

(1965) 01 GUJ CK 0002
In the Gujarat High Court

Vora Sirajudin Kalimuddin and Another	APPELLANT
Vs	
Safkathassein Badruddin and Others	RESPONDENT

Date of Decision : 22-01-1965

Acts Referred:

Registration Act, 1908 — Section 17(1), 17(1)(d), 17(1)(d) , 49
Specific Relief Act, 1963 — Section 12, 12(c), 27A
Transfer of Property Act, 1882 — Section 53A

Citation : (1966) 7 GLR 512

Hon'ble Judges : N.G. Shelat, J

Bench : Single Bench

Judgement

N.G. Shelat, J.—The suit from which this second appeal arises was instituted by the plaintiffs-appellants in the court of the Joint Civil Judge (J.D.) Godhra, for specific performance of an agreement of lease executed on 6th November 1952, and as deceased Haji Badruddin has committed a breach thereof, for a permanent injunction restraining him from recovering a sum of Rs. 6,000/- advanced to them under a mortgage-deed dated 11th November 1952 and for costs of the suit against the original defendant Haji Badruddin Musaji Poonawala, as the owner and Vabivatdar of a Firm in the name of Haji Badruddin Musaji Poonawala and Sons. On his death having taken place during the pendency of the suit, his heirs and legal representatives have been joined as defendants.

2. The plaintiffs-appellants are brothers and they owned a house situated in Municipal Lots Nos. 137 and 138 at Godhra. During the communal riots which took place in 1952 that house was burnt. The original defendant Haji Badruddin Musaji suggested to the plaintiffs to construct a new building on the said land and agreed to advance a sum of Rs. 6,000/- for the construction thereof on condition that the building was given as security for the amount. He also agreed to take on lease the building after it was ready for a period of 10 years on a monthly rent of Rs. 80/-. The building was to have a cellar, a ground floor and two storeys. On 6th November 1952 an agreement to lease the said building came to be executed by the parties. The terms thereof in substance were that

while Rs. 6,000/- were taken by the plaintiffs for the construction of a shop of four storeys, that building was to be given in mortgage for the said amount, to the defendant and on the said shop becoming ready which was to be constructed within four months, the plaintiffs had to let out the same to the defendant Haji Badruddin Musaji Poonawala and Sons on a monthly rent of Rs. 80/- for a period of ten years, and the latter had to execute the rent-note and get it registered. Of the amount of rent viz. Rs. 80/- Rs. 30/- were to be credited towards interest at the rate of Rs. 30/- per month on the mortgage amount of Rs. 6,000/- and the remaining amount of Rs. 50/- per month was to be paid to the plaintiffs for rent of the building. A mortgage deed was accordingly passed on 11th November 1952 for a sum of Rs. 6,000/- by the plaintiffs and the amount did not carry any interest as under the agreement dated 6-11-1952, Rs. 30/- out of the rent amount was to be adjusted for the same every month by way of interest on Rs. 6,000/-. These terms of the agreement are not in dispute. The construction of the building was commenced and while it was nearing completion in March 1953, Badruddin suggested some alterations in that building which he was to take on lease. After obtaining the necessary permission from the Municipality, those alterations were also effected. A completion certificate was obtained by them from the Municipality on 16th September 1953. Badruddin was thereupon requested by the plaintiffs to take over the said building, to which he did not agree. However, by a notice dated 31-10-1953 he intimated that since the building was not completed within the period of four months fixed under the terms of the agreement, he was not bound to take the property on lease: He also said that in case the interest on the mortgage amount was not paid to him as it had already become due, he would file a suit for recovering the amount under the mortgage-deed executed by them in respect of that property. That notice was replied to by the plaintiffs on 8th November 1953 wherein they said that time was not and cannot be the essence of the contract and that he was trying to get out of the contract by resorting to some such lame excuse. They also called upon him to execute a registered lease-deed within 30 days and take possession of the building, at the same time referring therein about the delay in constructing the building having occasioned by reason of his own desire to have certain alterations, failing which they will file a suit against him for specific performance of that agreement of lease and for a declaration that the amount of Rs. 6,000/- advanced by him be appropriated towards the damages resulting from the breach of the agreement. That led the plaintiffs to file the present suit for the reliefs already set out here above.

3. The original defendant resisted the suit inter alia contending that the agreement dated 6th November 1952 was compulsorily registrable and since it was not registered as required under law, the suit was not maintainable on any such deed for the specific performance of the agreement; that the terms of the agreement were vague and incomplete; that time was the essence of the contract; that the alterations in the building were not made at his instance, and that the plaintiffs were not entitled to any of the reliefs sought for in the suit.

Badrudin died thereafter and his legal representatives who were brought on record as defendants in the suit, adopted the same contentions.

4. The various issues were raised by the trial Court and in its view the agreement Exh. 54 did not require to be registered; that it was admissible in evidence; that the time was not the essence of the contract; that the possession of the building was offered by the plaintiffs to Badruddin in September 1953; that he was bound to take possession of the said building and execute the lease and have it registered; that Badruddin committed the breach of the terms of the agreement; that the terms of the agreement were clear and complete; and that the plaintiffs were entitled to specific performance of the said agreement. It further held that the plaintiffs were also entitled to recover Rs. 3106/- from the defendants on account of damages fixed at the rate of Rs. 80/- per month from the date when the building was offered to deceased Badruddin viz. from 1st October 1953 till the date of this judgment. In accordance with those findings, the trial court passed a decree directing the defendants, the partners of the Firm in the name of Haji Badruddin Musaji Poonawala and Sons, to execute a lease-deed in favour of the plaintiffs and get it registered within two months from that date as per the terms mentioned in the agreement Exh. 54 and they shall also take possession of the shop-building on execution of the lease-deed. The defendants were further directed to pay Rs. 3106/- as damages on payment of necessary court-fees thereon and also to pay the costs of the suit to the plaintiffs. Against that decision passed on 26th December 1956 by Mr. M.B. Pancholy, Joint Civil Judge (J.D.) Godhra, the defenders preferred a Regular Civil Appeal No 20 of 1957 in the Court of the District Judge Panchmahate at Godhra.

