable property is sought as a relief consequential on the relief of specific performance of a contract. Certainly in practice the leave of the Court has not been asked for in such cases, though it is a little difficult to see on what principle one can say it is not required. Assuming, however, that the leave of the Court was necessary strictly speaking--and that seems to be the better view--the case is covered by Section 99 of the Code, and the absence of leave, which could be granted even in appeal, is not a ground on which the decree could be reversed or varied.

12. I now come to the merits of the case, and for that purpose it is necessary to state some further facts. Nandurdikar saw Sir Shapurji first towards the end of May, 1936, and offered Rs. 62,000 for the factory, which offer was refused. On July 3 the liquidators wrote and asked him to come to Bombay to discuss the matter and settle the terms. From letters exchanged between Nandurdikar and the plaintiff it appears that plaintiff was very anxious to purchase the factory and that Nandurdikar had authority to raise his offer to Rs. 65,000 if necessary. There seems, however, to have been some doubt as to whether the liquidators really meant business. Nandurdikar went to see Sir Shapurji on July 6 and made the same offer as before, Rs. 62,000, with the same result. But this was obviously only a try on, as appears from a) letter which Nandurdikar wrote to the plaintiff after the interview. He was hopeful of success but did not think that Sir Shapurji would accept less than Rs. 65,000.

13. Next day, which is the important day, Nandurdikar went to see Sir Shapurji again and made an offer of Rs. 63,000 which was accepted. The other terms agreed upon were that the sale was to be completed within one month, that the costs of the conveyance, etc. were to be borne half and half and that brokerage at two and a half per cent. was to be paid to Nandurdikar by both vendor and purchaser. The amount of the earnest money was also discussed, and this is the only point as to which there is any disagreement between Nandurdikar and Sir Shapurji. The former says that Rs. 7,000 was the amount fixed, the latter says it was Rs. 10,000. Nothing turns on this, however, as Rs. 7,000 was the figure ultimately agreed on. Nandurdikar went away to fetch the earnest money and on his return Sir Shapurji sent him with Antia, one of the company's clerks, to the office of Messrs. Wadia, Ghandy & Co., the company's solicitors, to get the draft agreement prepared. Manekshaw after ascertaining what had been settled between Nandurdikar and Sir Shapurji drew up the draft agreement and read it

over to Nandurdikar. A discussion then took place.

14. There is a conflict of testimony as to the character of this discussion. Nandurdikar says that he queried the clause in the draft agreement about apportioning the fire policy between the vendor and purchaser and also wanted provision made about a watchman on the premises until delivery of possession; but as Manekshaw was not agreeable he did not press his points and agreed to all the terms. According to Manekshaw, Nandurdikar not only objected to the fire policy clause but also argued about the costs and wanted the time of completion extended from one month to three months. However, whatever Nandurdikar may have said, Manekshaw cannot have taken his objections very seriously, for he gave orders the same evening for the draft agreement to be engrossed. Moreover, Nandurdikar wrote that night to the plaintiff saying "I saw the liquidator to-day according to my yesterday's letter and the contract is settled to-day. It is settled at Rs. 63,000 and a bayaona chithi has been passed. Rs. 7,000 have been paid as earnest and the sale deed is to be completed within a month. Costs are to be paid half and half." It can hardly be doubted that the parties were substantially in agreement on all points, or at any rate Nandurdikar was prepared to conclude the bargain on the terms of the draft agreement. That this was Manekshaw's own view of Nandurdikar's attitude on the 7th is clear from his letter of July 17 in the correspondence before the suit.

15. Nandurdikar says that the draft was initialled by him and Manekshaw. Manekshaw denies this. In the correspondence plaintiff's solicitors repeatedly asked for copies of the draft and engrossment and defendants' solicitors refused to furnish copies or give inspection. This conduct I think was rather pernicky, but it does not justify the inference that the document, exhibit 149, which was ultimately produced is not the original draft. There are no initials on it. It is to be noted that nothing was said about initials in the correspondence or even in the plaint. The trial Judge left the point undecided. I do not think it makes much difference whether the draft agreement was initialled or not. But if it had to be decided, I should say on the evidence that there were no initials.

