

IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 248 OF 2002 WITH CROSS OBJECTIONS STAMP  
NO. 2312 OF 2002.

FIRST APPEAL NO. 248 OF 2002.

Smt. Regina G. Rebello  
(deceased by her L.Rs.)

- 1a. Floriano Constancio  
Rebello,
- b. Isabella Rebello,  
both r/at Rua John Issa,  
206, Maputo, Mozambique.
- c. Victoria Colaco,
- d. Orlando Colaco,
- e. Victor Colaco,  
all r/at R. Herois de  
Ultramar No. 3,  
20D to 2575 Odivelas,  
Portugal.

... Appellants.

Versus

1. Mr. Guido de Loyola Furtado,  
alias Jose Inacio Guido de  
Loyola Furtado, r/at Dr.  
Wolfango de Silva Road,  
Panaji.
2. Mrs. Marta Cota Loyola  
Furtado, r/at Dr. Wolfango  
de Silva Road, Panaji.

... Respondents.

Mr. R.V. Kamat, Advocate for the Appellants.

Mr. J.E. Coelho Pereira, Senior Advocate with Mr. V.  
Korgaonkar, Advocate for the Respondents.

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Mr. R.V. Kamat, Advocate for the Respondents.

Coram : R.J. KOCHAR AND P.V. HARDAS, JJ.

Date of reserving the Judgment : 25.8.2003.

Date of pronouncing the Judgment : 29.9.2003.

J U D G M E N T (PER HARDAS, J.)

The appellants/original defendants, being aggrieved by the Judgment and Decree, passed by the Additional Civil Judge, Senior Division, Panaji, dated 10th May 2002, in Special Civil Suit No. 56/1987/B, have filed the present appeal. The cross objection has been filed by the original plaintiffs, whose claim for specific performance of the contract and for damages was negatived by the learned trial Court.

2. The facts in brief as are necessary for the decision of this appeal and the cross objection are stated hereunder:-

The original defendant is an occupant of one

of the houses in the property known as "Sete Pedacos", situated along the 18th June Road, Panaji, described in the Land Registration Office under No. 17813 of Book B 47 (New) and surveyed under Chalta Nos. 82, 83, 84 and 85 of P.T. Sheet No. 62. The original plaintiff no. 1 entered into an agreement to purchase the property from the owners, namely, Dr. Bernardo Rigoberto Fonseca and his wife Maria Verediana Fonseca, in 1981. The agreement of purchase was for development of the property by constructing buildings thereon. The flats in the proposed buildings were meant for sale on ownership basis to the prospective purchasers. When the agreement with the owners was entered into, there were three structures on the suit property occupied by tenants. The three structures had about 10 tenants. The original plaintiff no. 1 negotiated with some of the tenants and, accordingly, succeeded in constructing one building comprising of a ground plus three floors. The project of development of the suit property contemplated construction of another building having ground plus five floors. The original defendant was a tenant staying in one of the structures in the suit property. The structure occupied by the tenant occupied 135 sq. metres in area. The structure occupied by the original defendant was situated on the area where the second building was proposed to be constructed. The original plaintiffs, accordingly, entered into an

agreement with the original defendant on 6th May 1985. The agreement is at Exhibit P.W.1/A. The said agreement acknowledged that the original defendant was residing and running a bar-cum-restaurant since last more than 40 years in the premises having plinth area of 135 square metres. The agreement further acknowledged that, at the request of the original plaintiff no. 1, the original defendant had agreed to quit, vacate and deliver quiet and vacant possession of the old structure to the original plaintiff no. 1 as representing the owners of the land, to enable the original plaintiff no. 1 to proceed with further construction on the said property. The agreement also acknowledged that, in consideration of the original defendant vacating the old structure, the original plaintiff no. 1 had agreed to assign, convey and transfer to her, without any consideration, the ground floor tenement, admeasuring 3.30 by 9.23 metres, bearing Shop No. 7, in the said building already completed by the original plaintiff no. 1 and situated at the extreme left hand side as one faces the building from the 18th June Road. The agreement further acknowledged that in further consideration of the original defendant vacating the structure in her occupation, the original plaintiff no. 1 had agreed to allot, assign, transfer and convey to her a self contained two bedroom flat with hall-cum-dining and kitchen on the first floor of the proposed construction