5. After this suit was filed by the plaintiffs-appellants, the defendants had also instituted a Regular Civil Suit No. 83 of 1954 against Sirajuddin and Salemanji, the present plaintiffs, for recovering Rs. 6000, - due under the mortgage deed dated 11th November 1952 passed by them. That suit was resisted by the mortgagors-the plaintiffs of this suit, and both the suits were heard by the same learned Judge In, that suit it was held District Judge, Panchmahals at Godhra.

6. Both these appeals were heard by the learned Assistant Judge at Godhra. In so far as the appeal against the decision in Civil Suit No. 7 of 1954 is concerned, the learned Assistant Judge held that the agreement dated 6th November 1952 requires to be compulsorily registered under the provisions of the Indian Registration Act and that it is inadmissible in evidence for any purpose. He, however, agreed with the findings of the learned Civil Judge about the time being not the essence of the contract and about the original defendant having committed breach of the said agreement. He then found that the pecuniary compensation for breach of the agreement can afford adequate relief and that way the plaintiffs were not consequently entitled to specific performance of the said agreement. He further held that the plaintiffs were not entitled to the alternative prayer in respect of permanent injunction restraining the mortgagees from recovering the mortgage debt of Rs. 6000/- and that the plaintiffs were not

entitled to any damages in addition to the relief of specific Performance as given by the learned Civil Judge. In case damages were available to the plaintiffs, they would be entitled to Rs. 200/- only by way of compensation for loss of rent from the date when the bidding was offered i.e. on 16-9-1953 till Badruddin refused to take the same i.e. till end of November 1953, at the rate of Rs. 80/- per month. In the result the decree passed by the learned Civil Judge was set aside and plaintiff's suit was dismissed with costs throughout. In the other appeal before him, (sic). The decision in the other Civil Suit No. 83 of 1954, he set aside the decree passed by the learned Civil Judge and granted a decree in favour of the plaintiffs for sale of the mortgaged property together with costs on their failing to pay the amount of Rs. 6000/- under the mortgage-deed. He, however, did not award any interest on the amount of Rs. 6000/- till the date of suit and only awarded 6% interest on that amount from the date of the judgment till payment. Against that decision there has been no appeal before this Court. However, feeling dissatisfied with the judgment and order passed on 29th November 1958 by Mr. C.A. Phadkar, Assistant Judge, in the other appeal, the plaintiffs have come on appeal before this Court.

7. The material contentions that affect the determination of the issues involved in this appeal revolve round the point as to whether the agreement Exh. 54 requires to be compulsorily registered u/s 17(1)(d) of the Indian Registration Act, and if yes, whether it can be admitted in evidence for any purpose such as for claiming specific performance thereof u/s 49 read with its proviso of the Act. Before I go to the rival contentions of the parties, I would set out the relevant provisions of the Indian Registration Act. Section 17(1) enumerates certain types of documents which are compulsorily required to be registered. One of them is contained in Clause (d) thereof which relates to leases of immovable property from year to year; or for any term exceeding one year, or reserving a yearly rent. The term "lease" is defined u/s 2 Sub-section (7) of the said Act as one including a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to "lease." Ordinarily speaking, therefore, an agreement to lease would amount to a lease as contemplated u/s 2(7) of the Act and if such a lease or an agreement to lease becomes a lease in respect of an immovable property from year to year; or for any term exceeding one year as it has been in this case, viz., for 10 years, it would require to be registered. Now, Section 49 of the Act provides that:

No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall-

- (a) affect any immovable property comprised therein or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered.

Then comes the proviso thereto which says that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter 11 of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

8. The arguments advanced in this connection can well be divided in two parts. The first is that the agreement, as it is in the present case, falls under the definition of "lease" as contemplated u/s 2(7) of the Act and that way it was required to be registered compulsorily. In not having been so registered, not only it cannot affect any immovable property comprised therein but it cannot be received as evidence of any transaction affecting such property. That argument of Mr. Oza for the respondents, was sought to be repelled by saying that since it did not create any right in present in the property it cannot be called lease u/s 2(7) of the Act, and that argument has its basis on certain authorities relied upon in this court. Another argument was based on the proviso to Section 49 of the Act, and it was urged by Mr. Karlekar for the appellants, that since the suit is one for specific performance of an agreement affecting immovable property, even if it is required to be registered and has not been registered, it can be received as evidence of any contract as the suit is one which falls under Chapter II of the Specific Relief Act, 1877. On the other hand, Mr. Oza's reply in that direction is that even if the agreement Exh. 54 does not require to be registered unless the provisions of Section 27A of the Specific Relief Act are complied with by the plaintiffs as contemplated in that proviso to Section 49, it cannot be received in evidence for claiming any specific performance of a contract and since no requirements of that Section 27A are complied with by the plaintiffs the agreement cannot be taken in evidence and the suit "cannot lie. It was, besides, urged that even a claim for damages, arising out of such an agreement which requires to be registered under law, would not as well be tenable, for, after all that claim arises out of the terms of the contract reduced into writing and contained in the agreement Exh. 54 in the case.

