

(1973) 11 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 1313 of 1967

Vasant Sakharam Sanas

APPELLANT

Vs

Chabildas Sobhagchand

RESPONDENT

Date of Decision : 20-11-1973

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11, 28
Contract Act, 1872 — Section 29
Specific Relief Act, 1963 — Section 22, 9
Transfer of Property Act, 1882 — Section 106, 107, 110, 54

Citation : (1974) 76 BOMLR 584

Hon'ble Judges : Naik, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Naik, J.—This is an appeal by the original defendant against the judgment and decree of the learned Extra Assistant Judge, Poona, in civil appeal No. 615 of 1966 confirming the decree passed by the 3rd Joint Civil Judge, Junior Division, Poona, in civil suit No. 207 of 1965 on the file of his Court, whereby the learned Civil Judge decreed the plaintiff-respondent's suit for specific performance of the suit agreement to lease and for possession.

2. Briefly stated, the allegations on which the plaintiff-respondent's suit for specific performance of an agreement to lease and for possession was founded are these: It appears that in City Survey No. 122 of Bhavani Peth, Poona, there was a building which was originally owned by one Kamlabai Harilal Pandya. The entire structure being burnt down, the said property was purchased by the defendant. The defendant thereafter constructed a four storied building on the said open site. He secured the completion certificate from the Corporation of Poona on April 12, 1963 and let out some shops to other persons. On February 19, 1965, the plaintiff-respondent filed the suit giving rise to this appeal, for specific performance of an alleged agreement to lease two Galas from the said building and for possession. The plaintiff alleged that he was a tenant of one of

the shops in the former building when it was owned by Kamalabai and was burnt down. He alleged that the defendant having purchased the property and asked him to vacate the burnt portion of the shop, he declined to do so. Thereafter he alleged that with the intervention of one Manikchand, he vacated the premises on the defendant having executed an agreement exh. 52P/1, dated July 26, 1960 to lease two Galas- to him. According to this agreement, after the reconstruction of a new building on the original site, the defendant was to lease to the plaintiff two Galas of his choice after securing the completion certificate of the Corporation, on a rent which might be mutually agreed upon between the parties.

3. The suit was resisted by the defendant-appellant. The defendant denied the plaintiff's case in toto. He contended that the agreement to lease was executed by him because of a false representation made to him that the plaintiff was a tenant in the former building, and also under coercion. The defendant, therefore, contended that the agreement in question is not binding on him. He also contended that the suit is barred by time. In particular, he contended that the suit agreement being void for uncertainty it could not be specifically enforced and lastly he contended that in any event the civil Court had no jurisdiction to entertain the suit in view of the provisions of the Bombay Rents, Hotel and Lodging House Bates Control Act, 1947--hereinafter referred to as the "Act of 1947".

4. On the relevant issues settled for decision, the learned Civil Judge held that the suit agreement was proved and that the defendant has failed to prove that it was executed either as a result of any misrepresentation or coercion. He, therefore, held that the suit agreement was binding on the defendant. Dealing with the contention that the terms of the agreement are uncertain and incapable of being enforced, he held, that though the terms were wide and incomplete in certain respects, they did indicate a concluded agreement inasmuch as, although it was left to the lessor to lease the Galas of his choice, and the rent was not specified, the structure from which the two Galas were to be leased was specified, and in the absence of agreement, since the rent payable is the standard rent, the same could be fixed u/s 11 of the Act of 1947. On the question of jurisdiction he held that there was no substance in the contention of the defendant in view of the reported decisions in *Shiavax C. Cambata and Another Vs. Sunderdas Ebji*, and *Raghubir Narayan Lotlikar and Others Vs. G.A. Fernandes*, . He also repelled the contention of the defendant that the suit was barred by time. Consistently with these findings, he decreed the plaintiff's suit for specific performance of the suit agreement to lease and also for possession of two shop Galas.

5. Aggrieved by that judgment _and decree the defendant preferred an appeal to the District Court and the learned Extra Assistant Judge held that since the suit was based on an executory contract, it did not fall within the purview of Section 28 of the Act of 1947 and, therefore, the civil Court has jurisdiction to entertain the suit. Dealing with the contention about the contract being void for

uncertainty, he substantially adopted the reasoning of the trial Court, for repelling that contention of the defendant. So also he agreed with the trial Court in holding that the agreement is not obtained by misrepresentation or coercion. Consistently with that view, he dismissed the appeal.

