CALCUTTA HIGH COURT

Gostho Behari Sadhukhan

Vs.

Omiyo Prosad Mullick

A.F.O.D. No. 156 of 1953

(K.C. Das Gupta, C.J. and H.K. Bose, J.)

16.06.1959

JUDGMENT

K.C. Das Gupta, C.J.

1. This appeal from a judgment of Bachawat, J., by which he dismissed the appellants' suit for specific performance of an agreement for lease of premises No. 219, Cornwallis Street, Calcutta and gave a decree for the refund of the sum of Rs. 7,201/-from the first three defendants, raises several questions of law of which two are particularly important and interesting. One of these is the question as to how far the provisions of Section 110 of the Transfer of Property Act that if no particular date of commencement of the lease is mentioned in the document creating the lease, the date of execution of the document should be the date of commencement of the lease, can be taken into consideration in arriving at a conclusion, where an agreement for lease mentions no date of commencement of the lease, whether any date of commencement has by implication been agreed upon. The other question is : How far delay in the plaintiffs' institution of the suit for specific performance will disentitle him to such relief? The plaintiffs, Gostho Behari Sadhukhan and Sarat Chandra Sadhukhan, brought the suit on the averment that there was a concluded agreement by correspondence by which Omiyo Prosad Mullick, Radha Gobinda Mullick and Shib Prosad Mullick, who will be referred to hereafter as Mullick defendants, agreed to grant them, the Sadhukhans, a lease of 219, Cornwallis Street, of which they are the owners and that though the plaintiffs have, since the date of conclusion of the agreement, always been and are still ready and willing to perform the said agreement, the Mullick defendants have failed to grant the said lease and in breach of that agreement granted a lease of the premises to Indu Bhusan Bose, Phani Bhusan Bose and Satya Bhusan Bose who were impleaded as defendants 4, 5 and 6. Satya Bhusan having died during the pendency of the suit, his heir and legal representative Rama Bose was brought on the record as defendant No. 6. These defendants 4, 5 and 6 will be referred to hereafter as the Bose defendants. The main defense of the Mullick defendants as taken in the written statement is that there was no concluded agreement to grant a lease and by correspondence only certain terms of the lease was agreed upon while "there were other equally important terms which the plaintiffs and these defendants were still discussing by correspondence and with regard to which no agreement had been reached". It was further alleged that though the "defendants proceeded with the negotiation on the assumption that the plaintiff's would, as was

the custom in Calcutta, pay these defendants their solicitor's costs of preparation and execution of the lease - if one was eventually agreed upon, the plaintiffs by their solicitors' letter dated 29-3-1944 and 30-3-1944 respectively refused to pay such costs on the ground that there was no express agreement to pay such costs." It was further urged that "it was the intention of these defendants and the plaintiffs that they would not be bound by any agreement until a former indenture of lease was prepared and executed". The Bose defendants besides reiterating the plea that there was no concluded agreement as between the plaintiffs and the Mullick defendants to grant lease, pleaded that they were "*bona fide* transferees for value who paid the money and came into possession of the said premises in good faith and without any notice of the alleged agreement". The Bose defendants also took the further defense that "the plaintiffs are not entitled to any relief against these defendants on account of delay and acquiscence." Of the issues that were raised on these pleadings, we are concerned with 6 only for the purpose of appeal. These are :

1. Was there a concluded contract as alleged in paragraph 2 of the Plaint?
2. Was there a custom in Calcutta that a lessee pays the lessor's solicitor's costs for preparation and execution of the lease, as alleged in paragraph 3 of the written statement of the defendants 1 to 3?
3. Did the plaintiffs refuse to pay such costs as alleged in the said paragraph?
4. Have the plaintiffs been and still are ready and willing to perform their part of the agreement if any?
6. Were the Bose defendants transferees for values and without notice of the contract, if any, between the plaintiffs and the Mullick defendants?
7. Is the suit barred by delay and acquiescence?

2. On a consideration of the evidence, oral and documentary, the learned Judge rejected the defendants' contention that the agreement was conditional upon the preparation of a draft of the lease by the lessor's solicitors and the approval thereof by the lessee's solicitor and that the reference for the preparation and approval of the draft lease in one of the letters was a "mere expression of the desire of the parties as to the manner in which the transaction already agreed will in fact go through". He was of opinion "that apart from the question of the date of the commencement of the lease all other essential terms had been settled and agreed upon between the parties", but that "the date of commencement of the lease was not expressly agreed upon." On further consideration of the evidence and the arguments based on behalf of the plaintiffs on Section 110 of the Transfer of Property Act, the learned Judge held that "the parties left the matter of the date of commencement of the lease to be decided by future negotiation". He observed "I think that the parties contemplated that in the ordinary course of events the lease would be executed within a reasonable time. They did not anticipate that there would be any difficulty in settling the matter by negotiation. It is possible that if the lease was completed within a reasonable time as contemplated by them they would have agreed that the term of the lease would commence from the date of the execution of the lease. But as the matter stands today the date from which the term is to run is not fixed and is not certain." Holding that "the parties had omitted to provide in the agreement about the date of commencement of the term of the lease and consequently the agreement is essentially defective and uncertain and cannot be specifically enforced", he held "that a contract for the grant of lease had not been concluded between the

parties".

3. On the question of existence of a custom that a lessee pays the lessor's solicitor's costs for preparation and execution of the lease, some evidence was adduced by the defendants. It appears, however, that the learned counsel for the plaintiffs conceded at the time of argument that there was a custom as alleged in the written statement. The learned Judge after holding that the result of the custom is that an obligation to pay to the lessors the costs of the lessor's solicitor for the preparation and execution of the lease was an implied term of the contract and holding further that the plaintiffs had repudiated this implied term by refusing to pay the costs, held that this being an essential term of the bargain, the plaintiffs were not entitled to specific performance. The learned Judge rejected the defense raised by the Bose defendants that they were *bona fide* transferees for value without notice. On the question that the delay by the plaintiffs in bringing the suit should disentitle them the learned Judge was of opinion that the "the delay of a few months only which is not explained by the evidence on the record" would not have disentitled the plaintiffs the specific performance. On these findings the learned Judge answered the issues as follows :

> "Issue No. 1 .. No.
> Issue No. 2 .. Yes.
> Issue No. 3 .. Yes.
> Issue No. 4 . . In view of my answer to issue No. 3, my answer is "No".
> Issue No. 6 .. The Bose defendants are transferees for value but they have not established that they are transferees without notice of the transaction between the plaintiffs and the Mullicks.
> Issue No. 7 .. No."

4. The first contention on behalf of the appellant is that the learned Judge is wrong in his view that the date of the commencement of the lease was left to be decided by a future negotiation, but should have held that the parties agreed, though not expressly, that the lease should commence on the date of execution of the document for the lease. Next it was contended that the learned Judge was wrong in finding that there was in Calcutta a custom that a lessee pays the lessor's solicitor's costs for preparation and execution of the lease and that even if there was such a custom and so such obligation by the lessee to pay such costs to the lessor be an implied term, the learned Judge was wrong in holding that this was repudiated. It was further urged that even if the evidence justifies the conclusion that such a condition was repudiated, this was not an essential term of the contract and repudiation thereof does not in law disentitle the plaintiffs to specific performance.

5. Coming to the second question first, I have no hesitation in holding that the evidence on record fully justifies the learned Judge's conclusion that there is a custom in Calcutta under which the lessee pays the lessor's solicitor's costs for preparation and execution of the lease. In holding this I have left cut of account the fact that the learned counsel for the plaintiffs conceded in the trial Court that there was such a custom. It appears that this concession was made after evidence had been closed and was really in the nature of a submission, that on the evidence the learned counsel was not in a position to urge that the custom had not been proved. Such a submission would not, in my opinion, stand in the way of counsel in the Court of Appeal trying to convince the Court

that the evidence did not prove the existence of a custom. The evidence on this point consists of the testimony of 3 experienced solicitors, Rabindra Chanda Deb, Sisir Kumar Ghose and Nripendra Chandra Mittra. Mr. Deb was at the time of the evidence the President of the Incorporated Law Society; Mr. Ghose who was at the time of the trial a member of the Law Council of the Incorporated Law Society, but for a long time before that had been the Secretary of the Incorporated Law Society; Mr. Mittra was the solicitor to the State of West Bengal and a member of the Council of the Incorporated Law Society. These gentlemen were undoubtedly competent to give evidence about the custom prevalent in Calcutta on the question raised. Their evidence leaves no doubt that it is a certain and longstanding custom in Calcutta that the lessor's solicitor's costs for preparation and execution of the lease are paid by the lessee; the admitted fact that the amount has to be settled by negotiation throws no doubt on the existence of the custom as alleged. A perusal of the depositions of these three witnesses clearly indicates that the existence of the custom as alleged was not seriously challenged in cross-examination. I have no hesitation in agreeing with the learned Judge that the existence of the custom has been proved.

6. There is no dispute about the legal position that when such a custom exists, an agreement by the lessee to pay the lessor's solicitor's costs for preparation and execution of the lease has to be implied in an agreement to lease. The plaintiffs have tried to prove a case that ultimately sometime on 18-4-1944, there was an agreement between the plaintiffs and the Mullick defendants as regards the payment of this cost. The learned Judge is not satisfied about this evidence. The evidence that there was such an agreement on the 18th April was given by Gostho Behari Sadhukhan. The learned Judge has thought that Gostho's evidence rather suggests that the agreement, if any, was conditional upon its acceptance by Mr. N.K. Roy. One Jatin Banerjee who was said to have been present at the time of the agreement, was not called to substantiate this agreement. After careful consideration I find it difficult to agree with the learned Judge that Gostho's evidence suggests that the agreement was conditional upon Mr. N.K. Roy's acceptance. Gostho definitely said that Omiyo Mullick agreed to this sum of Rs. 400/- as the amount to be given to the Mullicks for their solicitor's costs, the fact that he further said that he would make their solicitor - Mr. Roy agree to accept Rs. 400/- does not, in my opinion, justify any conclusion that the agreement was conditional. Nor am I prepared to draw an adverse inference to the plaintiffs' story for the non-examination of Jatin Banerjee. The position undoubtedly was that by not examining Jatin Banerjee the plaintiffs took the risk of an argument that he did not bring any corroborative evidence. When, however, it is found that Omiyo Mullick who, according to Gostho's evidence, agreed to this arrangement comes forward with an entirely different story which is clearly at variance with the case put by his counsel to Gostho Behari, I would myself think it reasonable to accept Gostho's version as regards the agreement of Rs. 400/- as the costs.