to be undertaken by the original plaintiff no. 1 and for a price of Rs. 2,35,000/-, out of which, the original plaintiff no. 1 had received a sum of Rs. 20,000/- as part payment of the said flat. It was also agreed by the original plaintiff no. 1 that the construction of the flat would be completed within a period of twenty four months from the execution of the agreement and that the original plaintiff no. 1 would deliver possession of the said flat to the original defendant within 15 days of obtaining occupancy certificate in respect of the flat.

3. The possession of the shop was handed over to the original defendant in April 1986. The original defendant shifted her business from the old premises to the shop so allotted to her. The original plaintiffs by the letter, dated 23rd April 1986, at Exhibit P.W.1/B, requested the original defendant to hand over the vacant possession of the old premises in terms of the agreement, dated 6th May 1985. The original plaintiffs by their letter, dated 30th June 1986, at Exhibit P.W.1/C, also requested the original defendant to hand over the vacant possession of the old premises in her occupation as they intended to start the construction of the building in which they had promised to sell to the original defendant a flat. The original plaintiffs by their letter, dated 11th September 1986, at Exhibit

P.W.1/D, reiterated that they had handed over the possession of shop no. 7 to the original defendant in terms of the agreement. They also reiterated that original defendant had agreed to hand over the possession of the old premises to enable the original plaintiffs to commence construction work of the proposed building. The letter pointed out that some belongings of the original defendant were still lying in the premises and, therefore, requested her to remove the said belongings as the original plaintiffs intended to start the work from 18th September 1986. The original plaintiffs also pointed out in the said letter that, as per the request of the original defendant, the electricity and water connection in respect of shop no. 7 would be changed to her name and necessary steps in that regard were being taken. The original plaintiffs again by their letter, dated 18th September 1986, at Exhibit P.W.1/E, requested the original defendant in response to her request to vacate the old structure by 25th September 1986 to remove her belongings and, if necessary, were willing to extend help in shifting her belongings. The original defendant by her letter, dated 23rd September 1986, at Exhibit P.W.1/F expressed her surprise at the statement in the letter, at Exhibit P.W.1/E that the original defendant had requested for time upto 25th September 1986 to vacate the premises in her occupation. She pointed out, in the said letter,

that by virtue of the agreement, dated 6th May 1985, the original plaintiffs had agreed to assign, convey and transfer in her favour, without any consideration, shop no. 7. She also pointed out that it was agreed by the original plaintiffs that the original plaintiffs shall put the original defendant in possession of the said shop and execute the requisite conveyance transferring the said shop in her favour on ownership basis, without any consideration, within a period of 6 months from the execution of the agreement. In paragraph 4 of the said letter, the original defendant pointed out that the plaintiffs had delivered the possession of the said shop to her in the month of April 1986, much beyond the period agreed to. She also stated that the original plaintiffs had neglected to execute the requisite conveyance transferring the said shop in her favour on ownership basis. She has further reiterated that vacating of the old premises was clearly conditional upon the original plaintiffs executing the necessary conveyance of the shop in her favour. She further pointed out that the original plaintiffs had been promising to execute the necessary conveyance. The original defendant expressed her apprehension that in case she vacated the premises, the premises would be demolished and she would be left with nothing at all. In paragraph 6 she has stated that she has every intention of honouring the agreement and requested the

original plaintiffs to execute the conveyance transferring the ownership of the said shop in her favour and she would then vacate the premises under her occupation.