6. Aggrieved by that judgment and decree, this second appeal is preferred by the defendant.

7. Mr. Paranjpe, the learned Counsel for the defendant-appellant, has assailed the judgments of, the Courts below by contending (1) that the suit agreement to lease being in fact an agreement to agree in future, is not at all a concluded contract, and that even otherwise, it being void for uncertainty in several respects, cannot be specifically enforced in view of the provisions of Section 29 of the Indian Contract Act read with Section 9 of the Specific Relief Act of 1963; and (2) that while the civil Court has jurisdiction to entertain the suit for specific performance, in view of the provisions of the Act of 1947, it has no jurisdiction to pass a decree for possession of the suit premises.

8. While developing his first contention, Mr. Paranjpe has argued that the suit agreement to lease is in fact an agreement to agree on a future date about the rent payable for the premises and, therefore, it is not specifically enforceable. He also argues that since the date of the commencement of the tenancy is not mentioned in the suit agreement to lease it is not a concluded agreement capable of being specifically enforced. He further argues that the agreement is vague and uncertain in several other respects. What, he asks, is the precise premises of which the Court could decree specific performance. Since, he argues, the choice is left to the defendant to lease Galas of his choice, what would happen if he does not make a choice So also, with regard to rent, he says, if the parties do not agree on the rent, how could the Court enforce the suit agreement. He further argues that the property is not in existence, the size and location of the Galas have not been mentioned; the period of tenancy and the nature of tenancy has not been mentioned; the purpose of the lease has not been mentioned, there is no mention about other conditions of tenancy like right to sub-let or prohibition against sub-letting. Having listed these numerous attacks against the suit agreement, he has in particular stressed his contention that the agreement to lease being an agreement to agree on a future date is not a concluded contract, and since the rent is not agreed upon and is to be agreed upon in future on the happening of the events mentioned in the agreement, and the date of commencement of the tenancy is not mentioned in the suit agreement, the same is void for uncertainty and cannot be specifically enforced. In my opinion, these contentions of Mr. Paranjpe are valid and must prevail.

9. Section 29 of the Indian Contract Act is to this effect:

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Section 9 of the Specific Relief Act, 1963 provides:

Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

10. The suit agreement, exh. 52 P/I, in so far as it is material, is to this effect:

I have decided to construct a new building on the said open site. I am going to construct Galas for shop premises in the front portion of the said building. After the building is constructed and the completion certificate of the Municipal Corporation is secured, I will let out to you two Galas of my choice, out of the said Galas, on a rent which would be mutually agreed upon.

11. The question which I have to address myself to is, as to whether having regard to the provisions of Section 29 of the Contract Act read with Section 9 of the Specific Relief Act, the agreement in question is void for uncertainty and, therefore, incapable of being specifically enforced. Now, a perusal of the material part of the agreement in question which is set out above, would show that the agreement could not be said to be an agreement to lease, the meaning of which is certain or is capable of being made certain. Since the rent is not at all agreed upon and it has been specifically provided that the rent would be mutually agreed upon in future, it is not at all a concluded contract which could be specifically enforced. But then Mr. Pratap, learned advocate for the plaintiff-respondent, argues, as was done by the Courts below, that after all the premises being shop premises situated in Poona to which the provisions of Part II of the Act of 1947 apply, the rent payable by the tenant is the standard rent which could be fixed u/s 11 of the Act of 1947, and that being the legal position, the rent in this case is capable of being made certain. I am unable to agree with Mr. Pratap.

12. In the instant case we are concerned with interpreting an agreement to lease. There is absolutely no scope for importing into this agreement between the parties the provisions of the Act of 1947. That Act nowhere deals with an agreement to lease. Section 11 of that Act on which reliance is placed deals with fixation of standard rent in the circumstances mentioned therein and it does not and could not have regard to the preamble to the Act and the provisions in the Act provide for fixation of contractual rent, or rent. As held by the Supreme Court in *Raizada Topandas v. Gorakhram* (1968) 66 BomLR 106, S.C. all the provisions of the Act of 1947 proceed on the footing that there is or was, at the inception, a relation of landlord and tenant between the parties. At page 114, we have the following relevant observations of Sarkar J.,

...The Act (The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947) does not create any tenancy. That has to be created by a contract. The question whether the appellants are sub-tenants, that is to say, tenants of a certain kind, is really a question whether a contract of tenancy was made between the appellants and the respondent. That question is not one arising out of the Act for

the Act says nothing as to the creation of a tenancy and is only concerned with the regulation of the relations between a landlord and tenant in a tenancy the existence of which is otherwise brought about.