7. That, however, does not alter the fact that prior to this agreement on the 18th of April the plaintiffs had refused to honour this implied term of the agreement. On the 23rd March the Mullicks' solicitor N.K. Roy wrote to the plaintiffs' solicitor Fox and Mondal "It is of course understood that your clients are to bear and pay all costs of the lease including my costs. I am prepared to settle my costs, if you so desire." On the 27th of March Fox and Mondal replied "With regard to your costs, we have referred the matter to client and are awaiting his instructions". On the same date N.K. Roy wrote again saying "As regards my costs there should not be any dispute as to your client's liability to pay the same." On the 29th of March Fox and Mondal wrote "We are instructed that there was no agreement to pay your client's costs by our client." On the 30th March N.K. Roy wrote "It is the usual practice that the lessee is to bear and

pay all costs of the lease and I do not find any reason why there should be any departure from this practice in the absence of any agreement to the contrary. If your clients still insist that they would not pay the costs of and incidental to the lease, I am afraid the transaction will fall through. Please do not proceed any further till the question of costs is settled." On the 31st of March Fox and Mondal wrote "We know of no practice whereby the lessee is to bear all costs of the lease. Under the statute the lessee is to bear the costs of stamp on the lease only in the absence of agreement to the contrary. During the course of the correspondence which culminated in the conclusion of the agreement there was no suggestion at any stage for payment of your costs by our client." After several other letters had been exchanged in which the lessee's liability to pay the lessor's costs was being pressed by N.K. Roy and denied by Fox and Mondal, the position finally reached on the 18th of April was that N.K. Roy wrote "My clients deny that there has been any concluded agreement. They are entitled to cancel the alleged agreement as your clients have refused to pay my client's costs which are one of the implied terms of the lease. At the request of your client my clients have granted them time till 3 P.M. today to reconsider their liability to pay my client's costs." On that very date Fox and Mondal replied "We understand that the fresh negotiations for payment of your costs is being hampered for your not being able to state an approximate amount. If you will be good enough to let us know the approximate amount of your bill for the lease only and if you are agreeable to have the said costs certified by two eminent solicitors we can obtain definite instructions from our client in the matter."

The reply to this letter by N.K. Roy was :

> "It is really surprising that your client should take recourse to making false statements at this stage when they found themselves in the wrong. Up-till now your client did not acknowledge their liability to pay my clients costs and therefore it is not correct to say that the negotiations for payment of costs are hampered by my not being able to state the approximate costs. I am unable to follow what you meant by my bill of costs of the lease only. In this connection I may point out that the lessee is liable to pay the costs of the preparation and execution of the lease by lessor. Your clients have taken enough time to consider the point and my clients have no intention to haggle over costs any further.

I am returning herewith the cheques for Rs. 7,201 paid to client. Please return the receipt to us." It was on that very day, 18-4-1944, that Fox and Mondal wrote another letter to N.K. Roy in these terms:

> "We are instructed that the parties have now agreed to pay you a settled costs of the lease amounting to Rs. 400/-. Kindly send us the final draft for engrossment and send answers to the requisitions on the title already sent."

8. A study of the correspondence clearly shows that until this last letter was written on the 18th April mentioning agreement to pay settled costs of the lease amounting to Rs. 400/-, the plaintiffs through their solicitor had been insisting that they were not liable to pay these costs. There can thus be no escape from the conclusion that for a considerable time the plaintiffs were not ready and willing to perform one of the terms of agreement namely, this term for payment of the lessor's solicitor's costs which by reason of the custom was as good as written into the agreement.

9. The important question is whether this is an essential term of the agreement. If it was, repudiation thereof would certainly disentitle the plaintiffs to specific performance of the agreement. I am unable to agree, however with the learned Judge that this is an essential term. Apart from the question that the amount involved was negligible in comparison with the financial outlay which the plaintiffs were prepared to undertake, it has to be remembered that this term had nothing to do with the real demise of the property. Law and equity have always recognized a distinction between essential and non-essential terms. If the term as regards payment of solicitor's costs is to be considered essential, I fail to understand what term there can be in an agreement for lease which is non-essential. The essence of a contract of lease should ordinarily be held to consist of the terms as regards the identity of the property demised, the period of the lease, the amount of rent, the amount of premium, if any, the mode of payment, the time of payment, the consequences of nonpayment and terms of a like nature. A term for payment of solicitor's costs for preparation of the lease is really ancillary to the main transaction and cannot reasonably be considered to be an essential term.

10. Section 24 (b) of the Specific Relief Act makes it clear that while violation of an essential term disentitles the plaintiffs to specific performance, violation of a non-essential term would not do so. Repudiation of non-essential term, therefore, would not disentitle the plaintiff's to specific performance.

11. The learned Advocate General tried to convince us that when after this term was repudiated by the plaintiffs the repudiation was accepted by the Mullicks through their solicitor by one of the letters of the 18th April, the contract was at an end. If the repudiation had been of an essential term, there would have been much force in this contention, but the repudiation being of a non-essential term I find it impossible to accept the argument.

12. Coming now to the first contention raised on behalf of the appellants as regards the question whether the date of commencement of the lease was agreed upon by implication, it is interesting to notice that though it was said in the written statement that while some terms were agreed upon by the correspondence "there were other equally important terms which the plaintiffs and the defendants were still discussing by correspondence and with regard to which no agreement had been reached", no definite assertion was made that the date of commencement of the lease had not been agreed upon. It is no less interesting to notice that no question as regards the date of commencement of the lease appears to have been raised when the two witnesses for the plaintiffs, Gostho Behari and Sarat, were in the witness box or even when Omiyo Prosad Mullick was in the witness box. There was no suggestion either in the cross-examination of the Sadhukhans' nor in the Examination-in-Chief of Omiyo that negotiations were going on as regards the date of commencement of the lease and that no agreement had been reached thereupon. On the contrary we find that when Omiyo, after he had replied to question No. 197 that the agreement was in the stage of negotiation and suggestion put forward by each party, was asked "What were the terms that were outstanding according to you", his reply was "As far as I can remember the value of the structures was yet to be assessed. I beg to amend my previous answer. I want to say that the clause regarding premium was yet to be corrected and made into a clause of the value of the structures. Thereafter that question of cost was also left outstanding." The matter was pressed in question No. 199 thus : "Those are the two points according to you which were left outstanding on 20-3-1944?" The answer was "Roughly these were the two terms

left outstanding." What is clear, therefore, is that the Mullicks themselves did not think that the date of commencement of the term had not been agreed upon.

13. What could be the reason of their thinking thus? The answer to my mind is to be found in the knowledge by both parties of the provisions of Section 110 of the Transfer of Property Act. The relevant portion of the section is in these words :

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

There can be no doubt that this provision that "where no day of commencement is named, the time so limited begins from the making of the lease" applies only when a lease has been made in the way required by law as provided in Section 107 of the Transfer of Property Act. It has been strenuously argued by the learned Advocate General, who appeared for two of the Bose defendants - and the argument was adopted by the counsel appearing for the other defendants - that this provision as regards the time beginning from the making of the lease should not be. taken into consideration at all in a case where the lease has not yet been executed, I have no hesitation in agreeing with the learned counsel that the provision cannot possibly have the same effect when only an agreement to execute a lease in future is being considered as it has where the lease has been executed. In the latter case, namely, where the lease has been executed in accordance with law and no day of commencement is named, the day of commencement is, by operation of law as provided in this section, the day of the making of the lease. Where, however, the lease has not been made, the date of the making of the lease is not yet ascertained and so there can be no question of the time of the lease beginning, in fact, from the making of the lease. To say this is however not to say that the provision of Section 110 cannot or should not be taken into consideration in reading the mind of the parties to an agreement for the lease. We are bound to hold that the parties who are negotiating on the question of this lease to be given in future and their lawyers knew well this provision of law that if in the lease that will be made no day of commencement is named, the time of the lease would begin from the making of the lease. It is, in my opinion, proper and necessary to remember, when the question arises as to whether the parties during negotiation did agree to any day of the commencement of this lease, that this knowledge of the law was guiding their actions. This knowledge and the conduct of the parties as influenced by that knowledge would, in my opinion, be important circumstances in deciding whether an agreement was reached by them as regards the day of commencement of the lease even though no such agreement appears to have been expressed in words. There may be cases where there is clear evidence that negotiations were going on as regards the date of commencement of the lease. If there is nothing else, it may in such cases be reasonable to think that the parties were not content to leave the matter to the operation of law as provided in Section 110 of the Transfer of Property Act; for if they had been so inclined, they would not have thought of other negotiations as regards such date of commencement. There may be other cases where the parties or at least one of them has by word or deed indicated that he does not want to leave the date of commencement unexpressed in the lease that is going to be executed. In such cases also it would be unreasonable to think that the parties intended that in the lease when it will be executed the time of commencement of the lease should be the date of the making of the lease. I can see no reason, however, why, where the evidence makes it clear that there were no distinct

negotiations as regards the date of the commencement of the lease and in spite of the absence of such negotiation, the parties proceeded on the basis that the date of commencement of the lease is certain, it should not be thought that they acted in this manner because of their know-ledge of the provisions of law in Section 110. In such cases it would, in my opinion, be proper to hold, if there are not other circumstances showing otherwise, that the parties did agree that the lease should commence from the date of making of the lease.

14. Strong support for this view is available in a decision of this Court in *Kailash Chandra Bhoumik v. Bejoy Kanta Lahiri*[1], That was a suit for specific performance of an agreement to grant a permanent lease made orally on 30th December 1908. A decree for specific performance was made by the Trial Court, but on appeal a point was taken for the first time that the contract was not complete because the date of commencement of the lease had not been expressly stipulated. The District Judge accepted this objection and set aside the decision inter alia on the ground that the time of commencement of the lease was not specified. Dealing with this question the learned Judges, Mookerjee and Roe, JJ. said :

> "We must consequently examine whether the circumstances of this case furnish an indication of what date was intended by the parties for the commencement of the lease and here we must bear in mind that there was no suggestion at any stage in the primary Court that the contract was not complete because the date of the commencement of the lease had not been expressly stipulated. The objection was taken for the first time in the Court of Appeal below. It is plain, in view of the provisions of Section 110 of the Transfer of Property Act, that the intention of the parties must have been in the absence of indication to the contrary that the lease would take effect from the date of the execution of the instrument. This was formulated expressly in the plaint and was not challenged in the written statement. We are of opinion accordingly that the contract cannot be treated as other than a concluded agreement, though there was an absence of an express stipulation for the commencement of the lease. We may add that the Judicial Committee held in the case of *Ikramul Huq v. Wilkie*[2], that there was a concluded agreement, although the time of commencement of the lease was not expressly mentioned."