9. It is, therefore, necessary in the first instance, to consider whether the agreement Exh. 54 dated 6th November 1952 "does fall within the ambit of the definition of the term "lease" u/s 2(7) of the Act so as to require compulsorily registration as contemplated u/s 17(1)(d) of the Act.

10. Various citations have been made by the learned advocates appearing on both the sides for the consideration of the question as to whether such an agreement can be said to fall within Section 2(7) of the Indian Registration Act but it may not become necessary to refer to all of them, unless having pointed significance in relation to the nature of the agreement in this case, as practically all those decisions have been considered and some broad propositions have been laid down by Their Lordships of the Supreme Court in a case of Tiruvenibai and

Another Vs. Lilabai, This case has in the first instance approved of the decision in a leading case of Hemanta Kumar Debi v. Midnapur Zamindari Co. A. I. R. 1919 Pc 79, where the Privy Council held that "an agreement to lease, which, a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease". In other words, an agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included u/s 2 Sub-section (7) of the Indian Registration Act. The document with which the Privy Council was concerned was "an agreement that, upon the happening of a contingent event at a date, which was indeterminate and having regard to the slow progress of Indian litigation might be far distant, a lease would be granted" and it was held that "until the happening of that event it was impossible to determine whether there would be any lease or not". The decision also makes it clear that the meaning of the expression "an agreement to lease" "which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land". After quoting the observations of the Privy Council, the Supreme Court observed that "ever since this decision was pronounced by the Privy Council the expression "agreement to lease" has been consistently construed by all the Indian "High Courts as an agreement which creates an immediate and a present demise in the property covered by it". In other words, in order that an agreement to lease is governed by Section 2(7) of the Act, it must create an immediate and present demise in the property covered by it.

11. After approving of the ratio laid down in that Privy Council case, the Supreme Court further said that in considering the effect of the document, it is essential to enquire whether it contains unqualified and unconditional words of present demise and includes the essential terms of a lease. Then they have observed that while construing the document, the usefulness of precedents is usually of a limited character; after all, courts have to consider the material and relevant terms of the document with which they are concerned; and it is on a fair and reasonable construction of the said terms that the nature and character of the transaction evidenced by it has to be determined. What is essential to be kept before our mind is that a document executed by laymen without legal assistance must be liberally construed without recourse to technical considerations. Then it has said with regard to certain usual references to the heading and recitals in the document, that the heading of the document, though relevant, would not determine its character and further that an agreement would operate as a present demise although its terms may commence at a future date, or they contemplate to execute a more formal document in future. Same general tests such as if rent is made payable under an agreement from the date of its execution or other specified date, or if possession is given under an agreement, and other terms of tenancy have been set out, then the agreement can be taken to be a lease as contemplated by Section 2(7) of the Act. It is also necessary to keep in mind that as in the construction of other documents, so in the

construction of an agreement to. lease, regard must be had to all the relevant and material terms; and an attempt must be, made to reconcile the relevant terms, if possible, and not to treat any of them as idle surplus age. Some of these observations have flown from various authorities of different High Courts and therefore it is unnecessary now to refer to those decisions for the purpose of determining the character of the agreement in this case.

12. We have to find out, with these settled principles, as to whether the agreement Ex. 54 contains unqualified and unconditional words of present demise and includes essential terms of lease. The learned Assistant Judge has referred to the terms of the agreement and has found that all the necessary terms which a document of lease contains are found in the agreement. In his view, it effects an actual demise and creates the present and immediate interest in the property. The point, therefore, that requires to be determined is as to whether it does in fact create an immediate interest in the property so as to say that it effects an actual present demise from the date it came to be passed, when it contains a recital indicative of the intention of the parties to give effect to the same after the shop was ready for being handed over to the original defendant-document has to be taken as a whole and the cumulative effect of the recitals therein have to be considered in determining its character. In the first place, a lease ordinarily understood and as contemplated under the provisions of the Transfer of Property Act, if it has been for more than a year, does require to be registered. An agreement to lease may not, to a layman, appear to be such a document as would require registration unless one looks to the definition of the term "lease" in Section 2(7) as contemplated under the Indian Registration Act. It reads not as a completed document of lease, but an agreement to lease and as understood by the parties, a document of lease was to be executed and got registered at some later date. By themselves they may not be determinative to say that it did not fall under the terms "lease" as defined in Section 2(7) of the Act, but these recitals do help in construing the document and finding out the intention of the, parties behind the same. But more important point that weighs with me is that the property in question was agreed to be given in future i.e. when it becomes ready. It was, on the other hand, contended that the period of making the shop ready has been fixed in the agreement and that would be the date which was fixed between the parties for the commencement of the lease. But, in that connection, it has to be noted that it was not a case where the shop or the property was already standing and ready and possession of the same was to be given within four months. If that were so, one can say that the period to commence the lease was definite. But when it depended upon the construction of the shop itself, in my opinion, it depended upon some act on the part of the plaintiffs which may be completed within four months or may not be completed. The construction of the building depended upon various factors-all of which may not be under the control of the plaintiffs. It may, therefore, take even a longer time which they may not be able to expressly know.