4. Since the defendant was not honouring the terms of the agreement, the plaintiffs filed a suit for specific performance of the contract and prayed for directing the defendant to specifically perform the contract by handing over possession of the premises in her occupation to enable the plaintiffs to construct the second building. In the alternative it was prayed for a decree directing the defendant to hand over the possession of the shop to the plaintiffs. Alternatively it was also prayed by the plaintiffs that the defendant be directed to pay to the plaintiffs mesne profits at the rate of Rs. 7,500/- p.m. from April 1986 and until the date of effective delivery of possession of the suit shop. Alternatively also the plaintiffs claimed damages totalling Rs. 24,00,000/-. An injunction restraining the defendant from transferring and parting with the possession of the shop was also prayed.

5. The defendant filed her written statement, at Exhibit 3, and stated that the defendant was to vacate the old structure on the plaintiff no. 1 transferring, conveying and assigning to her the ground floor



tenement, namely, shop no. 7. The plaintiff no. 1 was required, as per the terms and conditions of the agreement, to execute the requisite conveyance transferring the shop on ownership basis within a period of 6 months from the execution of the agreement. It was only in April 1986 that the defendant was put in possession of the said shop. It is also stated by her in her written statement that the plaintiffs had committed a breach of the agreement, dated 6th May 1985, in not executing the conveyance of the said shop in favour of the defendant. In paragraph 12 of the written statement, the defendant submitted that she was ready and willing to perform her part of the contract, namely, to hand over vacant possession of the old premises, if a conveyance transferring the said shop in her favour was executed.

6. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiffs prove that defendant has failed to hand over the possession of the old premises to the plaintiffs contrary to the undertaking given by her as stated in para 7 of the plaint?

2. Whether the plaintiffs prove that the plaintiffs are entitled for a decree for the specific performance of the contract directing the defendant to hand over the possession of the old premises as stated in para 12 of the plaint?

3. Whether the plaintiffs prove that the plaintiffs are entitled for a judgment and decree directing the defendant to return back the possession of the shop in the same condition as it was handed over to the plaintiffs as stated in para 13 of the plaint?

4. Whether the plaintiffs prove that the defendant is liable to pay a compensation for the occupation of the suit shop @ Rs. 7,500/- per month from April 1986 till the date of delivery of the said shop?

5. Whether the plaintiffs are entitled to claim damages of Rs. 24,00,000/- from the defendant?

6. What relief? What order?"

7. The plaintiff no. 1 examined himself as P.W.1. The original defendant expired during the pendency of the suit and the legal heirs were brought on record. The defendants examined Floriano Coutinho as D.W.1. The learned trial Court answered issues nos. 1 and 3 in the affirmative and issues nos. 2 and 5 in the negative. In respect of issue no. 4, the learned trial Court held that the defendant was liable to pay compensation for the occupation of the suit shop at the rate of Rs. 3,750/- per month from 21st October 1986 till delivery of the shop. The trial Court decreed the suit by granting the prayer of possession of the suit shop and the prayer for mesne profits at the rate of Rs. 3,750/- per month. The original defendants have, thus, challenged the Judgment and Decree ordering them to hand over vacant possession of the suit shop and also the payment of mesne profits. The original plaintiffs have

filed the cross objection in respect of refusal of the trial Court to pass a decree for specific performance and for damages.

8. The plaintiff no. 1 in his evidence has referred to the agreement and the various letters at Exhibit P.W.1/A to P.W.1/F. The plaintiff no. 1 has further stated that he was unable to transfer the ownership of the shop within 6 months from the date of the agreement, dated 6th May 1985, because of a dispute which had cropped up between him and the original owners, which had resulted in filing a civil suit against the original owners. The copy of the plaint is at Exhibit P.W.1/G. According to the plaintiff no. 1, when the possession of the shop was handed over to the defendant, he had informed the defendant that he was unable to transfer the title of the shop in her name within 6 months, since there was a dispute with the original owners. He has produced his reply at Exhibit P.W.1/H, dated 21st October 1986, to the letter of the defendant, dated 23rd September 1986, at Exhibit P.W.1/F. In the said letter he has claimed occupation charges and requested the defendant to vacate the premises. The defendant, by her letter, dated 21st November 1986, at Exhibit P.W.1/I, reiterated her contention that as per the agreement the plaintiffs were to execute the conveyance deed and only upon the

execution of the conveyance deed would she hand over the vacant possession of the old premises. She has stated that the delay in completion of the project is solely attributable to the plaintiffs and not to her. The plaintiff no. 1 has further stated that he is unable to execute the conveyance of the shop in favour of the defendant, in view of the dispute with the original owners of the suit property, which is still pending in the Court.