Bachawat, J. took the trouble of sending for the original records of the case in 11 Cal WN 946 (PC) and found there from that in the plaint a date of commencement of the lease was definitely asserted. He is, therefore, of opinion that the decision of the Judicial Committee in that case cannot be taken to have proceeded on the basis that time of commencement of the lease was not expressly mentioned. It is important to mention that even though the plaint did mention a date of commencement of the lease, the letters by which the

[1]23 Cal WN 190 : AIR 1919 Cal 837

[2]11 Cal WN 946 (PC)

agreement was reached in that case did not mention any date of commencement of the lease. It seems to me reasonable to think that Mookerjee and Roe, JJ. had in mind this fact that the letters by which the agreement was reached not having mentioned the date of commencement of the lease when they made the observation referred to above in Kailash Chandra Bhoumik's case 23 Cal WN 190 at p. 192 : AIR 1919 Calcutta 837 at page 838. What was being asserted by these learned Judges, is that here was a case where in the letters no time of commencement of the lease

was expressly mentioned and still the Judicial Committee had no difficulty in holding that there was a concluded agreement. It is possible and I think proper to say, however, that the question whether there was a concluded agreement in spite of the fact that no time of commencement of the lease had been expressly mentioned in the correspondence, was not raised in that case and so the Judicial Committee should not be considered to have come to any opinion on that question.

15. Assuming that Ikramul Huq's case 11 Cal WN 946 (PC) gives no support to the view expressed by the learned Judges in Kailash Bhoumik's case, I do not think that this takes away at all from the authority of that decision; for it is to be noted that the learned Judges did not refer to Ikramul Huq's case as the basis of the decision but merely referred to that case after having reached their decision.

16. I have noticed that after expressing their views as regards the effect of provisions of Section 110 of the Transfer of Property Act in ascertaining the intention of the parties, the learned Judges said "This was formulated expressly in the plaint and was not challenged in the written statement." I have also noticed the fact that the objection was taken for the first time in the Court of Appeal and was not taken in the Trial Court. These circumstances, in my opinion, afford no ground for doubting that the learned Judges who decided Kailash Chandra Bhoumik's case, 23 Cal WN 190 : AIR 1919 Calcutta 837 considered that as a matter of law "it is plain, in view of the provisions of Section 110 of the Transfer of Property Act that the intention of the parties must have been in the absence of indication to the contrary, that the lease would take effect from the date of the execution of the instrument,"

17. The Madras High Court had to consider this question of the effect of Section 110 of the Transfer of Property Act where it becomes necessary for the Court to ascertain whether the date of commencement of the lease had been agreed upon in *Sri Visiaram Gajapathiraj v. Sri Vikrama Deo Varma*[3], In that case no date was expressly mentioned as the date of commencement of the lease. The learned Judges, Wadsworth and Patanjali Sastri, JJ. relying on Kailash Chandra Bhoumik's ease and the decision of the Privy Council in Ikramul Huq's case held that it was legitimate to read into the agreement the provisions of Section 110 Of the Transfer of Property Act and so the agreement was certain as regards the date from which the lease was to commence. The learned Judges referred to the decision of the Privy Council in *Smt. Giribala Dasi v. Kalidas Bhanja*[4], and pointed out that this case was no decision as regards the effect of Section 110 of the Transfer of Property Act on the question under consideration.

18. In 25 Cal WN 320 , the Privy Council had to deal with the position where in the

[3] ILR 1945 Mad 355 : AIR 1944 Mad 518

[4] 25 Cal WN 320

correspondence no date of commencement of the lease was mentioned and had to consider the circumstances as disclosed by the evidence to ascertain whether any date of commencement could be held to have been agreed upon by implication. Their Lordships held that the circumstances did not justify a conclusion that any date had been agreed upon. No reference was, however, made in this case to the provisions of Section 110 and their Lordships did not consider the question whether in the absence of evidence to the contrary, parties to an agreement, may reasonably be taken to have the provisions of Section 110 of the Transfer of Property Act in their mind on the question of commencement of the lease. It is not necessary for us to consider why

this question as regards the effect of Section 110 of the Transfer of Property Act was not raised before the Privy Council. The fact remains that it was not raised and I find myself in respectful agreement with the Judges of the Madras High Court that the decision in Giribala Dasi's case, 25 Cal WN 320 , cannot be considered to be an authority against the view taken in Kailash Chandra Bhoumik's case, 23 Cal WN 190 : AIR 1919 Calcutta 837.

19. I am not aware of any decided case in the Indian High Courts or of the Privy Council where a view contrary to that enunciated in Kailash Chandra Bhoumik's case, 23 Cal WN 190 : AIR 1919 Calcutta 837, has been taken.

20. I, therefore, find no principle and authority that the knowledge of the provisions of Section 110 of the Transfer of Property Act as regards the commencement of the lease and the conduct of the parties as influenced thereby are important circumstances to be taken into consideration in deciding whether an agreement has been reached by the parties as regards the date of commencement of the lease.

21. As I have mentioned above there was no suggestion in the written statement that date of commencement of the lease had not been agreed upon. There was no such suggestion in cross-examination of the two Sadhukhan witnesses or in the examination of the defendants' witness Omiyo Prosad Mullick. Mention may also be made of the fact that even when N.K. Roy was writing again and again that a concluded agreement had not been reached, he never mentioned that agreement had not been reached as regards the date of commencement of the lease. On the contrary in writing on the 17th of April to Fox and Mondal N.K. Roy uses these words :

> "I am in receipt of your letter of the 14th instant and have been instructed to state that there has not been any concluded agreement inasmuch as your clients refused to pay the costs of the lease". and again on the 18th of April he was writing :
> "My clients deny that there has been any concluded agreement. They are entitled to cancel the alleged agreement as your clients have refused to pay my client's costs which are one of the implied terms of the lease."

There was not a shadow of suggestion that no agreement had been reached as regards the date of commencement of the lease. It appears clear from all these that it was not until N.K. Roy himself was in the witness box that the question that such a defense that the date of commencement of the lease had not been agreed upon crossed the minds of the defendants' advisers. The first inkling we get of such defense is when question No. 183 was asked as regards the blank in the draft of the lease in the portion "For the term of 31 years computed from ..... day of..... 1944". He was asked "Why did you leave that blank in the draft?" and N.K. Roy replied "No date was fixed or settled for the commencement of the lease." Nothing has been said by any of the several learned Counsel for the defendants why no suggestion on this question was made to the Sadhukhan witnesses or to Omiyo Prosad Mullick. I am clearly of opinion that this defense that no date of commencement of the lease had been agreed upon was an after-thought and took shape not before N.K. Roy was in the witness box.

22. On consideration of all these circumstances along with the parties' knowledge of the provisions of Section 110 of the Transfer of Property Act, I am of opinion that the parties did

agree that the lease should commence from the date of execution of the lease.

23. I am, therefore, of opinion that the ground given by the learned Judge for holding that there was not a concluded agreement cannot be sustained.

24. Mr. Roy, who appeared for the substituted defendant Rama Bose, pressed the argument which was rejected by the learned Judge that the intention of the parties was that the agreement was conditional on the preparation and approval of a new draft lease. I have no hesitation in rejecting the oral testimony of Omiyo Prosad Mullick and of N. K. Roy on this point and in holding in agreement with the learned Judge that the several letters namely, the letter from Fox and Mondal on the 18th March 1944, the letter of N.K. Roy in reply thereto on the 20th of March and the letter of the same date from Fox and Mondal and of N.K. Roy of the same date by which he said :

> "I am instructed to accept your suggestion with the following modification.

The sum of Rs. 7201 will be appropriated towards rent within 2 years after completion of construction or commencement of the business. Thereafter the lessee will furnish security to the extent of Rs. 7201 by depositing with the lessors G. P. Notes of the actual value of Rs. 7201 and the lessee will be entitled to realize the interest thereon. The said security will be held by the lessors during the continuation of the lease and shall be liable to be forfeited if the lease is cancelled by the lessee. I am sending back the form of the receipt duly approved in black ink. Kindly send the amount immediately." show clearly that the reference to the preparation and of approval of draft lease was "mere expression of the desire of the parties as to the manner in which the transaction already agreed will, in fact, go through." As I have already mentioned, the learned Judge held that apart from the question of the case as to the date of the commencement of the lease all other essential terms had been agreed upon between the parties on the 20th March 1944. For reasons I have already given, I am of opinion that even the date of commencement of the lease had been agreed upon by this date. My conclusion, therefore, is that there was a wholly concluded agreement between the parties on the 20th March, 1944.

25. It has to be mentioned that before us it was sought to be argued by Mr. Prafulla Roy on behalf of the defendant, Rama Bose, that the Court will find difficulty in making a proper draft of the lease to be executed as in some other matters, namely, as regards the payment of insurance money and other matters, the correspondence which passed between the parties left the matter uncertain. No such question was raised either in the pleadings or was hinted at before the Trial Court. We cannot, therefore, permit the defendants to raise a question of uncertainty on these grounds for the first time in this Court of Appeal.

26. On behalf of the other Bose defendants the learned Advocate General also tried to convince us that difficulty is introduced into the matter by the terms 2 and 3 as mentioned on the 18th of March 1944 even after the modification on behalf of the lessors by their letter dated 20th March, 1944. This question was also neither pleaded in the written statement nor hinted at in the Trial Court. We cannot, therefore, permit this question to be raised for the first time here before us.