13. In this respect I was referred to two decisions by Mr. Karlekar for the

appellants. The first is a case of Sir Mahomed Yusuf Ismail, Bart. Vs. The Secretary of State for India in Council, . The facts, as appear from the judgment of His Lordship, Macleod C.J., were that the defendant in the suit was erecting a building at Sutar chawl and since the Presidency Post Master was anxious to secure premises in the building for a Post Office, he entered into correspondence with him. On 1st February 1915 the defendant wrote to the Presidency Post Master that with reference to Post Office Superintendent's interview with him he had arranged with Messrs. Mistry and Bhadwar, Architects, to have an accommodation for a Post Office at Sutar Chawl measuring about 653 sq. yds. and shall let it to him on a lease for ten years on the condition that (1) the rent for the place would be Rs. 175/- per mensem; (2) the counters and a shelf would be supplied by him; and (3) the electric installation to be made by him, but will be maintained thereafter by the Post Office Authorities. Then it was mentioned that the place would be ready for occupation by the 1st of April, 1915. That offer to let the building to the Presidency Post Master for ten years at the rent of Rs. 175/- per month was accepted by the latter as per his letter dated 13th of February 1915. It was contended that these letters amounted to offer and acceptance in respect of a transaction of agreement for lease and that it was required to be registered. In view of the decision in Hemanta Kumar Debi v. Midnapur Zamindah Co., they were admitted in evidence though no doubt as pointed out by Mr. Oza that it was so done on the concession by the appellant about the principle laid down in that Privy Council case having settled the question. At any rate, that case does show that the place was yet to be ready for the purpose of enabling the other side to occupy and it was in fact not ready at the date when the offer was made to the Presidency Post Master. It was on that basis that the Privy Council case came to be applied since no interest in presenti was created by reason of that correspondence. The position more or less is similar here in this case where the building was not at all ready and it was yet to be constructed. The building was at best expected to be ready by four months and the lease was to become effective from the time it became ready. It cannot, therefore, be said that the interest in that property by reason of the agreement was created in presenti or that the demise was effected at that time or even at a time specified later on. The relationship of landlord and tenant cannot be said to have arisen from the date of any such agreement and unless the document is intended to give that effect, it would be difficult to say that an interest in the property was created in favour of the defendants.

14. Another case referred to by Mr. Karlekar was that of Tolaram Relumal v. The State of Bombay I.L.R.Bom 1207 (S.C.). In that case the accused who happened to be the landlord of a house under construction received from his prospective tenants a sum of money by way of premium or pegree under an oral agreement to lease certain rooms when completed. When, however, the building was ready, the Controller of Accommodation, acting under the Bombay Land Requisition Act, 1948, as amended, requisitioned the rooms in question, and the landlord got into no opportunity of giving effect to the executory contract entered by him. On a

prosecution of the accused, u/s 18(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, for having received a premium in respect of the grant of lease, the question arose for consideration as to whether the oral agreement made between the parties constituted a lease and it was held that the oral agreement made between the parties did not constitute a lease, but that it amounted to an agreement to grant a lease in future. In this respect the judgment of the High Court under appeal was quoted by the Supreme Court saying that "in the present case the work (regarding the building) which still remained to be done was so important that both the parties agreed that the complainant should get into possession after the said work was completed. In such case unless the building is completed the tenant has no right which can be enforced in a court of law. If the landlord finds it impossible for any reason to complete the building, what is the right which an intending tenant can enforce against him? Therefore, in our opinion, there is considerable force in the contention urged by Mr. Lulla that in the present case even if it be held that the accused had received Rs. 2,400/- in the circumstances to which I have already referred, that would not bring them within the mischief of Section 18(1), because there has been no grant of a lease at all. There is only an agreement that the land lord would lease to the complainant a particular flat after the building has been fully and properly completed. It does appear that Section 18(1) does not bring within its mischief executory agreements of this kind". While dealing with that aspect of the case, Their Lordships of the Supreme Court said that "whether or not an executory agreement for grant of a lease comes within the ambit of the section by reason of the use of the words in respect of would be examined hereinafter. Before doing so it may be stated that an instrument is usually construed as a lease if it contains words of present demise. It is construed as an executory agreement, notwithstanding that it contains words of present demise, where certain things have to be done by the lessor before the lease is granted, such as the completion or repair or improvement of the premises, or by the lessee, such as the obtaining of sureties. On the facts of the case, therefore, the full bench very rightly held that the oral agreement made between the parties did not constitute a lease but it amounted to an agreement to grant a lease in future". The facts appear to be broadly similar in the present case so far as that aspect of the agreement goes, viz. that certain things had to be done by the lessor before the lease is granted viz. to finish the construction of the building and unless that was done, it was not possible to give him on lease. It is, therefore, difficult to say that any interest in presenti was created in respect of the said property in favour of the defendants so as to constitute the agreement as one falling in line with "lease" as contemplated in Section 17(1)(d) of the Indian Registration Act. The period to finish the building within four months cannot be said to be a period to commence the operation of the lease from that date, as the lease was to be effected only after the building was completed and made ready. That was an indefinite period as no enforcement of having the building finished can be done in a court of law. Thus not only the construction of the shop was to take place, but that on the same being ready, he had to execute

the rent-note and get the same registered in favour of the plaintiffs. It is not that the payment of rent by defendants was to commence from any specified date-but that depended upon the completion of building. The dominant intention of the parties, therefore, was, much though the main terms which ordinarily find place in a lease are found in the agreement, that it was not taken as a lease creating interest in presenti but contemplated a promise to give the same on lease on the terms set out therein. In my opinion, the agreement Exh. 54 was thus not a lease as defined u/s 2(7) of the Act, so as to be compulsorily required to be registered u/s 17(1)(d) of the Act. I, therefore, disagree with the finding recorded by the learned Assistant Judge in that respect and hold that the provisions of Section 49 of the Act do not come in the way of its admissibility in evidence both for the purposes of either filing the suit for specific performance or for claiming damages on account of breach committed by the defendants in respect of the terms of the said agreement.