16. Nandurdikar was given a receipt for the earnest money in this form:

"Received from Mr. Shankerlal Naraindas Mundade through Mr. Damodar Trimbuck Rs. 7,000 as earnest and on account of Rs. 63,000 being the price for the sale of the Pressing and Ginning Factory of the New Mofussil Company Limited at Dhulia with the land, building, machinery and stores in the factory on the terms of the draft agreement prepared this day.

There is a dispute between Nandurdikar and Manekshaw as to which was written first, the receipt or the draft agreement. Nandurdikar says the receipt was written last of all and that seems most probable as it refers to the draft agreement. The point is not of material importance.

17. The terms of the draft agreement which were fair copied in the engrossment made on the morning of July 8 were as follows:--

1. That the vendor agrees to sell and the purchaser to purchase the land hereditaments and premises situate at Dhulia and more particularly described in the schedule hereto the Ginning and Pressing Factory thereon with their appurtenances free from incumbrances at the price of Rs. 63,000 to be paid as follows; that is to say Rs. 7,000 as deposit on the signing of this agreement and Rs. 56,000 on the completion of the purchase.

2. The purchase shall be completed at the office of Messrs. Wadia Gandhi & Co., within one month from the date hereof. Up to the day of completion the vendor will receive the rents and profits and pay the outgoings of the premises and such rents and profits and outgoings and the amount of the premium (if any) on the fire policy effected on the said premises will be apportioned between the vendor and the purchaser.

There is a press pool agreement for the Pressing Factory which runs from year to year subject to notice of termination as therein provided. There is also a Gin Pool Agreement from November 16, 1935, to August 31, 1936. The purchaser will be bound by these agreements.

3. The vendor shall make out a marketable title to the said premises free from all reasonable doubts and clear at its own expense all claims and incumbrances of whatever nature on the said premises.

4. The vendor shall immediately on the signing of this agreement deposit with the purchaser's solicitors all the title deeds relating to the said premises.

5. The purchaser shall furnish to the vendors' solicitors his requisitions (if any) on the title within 10 days after receipt of the title deeds or after inspection thereof and if he does not do so he shall be deemed to have accepted the title.

6. If the purchaser shall make any objection or requisition which the vendor shall be unable or unwilling to remove or comply with the vendor may notwithstanding any intermediate attempt to remove or comply with the same rescind this agreement by notice in writing to the purchaser unless the purchaser shall within 7 days after such notice unconditionally withdraw such objection or requisition. In case of rescission the vendor shall repay the amount of earnest money without costs or interest.

7. Upon payment of the purchase money at the time and in the manner aforesaid the vendor shall make and execute to the purchaser or such person or persons as he may nominate a proper assurance of the said premises prepared by the purchaser's solicitors and approved by the vendors' solicitors.

8. On the completion of the purchase as aforesaid the vendor shall put the purchaser in possession of the said premises.

9. The vendor has not received any notice for the acquisition of the property under the Land Acquisition Act. If, however, pending the completion of the purchase any such notice is received it shall be optional to the purchaser to put

an end to this agreement in which case the vendor shall repay to the purchaser the amount of the earnest money without interest or costs.

10. Except where otherwise provided all the costs and expenses of the vendor and the purchaser of and incidental to this agreement and the sale including investigation of title searches advertisements in one English and one vernacular paper battakee survey preparation of plans and conveyance including stamp duty and registration charges and certified copies (if any) and of correspondence (if any) shall be borne by the vendor and the purchaser in equal shares.

11. The broker in this transaction is Mr. Damodar Trimbuck Nandurdikar of Jalgaon. If the sale and purchase is completed but not otherwise the vendor and purchaser respectively shall pay him brokerage at the rate of two and a half per cent. on the amount of the purchase money.

18. It will be seen that there are a number of other terms besides those agreed on between Nandurdikar and Sir Shapurji. Some of them may be said to be matters of form, that is terms which would have been implied anyhow under the Transfer of Property Act. But this does not by any means apply to all of them, for instance the provision about the fire policy and about the press pool and ginning pool agreements in Clause (2). This latter provision not being in the standard cyclostyled form had to be written in by hand. Clauses (6) and (7) and Clauses (9) and (11) also contain important provisions for the benefit of the vendor and purchaser respectively which would not have been implied without special agreement.