27. The learned Advocate General contended next that the learned Judge was wrong in his

conclusion that the Bose defendants had not been able to establish that they were *bona fide* transferees for value without notice of the previous contract. The learned Judge held that they were transferees for value and this was not seriously disputed. The real question in dispute was whether before they took the transfer they had notice of the previous contract. Direct evidence that the transferees had notice of the previous contract is seldom available and in deciding whether the defendant in a suit for specific performance for a contract has been able to discharge the burden that he was a *bona fide* transferee without notice, the Court has to depend necessarily on circumstances. The circumstances here are eloquent enough to indicate that the Bose defendants had notice of this previous contract. The haste with which the transaction was concluded as between the Boses and the Mullicks taken with the circumstance that no steps were taken by the Boses to investigate the title of the Mullicks are circumstances indicating that the Boses knew very well of the previous contract. The learned Advocate General tried to convince us that if they knew of the previous contract they must have known the fact that there had been repudiation of the implied term to pay the solicitor's costs. As, however, in my opinion this term was not an essential term of the contract and the contract must be considered to be alive in spite of the repudiation of this non-essential term, it must be held that the Bose defendants at the time they took transfer of this property acted with the knowledge that there was an existing contract between the Mullicks and the Sadhukhans under which the Mullicks were bound to grant lease of the property to the Sadhukhans.

28. On the above findings I have reached the conclusion that unless there is some other reason in view of which the Court should, in the exercise of discretion, refuse to grant specific performance as prayed for by the plaintiffs, the plaintiffs would be entitled to get such a decree for specific performance.

29. The old principle that the specific performance of a contract is discretionary relief is embodied in Section 22 of our own Specific Relief Act. The latter part of this section enumerates certain principles which the Court have to take into consideration in exercising this discretion. Obviously, however, these instances are only illustrative and do not purport or intend to give an exhaustive list of the circumstances which have to be taken into consideration. The scope of variation in circumstances from case to case is almost infinite and it is well-nigh impossible to lay down any exhaustive rule as to the circumstances in which specific performance ought to be granted and circumstances in which it ought not to be granted in the exercise of the Court's discretion in this matter. One principle that may be safely enunciated for the guidance of Courts in such matters is the principle that in giving equitable relief, the Court ought not to act in an inequitable manner. If, therefore, on a consideration of all the circumstances in the case the Court thinks that it will be inequitable to grant the relief asked for, it should not give the relief. An authoritative pronouncement of this principle was made by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Hurd*[5], in these words :

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most

material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which may affect either party to cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

30. Relying on these observations Suhrawardy, J. observed in *Jadu Nath Gupta v. Chandra Bhusan Sur*[6],

> "Every case in which the discretion given by the law is to be exercised must be tested on its particular facts and surrounding circumstances, such as the relation between the parties, the nature of the subject-matter of the contract, the conduct of the parties and other material circumstances existing at the time."

31. Considering this question how far delay would bar the relief of specific performance, in *Kissen Gopal Sadaney v. Kally Prosonno Sett*[7], Woodroffe, J. made the following observations :

> "..... on the whole the tendency of the Courts is to discourage the plea of laches, unless somebody has been damnified by it; and as in this country, the period of limitation enacted by the statute is generally very short, there is the less need for the application of the equitable doctrine relating to delay.

In my opinion delay is not material so long as matters remain in status quo and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case, any lapse of time short of the period allowed under the Limitation Act should not disentitle the claimant to relief, to which he is otherwise entitled." On the evidence in that case the learned Judge held that the

[5](1874) 5 PC 221 [7] ILR 33 Cal 633

[6]36 Cal WN 285: AIR 1932 Cal 493

defendants had failed to establish an abandonment of the plaintiff's rights the onus of proving which lay upon them and such delay as there may have been on the plaintiff's part should not under the circumstances of the case deprive him of a decree for specific performance.

32. In *Maharaj Bahadur Singh v. Suresh Chandra Roy*[8], Sanderson, C. J. and Richardson, J. referred to the difference between the view expressed by Woodroffe, J. in Kissen Gopal Sadaney's case, ILR 33 Cal 633 and the view expressed in *Nawab Begum v A. H. Greet*[9], and *Mokund Lall v. Chotay Lall*[10], In *Nawab Begum's case*[11], the Allahabad High Court held :

> "Great delay on the part of the plaintiff in applying to the Court for specific performance

of a contract, of which he claims the benefit, is of itself, sufficient reason for the Court in the exercise of its discretion to refuse relief." In Mokund Lall's case, ILR 10 Cal 1061, Pigot, J. said :

"In this case, the time which was allowed to elapse was so long that under ordinary circumstance specific performance would not be granted by the Court."

Since (sic) (but) the learned Judges did not consider it necessary to decide which of these two views was correct.

33. In *Haradhan Debnath v. Bhagabati Dasi*[12], it was argued for the defendants that there was delay in the institution of the suit and that as before its commencement the transferee has spent money for the improvement of the property, the plaintiff should not be allowed a decree for specific performance. The transfer to the third defendant took place on the 30th August 1910 and the conveyance was registered on the following day. The suit was instituted on the 5th November 1910. The Court in which the suit could be instituted was closed from the 2nd October to the 3rd November. Their Lordships, Mookerjee and Beachcroft, JJ., held that the suit was not instituted with undue delay.

34. That mere delay does not by itself prejudice the plaintiff from obtaining specific performance if the suit is in time and that the delay in order to defeat the claim for specific performance must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstance that the grant of specific performance would prejudice the defendants, was the view taken by the Madras High Court in ***Sankaralinga v. Ratnaswami Nadar, AIR 1952 Madras 389.***

35. On consideration of the authorities it seems to me reasonable to hold that it would be, too much to say that mere delay, merely because of its length, would preclude a plaintiff from obtaining specific performance. I am unable to agree, however, that unless it is positively shown that the plaintiff has abandoned his right or there has been such a change of circumstance that the grant of specific performance would prejudice the defendants, the Court is bound to exercise its discretion in favor of the plaintiff. In my opinion Sir Barnes Peacock in saying that lapse of time and delay are most material "where it would be practically unjust to give a remedy cither because the party has, by his

[8]34 Cal LJ 364 : AIR 1921 Cal 179 [10] ILR 10 Cal 1061 [12] ILR 41 Cal 852 : AIR 1914 Cal 137
[9] ILR 27 All 678 [11] ILR 27 All 678

conduct, clone that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted "mentioned such cases only as illustrations and did not intend to give an exhaustive list. The principle that was being laid down by Sir Barnes Peacock appears to me clearly this that in deciding whether delay bars the grant of specific performance, the Court should consider the balance of justice and in considering this should take into account the length of the delay and the nature of the acts done during the interval which may affect such questions. In my opinion even if the circumstances do not show a waiver but it appears that the plaintiff has come to the Court not merely with the motive of obtaining specific performance but with an ulterior motive of taking advantage of money spent by a transferee, it will be proper for the Court to take into

consideration such conduct of the plaintiff in deciding whether discretion should be exercised in his favor or not.

36. In the present case the refusal of the Mullick defendants to execute the lease agreed upon was made abundantly clear to the plaintiffs on the 18th April 1944. That very month the plaintiffs inserted public notice of their alleged conduct of the Mullicks. They even took steps for registering the correspondence by which the agreement to grant a lease was said to have been concluded. The registration was effected in July 1944. Ordinarily it would be reasonable to expect the plaintiffs to institute the suit, if they were earnest about getting the lease as they seemed to be, at least up to July 1944. After 18th April 1944 or at least a short time after the registration of the correspondence, they waited, however, till the 20th February 1945 before instituting the suit. Trying to explain this delay Gostho Behari Sadhukhan said that as early as July 1944 he asked his solicitor Fox and Mondal to file this suit but Fox and Mondal did not do so, so that they had to take a change of attorney and after engaging Mr. T. Banerjee in place of Fox and Mondal instituted this suit. As a further reason for not bringing the suit earlier than February 1945 Gostho Behari Sadhukhan said in reply to question 457 :

> "I did not expedite matters because Ananta Babu used to visit us occasionally, he camp and reported to us that we would get the land in any event since the registration of the papers were effected. So I did not interest myself in the matter of any suit being brought against them."

Ananta, who is an employee of the Mullicks, has given evidence and has denied that he gave any such information to Gostho. It seems to me very unlikely that some such information should be given and I agree with the learned Judge that this evidence of Gostho Behari Sadhukhan should be rejected. I am also not satisfied that Fox and Mondal refused to bring the suit in spite of requests by Gostho to do so.

37. There is, in my opinion, no reasonable explanation for this delay of the plaintiffs in coming to Court from at least July 1944 to February 1945. It is interesting to notice in this connection that the Bariks, whose advice Gostho states he took in engaging his new solicitor, Mr. T. Banerjee is said to have had trouble with the Mullicks. It is also important to notice that the Bose defendants had made considerable progress in constructing the building on the demised land, as they were required to do under the terms of the lease, before the suit was brought. In my opinion, it is reasonable to think that it was at the instigation of the Bariks and in the hope of getting the structure already raised by the Boses on the land that the plaintiff brought this suit in February 1945. While I am not prepared to say on the evidence that there was total abandonment or waiver by the plaintiffs of their right to obtain specific performance and do not think it reasonable to say also that it was the non-action by the plaintiffs that induced the Bose defendants to go on with the construction, I am of opinion that the plaintiffs were not serious about bringing the suit until the Bariks started their investigation and the plaintiffs found that such progress had been made in the construction of the building by the Boses that it might be worth while to start the risk of litigation. It is, in my opinion, unjust to give a party, who is coming to Court with such unclean motives, the benefit of equitable relief. The plaintiff's prayer for specific performance should, therefore, be refused.

38. I have therefore come to the conclusion that the decision of the learned Judge that the plaintiff is not entitled to the relief of specific performance of the agreement to grant lease is correct, even though my grounds for reaching this conclusion are entirely different from those which found favor with the learned Judge.

39. I would, therefore, dismiss the appeal.

40. Each party will bear its own costs here and below.

41. Certified for two counsel.

Bose, J.

42. This appeal arises out of a suit for specific performance of an agreement to grant a lease.

43. The appellants who are the plaintiffs in the suit alleged that by an agreement entered into by correspondence the respondents Nos. 1 to 3 who may be described as "Mullick" respondents agreed to grant in favour of the appellants a building lease in respect of premises No. 219, Cornwallis Street, Calcutta, on terms and conditions contained in the said correspondence. The correspondence constituting the agreement are referred to in paragraph 2 of the plaint and are dated the 18th March 1944, 20th March 1944, 20th March 1944, 20th March 1944, 21st March 1944, 27th March 1944, 27th March 1944 and 29th March 1944. On 20th March 1944 the appellants paid to the Mullick respondents a sum of Rs. 7201/- in terms of the said agreement for lease. The Mullick respondents however after some further correspondence refused to grant the lease in favour of the appellants and on 19th April 1944, they granted a lease in respect of the said premises in favour of the respondents Nos. 4, 5 and one Satya Bhusan Bose. In June 1944, the appellants got the correspondence constituting the agreement, registered under the Indian Registration Act and on 21st February 1945 filed the suit out of which this appeal arises against the Mullick respondents and the respondents Nos. 4, 5 and the said Satya Bhusan Bose who may be described as Bose defendants for specific performance of the agreement for lease, for compensation in addition to or in lieu of specific performance, for injunction restraining the Bose defendants from acting upon the agreement dated 19th April 1944 or interfering with the plaintiff's rights in respect of the said premises and other reliefs. During the pendency of the suit the defendant Satya Bhusan Bose died on 14th January 1950 and his widow has been substituted in his place as the sole heiress and legal representative of the said Satya Bhusan Bose.