15. The other point raised by Mr. Karlekar, in view of my finding as stated above, ordinarily would not survive. In case my view in that respect is not correct, and since the point has been argued at length by both the sides, it is desirable to deal with the same. That arises out of the proviso to Section 49 of the Act, which has been already set out here above.

16. That proviso came into effect by the Transfer of Property (Amendment) Supplementary Act, 1929 (XXI of 1929) with effect from 1-4-1930. It says that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter VI of the Specific Relief Act, 1877. This serves as an exception to the main Section 49 of the Act which says that a document which is compulsorily required to be registered u/s 17 or by any provision of the Transfer of Property Act, 1882, and if not registered, would not affect any immovable property comprised there in or be received as evidence of any transaction affecting such property. The condition, however, is that such a document, though not registered is admissible in evidence if a suit thereon is based for specific performance falling under Chapter II of the Specific Relief Act. One has, therefore, to turn to the provisions contained in Chapter II which entitle a party to seek specific performance of any such contract. Be it said there, that it does not restrict a suit to be filed under any particular provision of Chapter II of the Specific Relief Act so as to justify the contention made out by Mr. Oza that the suit must be one which has to fall u/s 27A of the Act. Now such a suit can be filed either u/s 12 of the Specific Relief Act or u/s 27A of the Act. Those provisions fall under Chapter II of the Specific Relief Act. Section 12 is a general section providing for the specific performance of any contract and that way provides for a general right of a party to any agreement for seeking its specific performance and that can be given by the Court under certain circumstances which have been set out in Clauses (a) to (d) thereof. Then comes Section 27A which came to be added at the time when the proviso was added to Section 49 of the Indian Registration Act and it runs thus:

27A. Subject to the provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,-

(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract.

This section applies to contracts to lease executed after the first day of April, 1930. Mr. Oza contends that when a specific provision for a suit for completion of a contract of lease is made, and that too at the time when proviso to Section 49 of the Indian Registration Act was added, the suit must be governed by that specific provision and conditions required thereunder must be fulfilled. The general provision, in these circumstances cannot afford any help to the plaintiffs. Now it is no doubt true that if the suit were to fall u/s 27A of the Act, then certainly unless the conditions set out thereunder are fulfilled, the specific performance cannot be obtained. In the present case, while the agreement has been signed by both of them, there has been no part performance in the sense that the possession of the property has been delivered. Thus, Section 27A by itself would not come in operation to justify a claim for specific performance of a contract. But as already pointed out here above, the proviso to Section 49 does not restrict the filing of a suit only u/s 27A of the Specific Relief Act but also contemplates and refers to filing of suits arising under any of the provisions of Chapter II and that way the availability of Section 16 is neither taken away nor does it become abrogated by reason of the said proviso or by introducing Section 27A of the Act. Besides, with the words "Subject to the provisions of this Chapter" commencing in that Section 27A of the Specific Relief Act, it becomes clear that it does not intend to take away any such existing right in a party under any other provisions of the Specific Relief Act. It was urged that when a special provision is created for such a suit, that should prevail against the general provision contained in Section 12 of the Specific Relief Act. But as already pointed out hereabove, by reason of Section 27A right is given subject to certain conditions fulfilled. But the proviso to Section 49 of the Indian Registration Act, keeps that right open, if available under Chapter II of that Act and not only in respect of such cases, if they fall u/s 27A of the Specific Relief Act. Even Section 27A does not debar any suit of such a character, if it fell within any other provisions of that Act. The words "Except as otherwise provided in this Chapter" used in Section 12 of the Act may suggest that specific performance of any contract can be obtained in a court of law not only under this section but also under any other provisions of this Chapter if permissible in law. In my opinion,

Section 27A cannot restrict or take away any party's right to bring a suit for specific performance of a contract when the claim is based on conditions other than those required to be fulfilled u/s 27A of the Act.