9. In the cross-examination he has admitted that the owners of the property were supposed to transfer the land in his name after giving them possession of the third floor of the building. He has admitted that he had completed the third floor of the building but did not hand over its possession to the owners. The agreement with the owners of the year 1981 also covered the land where the suit house of the defendant was standing. He has further admitted in the cross-examination that he cannot execute the sale deed in respect of the suit shop in favour of the defendant since a case is pending in the Court. He has further admitted as true that as per Clause 5 of the agreement, at Exhibit P.W.1/A, he was bound to execute the conveyance of the shop within 6 months from the date of the agreement. He has admitted that when the defendant had orally assured him to vacate the premises by 25th

September 1986, there was no one else present in his Office at that time.

10. D.W.1 Floriano Coutinho the Power of Attorney Holder of the legal heirs of original defendant has stated that the original defendant was not aware about the dispute between the plaintiff no. 1 and the owners. The plaintiffs had not informed the original defendant about the dispute. D.W.1 Coutinho has further stated that the plaintiffs had never informed the original defendant that conveyance of the shop would be done after the dispute with the owners is settled. In the cross-examination he has admitted that he was not aware of what was agreed to in the agreement. D.W.1 has further admitted that the possession of the shop no. 7 had been given by the plaintiffs as per the agreement. He has denied the suggestion that the original defendant had accepted that it was not possible to execute the sale deed immediately and had, thereafter, taken possession of the shop. He has denied the suggestion that the original defendant had agreed that the sale deed could be executed after the dispute between the plaintiffs and the owners of the property was settled.

11. The learned trial Court, while answering issue no. 1, at paragraph 5 of the Judgment has held that neither in the recitals nor in the terms and conditions

of the agreement, at Exhibit P.W.1/A, is there any stipulation to the effect that the defendant would quit and vacate the house occupied by her after the deed of conveyance was executed in her favour in respect of shop no. 7. The learned trial Court further held that, as per Clause 3 of the agreement, the plaintiffs were required to complete the construction of the second building within 24 months of the date of agreement and it could, therefore, be safely concluded that the defendant had agreed to hand over the possession of the old house to the plaintiffs immediately on execution of the agreement. The learned trial Court further held that the defendant ought to have handed over possession of the house at least on transfer of the business to shop no. 7. The trial Court, therefore, answered issue no. 1 in the affirmative. In respect of issue no. 2, the learned trial Court recorded a finding that since the plaintiffs were unable to execute the title document of shop no. 7 in favour of the defendant, the plaintiffs were not entitled for a decree of specific performance by directing the defendant to hand over the vacant possession of the old premises in her occupation. The learned trial Court, therefore, answered issue no. 2 in the negative. In paragraph 7 of the Judgment, in respect of issue no. 3, the learned trial Court held that the defendant had been put in possession of shop no. 7 pursuant to the agreement, at Exhibit P.W.1/A.

According to the learned trial Court, there was admittedly no intention of the plaintiffs to do any gratuitous act in delivering shop no. 7 to the defendant and, therefore, in view of the provisions of Section 70 of the Indian Contract Act, the defendant is bound to return the suit shop to the plaintiffs. The learned trial Court, thus, answered issue no. 3 in the affirmative. In paragraph 8 of the Judgment, in respect of issue no. 4, the learned trial Court came to the conclusion that since the defendant was in occupation of shop no. 7, she cannot be expected to enjoy the old house as well as shop no. 7, which was "delivered to her as part performance of the contract to be performed by the plaintiffs". According to the learned trial Court, since the defendant had taken possession of shop no. 7 and had failed to perform her part of the contract by delivering the possession of the old premises to the plaintiffs, the defendant was liable to pay mesne profits in respect of occupation of shop no. 7. The learned trial Court, therefore, assessed the mesne profits at the rate of Rs. 3,750/- per month and held the defendant liable for payment of the same from 21st October 1986, as the date on which the defendant came to know that the plaintiffs could not execute the deed of conveyance for want of marketable title till the date of actual handing over of shop no. 7 to the plaintiffs. The learned trial Court, thus, answered