44. The defense of the Mullick defendants was that there was no concluded contract between the plaintiffs and these defendants. Certain important terms were in a stage of negotiations and during such negotiations the plaintiffs refused to pay the costs of the preparation and execution of the lease of the solicitor of these lessor defendants, although it was the custom in Calcutta for the lessees to pay all such costs. Further the agreement was conditional upon a formal indenture of lease being prepared and executed and until that was done the agreement was not binding. Moreover, the plaintiffs were not ready and willing to perform their part of the agreement and they did not make any demand for execution of the lease after 18th April 1944 and so the suit should be dismissed.

45. The defense of the Bose defendants was that they were the lessees in respect of the premises

in suit since 19th April 1944 under a registered lease for 31 years dated the 19th April 1944. They had paid Rs. 29,000/- to the Mullick defendants for the price of the unfinished structures which were standing on the land and they paid to the mullicks a further sum of Rs. 7201/- being one year's rent as security for due performance of the terms of the lease. They had also spent about one lakh of rupees over the construction of a Cinema house on the land after obtaining the approval of the Commissioner of Police on 10th October 1944 and the sanction of the Corporation of Calcutta on 18th December 1944 and they had made arrangements for buying the machinery and other accessories to open the Cinema very soon. These defendants also claimed to be *bona fide* transferees for value without notice of the alleged agreement between the plaintiffs and the Mullick defendants.

46. The Issues that were raised before the learned trial Judge were as follows :

> "1. Was there a concluded contract as alleged in paragraph 2 of the plaint?
> 2. Was there a custom in Calcutta that a lessee pays the lessor's solicitor's costs for preparation and execution of the lease as alleged in paragraph 3 of the W. S. of the defendants Nos. 1 to 3.
> 3. Did the plaintiffs refuse to pay such costs as alleged in the said paragraph?
> 4. Have the plaintiffs been and still are ready and willing to perform their part of the agreement, if any?
> 5. To what reliefs, if any, are the plaintiffs entitled?
> 6. Were the Bose defendants transferees for value and without notice of the contract, if any, between the plaintiffs and the Mullick defendants?
> 7. Is the suit barred by delay and acquiescence?
> 8. Is the plaintiff entitled to any of the reliefs prayed for?
> 9. Was the sum of Rs. 7201/- paid in terms of the agreement mentioned in paragraph 2 of the plaint or was the said sum paid while negotiation for grant of lease was in progress?
> 10. Is the registration of the correspondence alleged in paragraph 4 of the plaint invalid and of no effect?"

47. The learned trial Judge has found that :

> (1) there was no concluded contract between the plaintiffs and the Mullick defendants,
> (2) there is a custom in Calcutta for the lessees to pay the costs of preparation and execution of the lease, (3) the plaintiffs refused to pay such costs, (4) the plaintiffs were not ready and willing to perform their part of the agreement (5) the Bose defendants were transferees for value but not without notice of the agreement between the plaintiffs and the Mullick defendants (6) there was no such delay or acquiescence as to bar the plaintiffs' suit and (7) the correspondence did not require registration.

48. The learned counsel for the appellants has contended before us that the learned trial Judge was in error in coming to the conclusion that as no date of commencement of the lease was expressly agreed upon there was no concluded contract entered into which could be enforced

specifically by the Court. It is argued that having regard to the provisions of Section 110 of the Transfer of Property Act and the surrounding circumstances the Court should infer that the parties contemplated that the date of execution of the lease will be the date of the commencement of the lease and the absence of any express stipulation as to the date of the commencement of the lease does not prevent the contract from becoming a concluded contract.

49. The learned counsel has placed reliance on the case of 23 Cal WN 190 : AIR 1919 Calcutta 837. In this case a suit for specific performance was brought to enforce an oral agreement to grant a permanent lease. The Additional Subordinate Judge of Mymensingh who originally tried the suit passed a decree for specific performance. The Additional District Judge upon appeal, set aside the decree of the court of first instance on the ground that there was no concluded agreement, because the time of commencement of the lease was not specified and because the plaintiffs failed to prove that they had tendered the balance of premium within the period stipulated.

50. In the Court of first instance however there was no suggestion made at any stage that the contract was not complete because the date of the commencement of the lease had not been expressly stipulated. It was in the first appellate Court that this objection was raised and the learned District Judge held that in a contract for the grant of a lease the date of commencement of the lease is a material term and if it does not appear in the contract either expressly or by inference, the agreement is incomplete and incapable of specific performance. Mookerjee J. and Roe, J. pointed out that where there is an oral agreement to grant a lease Section 92 of the Evidence Act does not stand in the way of proof that there has been an agreement by implication or inferable from the circumstances, for the time of the commencement of the lease. The learned Judges relied on the decision of Maclean C. J., Harrington J. and Fletcher J. in *Ambica Prosad v. J. C. Galstaun*[14], and proceeded to examine the surrounding circumstances and observed that :

> "It is plain in view of the provisions of Section 110 of the Transfer of Property Act that the intention of the parties must have been in the absence of any indication to the contrary that the lease would take effect from the date of the execution of the instrument. This was formulated expressly in the plaint and not challenged in the Written Statement."

[14]13 Cal WN 326

51. Accordingly the learned Judges held that there was a concluded agreement.

52. So this was a case of an oral agreement and Section 92 did not stand in the way of the Court taking into consideration extrinsic evidence of surrounding circumstances. In the court of first instance no objection had been raised at all, as to contract being not complete for want of date of commencement of the lease. In fact there was some sort of indication in the plaint that the lease would take effect from the date of execution of the lease and this was admitted in the Written Statement. Upon these facts the learned Judges inferred that there was a concluded agreement.

53. In the case of 13 Cal WN 326, which is relied on in 23 Cal WN 190 : AIR 1919 Calcutta 837, the contract of which specific performance was sought was contained in four letters - two of which were dated 26th May 1906 and the other two 29th May 1906. The letters of 26th may indicated that the "principal terms" of the lease were being agreed upon, by those letters. The two letters of 29th May contained agreement as to one additional term which the lessors forgot to

mention at the time the principal terms were agreed upon. In none of the four letters was there any express stipulation as to the date of the commencement of the lease.

54. Maclean C. J. pointed out that as the letters of 26th May only spoke of the principal terms, the other terms could be proved by oral evidence as Section 92 of the Evidence Act did not exclude such oral evidence. The learned Chief Justice considered the oral evidence of the parties and the correspondence containing the contract as also the subsequent correspondence and came to the conclusion that there was nothing in the correspondence to show that there was ever any difference of view as to the date of the commencement of the lease and the parties and their solicitors regarded the matter as absolutely concluded. The observation that the learned Chief Justice made was :

> "When they say that the only term remaining to be settled was as to the old materials of the demolished buildings, the inference is irresistible that the other terms had been agreed upon, including the date of the commencement of the lease." But as the plaintiff in this case before Maclean C. J. did not file any cross-objection asking for specific performance, - which relief had been refused to him by the lower court the court of appeal could not grant the plaintiff any decree for specific performance but it maintained the decree for damages which had been passed by the lower court in favor of the plaintiff and dismissed the appeal preferred by the defendant.

55. The attention of this Court was drawn to the decision of the Judicial Committee in 25 Cal WN 320 , where the Judicial Committee has observed that

> "it is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to begin."

56. In this case an agreement provided for the grant of a Mourasi Mokurrari Ijara lease for the annual jama of Rs. 840/- exclusive of the revenue and road cess payable. This lease was to be granted in favor of the plaintiffs in respect of a four annas share of a Taluk of which the plaintiffs were already in possession of the remaining twelve annas share. The purpose for which this lease of the four annas share was to be granted was to enable the plaintiffs to have in their own hands the collection of the rents of the entire 16 annas share.

57. A letter written subsequently to the verbal agreement for lease but ante-dated was relied on as confirmation of the agreement for lease. This letter stated inter alia as follows :

> "..... In consideration whereof I do hereby promise and agree to execute a permanent ijara hereafter. I have this day issued notices to the tenants of the said mahals to pay their respective rents etc. to you as my ijaradars."

58. The Privy Council pointed out that the words "permanent" and "hereafter" were ambiguous and there was no indication of the date from which the term of the lease to be granted was to run.

59. It was contended before the Privy Council that a reference to the notice which was issued by the lessor to the tenants to pay rent to the plaintiffs gave indication of the date of the commencement of the lease.

60. The Privy Council found that it could legitimately refer to and consider this notice to the tenants, as this notice was mentioned in the other letter by which the lessor promised to grant the lease, but Privy Council held that it would not be proper to confine its attention exclusively to the two written documents, but the circumstances surrounding the issue of the notice and the facts from which it emerged could be considered; but from such consideration of the surrounding circumstances it was not possible to infer that there was any definite agreement as to the date from which the term of the promised lease was to commence. The Privy Council therefore refused specific performance.

61. A point has been raised by the learned counsel for the appellant that in this Privy Council case 25 Cal WN 320 , Section 110 of the Transfer of Property Act was not considered as the lease proposed was for an agricultural purpose and under Section 117 of the Transfer of Property Act the applicability of the provisions of Chapter V of the Transfer of Property Act was excluded. But it has been pointed out by the Privy Council and the Courts in India that the creation of a tenancy for the purpose of the tenant realizing the rent from the cultivators is not a tenancy exempted from the provisions of Chapter V of the Transfer of Property Act, *Satyaniranjan v. Sarajubala*[15], So there is no substance in this point.