19. On the afternoon of July 8, Nandurdikar went to the solicitors' office accompanied by plaintiff's brothers Tulshiram and Bhagirath who happened to have come to Bombay. He went again with the same two persons on the 9th, again with Tulshiram on the 10th, and again with one Sathe, a partner of Bhagirath, on the 11th. According to his story the only purpose of these visits was to arrange about the signing of the engrossment. He had at first offered to sign himself but was told that that would not do as he was mentioned in the agreement as the broker. Then he suggested that Tulshiram should sign and Manekshaw said he would consult Sir Shapurji about it. That was on the 8th, on which day according to Nandurdikar the description of the property was also not ready. On the 9th Nandurdikar says Manekshaw merely told him that he had not yet consulted Sir Shapurji and on the 10th he said that plaintiff must sign. Bhagirath left Bombay that evening to fetch plaintiff and on the 11th Nandurdikar looked in to tell Manekshaw that plaintiff would be coming on the 13th. Manekshaw then told him that the negotiations were at an end, and he protested against this. On the 13th he took plaintiff along with him to the office and asked Manekshaw to take his signature on the engrossment but Manekshaw refused and said that the agreement was broken and the earnest money should be taken back.

20. Manekshaw's story about the events of these days is that there was no

difficulty about the description of the property--it was already sufficiently described in the schedule to the engrossment--and there was also no difficulty about Tulshiram signing. It did not matter to them who signed. But Nandurdikar was pressing for changes in the terms, in particular he wanted provision made for a watchman and he wanted the time for completion extended. Sir Shapurji was consulted and said that he was not agreeable to any change. He (Manekshaw) told Nandurdikar so on the 9th and Nandurdikar asked him to try and persuade Sir Shapurji. Next day he informed Nandurdikar that the transaction was at an end As to the 11th and the 13th Manekshaw's account does not differ materially from Nandurdikar's.

21. The learned trial Judge believed Nandurdikar who is supported by plaintiff's brothers. He was favourably impressed with Sir Shapurji's evidence but has criticised Manekshaw severely and refused to believe him even in matters where he is corroborated by Sir Shapurji. The learned Judge had of course the advantage of seeing the witnesses. I must say that in some respects Nandurdikar's story is to my mind a good deal less than completely convincing. I cannot help thinking that there must have been a certain amount of haggling on his part to account for all those interviews from the 8th to the 11th. It could not have taken long to settle who was to sign, and if that was the only point it is difficult to see why Nandurdikar did not wire or write to the plaintiff on the 8th or 9th and simply tell him to come to Bombay and sign. On the other hand it is scarcely credible that he was seriously insisting on any variation of the terms. Most of the things he is said to have argued about were trivial matters. He knew his principal was anxious to buy the factory. It was to his own interest to conclude the transaction. There is no reason to suppose that plaintiff was in any difficulty about finding the money. He had told Nandurdikar to arrange for two or three weeks' time and a month's time had been allowed. It does not stand to reason therefore that Nandurdikar would have risked a breakdown of the negotiations by standing out for a longer period. I think the trial Judge was clearly right in rejecting this part of the defendants' case.

22. It was part of the plaintiff's case, though not expressly mentioned in the plaint, that Sir Shapurji resiled from the agreement because of the more advantageous offer from defendants Nos. 2 to 5. The evidence on this point is as follows. On July 12, a pleader from Dhulia acting for defendant No. 4 had a long talk with Manekshaw about purchasing the factory. On the 13th defendants Nos. 2 to 5 who had travelled from Dhulia to Bombay on the 12th (in the same train as the plaintiff as it happened) came to see Sir Shapurji and settled to purchase this factory and another one. Sir Shapurji says that he knew nothing about the new purchasers before the 13th. But on that day their broker Birmadutta, who used to visit Sir Shapurji's office from time to time on insurance business, wrote a letter to Sir Shapurji reporting the completion of the transaction and in this letter he said; "I shall thank you to reserve for me the agreed commission of three per cent. on the sale price as intimated on the 11th instant." This evidence certainly does not justify the trial Judge's finding that Sir Shapurji was

negotiating a sale to defendants Nos. 2 to 5 from July 8. It may justify an inference that the negotiations began on the 11th, which is the date on which Manekshaw told Nandurdikar that his business was at an end. But in the view which we take of the law Sir Shapurji's motive for turning down the plaintiff's offer is immaterial. Indeed every item in the plaintiff's case might be conceded and he would still not be entitled to specific performance.