17. Mr. Oza, the learned advocate appearing for the respondents then referred to some decisions in support of his contention saying that the proviso to Section 49 of Indian Registration Act can help only if the suit is filed u/s 27A of the Specific Relief Act. The first case relied upon by him is of Gadiraju Sanyasi Raju Vs. Kandula Kamappadu and Others, . The case had come up first before the Division Bench of that Court and since one of the important questions to be decided was whether the agreement Exh. A-6 was a "lease" falling within the ambit of Section 17(1)(d), and, therefore, came within the mischief of Section 49 of the Indian Registration Act, the matter was referred to the Full Bench of that High Court. It was held in that case that to determine whether an agreement to lease amounts to a lease within the meaning of Section 2(7), the test is to see whether the agreement itself would confer a legal right or whether the execution of another instrument which would give a legal right was in the contemplation of the parties. It is unnecessary to refer to the observations in that direction, as I have dealt with that aspect of the case by reference to the decision of the Supreme Court. The matter had then gone back to the Division Bench and it had dealt with the point now arising before me. It took the view that while Section 53A gave only a shield, Section 27A placed a weapon of attack in the hands of the lessee. He can not only defend his possession but also file a suit claiming specific performance and thus obtain a good title. This new section in the Specific Relief Act must be understood as making an exception in favour of possessory rights of persons having in their favour written contracts of lease which were hitherto inadmissible in evidence and therefore ineffective to sustain suits for specific performance. Then they have said that according to well-known canons of construction, the legislature must be held to have intended that the new remedy is to be confined to cases falling within the four corners of the section. Going further they have said that the substantial object of both Section 53A of the Transfer of Property Act and Section 27A of the Specific Relief Act is to protect rights acquired under written contracts which have been partly performed. It can hardly be said therefore that the intention of the legislature was to make a written contract of lease of a compulsorily registrable character enforceable proprio vigore. It is, thus, clear that no suit for specific performance of a written contract to lease immovable property can be maintained unless it can be brought within the language of Section 27A. Going further, they have said that Section 27A was exhaustive of all claims for specific performance based on written contracts and Section 12 was applicable only to the oral agreement to lease, and an unregistered lease signed by only one party amounted to a lease and as such was compulsorily registrable and under which no possession had been delivered, to the lessees was not governed by Section 27A and, therefore, could not be saved by the proviso to Section 49 of the Act. The document, was, therefore, not admissible in a suit for the specific performance of the lease. This, decision has

its basis as it were on the case of AIR 1949 389 (Nagpur) and one other decision given by Subba Rao C.J., as he then was, in Venkateswarlu v. Kolilingam 1956 Ap. L.T. 998 . That latter decision has not been cited before me presumably as not available here. On the perusal of the case, what appears to have appealed to the Division Bench of that Court is that Section 27A is in the nature of, an exception in favour of possessory rights of persons having in their favour written contracts of lease and about Section 12 having only reference to oral contracts of lease as it were. On a consideration of the provisions contained in Section 12 and Section 27A of the Specific Relief Act read with the proviso to Section 49 of the Indian Registration Act, with great respect, it has not been possible for me to agree with the view subscribed by the Division Bench of that Court. Section 12 nowhere refers to a suit for specific performance of an oral contract as such. There are no such words anywhere either in Section 12 or in the proviso to Section 49 of the Indian Registration Act. Nor is it possible to say that Section 27A serves as an exception to the general rule contained in Section 12 of the Act as thought by the Division Bench. It is in a way a right given to a party to any such lease subject to fulfillment of certain conditions as contemplated u/s 27A of the Specific Relief Act. It does not thereby take away or, at any rate, it is nowhere contemplated that the Legislature wanted to take away the right of any party where such conditions are not fulfilled and, to my mind, that appears to be the uppermost in the mind of the Legislature when it refers to, in the proviso to Section 49 of the Act, a suit for specific performance under Chapter II of the Specific Relief Act and not u/s 27A of the Act only. The case of AIR 1949 389 (Nagpur) also lays down the same principle and for the same reasons, with respect, it has not been possible to agree with that view. If a suit falls under any of the two Sections 12 and 27A of the Specific Relief Act-they being in Chapter 11 referred to in proviso to Section 49, the document would become admissible in a suit for specific performance based thereon u/s 12 of the Act and not falling within Section 27A of the Act.

18. On the other hand, a decision in a case of Trivenibai w/o Mangilal v. Leelabai w/o Vrigpaljl AIR 1955 Nagpur 170 was referred to by Mr. Karlekar appearing for the appellants. It was from this decision that the appeal had gone to the Supreme Court. The decision of the Supreme Court reported in AIR 1959 S.C. 62 has been referred to by me at the outset, while dealing with the first contention in this appeal. In the Nagpur case such a point had come to be considered, and that, however, does not appear to have been raised before the Supreme Court. In that case it was observed by His Lordship the Chief Justice Sinha as he then was, that "even apart from the provisions of Section 27A Specific Relief Act, a suit for specific performance of such a contract may be entertained under the other provisions of the Specific Relief Act, because Section 27A is not in derogation of them but subject to them and hence, if the suit was otherwise sustainable there is nothing in Section 27A to bar the present action". Those observations justify me in the conclusion I have reached on a consideration of all the three provisions of law, contained in proviso to Section 49 of the Indian

Registration Act and of Sections 12 and 27A of the Specific Relief Act. In fact it appears that the Legislature appears to have thought of enabling parties to get rid of any such technical considerations by adding such a proviso to Section 49 of the Indian Registration Act and thereby saying that if a suit for specific performance of any such contract is to be filed in a court, that contract can be received in evidence provided such a suit falls within the provisions contained in Chapter II of the Specific Relief Act. In my opinion, therefore, the right to file a suit u/s 12 of the Specific Relief Act is not taken away even if for a moment it were held that this agreement Exh. 54 creates a right in presenti in favour of the defendants and that it requires to be compulsorily registered u/s 17(1)(d) of the Registration Act. If a suit for specific performance is maintainable on an oral agreement, it is difficult to reconcile how a suit on a writing evidencing a contract having taken place whereby a certain property is to be given, on lease cannot be the basis of a suit for specific performance whether it requires registration or not having regard to the provisions contained in Section 17(1)(d) of the Registration Act. A suit for specific performance of an agreement, therefore, does lie u/s 12 of the Specific Relief Act and it makes no difference whether the agreement was required to be compulsorily registered and in fact was not registered as required u/s 17(1)(d) of the Act. I am unable to agree with the learned Assistant Judge when he held that the suit as framed by the plaintiffs was not maintainable on the basis of an agreement Exh. 54 in the case.