issue no. 4 accordingly. In respect of issue no. 5, the learned trial Court, at paragraph 9 of the Judgment, has held that the defendant alone could not be blamed for non-delivery of the possession of the old premises, as the plaintiffs did not have a marketable title to be conveyed in respect of shop to the defendant. The learned trial Court, therefore, held that the plaintiffs were not entitled for the damages claimed by them.

12. Mr. Kamat, the learned counsel appearing on behalf of the appellants/defendants, has urged before us that reliance on Section 70 of the Indian Contract Act by the learned trial Court is wholly unjustified. According to him, the defendant was put in possession under a valid agreement towards the part performance of the contract. The said agreement is subsisting and has not been terminated by any of the parties. The plaintiffs had agreed to execute the sale deed within 6 months of the date of agreement. The defendant was to be forthwith put in possession of shop no. 7, which the plaintiffs could do only in April 1986. Thus, on the day on which the defendant was put in possession of shop no. 7, the defendant was entitled for a deed of conveyance and as the defendant had agreed to vacate the old premises on the consideration that shop no. 7 would be conveyed to her, the defendant was, thus, justified in contending that unless the sale deed in respect of



shop no. 7 was executed, she could not be called upon to deliver vacant possession of the old premises. The learned counsel for the appellants has further urged before us that the possession of the defendant of shop no. 7 cannot be termed as wrongful or illegal as the defendant was put in possession of the premises under the contract and, therefore, the decree of mesne profits ought not to have been granted. He has further urged before us that the learned trial Court was in error in directing the defendant to hand over vacant possession of shop no. 7 in the face of a subsisting and valid contract between the parties.

13. Mr. Coelho Pereira, the learned senior counsel appearing on behalf of the respondents/plaintiffs, has urged that the undertaking of the defendant to hand over the old premises on 25th September 1986 constitutes a fresh contract between the parties. Since the defendant had not performed her part of the contract in delivering vacant possession of the old premises, the plaintiffs were entitled for a decree of specific performance of the contract. He has further urged that Section 70 of the Indian Contract Act would squarely be applicable to the facts of the present case. In support of the cross objection, he has urged that the plaintiffs were entitled for damages as because of the act of the defendant in not handing over the possession

of the old premises, the construction of the second building has been delayed, on account of which, the plaintiffs have suffered losses. He has further urged that since the defendant was not willing to perform her part of the contract, the defendant is not entitled to retain the possession of the said shop and is further liable to pay mesne profits.

14. The Supreme Court in **State of West Bengal v. M/s. B.K. Mondal and Sons**, A.I.R. 1962 S.C. 779, has held as follows:-

" Where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties; it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party."

15. The Supreme Court in **Mulamchand v. State of Madhya Pradesh**, A.I.R. 1968 S.C. 1218, in paragraph 6 has held that in a case falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So where a claim for compensation is made by one person against another under S. 70, the juristic basis of the

obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

16. Mr. Coelho Pereira, learned counsel appearing on behalf of the respondents/plaintiffs has placed reliance on the Judgment of the Supreme Court in **K.S. Satyanarayana v. V.R. Narayana Rao**, (1999) 6 S.C.C. 104. According to him, this authority can be pressed into aid for his submission that Section 70 had been invoked by the learned trial Court in order to see that substantive justice between the parties was done. According to the learned counsel for the respondents/plaintiffs, since it was not possible for the respondent no. 1/plaintiff no. 1 to have fulfilled his part of the contract of executing the conveyance deed in favour of the original defendants, as the owners of the suit property had filed a suit against him, the substantive justice, therefore, would demand that the original defendants restitute to the plaintiffs the suit shop of which they had been put in possession. According to him, therefore, by permitting the original defendants to retain the suit shop as well as the tenanted premises in their occupation would be undue enrichment. According to us, the reliance placed on the aforesaid Judgment of the Supreme Court is wholly misplaced. The facts of the aforesaid Judgment are