23. On the question whether what happened on July 7 amounted to a binding agreement between the parties many authorities were cited, the effect of which is summed up in Halsbury, Vol. XXIX, p. 237, paragraphs 321 and 322:--

An acceptance must be absolute and unqualified. There is no completed contract if the acceptance is "subject to approval of terms of contract"; or "subject to a formal contract being prepared and signed by both parties as approved by their solicitors"; or simply "subject to contract"; or where it otherwise appears that all the terms of the contract are not definitely settled or that additional terms are to be agreed to and inserted in the formal contract.

On the other hand, if it appears that the parties have agreed upon the essential terms of the sale, a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature, or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself, does not prevent the agreement being enforceable.

It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up.

I may also refer to Dart, Vendor and Purchaser, eighth edition, p. 227. Before referring to the cases I may point out that the law is the same in India as in England: Harichmd Mancharam v. Govind Laxman Gokhale (1922) L.R. 50 IndAp 25 and (1933) ILR 60 980 (Privy Council)

24. The earliest important case on the subject is Winn v. Bull (1877) 7 Ch. D. 29. In that case there was a lease by written agreement of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract." No other contract was in fact entered into by the parties and it was held that there was no final agreement which could be enforced. Sir George Jessel M.R. said (p. 30):--

I am of opinion that there is no contract. I take it the principle is clear. If in the case of a proposed sale or lease of an. estate two persons agree to all the terms and say, "We will have the terms put into form", then all the terms being put into writing and agreed to, there is a contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled.

Further on in his judgment he said (p. 32):--

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.

These latter observations show that the decision did not turn on the fact that the stipulation about a formal contract was express.

25. *Winn v. Bull* was approved by Mr. Justice Parker, afterwards Lord Parker, in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284. In the course of his judgment his Lordship said (p. 288):--

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

These observations have become classic and have been cited with approval in *Rossdale v. Denny* [1921] 1 Ch. 57, and in many other cases.

26. Pausing here for a moment I may say that although the trial Judge in one place in his judgment has expressed the view that there was a concluded contract as the result of the conversation between Nandurdikar and Sir Shapurji on July 7, and that only a formal agreement remained to be drawn up, that is not and never has been the plaintiff's case. Neither in the pleadings nor in Nandurdikar's evidence has it been stated or even suggested that the agreement was finally concluded at the interview between Nandurdikar and Sir Shapurji. It is not even plaintiff's case as appearing in the pleadings and the evidence that the agreement was finally concluded by the oral discussion between Nandurdikar and Manekshaw, without reference to the written agreement. Nandurdikar has admitted that Sir Shapurji sent him to the solicitors' office to get the draft agreement prepared. It was the terms of the draft agreement which he discussed with Manekshaw. In the correspondence before the suit plaintiff's solicitors stated that they based their case on the draft agreement and the engrossment, and in paragraph 13 of the pleadings it was quite definitely stated that the agreement of which specific performance was sought was the one contained in these two documents. In such a case; it is difficult to see how Lord Parker's rule can assist the plaintiff. It is impossible to hold that the oral agreement only need

be looked at and that the documents may be ignored, for it was admittedly part of the understanding between the parties that these documents should be prepared and the suit is actually founded on them. The question to be decided seems to me to be, not whether these documents were necessary or whether the agreement was complete without them, but whether, a draft agreement and engrossment being evidently contemplated by the parties, the contract can be said to be complete without the formal agreement being signed and executed.

27. In that connection we have to refer to the line of authorities beginning with *Coope v. Ridout* [1921] 1 Ch. 291. The facts of that case are thus stated in the head-note:--

Purchasers made an offer by letter to a vendor to purchase his freehold property at a specified sum "subject to title and contract". Negotiations followed, and the purchasers alleged that all the material terms were subsequently agreed to between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: "it seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft.

It was held that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written agreement made inter partes should be formally entered into, and in the absence of such a document there was no enforceable contract. The case was originally tried by Mr. Justice Eve (1920, 2 Ch. 416) who said in the course of his judgment (p. 419):--

That brings me to the question of what is the true meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are ad idem and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract inter partes and formally entered into.

This view was affirmed by the Court of Appeal.