19. The next point that arises for consideration is as to whether specific performance of the said contract can be given in the circumstances of this case. In this connection, it appears no doubt clear that either party to a contract such as the one before the Court is prima facie entitled to claim specific performance thereof u/s 12 of the Specific Relief Act. Both the courts have found that soon after the building was ready, the plaintiff had informed Badruddin about the same in about September 1953 and asked for the execution of the case as per the terms previously settled under the agreement Exh. 54 in the case. The defendant expressed his unwillingness to agree to the same putting up some excuse such as about the time being the essence of the contract and since the building was not constructed within a period of four months, he was not bound to take the building on lease. Both the courts have, however, found that the time was not the essence of the contract for the obvious reason that it was to come into effect only after the building had become ready. The defendant Badruddin had, thus, committed a breach of the agreement when at any rate he sent a notice Exh. 49 that he was not bound to take the building. It was, however, urged by Mr. Oza, for the respondents, that in the circumstances of such a contract to lease, having regard to the provisions contained in Section 12 of the Specific Relief Act, it cannot be said that compensation would not be an adequate relief so as to justify the court not to grant the specific performance of such a contract. Clause(c) of Section 12 of the Act says that when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief, the specific performance of any contract may in the

discretion of the Court be enforced. The learned Assistant Judge has taken the view that this is a case where compensation can serve as an adequate relief, for, in his opinion, the plaintiffs were interested more in realising rent out of the building rather than anything else. If, therefore, the defendant resiled from the contract and did not show his willingness to take over the property by executing a lease-deed the plaintiffs could be said to be in a position to claim damages which can be easily ascertained on the basis of the terms of the agreement itself. The contention on the other hand was that they had borrowed the sum of Rs. 6,000/- from the original defendant by mortgaging this very property and since the amount was to be paid out of the rent realised from this very building on being given over to the defendant as lessees, they will not be able to do. That, in my opinion, can hardly be said to be a good ground justifying a lessor to claim specific performance of a contract. It may be a different thing if the lessee were to seek specific performance of the contract such as the one before the court, for, it can be easily said in his favour, as urged by Mr. Oza, that he needed such a property that he went to the length of advancing such a large sum for construction of a shop and that too as his convenience demanded, and it being a very useful property from the point of view of his business etc. He may not, therefore, be so very willing to part with such a property and be satisfied with any compensation. A lessee would in such circumstances be justified in claiming specific performance of such a contract against the lessor. But that cannot be said of the plaintiffs-lessors, for after all they were out to part with the property not only for a month or a year, but for a long period of ten years. They were more interested in realising the rent out of it, no doubt their having a paramount desire to meet the debt contracted by passing the mortgage-deed in favour of defendants. It is not that he could not, or was not able to realise that much rent therefrom by letting it out to some other person. In fact, even as admitted by plaintiff No. 1 in his evidence, the property would not have fetched less than Rs. 80/- as rent from the time deceased Badruddin refused to take the same towards the end of November 1953. He could have paid the amount towards his mortgage-debt, and consequently such an argument can have no force in claiming specific performance of that contract. In such a case the court would be justified in exercising its discretion in not granting the specific performance of a contract, as compensation can serve as an adequate relief as contemplated u/s 12(c) of the Specific Relief Act.

20. In this view of the case, the question that remains, is, as to what compensation, the plaintiffs are entitled to have in view of the breach of the agreement found, by both the courts here below to have been committed by deceased Badruddin. It was urged by Mr. Oza, that the utmost that the plaintiffs, can be awarded by way of compensation is the amount of rent that the plaintiffs had to lose by Badruddin having declined to take the property towards the end of November 1953. The Building was ready and offered by the plaintiffs to him on 16-9-1953, and thus for two and half months the plaintiffs can claim Rs. 200/- by way of compensation on account of loss of rent. It was also said that with

Badraddin's refusal to take the property, the plaintiffs could have let it out to any other person and it was his duty to minimise the loss, if any that may arise, having regard to Section 73 of the Act. Now it is clear, and over which there can be no dispute that Section 19 of the Specific Relief Act entitles the court to award compensation for the breach of any such agreement, either in addition to, or in substitution for the specific performance of such a contract. The second part thereof provides that if in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. It also provides that if in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him "such compensation accordingly. The compensation to be awarded under this section has to be assessed in such manner as the court may direct. Thus the court has power to award compensation in either of the cases contemplated u/s 19 of the Act, but as contended by Mr. Oza that compensation has to be understood in the same sense as damages contemplated u/s 73 of the Indian Contract Act. In a case of AIR 1937 243 (Nagpur) it was held that the word "compensation" used in Section 19 of the Specific Relief Act, must be understood in the sense of damages contemplated in Section 73, Contract Act. That way the compensation has to be ascertained by the same principles as would govern a claim of damages in any action and they are well laid down in Section 73 of the Indian Contract Act. Section 73 of the Indian Contract Act runs as under:

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

...