clearly distinguishable. The appellant therein had entered into an agreement to purchase a two storeyed building belonging to the respondent therein. The agreement was executed by the appellant and the original defendant no. 2, who had been authorised in writing by the respondent therein to enter into an agreement to sell the property. The appellant therein had also made payment by cheque of Rs. 1 lakh each to the respondent therein and the original defendant no. 2. However, the agreement fell through and, therefore, the appellant therein demanded his money back. The original defendant no. 2 had paid Rs. 50,000/- but the respondent therein refused outright to return the money. The defence of the respondent therein was not that he denied the receipt of Rs. 1 lakh, but had stated that the cheque had been given to him by the defendant no. 2. He had denied his signature on the authorisation letter, on the agreement and had even denied his signature on the wakalatnama and on the written statement. In that background, therefore, the Supreme Court held that since the respondent had admitted having received Rs. 1 lakh, he could not retain that money on the specious plea that there was no contract between him and the appellant. The appellant could not have paid Rs. 1 lakh to the respondent therein but for the agreement to sell. Thus, the Supreme Court held that the doctrine of undue enrichment would squarely apply to the facts of that

case and the appellant would be entitled to restitution.

17. In the present case, the original defendant had been put in possession in pursuance of a valid contract, which was subsisting even on the date on which the Civil Suit came to be filed. Neither parties had terminated the said contract. Thus, in part performance of the agreement, the plaintiffs had put the original defendant in possession of the suit shop. It was strongly averred by the original defendant that she was ready and willing to perform her part of the agreement. Her contention was that the original plaintiffs should execute the conveyance deed of the suit shop in her favour and only then she would vacate the tenanted premises in her occupation. When the agreement was executed, it was agreed between the parties that a conveyance deed in respect of the suit shop would be executed within 6 months. It was also contemplated under the terms of the agreement that the plaintiffs would put the defendant in possession of the suit shop immediately. However, the plaintiffs were able to put the defendant in possession of the suit shop in April 1986. Thus, the defendant was perfectly entitled to contend that until and unless the conveyance was executed in respect of the suit shop, the defendant would not hand over the vacant possession of the old premises. By the time the defendant was put in

possession of the suit shop, the period of 6 months had already lapsed. Since the original owners of the property had filed a civil suit against the plaintiffs, the plaintiffs were not in a position to execute the conveyance of the suit shop in favour of the original defendant. Thus, by retaining the possession of the suit shop, it cannot be said that it was a case of undue enrichment on the part of the defendant. The terms of the agreement are explicit and they contemplate the execution of a conveyance in favour of the defendant within 6 months. Since the plaintiffs had failed to execute the conveyance in favour of the defendant, the defendant was entitled to claim that she would hand over the vacant possession of the tenanted premises on the execution of the conveyance in respect of the suit shop.

18. Mr. Coelho Pereira has further submitted that the original defendants have not stepped into the witness box to prove their averments that the original defendant was ready and willing to perform her part of the contract and, therefore, though the original defendant was put in possession of the suit shop in part performance of the contract, the defendant has been rightly directed to hand over vacant possession of the suit shop. In support of this he has placed reliance on the Judgment of the Supreme Court in a **Mohan Lal (deceased) through his L.Rs. Kachru and others v. Mira**