28. A similar decision was given by the Court of Appeal in *Chillingworth v. Esche* [1924] 1 Ch. 97. In that case there was an agreement to purchase land "subject to a proper contract to be prepared by the vendor's solicitors". A proper contract was subsequently prepared by the vendor's solicitors, approved by the purchasers as well as executed by the vendor and tendered to the purchasers for execution. The purchasers refused to sign. Nevertheless it was held not only that there was no contract but that the purchasers were entitled to recover the deposit. Pollock M.R. seems to have attached some importance to the expression "proper contract", but the decision did not turn upon that. *Coope v. Ridout* was followed among other cases by all the Judges and it was held that in the absence of an executed agreement either party was entitled to break off negotiations "for reasons good, bad or indifferent", on the simple ground that there was no

contract capable of enforcement.

29. In *Lockett v. Norman-Wright* [1925] 1 Ch. 56. Mr. Justice Tomlin (as he then was) held that an agreement "subject to suitable agreements being arranged by solicitors" was in the same category as agreements "subject to contract" "subject to formal contract" and "subject to proper contract" and that the principle laid down in *Coope v. Ridout* and *Chillingworth v. Esche* applied. It was not sufficient that the draft agreement should be approved by the solicitors. They were not agents to conclude a bargain for¹ their clients. Execution of the agreement was essential.

30. I have already mentioned that the English law applies in this country. It must be applied *mutatis mutandis*. As we have no Statute of Frauds the agreement need not be in writing and therefore it may be a matter of oral agreement or even of inference from the conduct of the parties that the terms of their bargain are to be reduced to a formal contract. But once it is clear that that is the understanding the consequence must be the same as under the English law where the words "subject to contract" or similar words are used.

31. The understanding here was that there was to be a draft agreement and an engrossment of that draft. That I think is beyond dispute. It has never been suggested in the pleadings or the evidence that the preparation of these documents was in any way superfluous or contrary to the understanding between Nandurdikar and Sir Shapurji. I may at this point refer to the actual evidence. Sir Shapurji says that when Nandurdikar went away to get the earnest money he sent for Antia, the company's clerk, and told him the conditions agreed to between Nandurdikar and himself. Then I quote his own words:

I asked him to wait until Nandurdikar came and to take him to Mr. Manekshaw to have the usual agreement drawn up. He came; at about 5-30 p.m. and in his presence I again gave instructions to Antia to take him to Manekshaw to have the agreement drawn up.

In cross-examination on this point he said:

Mr. Manekshaw had to take instructions from me about the terms. He had to put them into legal form and incorporate such other terms as to safeguard the interests of the client. In the present case the main terms were settled between me and Nandurdikar. The solicitors were to insert other terms about fire insurance and other usual terms.

32. Drawing up a draft agreement and engrossing it would naturally mean that the document was not to be a mere memorandum of terms already agreed on but was to be signed and executed. It seems to me that the plaintiff's case can only be taken out of the ordinary rule if he is able to show that execution was not necessary because the agreement or understanding between Nandurdikar and Sir Shapurji rendered it unnecessary. But Nandurdikar has never said or suggested that the engrossment was not to be signed and his whole conduct

even on his own showing indicates that he knew it had to be signed. He says that he had three interviews with Manekshaw to settle who was to sign it and even after he had been told that the negotiations were at an end he produced the plaintiff for the purpose of getting it signed. On what principle then can it be said that the agreement was complete without execution of the document? It seems to me that the case clearly falls within the principle of *Coope v. Ridout* and the other authorities cited.

33. It may be mentioned, though learned counsel for the plaintiff did not make a point of it, that there was no written agreement in the case of the subsequent agreement of sale to defendants Nos. 2 to 5. According to Sir Shapurji a written bargain paper was dispensed with by consent in that case to save expense. We are informed that the receipt for the earnest money gave full details. But anyhow the absence of a writing in a different transaction cannot assist the plaintiff. Whether a written Agreement is necessary and if so whether execution of the written agreement is necessary must obviously depend on the intention of the parties in the particular case. In our case the only possible inference seems to me to be that Sir Shapurji accepted Nandurdikar's offer subject to the execution of a written agreement and that Nandurdikar acquiesced.