(Italics are ours).

13. It would, therefore, appear that it is not permissible for us to import into the agreement the provisions of Section 11 of the Act of 1947 and to hold that the rent to be agreed upon is capable of being made certain. It would, therefore, appear that apart from other considerations, the plaintiff's suit is liable to be dismissed in limine as the suit agreement to lease being an agreement to agree at a future date is incapable of being specifically enforced.

14. In support of his second contention that specific performance of the suit agreement to lease cannot be decreed inasmuch as the agreement does not fix the date from which the lease is to commence, Mr. Paranjpe has invited my attention to the Privy Council decision reported in *Giribala Dasi v. Kalidas Bhanja* AIR [1921] P.C. 71, their Lordships have observed as under:

...The next and more serious ambiguity arises from the use of the word "hereafter" but the defect in it which, unless it can be remedied by legitimate implication, is fatal is that it does not indicate the date from which the term of the lease to be granted is to run. It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term, is to run.

It was contended on behalf of the respondents, that the word "permanently" means "in perpetuity", and the word "hereafter" means within a reasonable time in that behalf after the date of the letter. The most serious defect, however, remains, namely, from what date does the term of the lease commence?

15. When we turn to the agreement to lease in the instant case, the date of the commencement of the lease has not been mentioned. There is also no material in the record of the case from which the Court could imply or make certain the date of the commencement of the lease. It is true that as per the agreement, after the construction of the building is over and the completion certificate of the Corporation is secured by the defendant, he has agreed to let out two Galas of his choice on a rent which would be mutually agreed upon. Therefore, it may be said that the completion certificate which in "this case, we are told, was issued on April 12, 1963 might furnish us with some material for the probable time of the commencement of the lease. But then when we read the agreement in question, all that could be said is that after that date only, namely, after the date of the completion certificate, the defendant would make a choice of the Galas to be let and then the parties are to mutually agree upon the rent and it was only thereafter that the premises viz. two Galas, are to be let. In other words, although it may be said that a reasonable point of time for concluding the agreement to lease may be inferred from the completion certificate, it is not at all possible to fix the date of commencement of the lease. It would, therefore,

appear that the agreement in question suffers from this additional infirmity and could not therefore be specifically enforced as their Lordships of the Privy Council have observed in Giribala's case.

16. It is, however, argued by Mr. Pratap, that the ruling of the Privy Council in Giribala's case cannot be relied upon inasmuch as, it has not taken into consideration the provisions of Section 110 of the Transfer of Property Act and the provisions of Section 29 of the Contract Act, According to Mr. Pratap, that decision is based only on the provisions of Section 21(c) of the since repealed Specific Relief Act of 1877. Mr. Pratap further argues that if we import the provisions of Section 110 of the Transfer of Property Act, into the agreement in question, we could certainly fix the date of the commencement of the lease from the date of the making of the lease. I am unable to agree with the submission of Mr. Pratap.

17. It is no doubt true that there is no reference anywhere in the judgment of their Lordships in Giribala's case, either to Section 29 of the Contract Act or to Section 21(e) of the Specific Relief Act, 1877, although in the head-note, the editors have referred to Section 21 of the Specific Relief Act. The very fact that on p. 73 of the report, their Lordships have observed that, "it is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run", would show, that their Lordships had certainly in view the provisions of Section 29 of the Contract Act. Otherwise, as appears from the further part of the judgment of their Lordships, their Lordships would not have gone on to consider the effect of another document namely, a notice sent by the landlords to the tenants in an endeavour to see whether that document would furnish material for fixing the date of commencement of the lease. It is only after an elaborate discussion of the other material on record on which Mr. Harman relied in that appeal, and it is only after finding that, that notice to the tenants was an equivocal piece of evidence and not a conclusive piece of evidence, that their Lordships came to the definite conclusion that there was no material whatsoever in the record of that case to enable the Court to fix the date of the commencement of the lease. That would clearly show, that it is only because their Lordships had in view the provisions of Section 29 of the Contract Act and the provisions of Section 21 of the Specific Relief Act, 1877, as it then stood that they went on to consider the material other than the agreement in question to find out whether the date of the commencement of the lease could be fixed. I cannot, therefore, agree with the argument of Mr. Pratap that the decision in Giribala's case has been arrived at only by construing the provisions of Section 21(c) of the Specific Relief Act, 1877 and that it is not based on an interpretation of Section 29 of the Contract Act.