The explanation thereto is of considerable importance in such matters and it provides that in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the nonperformance of the contract must be taken into account. This Section 73 has been well explained in a case of Pannalal Jugatmal Vs. State of Madhya Pradesh, Now, as held therein damages are compensatory and not penal and one who has suffered loss from breach of contract must take every reasonable step that is available to him to mitigate the extent of damages caused by the breach. He can not claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

That has been, what is stated in the Explanation to Section 73 of the Contract Act just referred to above. This decision further says that the explanation casts a burden upon the person complaining of breach of the contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. The law, for wise reasons, imposes upon a party subjected to injury from a breach of a contract the active duty of making reasonable exertions to render the injury as light as possible. To the same effect we find the principles now well-settled in a decision of the Supreme Court in the case of Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, Two principles have been laid down in this case. The first relates to the measure of damages in cases of breach of contract as to, how damages are to be calculated. As far as possible, he who proves a breach of a bargain to supply what he contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed; but then as observed further, that principle is controlled rather than qualified by a second principle which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In other words, the principles for calculating the compensation or damages, as the case may be, are well-settled and the learned Assistant Judge was quite right in applying the same and that the plaintiffs would be entitled to compensation or damages by way of rent available to them for the said property during the period from 16-9-53 when the building was ready for being given over to the defendant till the end of November 1953 when the deceased Badruddain served the notice Exh. 49 dated 31st October 1953 resiling from the said agreement and giving the intimation that he would not be accepting the said property, no doubt saying that the plaintiffs had committed breach inasmuch as the property was not got ready within the specific period fixed in the said agreement. The time was not the essence of the contract as already stated hereabove, and the defendant had committed a breach of the agreement inasmuch as he refused to take over the property under the terms of the agreement to lease arrived at between them. The same contention was repeated by Mr. Karlekar which I have dealt with while considering the question whether the compensation was an adequate relief so as to say that the discretion exercised by the learned Assistant Judge in not granting the relief of specific performance of that contract was not well-exercised. That cannot avail the plaintiffs, as even admittedly rent of Rs. 80/- would have been available for that property even from that day, and not having availed of it, he can be said to have neglected an obligation cast on him u/s 73 read with explanation thereto as shown above. In fact it is not that the period for redemption of the mortgaged property was to coexist with the period fixed in the agreement of lease viz. of ten years as both the transaction were treated as quite independent of each other. The only thing that remained common in respect of two transactions was that out of Rs. 80/- which was fixed as rent of the suit building, Rs. 30/- were to be given to the defendants towards the interest that would become due every month on the amount of mortgage advanced to the plaintiffs. Thus, there could

have arisen no difficulty whatever to the defendants for recovering the mortgage amount from the plaintiffs independently of the fixation of the term viz. of 10 years in the agreement of lease. In those circumstances, since the plaintiffs were themselves to blame in not making any active attempt to render the injury as light as possible, they have to thank themselves for all that They did not do what they were required to do as prudent men would in those circumstances, for after all there was no justification for a lessor to insist on any particular person taking the property on lease, and a justification if there existed any, for taking the particular property, it would, in my opinion, be to the leasee. The lessors cannot, therefore, make any grievance whatever in that direction and claim the rent for the entire period or, at any rate, the period till the suit came to be decided as held by the learned Civil Judge. The only amount that the plaintiffs would be entitled to get by way of compensation or damages having regard to Section 19 of the Specific Relief Act read with Section 73 of the Indian Contract Act and the Explanation thereto, would be the amount of rent for a period of 21 months viz. from 16-9-1953 till 30th November 1953 as found by the learned Assistant Judge. That would come to Rs. 200/- and the defendants would be bound to pay that much amount only to the plaintiffs since they had committed breach of the said agreement.

21. The result, therefore, is that the agreement Ex. 54 was not a lease as contemplated in Section 2(7) read with Section 17(1)(d) of the Indian Registration Act, since it did not create present demise in the property inasmuch as it was to be made available after the same was being constructed and be ready and that way to take place at any later time. It did not, therefore, require to be compulsorily registered, and thus it was admissible in evidence in an action brought by the plaintiffs. Even if it was so required to be registered, since the suit was for specific performance in respect of that very agreement, falling u/s 12 of the Specific Relief Act and that way under Chapter II thereof, it would be admissible in evidence under the proviso to Section 49 of the Indian Registration Act. While, however, a suit for specific performance of such a contract is tenable, the rule of law as contemplated u/s 12(c) of the Specific Relief Act, is that the Court would not exercise its discretion in granting such a relief, where compensation can serve as an adequate relief. It becomes all the more so in an action brought by a lessor for the specific performance of the agreement, as he is interested in money as against the case of a lessee who may be interested in getting the property particularly when it is intended for a longer period such as 10 years or so as in this case. Such a lessor would however be entitled to compensation u/s 19 of the Specific Relief Act, which is otherwise understood by the term of damages used in Section 73 of the Indian Contract Act. But when the question comes for determination of those damages, it has to be remembered that the burden lies on him to take wise attempt to reduce to the minimum the injury that may be caused to him by such a breach of contract, and, if he fails to do so, law debars him from claiming any part of damages which is due to neglect to take such steps on his part. That way the plaintiffs would only be entitled to

get Rs. 200/- by way of compensation and no more on account of breach of agreement committed by deceased Badruddin, in the circumstances of the case.

21.1 In view of the fact that the breach of the said contract was committed by the defendants and in the circumstances of the case, they shall bear their own costs all throughout and pay costs in proportion to the claim allowed to the plaintiffs all throughout.

22. As the result, the appeal is partly allowed. The defendants-respondents shall pay Rs. 200/- by way of compensation or damages for the breach of contract committed by them to the plaintiffs. The defendants shall pay the costs in proportion to the claim allowed to the plaintiffs all throughout and they, shall bear their own costs all throughout.