34. Mr. Amin, I think, conceded that if that was our view of the evidence he would have no case. He cited some English cases, *Bonnewell v. Jenkins* (1878) 8 Ch. D. 70, *Botton Partners v. Lambert* (1889) 41 Ch. D. 295, and *Filby v. Hounsell* [1896] 2 Ch. 737. As to these it is only necessary to say, firstly, that they were all cases where there was originally a completed agreement. There was no doubt a stipulation for a formal contract, but the contract was to contain no new terms. These cases are therefore distinguishable from the present one on that ground. Secondly, they were all prior to *Coope v. Ridout*. Halsbury in his note to paragraph 322 already referred to says: "In practice the reference to a future contract is now treated as making the acceptance conditional on the signing of a formal contract."

35. We were also referred to *Bijoya Kanta Lahiri Chowdhury v. Kailash Chandra Bhoumik* (1919) ILR 46 Cal. 771. The facts in that case were that the defendant entered into an oral agreement to grant the plaintiff a lease of his specified share in certain mouzas at a fixed annual rent and a stipulated premium, and a draft lease was to be prepared and approved of by his pleader. Part of the premium was paid at once and accepted by the defendant as earnest money. No draft lease was prepared and approved of, but it was. held that the agreement was complete and enforceable notwithstanding the omission of the approved draft. The view which the Court took of the evidence was that the draft was intended by the parties to be merely commemorative of the terms already agreed upon and not a condition of the completion of the agreement. It is to be noted that this was a second appeal and the High Court was therefore bound to accept the findings of fact of the Court below. Mr. Justice Richardson in his judgment said (p. 777): "It is said that the mere fact that a formal document was contemplated

was prima facie an indication that the parties did not intend to be bound till it was executed. That may be so, but there was other evidence before the Court." He went on to say that the finding of the lower Court must be accepted because) it could not be held that there was no evidence to justify it. Another point to be noted with regard to this case is that it is of the year 1919 and is therefore prior to Coope v. Ridout.

36. The strongest case in favour of the plaintiff is Harichand Mancharam v. Govind Laxman Gokhale (1922) L.R. 50 IndAp 25. That was a case of a suit for specific performance based on two writings, practically in identical terms and signed respectively by the two parties. The conditions of sale were set out in considerable detail, and one of the conditions was that the bargain paper in respect of the sale was to be made through a vakil within two days. It seems that formal documents were prepared by the defendants' solicitors in which some additional terms were inserted, but the parties did not agree as to these terms. Their Lordships of the Privy Council agreeing with the judgment of the Appeal Court held that the plaintiff was entitled to specific performance. The case was decided in 1922 and Coope v. Ridout was not cited. But apart from that the case is clearly distinguishable from the present. Their Lordships said after referring to Von Hatzfeldt-Wildenburg v. Alexander (p. 31):--

The facts of that case were wholly different from the present, but the judgment marks the difference between a completed and binding agreement and one subject to a condition. Here exhibits A and A1 [those were the two documents signed by the parties containing the terms of the bargain] show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a Vakil only means that it should be put into proper shape and in legal phraseology, with any subsidiary¹ terms that the vakil might consider necessary for insertion in a formal document.

37. Evidently therefore their Lordships thought that it was a case where according to Lord Parker's dictum the further writing could be ignored because it was to be merely a record of what was already agreed upon. The case would only have been similar to the present case if the plaintiff here had sued on the basis of the oral agreement between Nandurdikar and Sir Shapurji and not, as in fact he has done, on the draft agreement and engrossment.

38. I think, therefore, this appeal must succeed on the merits and plaintiff is not entitled to specific performance.

39. The trial Court has awarded plaintiff some small amounts by way of mesne profits and damages. In the cross-objections a larger amount is claimed. Learned counsel for the appellants argues that plaintiff is entitled to nothing under these heads. He is not entitled to mesne profits because he has no right to possession

until the execution of a conveyance and therefore defendants' possession was not wrongful, and he is not entitled to damages because no specific amount was claimed, no Court-fees were paid for this relief and there is no evidence that any loss has been caused to him. I think there is a good deal of force in these contentions, but as the suit fails altogether in our opinion they need not be further discussed.

Divatia, J.