18. Let us examine the contention of Mr. Pratap based on the provisions of Section 110 of the Transfer of Property Act. Now, Section 110 of the Transfer of Property Act as the marginal note indicates deals with the exclusion of the day

on which the term commences. It is to this effect:

Where the time limited by a lease of Immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee and not the lessor, shall have such option.

Mr. Pratap has also drawn my attention to the provisions of Section 107 of the Transfer of Property Act, which as the marginal note indicates provides for making of lease. It is to this effect:

A lease of Immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of Immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of Immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of Immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

19. What Mr. Pratap argues is that, since in the suit agreement to lease the period is not mentioned, in view of the provisions of Section 106 of the Transfer of Property Act, this was a lease from month to month terminable by fifteen days" notice expiring with the end of a month of the tenancy. Mr. Pratap, therefore, argues that in view of the provisions of Section 107, the date of the commencement of the lease in this case is capable of being made certain and that date according to him would be either the date of registered instrument or the date of delivery of possession or the date of execution of a simple rent note. The fallacy underlying the argument lies in presuming that Section 110 or Section 107 of the Transfer of Property Act provides for an agreement to lease. It would appear that these sections have absolutely no bearing on an agreement to lease, but they deal with actual leases as distinguished from agreements to lease, as is manifest from the said provisions which are clear and also the respective marginal notes. By way of analogy I may set out for ready reference

the identical provisions in Section 54 of the Transfer of Property Act which provide not only for a transaction of sale, but also a contract for sale as distinguished from a transaction of sale. Section 54 is to this effect:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible Immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible Immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible Immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

20. A contract for the sale of Immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

21. It would, therefore, appear that the provisions of Section 107 and Section 110 of the Transfer of Property Act have absolutely no bearing for construing agreements to lease. They are intended only to lay down the law about a transaction of lease, and for ascertaining the date of commencement of a lease respectively, as distinguished from an agreement to lease. I feel fortified in my view, inasmuch as, if as Mr. Pratap argues, the provisions of Section 110 of the Transfer of Property Act could be imported for ascertaining the date of commencement of lease in an agreement to lease, it is highly unlikely that, that aspect of the case could have been lost sight of either by learned Counsel, or their Lordships of the Privy Council while dealing with *Giribala* case. It appears to me that it is precisely because Section 110 of the Transfer of Property Act has no application to agreements to lease, their Lordships have not referred to it in *Chribala*'s case. It would, therefore, appear that there is no force in the argument of Mr. Pratap to whittle down the efficacy of the Privy Council decision in *Giribala*'s case.

22. Mr. Pratap, however, has relied upon a decision of the Division Bench of the Madras High Court reported in *Raja of Vizianagaram v. Maharaja of Jeypore* AIR [1944] Mad. 518. In particular Mr. Pratap has relied upon the following observations (pp. 523-524) :

...The learned Advocate General argues that an agreement to lease which does not fix the date on which the lease is to begin cannot be enforced. This argument is based on the rule in *Marshall v. Berridge* (1881) 18 Ch. D. 233 where the Court of appeal held that in order to have a contract which would satisfy the Statute of Frauds it is necessary to find within the four corners of the agreement,

the date from which the contemplated lease shall begin and that if the contract is defective in this respect there is no enforceable contract and specific performance cannot be granted. In *Giribala Dasi v. Kalidas Bhanja*, their Lordships of the Privy Council state (p. 73):

...It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run" and on the peculiar facts of that case where-under the agreement provided for the execution of a permanent lease "hereafter" their Lordships held, differing from the High Court, that the correspondence between the parties did not indicate an intention that the lease should begin from the date of the agreement as was contended and that therefore the date of the commencement was left uncertain and the lease could not be enforced. In that case their Lordships were dealing with very special facts and no reference was made to the statutory rule embodied in Section 110, T.P. Act, which lays down that "where no day of commencement is named, the time so limited begins from the making of the lease."