62. In a decision of the Madras High Court reported in AIR 1944 Madras 518, Wadsworth J. and Patanjali Shastri J. held that an agreement for lease in which there was no express stipulation as to the date of the commencement of the lease was a concluded agreement as it seemed to them reasonable to infer from the surrounding circumstances that the parties had made their agreement in the light of the statutory provisions of Section 110 of the Transfer of Property Act and that it was understood that the lease was to run from the date when it was executed. The learned Judges have considered the two

[15]33 Cal WN 865

Privy Council cases of 25 Cal WN 320 and 11 Cal WN 946 (PC) and the Calcutta decision of 23 Cal WN 190 : AIR 1919 Calcutta 837, in arriving at the conclusion that the absence of express stipulation as to the date of the commencement did not make the agreement uncertain or incomplete.

63. Bearing in mind the principles laid down in these decisions, I shall now proceed to consider the facts and surrounding circumstances of the case before us.

64. On I8th March 1944 Messrs. Fox and Mondal Solicitors for the plaintiffs wrote to Mr. N.K. Roy, Solicitor for the Mullick defendants as follows :

> "Re. Building lease of premises No. 219 Cornwallis Street, Calcutta.
> Dear Sir,
> Referring to the negotiations for the above lease and referring to the conversation between your clients' representative Babu Anukul Chandra Sen and our client we are instructed to

make the final offer for taking the building lease of the aforesaid premises on the following terms :

1. Our client will pay to your client a premium of Rs. 29,000/- for the lease of the aforesaid land with unfinished structure thereon contemplated for Cinema House.

2. Our client will within one year and a half complete the construction of the said structures on the basis of the sanctioned plan and specification already submitted to the Corporation of Calcutta with such modification and deviation from the original plan as may be necessary during the process of completion for better efficiency of a Cinema House, provided that such deviation and modification shall be with the knowledge and consent of your client which consent shall not be unreasonably withheld.

3. As security for completion of the structure within a period for 3 years from the termination of the war our client will keep in deposit with your client a sum of Rs. 7201/- as earnest and in advance payment towards rent. If for any reason other than act of God construction of the building is not completed within the aforesaid period of 3 years from the termination of the War the lease will stand cancelled and the land with the buildings standing thereon will revert to the lessor.

4. On the completion of the building and commencement of the business thereon the said sum of Rs. 72017- will be appropriated towards the rent payable under the lease.

5. The period of demise of the land with the buildings will be 31 years with the option of renewal on the part of the lessee at the end of the period of 31 years for a further period of 9 years if during the said period there has been no breach in payment of rent, provided, in the event of renewal the lessors will be entitled to demand an Increase of rent by 15 per cent. The option will not be exercisable in the event of any transfer of the lease by the lessor within the period of the said 31 years.

6. During the first year of the lease client will pay rent to the lessors at the rate of Rs. 300/- per month and thereafter during the period of lease at the rate of Rs. 600/- per month besides the both shares of municipal rates and taxes.

7. Client undertakes to spend at least Rs. 35,000/- for the completion of the structure with good and substantial materials besides the said sum of Rs. 29,000/- paid to the lessors.

8. The lease in respect of the above, the draft whereof was sent to client for his perusal will be modified according to the terms stated herein and a fresh draft sent to us for approval within three days.

9. Your client will deliver to us the title deeds of the above premises within 3 days.

10. The lease of the above premises will be completed on or before the 31st day of March 1944 subject to lessors making out in the meantime a marketable title to grant lease free from all encumbrances.

11. The sum of Rs. 29,000/- mentioned in paragraph 1 will be paid on the date of the execution of the lease.

12. In the event of the existing structures being demolished and a complete new structure erected for the purpose other than the Cinema exhibition the lessee will furnish security to the extent of Rs. 35,000/-.

On hearing from you confirming the above terms our client will send you in course of the day the said sum of Rs. 7201/- on your client's proper receipt for the same amount.
Yours faithfully,
Fox and Mondal."

65. It is clear from this letter that it purports to be the final offer containing the terms on which the plaintiffs are willing to take the lease. The period of the lease is to be 31 years with an option of renewal for another 9 years (clause 5). In clause (8) of the letter it is stated that a draft of the lease in respect of the premises had been sent to the plaintiffs for their perusal and this lease will have to be modified according to the terms stated in this letter of 18th March 1944 and a fresh draft would have to be sent to the plaintiff's solicitors within three days, for approval. This clause as appears from the evidence on record has apparently reference to the previous lease which was granted by the Mullick defendants in favor of one Lala Sitaramprosad on 19th May 1933 for a period of 51 years and it was contemplated that the lease between the plaintiffs and the Mullick defendants would be like this previous lease with terms modified in accordance with the terms stated in this letter of 18th March 1944. In clause (10) the target for completion of the lease was fixed as the 31st March 1944 and in clause (11) it was stipulated that the sum of Rs. 29,000/- mentioned in Clause (1) was to be paid on the date of the execution of the lease.

66. On the 20-3-1944 Mr. N.K. Roy wrote to Messrs. Fox and Mondal as follows:

"Dear Sirs,
With reference to your letter of the 18th instant I have been instructed to confirm the same subject to the following modifications :
1. Clause 3.
The period should be one year instead of three years. If for any reasons other than act of God and other circumstances beyond the control of the lessees.
2. Clause 4.
The sum of Rs. 7201/- to be appropriated towards the rent of the last year of the lease and shall be liable to be forfeited if the lease is canceled by the lessee.
3. Clause 5.
Should be five years instead of nine. It is of course understood that the draft lease will also contain besides the terms and conditions mentioned in your letter under reply modified as aforesaid, other terms referred to in the draft lease already shown to you.
Yours faithfully,
N.K. Roy."

67. So this letter contains counter offers in the three clauses and the concluding portion clarifies the position that the terms and conditions in the previous lease of 1933 will be incorporated to the lease between the plaintiffs and the Mullick defendants, modified however by the new terms as stated in the letter of Messrs. Fox and Mondal and as altered in this letter of the 20th March 1944.

68. On the same day (20th March 1944) Messrs. Fox and Mondal replied to Mr. N.K. Roy's letter

as follows:

> "Dear Sir,
> With reference to your letter of the 20th instant we are instructed to accept the modification suggested in Clause 3 and Clause 5 of our letter of the 18th instant.
> With regard to modification in Clause 4 we are instructed that it has been agreed that the sum of Rs. 7201/- will be appropriated towards rent within 2 years after completion of construction or commencement of the business. Thereafter the lessee will furnish security to the extent of Rs. 7201/-by depositing with the lessors G. P. notes of the face value of Rs. 7200/- and the lessee will be entitled to realise the interest thereon. The said security will be held by the lessors during the continuance of the lease.
> On hearing from you accepting the above we shall send the amount of earnest money of Rs. 7201/- to you on your client's receipt for the same, a form whereof is enclosed herewith for your approval.
> Yours faithfully,
> Fox and Mondal."

69. On that very day (20th March 1944) Mr. N.K. Roy replied to the letter of Messrs. Fox and Mondal as follows:

> "Dear Sirs,
> With reference to your letter of the 20th instant I am instructed to accept your suggestion with the following modification.
> The sum of Rs. 7201/- will be appropriated towards rent within 2 years after completion of construction or commencement of the business. Thereafter the lessee will furnish security to the extent of Rs. 7201/- by depositing with the lessors G. P. Notes of the actual value of Rs. 7201/- and the lessee will be entitled to realize the interest thereon. The said security will be held by the lessors during the continuation of the lease and shall be liable to be forfeited, if the lease is cancelled by the lessee.
> I am sending back the form of the receipt duly approved in black ink.
> Kindly send the amount immediately.
> Yours faithfully,
> N.K. Roy."

70. It appears that the parties at this stage reached consensus with regard to the material terms and thought that a concluded agreement had been entered into, although no express stipulation as to the date of the commencement of the lease was made. On the very next day (21st March 1944) Messrs. Fox and Mondal wrote to Mr. N.K. Roy as follows :

> "Dear Sir,
> With reference to the agreement entered into yesterday kindly send us the title deeds for

our investigation as also the draft lease for our approval without delay.
Yours faithfully,
Fox Mondal."

71. It appears from the subsequent correspondence that Mr. N.K. Roy on that very day (21st March 1944) sent the title deeds to Messrs. Fox and Mondal and on the 23rd March 1944 wrote to Messrs. Fox and Mondal as follows :

"Dear Sirs,
I beg to send herewith the draft lease for your approval. In view of the Calcutta House Rent Control Order of 1943 I have not mentioned anything about the payment of the premium in the lease.
It is of course understood that your clients are to bear and pay all costs of the lease including my costs. I am prepared to settle my costs, if you so desire.
Yours faithfully,
N.K. Roy."

72. In the long correspondence that passed subsequently between the parties there was no suggestion made at any time by the Mullick defendants or their solicitor Mr. N.K. Roy the there was any contractual uncertainty because the date of the commencement of the lease was not expressly agreed upon. It is the question of payment by the lessee of the costs of the preparation and execution of the lease, which later on assumed importance and engaged the attention of the parties and their solicitors and formed the main subject of controversy, in the subsequent correspondence and ultimately resulted in the purported repudiation of the whole contract by the Mullick defendants.

73. When the parties were taking so much pains to arrive at a unanimity with regard to the various terms which they considered as essential or material terms and they did not feel the necessity of expressly entering into any stipulation as to the date of the commencement of the lease, it is obvious that they took it for granted and they intended that the date of execution of the lease would be the date of the commencement of the period of the lease.

74. The defendant Amiya Prosad Mullick has in answer to questions 197-199 stated that the question of payment of premium and the question of costs of the lease were the two terms which were outstanding after the 20th March 1944. The solicitor Mr. N.K. Roy has stated in answers to questions 181 to 183 that in the draft lease which was sent to Messrs. Fox and Mondal (Ex. B.) the space for date after the words "For the term of 31 years computed from ..... day of ..... 1944" was left blank because no date was fixed or settled for the commencement of the lease. But why there was no express stipulation with regard to the date of the commencement of the lease is not stated.

75. Moreover it appears that in the draft which was sent to the Bose defendants by Mr. N.K. Roy and which is marked as Ex. 7, the space for date of the commencement of the lease was similarly left blank but ultimately at the time of the execution of the lease the date of the execution was inserted as the date of the commencement of the lease. (Ex. OO-1). It has been pointed out by the

learned Advocate General that in Ex. OO-1, in Clause 2 of the covenants the expression "from the date of commencement of the lease" is used as distinguished from the expression "from the date of execution of these presents" occurring in other parts of the lease and so this indicates that the parties intended that the date of execution and the date of commencement of the lease would be different. But it is possible that although these different expressions had been used the date of execution and the date of commencement were intended to be the same. So too much stress cannot be laid on this aspect of the matter.