40. I concur.

41. The main point arising for decision on the arguments urged before us is whether there was a concluded contract between the parties. In India an oral contract to sell is valid and binding on the parties. But where a dispute arises after a draft agreement in pursuance of the alleged contract is made, the question would be whether it was the intention of the parties to be bound by the contract as embodied in the written document or by the contract on the terms agreed upon orally before the draft was executed. That intention may be inferred in the absence of definite evidence by comparing the terms alleged to have been agreed before the draft with the further terms discussed or agreed as appearing in the draft. In the present case the evidence shows to my mind that the contract by which the parties were to be bound was to be embodied in a formal document prepared by the solicitor of the first defendant and signed by or on behalf of both the parties. The evidence of the plaintiff's broker is sufficient to show that although the main terms of the contract had been agreed to between him and Sir Shapurji on the 7th, there was a further discussion after he went to the office of the defendants' solicitors at least with regard to one topic which according to the plaintiff's broker did not form part of the terms discussed between him and Sir Shapurji. That term was about fire insurance. He says that he told Manekshaw that fire insurance was not agreed to but the latter told him that it was the usual form, that the sum was trifling and hence he did not ask Manekshaw to delete the clause. He further says that he told the solicitors to allow the plaintiff to put a watchman until the sale-deed was made, although according to him the keeping of the watchman was not going to be a term of the contract itself. In the draft agreement as well as the unsigned engrossment there are certain terms which were admittedly not agreed to between the plaintiff's broker and Sir Shapurji and which must be regarded as new and additional terms between the parties. Some of those terms were not merely formal provisions to be put by the lawyer in the document. The principal out of these terms are those relating to the pool agreement between the parties and the terms under Clauses 6, 9 and 11 of the draft. Sir Shapurji says in his evidence that his solicitors had to put the main terms agreed upon in the legal form and incorporate such other terms as to safeguard the interests of his client. According to the evidence of the plaintiff's broker he sent the receipt to the plaintiff at Dhulia and when he was told that the plaintiff's presence was necessary for his signature on the engrossment, he sent word to him to come to Bombay for that purpose. That was so because it was the

written contract containing all the terms Agreed upon that was to govern the legal relation between the parties. Besides, it must be noted that what the plaintiff seeks to enforce in the present suit is specific performance of the contract as embodied in the draft agreement and the unsigned engrossment and not of the terms agreed upon between the plaintiff's broker and Sir Shapurji. That is a material point because it shows that the intention of the parties was to be bound by the terms as embodied in the written agreement.

42. If therefore the plaintiff seeks to enforce specific performance of the contract embodied in the draft agreement, it must be shown that that particular contract was concluded. It is, however, urged by learned counsel for the plaintiff that there were two contracts, one between Sir Shapurji and the plaintiff's broker and the other containing the additional terms in the draft agreement which were agreed to between the broker and the defendants' solicitors. As. has been observed by Parker J. in the leading case on the subject in *Von Hatzfeldt-Wildenburg v. Alexander*[1912] 1 Ch. 284. the criterion in such cases is whether the execution of a further contract was a condition or term of the bargain or whether it was a mere expression of the desire of the parties as to the manner in which the transaction already, agreed to will in fact go through. Now here if all the terms which were embodied in the draft agreement had been agreed to by the parties and what remained was for the lawyer of the party or parties to embody them into legal forms, the result might have been different. But admittedly there were several terms which were discussed after the main terms were fixed and the plaintiff's broker was sent to the solicitors. for the purpose of preparing a written agreement after discussion of those other terms. The further contract was therefore a term of the bargain and not merely an expression of desire. The question therefore is not whether there was another contract after the first contract was completed, but whether the intention of the parties was to make a proper contract by the execution of a written document, and on that point I think the evidence points to the conclusion that it was the written contract between the parties that was to govern the relations between them. That being so, the authorities relied upon by the learned counsel for the appellants would apply to the present case.

43. Out of a number of authorities which have been cited before us I think the material authorities, are the decisions in *Coope v. Ridout* [1921] 1 Ch. 291, and *Chillingworth v. Esche* [1924] 1 Ch. 97, and *Lockett v. Norman-Wright* [1925] 1 Ch. 56. All of them proceed on the basis that where the agreement was to be subject to a contract or subject to a proper contract or subject to a suitable arrangement being made between the solicitors of the parties, it is the finally executed contract that governs the legal relation between the parties. In India, as I said before, there can be an oral agreement to sell. But there also the principle applicable would be the same if from the oral agreement between the parties it can be concluded that the parties were to execute a written document containing the terms of the agreement as a condition of the contract.