The Privy Council had to deal with another case, *Ikramull Huq v. Wilkie* (1907) 17 M.L.J. 454 where the parties agreed in a series of letters that the lease should be executed shortly of certain properties of which the lessor was to get possession from the tenants and construct a godown for the occupation of the lessee in the course of three or four months. There was some delay in getting possession of the land, When it was obtained the lessee was asked whether he wanted the building constructed according to the original plan or had any alterations to suggest and the lessor said that he was prepared to finish the building within four months. Thereupon the lessee repudiated and justified the repudiation on the ground of the delay on the part of the lessor in] not putting himself in a position to complete the transaction. Their Lordships held on the facts of that case that the period within which the building were to be ready was not an essential part of the contract and the contemplation of both parties was that everything should be done without any unreasonable delay. In the circumstances they held that there was a completed contract of which specific performance will be granted. That was clearly a case in which the agreement between the parties did not contain any fixed date for the commencement of the lease. Although their Lordships did not expressly consider the effect of Section 110, T.P. Act, they do hold that the agreement contemplates the execution of the lease within a reasonable period and by implication it must be inferred that the lease was to run from the date of its execution. The circumstances of that case bear some resemblance to those of the present case. Here too the original agreement contemplates survey operations as a preliminary to the execution of the lease. The precise date on which those survey operations would be concluded was not known. The delay in their completion was not due to the default of either party. It is natural to infer that the parties contemplated the execution of the lease within a reasonable period after the completion of preparatory work. The delay after that date was due partly to the death of the Maharaja of Jeypore and

partly to the indecision of his successor; but in the absence of any other date being contemplated, it seems to us reasonable to infer from the circumstances that the parties made their agreement in the light of the statutory provisions of Section 110, T.P. Act, and that it was understood that the lease was to run from the date on which it was executed. A similar view has been taken by the Calcutta High Court in *Kailas Chandra v. Bejoy Kanta* AIR [1919] Cal. 837. where the learned Judges rely upon the decision of the Privy Council just quoted and hold that there was a concluded agreement in the absence of an express stipulation for the date of the commencement of the lease and that it is legitimate to read into the agreement the statutory provisions of Section 110, T.P. Act. We hold that the agreement in the present case is certain and definite both as to the rent and as to the date from which the lease is to commence and it is not unenforceable for uncertainty in either of these particulars.

23. It would appear that the above observations are based on the decision of the Privy Council in *Ikramull Huq's* case and the decision of the Calcutta High Court in *Kailas Chandra's* case. Now, when we peruse the judgment of the Privy Council in *Ikramull Huq's* case we find that in that case the only question which their Lordships of the Privy Council had to consider was, as to whether as contended by the defendant in that case, time was the essence of the contract to lease. Since the written contract itself did not provide for it, and their Lordships could not rely on the evidence of Borger that the term, that time was essence of the contract had inadvertently remained to be mentioned in the written contract, and it was also clear from the peculiar circumstances of the case that time could not have been the essence of the contract, that their Lordships of the Privy Council held that time was not the essence of the contract. In that case as the report goes, the question about the date of the commencement of the lease was not at all agitated or required to be considered. Since the only question which was considered in that case was as to whether in the circumstances of that case time was the essence of the contract, it would appear that that is not an authority on the question as to whether specific performance of an agreement to lease which does not either expressly or impliedly fix the date of commencement of lease could be granted. Such a question arose directly in *Giribala's* case and their Lordships of the Privy Council who are presumed to be aware of the earlier decision of the Board in *Ikramull Huq's* case, answered it in the negative.

24. It is true that in the case of *Kailas Chandra v. Bejoy Kanta* we have the following observations (p. 838) :

We may add that the Judicial Committee held in the case of *Moulvie Mahomed Ikramull Huq v. Wilkie*, that there was a concluded agreement, although the time of commencement of the lease was not expressly mentioned.

But then, as I have endeavoured to show by reference to the reported judgment of the Privy Council in the said case, the question about the date of the commencement of the agreement to lease was neither decided nor considered by their Lordships of the Privy Council. That question was specifically raised and

decided by the Privy Council in Giribala's case. I am, therefore, of opinion that the earlier decision of the Privy Council in Ikramull Huq's case could have no bearing on the subsequent decision of the Privy Council in Giribala's case and even otherwise in any event the subsequent decision ought to prevail over the former.