**Abdul Gaffar and another**, A.I.R. 1996 S.C. 910. In the cited case, the appellant therein had come into possession of the suit land pursuant to an agreement of sale. He had paid part consideration of Rs. 500/- and had obtained possession of the land. Subsequently, the respondent therein purchased the land by a registered sale deed. The appellant's suit for specific performance of the contract for sale was dismissed. The respondent therein, therefore, filed a suit for possession, which was decreed by the trial Court. On appeal, the Judgment of the trial Court was reversed and the suit was dismissed. In the second appeal, the High Court had set aside the Judgment and Decree of the appellate Court and had restored the Decree of the trial Court. The appellant therein had set up a plea that he had perfected his title by prescription and had also raised a plea that he was entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act. The Supreme Court in that background, therefore, held that since the appellant's suit for specific performance had been dismissed and had become final, it would be inconsistent and incompatible with his right to remain in possession under the agreement. The Supreme Court further held that since the agreement had met with the dismissal of the suit, his willingness to perform his part of the contract did not arise. The facts of the reported authority, in our view, therefore,

are wholly inapplicable to the facts of the present case. In the present case, by virtue of the letter issued by the original defendant, at Exhibit P.W.1/F, the original defendant had expressed that she was willing to perform her part of the contract and had called upon the plaintiffs to perform their part of the contract. From the perusal of the said letter, the readiness and willingness of the original defendant to perform her part of the contract is discernible. The original defendant had expired during the pendency of the suit and her heirs were brought on record. In support of the case of the original defendant, the defendants had examined the Power of Attorney Holder.

19. Since the original defendant was placed in possession of the suit premises in part performance of the agreement of sale, the possession of the original defendant, therefore, cannot be treated either as unauthorised/wrongful or illegal. Mesne profits could not have been awarded by the learned trial Court, since the defendant was not in occupation of the premises wrongfully or unauthorizedly. In fact, at paragraph 8, the learned trial Court has recorded a finding that the defendant was put in possession of shop no. 7 as part performance of the contract to be performed by the plaintiffs. The Judgment and Decree of the learned trial Court, therefore, in awarding mesne profits is



wholly unsustainable.

20. The suit of the plaintiffs for specific performance was dismissed by the learned trial Court on the ground that the plaintiffs could not have given a marketable title to the defendant either in respect of the shop or in respect of flat no. 2. Therefore, according to the learned trial Court, the plaintiffs were not entitled to a decree for specific performance.

21. Coming to the cross objection filed by the original plaintiffs, according to us, the plaintiffs' suit for specific performance has been rightly dismissed by the learned trial Court. In the facts, which have been proved, the plaintiffs were unable to perform their part of the contract, though, no doubt the original owners had filed a suit against the plaintiffs and, thereby, the plaintiffs could not perform their part of the contract. The fact remains that the plaintiffs could not execute the conveyance deed as per the terms of the contract. In the peculiar facts of the case, according to us, the defendant was perfectly justified in insisting with the plaintiffs to execute the conveyance deed before she hands over the vacant possession of the premises. On the day on which she was put in possession of the shop premises, the period of 6 months for execution of the conveyance deed was already

over and, therefore, when the plaintiffs called upon the defendant to hand over the vacant possession of the tenanted premises, the defendant, as per the contract, rightly insisted on the execution of the conveyance deed of the shop in her favour. It, therefore, cannot be held that the defendant was not willing to perform her part of the contract. As stated by us, the contract was subsisting as the parties to the contract have not terminated the contract. In a subsisting contract, therefore, on the dismissal of the suit of the plaintiffs for specific performance of the contract, the defendant cannot be asked to restitute and hand over possession of the property to the plaintiffs of which she had been put in possession towards a part performance of the contract, particularly so, when it is not demonstrated that the defendant was not willing to perform her part of the contract. In view of the findings which have been recorded by us, the claim of the original plaintiffs in the cross objection, in respect of damages, is not sustainable at all.

22. In the result, therefore, we allow the appeal of the appellants and quash and set aside the Judgment in respect of the decree of payment of mesne profits against the defendant and the decree directing the defendants/appellants to hand over vacant possession of the suit shop. The cross objection filed by the

original plaintiffs, for the reasons recorded above, is dismissed. In the circumstances, there shall be no order as to costs. Decree be drawn accordingly.

(R.J. KOCHAR)  
JUDGE.

(P.V. HARDAS)  
JUDGE.

ed's.