44. On this view of the law it is not necessary to dwell upon a good deal of the evidence which has been discussed by the learned Judge. But I may say briefly that in my opinion the defendants have not proved that the plaintiff's broker objected to the two conditions about the period of completion and the cost of execution. On the other hand it appears from the letters exhibits 147, 148 and 150 that the plaintiff was very eager to conclude the bargain and that the broker had informed plaintiff on the evening of the 7th as to what had happened between him and the defendants' solicitors. But the question is not what the plaintiff thought about the result of the arrangement but what would in law be the result if the intention of the parties was to be governed by the terms of the written agreement. Plaintiff says that the defendants backed out because they had a better offer. The evidence shows that on the 11th when the defendants' solicitors told the plaintiff's broker that the negotiations were at an end the defendants had some talk with the agents of the subsequent purchasers. The question, however, is not whether the conduct of the subsequent purchasers is, as has been put in one case, good, bad or indifferent, but whether there had been a concluded contract between the parties. The learned Judge below has based his decision on the defendants' failure to prove that the plaintiff's broker backed out after the terms were settled, but the legal relations between the parties as urged before us on behalf of the defendants had not been put or at any rate stressed before the learned Judge. The decisions in *Harichand Mancharam v. Govind Laxman Gokhale* (1922) L.R. 50 IndAp 25, and (1933) ILR 60 980 (Privy Council) , make it clear that on this point the English law applies to contracts for sale in India and that being so, the law as laid down in the latest rulings under the English law must apply to the facts of the present case.

45. It has been conceded by the learned counsel on behalf of the respondent that if the agreement between the parties is to be read subject to a contract or subject to the terms being embodied in a written document, then the authorities relied upon on behalf of the appellants would apply to the present case, and, as on the evidence it appears to me that the parties were to be bound by the written agreement, those authorities would apply with the result that till defendant No. 1's solicitor told the plaintiff's broker that the matter was off it was only in the stage of negotiations between the parties and had not reached the stage of a concluded contract. I therefore agree that the contract having not been concluded it was open to defendant No. 1 to break off the negotiations before the engrossment was executed by both the parties.

46. On behalf of the respondent reliance has been placed upon the decision of their Lordships of the Privy Council in *Harichand Manchmam v. Govind Laxman Gokhale*. That case bears some resemblance to the facts of the present case. But I do not think it is on all fours with our case. There were two writings there passed by the parties to each other in which all the material terms of the contract were embodied and a lawyer was to put those terms into legal shape. Subsequently certain subsidiary terms were introduced in the document and it was put into proper legal form. Here, however, the terms alleged to have been

agreed to in the first instance were not all the terms embodied in the document but only the main terms and the other terms embodied in the draft agreement cannot in my opinion be regarded as merely subsidiary. Besides, in that case the action was brought not on the terms as appearing in the written document prepared by the lawyer but on the terms agreed to by the parties in the two written documents. Here, as I said before, the plaintiff seeks specific performance not of the terms agreed to between the plaintiff's broker and Sir Shapurji but of the terms in the draft agreement about which there was no discussion in the alleged first contract. The decision in *Harichand Mancharam v. Govind Laxman Gokhale* therefore would not apply to the facts of the case before us.

47. With regard to the points of jurisdiction and leave required under Order II, Rule 4, I think the lower Court had the jurisdiction to entertain the present suit as it falls in any case u/s 16(d) of the Civil Procedure Code, and under the combined operation of Order I, Rule 3, as well as Order II, Rule 3, it would be open to the plaintiff to seek specific performance of the contract as well as possession of the property. It is true that it has been laid down in several cases that specific performance of a contract and possession of the property agreed to be sold are two different causes of action and therefore they cannot be combined in one suit except with the leave of the Court, and indeed there are observations in one decision of this Court, viz. *Bhagwandas Vrijbhukandas Shariff Vs. Naran Kanji*, that leave should be obtained under Order II, Rule 4. It may be more proper to ask for such leave on the ground that the causes of action are distinct, although they could be combined in one suit. Here, however, the point is academical because I do not think that even if leave was necessary it would affect the merits of the case u/s 99 of the Civil Procedure Code. The suit therefore was properly brought in the Dhulia Court and the want of leave under Order II, Rule 4, would not necessarily result at the present stage in the dismissal of the suit. But, as the plaintiff fails on the merits in proving that there was a concluded contract between the parties, I am of the opinion the suit must be dismissed on that ground.

48. Appeal allowed, the decree of the lower Court is set aside and the suit dismissed with costs throughout. Cross-objections dismissed with costs.