76. In the lease which was executed in favor of Lala Sitaram Prasad on 19th May 1933 (Ex. C) the date of execution and the date of commencement of the lease were the same.
77. Then again in the draft lease (Ex. B) that was sent by Mr. N.K. Roy, to the plaintiffs although the date of commencement was left blank, it was clearly provided that the rent was to be paid at the rate of Rs. 300/- per month for the first year from the "date of execution of these presents". This is some indication, though by no means conclusive, that the parties intended that the date of execution and the date of commencement would synchronise. (*Wasley v. Walker*[16],).

78. Now supposing the parties had in this case executed the lease but left the space for the date of the commencement of the lease, blank could it be said that the lease was void on the ground of uncertainty? It appears to me that the answer should be in the negative so far as the position under the Indian Law is concerned. The rule of interpretation as embodied in Section 110 of the Transfer of Property Act will apply and the date of commencement of the lease will be computed from the date of the making or execution of the lease. In other words, the date of execution will be the date of the commencement of the lease. It is said that this rule of interpretation is applicable only to a lease actually executed and not to an executory lease. But I fail to see why the parties who are presumed to know the law cannot be said to have contemplated that in view of the provisions of Section 110 of the Transfer of Property Act there was no necessity of any express stipulation as to the date of the commencement of the lease unless of course they wanted to have a date of commencement different from the date of execution which however does not appear to be the case here.

79. In view of the surrounding circumstances of the case and in view of the provisions of Section 110 of the Transfer of Property Act it is reasonably clear that the parties intended that the date of execution of the lease would be the date of commencement of the lease and that is why no necessity was felt of entering into any express agreement as to the date of the commencement of the lease. The absence of any express stipulation as to the date of the commencement of the lease did not prevent the agreement for lease from being a concluded agreement.
[16](1898) 38 LT 284
80. The learned Advocate-General in course of his argument before us has submitted that there are various provisions or terms in the letter of 18th March 1944 which are vague and uncertain but no such question of vagueness or uncertainty appears to have been raised in the pleadings or before the trial court and so these new points cannot be allowed to be agitated for the first time before this Court.

81. The further point that requires consideration is whether it was an implied term of the agreement that the lessees were to pay the costs of the preparation and execution of the lease of the lessor's solicitor and whether the non-performance of this condition by the lessees disentitled them to obtain a decree for specific performance.

82. Now as has been noted already Mr. N.K. Roy in his letter of the 23rd March 1944 made it clear that the lessees were liable to pay such costs. Messrs. Fox and Mondal on the 27th March 1944 in dealing with this question of costs wrote as follows :

> "With regard to your costs we have referred the matter to client and are awaiting his instructions".

83. On the same day Mr. N.K. Roy replied stating :

> "As regards my costs there should not be any dispute as to your client's liability to pay the same."

84. On the 29th March 1944 Messrs. Fox Mondal wrote as follows :

> "We are instructed that there was no agreement to pay your client's costs by our clients."

85. On receiving this latter Mr. N.K. Roy on 30th March 1944 wrote to Messrs. Fox and Mondal as follows :

> "It is the usual practice that the lessee is to bear and pay all costs of the lease and I do not find any reason why there should be any departure from this practice in the absence of any agreement to the contrary. If your clients still insist that they would not pay the costs of and incidental to the lease I am afraid the transaction will fall through. Please do not proceed any further till the question of costs is settled. In the meantime please return the title deeds to me."

86. On the next day (31st March 1944) Messrs. Fox and Mondal stated in reply as follows:

> "We know of no practice whereby the lessee is to bear all costs of the lease. Under the Statute the lessee is to bear the costs of stamp on the lease only in the absence of agreement to the contrary. During the course of the correspondence which culminated in the conclusion of the agreement there was no suggestion at any stage for payment of your costs by our client." On 1st April 1944 Mr. N.K. Roy wrote stating that as the lessees were denying their liability to pay the costs, his clients did not desire to proceed any further in the matter and treated the negotiations for the same at an end. After some more correspondence Mr. N.K. Roy stated in his letter of 17th April 1944 that "there has not been any concluded agreement inasmuch as your clients refused to pay the costs of the lease. It has been always the practice and custom here for the lessee to pay the costs of the lessors and your client's refusal to acknowledge such liability is unjustifiable". On the same day Messrs. Fox and Mondal wrote as follows :
> "We understand that the parties are negotiating afresh on the payment of your costs and we shall address you on the matter after the amount is agreed."

87. On 18th April 1944 Mr. N.K. Roy replied slating that as the lessees had refused to pay the costs which was one of the implied terms of the lease, the lessors were entitled to cancel the agreement and at the request of the lessees the lessors granted them time till 3 P.M. that day to reconsider their liability to pay the costs. On 18th April 1944 Messrs. Fox and Mondal denied that payment of the costs was an implied term of the lease. This letter was received by Mr. N.K. Roy at 2-30 P.M. on the 18th and on the same day after 3 P.M. Mr. N.K. Roy wrote stating that as the lessees did not till then acknowledge their liability to pay the costs he was returning the cheque for Rs. 7201/-. This cheque had been paid to the lessors by the lessees on 20th March 1944 in terms of the agreement. On the same day (18th April 1944) at about 4-15 P.M. Messrs. Fox and Mondal wrote as follows:

> "We are instructed that the parties have now agreed to pay you a settled costs of the lease amounting to Rs. 400/-."'

88. Messrs. Fox and Mondal also wrote another letter on that day refusing to accept the cheque for Rs. 7201/- returned by Mr. N.K. Roy and threatened to file a suit for specific performance if the final draft of the lease as approved was not sent to them within 24 hours and they wanted to know whether Mr. N.K. Roy was prepared to accept service of the Writ of summons. Besides this correspondence oral evidence as to there being a custom in Calcutta for the lessees to pay the lessor's costs of the preparation and execution of the lease has been adduced. Mr. Sisir Ghose, solicitor, has stated that if any dispute arises as to payment of the casts before the execution of the lease such payment is a condition precedent to the execution of the lease. (Q. 23 to 25). Mr. Nripendra Chandra Mitra, Solicitor, has also stated that if there is dispute, the lease will not be signed by the lessor unless the costs are paid before the execution (Q. 26 to 29). The learned judge has found that the custom has been proved and consequently the payment of the costs was an implied term of the lease.

89. Now assuming that the learned trial judge is correct in these findings, it remains to be considered whether this implied term is an essential term or not so that its non-performance will disentitle the plaintiffs to get a decree for specific performance, in this suit.

90. The Privy Council in the case of *Oxford v. Provand*[17] at p. 156 has observed :

> "The rule has been expressed in various forms, the substance of it, as regards the present purpose is that such breach is a bar when it goes to the whole of the consideration for the promise sued upon but when it amounts only to a partial

[17](1868) 2 PC 135

> failure of such consideration it is no bar to the suit : the defendant being entitled to recover in a cross-action compensation for such failure if it should be proved to exist".

91. In the case of *Besant v. Wood*[18] at 627-628 Jessel M.R. observed:

> "It is not every breach of a covenant upon his part which prevents a man coming to a Court of Equity to have covenants enforced. Take a simple instance. A man is a lessee

with a proviso that he may purchase on a six months' notice. He does not pay his rent punctually but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which specific performance is sought but it must be some such material and substantial breach as will enable the Court to say that his conduct has been such that it ought not interfere in his behalf at all".

92. Section 24(h) of the Specific Relief Act also provides that specific performance of a contract cannot be enforced in favor of a person who has become incapable of performing or violates any essential term of the contract that on his part remains to be performed.

93. So what prevents the plaintiff from enforcing specific performance is the breach on his part of the essential terms of the contract by acting in contravention of the contract or at variance with it. "Small breaches of good faith have been held not to be a bar to relief though they may affect the costs". (Fry on Specific Performance - Section 981).

94. Reference may also be made to the case of *Ma Sa Bon v. Ma Da Twe*[19], at p. 236 in support of the proposition that it is not every default or breach which debars a person from obtaining specific performance.

95. In the case before us the breach complained of is that the plaintiffs refused to perform the implied term as to payment of the lessor's costs of the preparation and execution of the lease. The evidence shows that the fair and reasonable amount of such costs in the present case would be Rs. 550/-The correspondence makes it clear that the solicitors of the plaintiffs were *bona fide* under the impression that the plaintiffs were under no liability to pay the costs. If this term had been a material or important term it would have been expressly stipulated in the agreement. It is true that any usage in relation to a particular type of contract is regarded as if it were a term set out in extenso in the contract but I am unable to regard this term as to payment of costs such an essential term as the breach of which will disentitle the plaintiffs to specific performance. It appears to me that the trial court in this case could have granted a decree for specific performance subject to the plaintiffs paying the amount of costs payable to the lessors before the decree was passed; or such payment might have been made a condition precedent to the drawing up of the decree.

96. The next question that has to be considered is whether the plaintiffs' refusal to pay the costs of the lease show that they were not ready and willing to perform their part of the contract and this refusal debarred therm from enforcing specific performance of the

[18](1879) 12 Ch. D. 605
[19] AIR 1924 PC 233

agreement in this suit.

97. In the well-known case of *Ardeshir H. Mama v. Flora Sassoon*[20], the Judicial Committee observed as follows :

"In a suit for specific performance on the other hand, he treated and was required by the

Court to treat the contract as still subsisting. He had in the suit to allege and if the fact was traversed to prove a continuous readiness and willingness from the date of the contract on his part. Failure to make good the averment brought with it the inevitable dismissal of the suit." (page 373 of Ind App) .

98. In a subsequent paragraph the Privy Council made the following further observations :

"Although so far as the Act (Specific Relief Act) is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (Section 24(b) is the nearest) it seems invariably to have been recognized and, on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same", (page 375 of Ind App). (at pp. 217-218 of AIR).

99. Now the question arises whether this readiness and willingness must be in respect of all matters or things to be done on the part of the plaintiffs whether essential or non-essential, or what the plaintiff's have to prove is their readiness and willingness in respect of the essential or material terms of the contract to be performed on their part. It appears to me that the Privy Council by pointing out that this principle of readiness and willingness, though not expressly embodied in the Specific Relief Act has its nearnest reflection in Section 24(b) of the Act, has indicated that the plaintiff in a suit for specific performance has to show that he has been always ready and willing to perform the essential terms of the contract. I do not think the Privy Council in this case intended to lay down that every default or breach however small, or the non-performance of the subsidiary or unimportant terms not going to the root of the contract, will debar the person seeking specific performance from getting the relief. As, I have pointed out, it is clear on the evidence that refusal at one stage on the part of the plaintiffs to acknowledge their liability to pay the costs of the lease was due to a misconception of the true legal position and mere failure on their part to perform this obligation, in my view, did not justify a dismissal of the suit.