25. We are then left with the fact that as appears from the decision in Kailas Chandra's case and the case of Raja of Vizianagaram, the Calcutta and the Madras High Courts have taken the view that the provisions of Section 110 of the Transfer of Property Act could be imported into an agreement to lease for ascertaining" the date of the commencement of the tenancy. I have already observed while dealing with the argument of Mr. Pratap that the provisions of Section 110 of the Transfer of Property Act deal with the exclusion of the day on which the term of a concluded or completed lease commences and not with agreement to lease, which was precisely the point considered by the Privy Council in Giribala's case. At any rate since in Giribala's case their Lordships of the Privy Council were specifically considering the question of the validity of an agreement to lease, with utmost respect, I am unable to agree with the view of the Madras High Court, that their Lordships of the Privy Council while deciding the question did not take into consideration the provisions of Section 110 of the Transfer of Property Act. If Section 110 of the Transfer of Property Act were to have any bearing on the decision on the point for issue in that case, it is highly unlikely that their Lordships would not have approached the matter in the light of that provision. At any rate I would prefer to follow the decision of the Privy Council in Giribala's case which has been followed by the Lahore High Court and the Nagpur High Court, in *Khusi Bam v. Munshi Lal* AIR [1940] Lah. 225 and AIR 1949 286 (Nagpur) The Patna High Court also has taken a similar view in *Rudra Das Chakravarti Vs. Kamakhya Narayan Singh*, although there is no reference in it to Giribala's case. I am, therefore, of opinion that the agreement is void for uncertainty even on the ground that the date of the commencement of the tenancy is neither mentioned in the agreement to lease nor could be ascertained or fixed with reasonable certainty in the very peculiar circumstances of the instant agreement to lease.

26. That leads me to the next contention of Mr. Paranjpe. Mr. Paranjpe argues that while no doubt, the civil Court has jurisdiction to entertain the suit for specific performance, in the instant case it has no jurisdiction to pass a decree for possession. He, therefore, argues that the civil Court can only pass a decree for specific performance and, thereafter the plaintiff shall have to approach the Court of Small Causes at Poona for the relief of possession. Mr. Paranjpe has drawn my attention to Section 22(7)(a) of the Specific Relief Act, 1963. That section provides:

22(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908) any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask

for--

(a) possession, or partition and separate possession, of the property, in addition to such performance;....

Mr. Paranjpe argues that the relief of specific performance is one and that of possession is another. He further argues that the enabling provisions of Section 22 of the Specific Relief Act by which a plaintiff suing for specific performance of an agreement, may also sue for possession, could not override the specific provisions of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Mr. Paranjpe further argues that once the relief of specific performance is granted, the relation between the plaintiff and the defendant would be that of a landlord and a tenant and, therefore, the civil Court cannot pass a decree for possession. Mr. Paranjpe has also tried to distinguish the decision of this Court in *Baghubir v. G.A. Fernandes*. That was a suit for specific performance by a landlord against a tenant for exchange of premises. This Court held that Section 28 of the Act of 1947 had no application to the case and, therefore, the High Court on the Original Side had jurisdiction to entertain the suit. Mr. Paranjpe submits that that was a case filed by a landlord for specific performance of an agreement to exchange the premises and one of the grounds for holding that the civil Court as distinguished from the Small Causes Court had jurisdiction to entertain the suit was, that the plaintiff-landlord had not at all become entitled to recover possession of the property by having determined the tenancy by a notice to quit. Mr. Paranjpe argues that whereas a landlord becomes entitled to recover possession only after terminating the tenancy, a tenant would become entitled to possession only after that relationship of tenant and landlord comes into being or is subsisting. He, therefore, argues that the thesis which he is contending for was not at all required to be considered by this Court in *Baghubir's* case inasmuch as, according to Mr. Paranjpe his thesis is the antithesis of the thesis which was considered by this Court in *Baghubir's* case. That is how, says Mr. Paranjpe, the decision of this Court in *Baghubir* case being clearly distinguishable, could not be relied upon as an authority for holding that notwithstanding the provisions of Section 28 of the Act of 1947, the civil Court has jurisdiction to decree the suit for possession in the instant case. I am unable to agree with the reasoning of Mr. Paranjpe for more than one reason.