100. The further question that remains to be considered is whether the plaintiffs have been guilty of any delay or acquiescence so as to disentitle them to a decree for specific performance.

101. It has been laid down in a number of cases that having regard to the fact that a particular period has been prescribed by Article 113 of the Limitation Act 1908 for bringing a suit for specific performance of a contract the English law of delay and negligence disentitling a plaintiff to enforce specific performance is not applicable in India and unless time is made the essence, of the contract, mere delay is not a ground for

[20]55 Ind App 360

refusing specific performance; but at the same lime the principle is well-recognised that the jurisdiction to decree specific performance being discretionary (Section 22 of the Specific Relief Act) if there is delay or laches on the part of the plaintiff, which has induced the defendant to alter his position such delay or laches may be considered as a sufficient ground for refusing specific performance.

102. In the case of ILR 33 Cal 633 some of the circumstances under which a delay may preclude the plaintiff from claiming specific performance have been indicated. It is pointed out in this case that the tendency of the courts is to discourage the plea of laches unless somebody has been damnified by it. Delay is not material unless it is shown to have prejudiced the defendant or unless it gives rise to an inference of abandonment of the right.

103. The Privy Council in the case of (1874) 5 PC 221 at p. 239 also expressed itself as follows :

> "Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct or neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place aim if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material. But in any case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable".

104. In the present case there is no specific averment by the defendants that the plaintiffs had "abandoned the contract" or that "by reason of the acts and conduct of the plaintiffs and the delay or laches on their part in bringing the suit the defendants have been induced to alter their position or have been prejudiced". There is evidence however to show that the Bose defendants have invested large sums of money on the construction of the Cinema house on the. demised premises and have spent further sums on machinery and equipments, The construction started substantially from December 1944 though some little work was done in July also and by the time the suit was filed a sum of about Rupees one lakh had been spent on construction of the building. Under the covenants of their lease which was executed on 19-4-1944 the Bose defendants were under an obligation to complete the construction within a period of 18 months and if they did not do that they would suffer a forfeiture of the lease and the sums of Rs. 29000/-and Rs. 7201/- paid by them to the Mullick defendants would also be lost and the portion of the building constructed by them would become the property of the lessors. So the Bose defendants being anxious to implement their part of the contract were taking steps for obtaining sanction of the Corporation and the approval of the Commissioner of Police and were collecting materials for the purpose of the construction. But if the plaintiffs had filed a suit shortly after the purported repudiation of the contract by the solicitor for the Mullick defendants, the Bose defendants might have stayed their hands or might have been forced to stay their hands by means of an order of injunction obtained by the plaintiffs. But as the plaintiffs did not file the suit although they had threatened to file the suit immediately by their letter of the 18th April 1944, the Bose defendants went on investing money on the demised property. It is of course to be pointed out that the plaintiffs had refused to take back the deposit of Rs. 7201/- from Mr. N.K. Roy and in June 1944 they got the correspondence containing the agreement for lease, registered and these are acts on their part which to a certain extent militate against the theory of abandonment of the contract. But the plaintiff Gosto Behary has stated in his evidence that before he filed this suit he had occasion to pass by the premises No. 219, Cornwallis street, that is the premises in suit, once and he noticed that structures were being built there. He was surprised and he mentioned this matter to the

Bricks (Barricks?) of the Chaya Cinema and it is upon their advice that he then approached the solicitor Mr. T. Banerjee (Questions 59-63). In answer to question 457 Gosto Behary has suggested that after he took back the papers from Messrs. Fox Mandal he did not expedite matters as he was assured by Ananta Babu (Representative of the Mullick defendants) that the lease would be granted to the plaintiffs in any event and so the witness did not interest him in the matter of any suit being, brought against the Mullick defendants. This part of the testimony has I think rightly not been accepted by the learned trial Judge.

105. On the other hand Indu Bhusan Bose has stated that after the suit was filed he got angry with the Mullick defendants because he and his brothers had invested large sums of money and now they were landed in this difficulty. (Q. 311-312).

106. It is possible that Gosto Behary Sadhukhan did not for some reason want to file the suit and that is why he kept absolutely quiet alter getting the correspondence registered in June or July 1944. Gosto Behary has been asked several questions about his indifferent attitude and he has been charged with standing by and allowing the Bose defendants to expend money upon the demised property. It has been pointedly suggested to him in cross-examination that he remained willfully passive and abstained from asserting his legal rights knowing full well that the Bose defendants were investing money on the property. Although Gosto Behary has denied all these charges the real state of affairs may be as suggested. (Gosto - Q. 532-542 and Q. 567-575).

107. It may be the fact that the plaintiffs having found in 1945 that there was a substantial structure on the land (part of which was fourstoreyed high) which had been built by the Bose defendants, hit upon the idea of getting this structure for nothing and that is why they suddenly became active and filed the suit on 21-2-1945. As I have pointed out already Gosto has admitted in his evidence that after seeing the structure being built in 1945 he consulted the Barricks and filed the suit through the Solicitor Mr. T. Banerjee.

108. It appears to me to be not unreasonable to presume that the continued inaction for a period of about ten months on the part of the plaintiffs led the defendants to suppose that the plaintiffs did not wish to proceed further in the matter. The learned trial judge has found that the plaintiffs have not been able to explain the delay for a few months and the evidence that they gave for explaining the delay is untrustworthy and unacceptable. Although there is no specific pleading of the expression "abandonment" or "waiver", the plea of delay and acquiescence has been taken in the Written Statement of the Bose defendants and the facts showing investment of money and alteration of position have been also pleaded in this Written Statement. A definite issue was raised as to this delay and acquiescence but the learned trial judge does not appear to have laid much stress on this Issue and he has dealt with it summarily. In my view the grant of a decree for specific performance when there has been a change of status quo since the contract, which has been contributed to a large extent by the dilatory conduct of the plaintiffs, will be inequitable and the delay and laches on the part of the plaintiffs in the facts and circumstances of this case disentitle them to obtain a decree for specific performance. (See the case of 36 Cal WN 285 at p. 289-291 : AIR 1932 Calcutta 493 at p. 496 per Suhrawardy J. and Graham J.).

109. Our attention was drawn to the cases reported in ILR 41 Cal 852 : AIR 1914 Calcutta 137; and AIR 1952 Madras 389 - paragraph 5 of the judgment; and *S. K. Buty v. Shriram Hari Tambe*[21], at p. 71 but it is not necessary to deal with these cases in detail, as they are distinguishable from the facts of the case before us.

110. It may be pointed however that in the case of 34 Cal LJ 364 : AIR 1921 Calcutta 179 Sanderson C. J. and Richardson J. referred to the cases of ILR 33 Cal 633, *Kedar Nath v. Manu Bibi*[22], but declined to express any opinion with regard to the two views illustrated by the cases, as it was not necessary for the purpose of the disposal of the case before them, to do so. The learned judges accepted the findings of the lower appellate court which were (1) that two years delay remained unexplained, (2) the matters at the time the suit was brought were not in status quo they were at the time the contract was entered into (3) the tenants of the defendant did not want that the plaintiff would be granted the putni lease which the defendant agreed to grant; and to dissuade the defendant from granting the lease they had agreed to an enhancement of their rents and this resulted in a change of the value of the property (4) there was delay on the part of the plaintiff in bringing the suit. If the plaintiff had filed the suit earlier the tenants of the defendant would not have agreed to an enhancement of the rent (5) the consideration of the agreement was so high that the plaintiff would not be prepared to enforce the contract but it is on account of the subsequent enhancement of rent and consequent increase in the value of the property that the plaintiff had come forward to enforce the contract.

111. Upon these findings the learned Chief Justice held that the lower court was right in refusing specific performance in the exercise of its discretion under Section 22 of the Specific Relief Act.

112. In my view the plaintiffs before us are not entitled to have the discretion exercised in their favour and the relief of specific performance should not be granted to them. The other point that has been raised is whether the Bose defendants are transferees for value without notice of the plaintiffs' contract before they took the transfer. On this point I am inclined to agree with the conclusion of the learned trial judge though not with all the reasoning's for his conclusion that the Bose defendants had notice of the plaintiffs' contract. The learned Advocate-General appearing for the Bose defendants has argued that as by reason of the repudiation of the contract which took place as a result of the exchange of the letters both dated 18-4-1944 (P. D. 22 and P. D. 23) the contract had ceased to be an existing contract, the Bose defendants could not be said to have notice of any existing contract by reason of the events that took place in the office of Mr. N.K. Roy on the 17th and 18th April 1944. According to the learned Advocate-General the Bose defendants came to know if at all, that the plaintiffs' contract was at an end as a result of

[21] AIR 1954 Nag 65

[22]16 Cal WN 247, ILR 10 Cal 1061, ILR 41 Cal 852 at pp. 861-862 : (AIR 1914 Cal 137 at pp. 139-140) and ILR 27 All 678

the repudiation. As it appears to me that Mr. N.K. Roy was not justified in putting an end to the contract for repudiation of a non-essential term by the plaintiffs it cannot be said that the contract had ceased to be an existing contract. If the client of the solicitor Mr. Roy could say that "I am not going on to perform my part of the contract when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct" the repudiation would be justified. (See *Mersey Steel and Iron Co. v. Naylor Benzon and Co*[23]*.,* But that is not the case here. Moreover this argument of the learned Advocate-General is based on the wordings of Section 91 of the Trust Act. But it is well known that besides Section 91 of the Trusts Act, Section 3 of the Specific Relief Act and illustration (g) and Section 27 of that Act and Section 40 of the Transfer of Property Act have a bearing on the question of rights and liabilities of a transferee for value without notice and the wordings of these sections are different. In my view this contention of the learned Advocate-General has no force and the Bose defendants' obligation

to hold the property for the benefit of the plaintiffs as imposed by the various statutory provisions remains unaffected.

113. In view however of my finding that the conduct of the plaintiffs disentitle them to obtain specific performance, this appeal should fail.

114. I agree with my Lord the Chief Justice that this appeal should be dismissed.
Appeal dismissed.
[23](1884) 9 AC 434 at pp. 443 to 444