27. It is now well settled that the question of jurisdiction of the Court is normally and ordinarily to be determined at the time of the inception of a suit. This view which was expressed by Chagla C.J. in *Govindram Salamatrai v. Dharampal* (1951) 58 BomLR 386 has been approved by their Lordships of the Supreme Court in *Raisada Topandas v. Gorakhram*, When there is no relationship of landlord and tenant alleged by the plaintiff, it is the civil Court as distinguished from the Small Causes Court, which has jurisdiction to entertain the suit. In the instant case there is no relationship of landlord and tenant between the parties, and it is precisely to bring about that relationship based on an agreement to lease, that this suit is filed for specific performance of the agreement to lease.

That is why Mr. Paranjpe has proceeded with his argument by saying, that while undoubtedly in the instant case the civil Court as distinguished from the Small Causes Court, has jurisdiction to entertain the suit for specific performance it has no jurisdiction to decree the suit for possession. Since the question of jurisdiction, as I have pointed out, arises at the stage of the inception of the suit, it is impossible to accept Mr. Paranjpe's submission, that though the Court has jurisdiction to entertain the suit, it could not have jurisdiction to pass a decree for possession. That is but one aspect of the matter. There is yet another aspect. In a suit for specific performance of an agreement to lease and for possession it could not be said with any stretch of imagination that the plaintiff is entitled to possession. It is only a discretionary relief which may or may not be granted by the Court. It is only when a tenant is entitled to possession and if he proves the ground on which he is so entitled, that the Court has no discretion in the matter but to decree the suit for possession. Since in a suit for specific performance of an agreement to lease it could not be said that the plaintiff is entitled to possession, the Court which had initial jurisdiction to entertain the suit could not cease to have jurisdiction to pass a decree for possession simultaneously while passing the decree for specific performance. Section 28 of the Act of 1947, as has been repeatedly held in numerous cases and the latest of which is the Full Bench decision reported in *Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore*, . would come into play when a landlord or tenant files a suit relating to the recovery of possession in their capacity as such. Since in the instant case, in the very nature of things, that status of landlord and tenant would only be brought about by the decree for specific performance, Section 28 of the Act of 1947 could not be a bar for decreeing the suit for possession simultaneously while decreeing the suit for specific performance. In this connection it is important to refer to the following observations of Chagla C.J. in the case of *Raghubir v. G.A. Fernan-des* (p. 77):

...But, with respect to the learned Judge, what he has overlooked is the very important fact that the plaint does not proceed on the basis that the plaintiffs have become entitled to possession of the property. The plaintiffs are asking for specific performance of an agreement, and it is only if specific performance is granted by the Court that they would become entitled to possession of the property. u/s 28 where the landlord files a suit for possession, the relationship of landlord and tenant is terminated. No contractual tenancy is subsisting and the tenant has become a trespasser and the plaintiff asks for possession and for compensation for the period of the occupation by his erstwhile tenant. When we turn to the nature of the present suit, the tenancy is not terminated. The plaintiffs still recognise the defendants as their tenants. All that they say is that by reason of the particular agreement they have a right to recover possession. But that right will only accrue to them when the Court grants specific performance.... The fallacy underlying the argument on the side of the defendants is that in this Suit they presume that the plaintiffs are entitled to possession. They are definitely not. Specific relief is a discretionary relief and it is

open to the Court either to give the plaintiffs possession which is a specific relief they claim or to give them damages in substitution of the specific relief. When a landlord files a suit for ejectment, he is entitled to the relief for possession, The Court has no discretion. Either the Court grants him possession or dismisses the suit. But in the present suit it is entirely left to the discretion of the Court as to whether it should give the plaintiffs the main relief which they seek in the suit.

28. These observations apply with equal force even in respect of the present suit for specific performance and possession and, I am, therefore, unable to agree with the submission of Mr. Paranjpe that although the civil Court has jurisdiction to entertain the suit for specific performance it cannot have jurisdiction to pass a decree for possession. But, since I have taken the view that the suit agreement is void for uncertainty and unenforceable, the appeal succeeds, and the result is that the decrees passed by the Courts below are set aside and the plaintiff's suit is dismissed with costs in all the three Courts.

29. Leave under Clause 15 of the Letters Patent Act granted to the respondent.