

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 3850 OF 2014
IN
FIRST APPEAL NO. 1324 OF 2014**

Mr.Jagdish Shankar Sawant & Anr. ... **Applicants/
Appellants**

Versus

Mrs.Prema Jagannath Chodnekar & Ors. ... **Respondents**

**WITH
CIVIL APPLICATION NO. 1017 OF 2015
IN
FIRST APPEAL NO. 513 OF 2015**

Mrs.Prema Jagannath Chodnekar & Ors. ... **Applicants/
Appellants**

Versus

Mr.Jagdish Shankar Sawant & Ors. ... **Respondents**

**WITH
CIVIL APPLICATION NO. 1019 OF 2015
IN
FIRST APPEAL NO. 515 OF 2015**

Floreat Investment Limited ... **Applicant/
Appellant**

Versus

Mr.Jagdish Shankar Sawant & Ors. ... **Respondents**

Mr.A.M. Khandekar with Mr.Aneesh Deshpande i/b. M/s. Tamhane & Co. for Applicants/Appellants in CAF/3850/2014 in FA/1324/2014 and Respondent Nos.1 and 2 in CAF/1017/2015 in FA/513/2015 and CAF/1019/2015 in FA/515/2015.

Mr.V.Y.Sanglikar for Applicants/Appellants in CAF/1017/2015 in FA/513/2015 and Respondent Nos.1 to 5 in CAF/3850/2014 in FA/1324/2014 and Respondent Nos.3 to 7 in CAF/1017/2015 in FA/513/2015.

Mr.Phiroze Colabawalla with Mr.S.A.K.Najam-es-sani i/b. Maneksha & Sethna for Applicant/Appellant in CAF/1019/2015 in FA/515/2015 and Respondent No.3 in CAF/1017/2015 in FA/513/2015 and Respondent No.6 in CAF/3850/2014 in FA/1324/2014.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 19TH OCTOBER, 2016.

P.C. :

1] As all these three applications arise out of one and same judgment and order passed by the City Civil & Sessions Court, Mumbai in S.C. Suit No. 8765 of 1999 dated 12th August, 2014, seeking stay to the said judgment and order and as they raise the common questions of law and fact, they are being decided by this common order. For the purpose of convenience, the parties in these applications are referred to by their original nomenclature as plaintiffs and defendants.

2] Civil Application No.1017 of 2015 is filed in appeal preferred by the original plaintiffs. By the said application the original plaintiffs are seeking the appointment of Court Receiver for the new permanent alternate accommodation bearing flat No.2902 J.K. Rehab Tower, Gamdevi, Mumbai, with a direction to put them in possession of it, without any security and royalty.

3] Civil Application No.3850 of 2014 is preferred by the original defendant nos.1 and 2 seeking stay to the operation and

implementation of the impugned judgment and order dated 12th August, 2014 passed in Suit No.8765 of 1999 by the City Civil Court, Mumbai.

4] Whereas the third Civil Application No.1019 of 2015 is preferred by original defendant no.3, the builder and developer viz. Floreat Investments Limited, seeking direction to defendant nos.1 and 2 to hand over possession of the suit premises bearing Room no.11, Building No.7, J.K. Building, Harishchandra Goregaonkar Road, Gamdevi, Mumbai to enable the applicant to demolish the said building and for further direction to the applicant to hand over possession of the newly constructed flat No.2902, Ad-measuring 225 sq. feet (Carpet area) on the 29th Floor of building known as J.K. Tower, “A” wing situated at Harishchandra Goregaonkar Road, Gamdevi, Mumbai, either to defendant nos.1 and 2 or to the plaintiffs, as this Court may deem fit, being the permanent accommodation, in lieu of the suit property.

5] Facts, which are necessary, for deciding these three applications can be stated in brief as follows:

Moru Sawant and Raghunath Sawant were the brothers *inter se*. Moru Sawant had one son by name Shankar Moru Sawant. Shankar came to Mumbai sometime in 1940-45 alongwith his uncle Raghunath. The rooms bearing nos.11 and 12 were taken on tenancy

basis by them. During the life time of Raghunath Room No.12 was sold to Mr.Kantilal Koticha somewhere in the year 1975, as by that time his daughters, the plaintiffs herein, had got married and left the said room. Shankar died in the year 1968 leaving behind him, five daughters and two sons namely Jagdish Shankar Sawant and Sandeep Shankar Sawant, who are defendant nos.1 and 2 in the suit. Raghunath died in the year 1975, leaving behind his six daughters who are the plaintiffs in the suit. The dispute thus now pertains to Room No.11, the tenancy of which stands in the name of Raghunath till the day. As per the plaintiffs, as they are the daughters of the deceased tenant Raghunath, they are entitled to succeed to the tenancy of Room No.11 and therefore, they are entitled to get the permanent alternate accommodation in the newly constructed building of defendant no.3, in lieu of the said room.

6] As against it, it is the case of the defendant nos.1 and 2 that at the time of death of the original tenant Raghunath, they were residing alongwith Raghunath in Room No.11 hence in view of the provisions of Section 5(11)(c) of **the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947** (hereinafter referred to as “the Bombay Rent Control Act” for short) and corresponding Section 7(15)(d) of **the**

Maharashtra Rent Control Act, 1999, they are entitled to inherit the tenancy. It is contended by defendant nos.1 and 2 that the plaintiffs being the daughters, after their marriage they had never remained in possession or occupation of the suit room. However, defendant nos.1 and 2 continued to occupy the suit room, not only at the time of the death of the deceased tenant Raghunath but even after his death. It is submitted that as on the date when the property was decided to be developed and the development rights were handed over to defendant no.3 for reconstruction, the possession of the suit Room No.11 was with defendant nos.1 and 2. They were the occupants of the said room and from them defendant no.3 has received the possession. Moreover as their names were appearing as “occupants” in the List as prepared by the MHADA, defendant no.3 has entered into an agreement with them. According to them, therefore they are entitled to get the possession of permanent alternate accommodation, in lieu of Room No.11.

7] So far as defendant no.3-builder developer is concerned, it is the stand of defendant no.3 that when the property was taken up for development, as per the List of the occupants prepared by the MHADA, the name of defendant nos.1 and 2 was appearing in the occupants column and therefore, the agreement was entered into with

defendant nos.1 and 2. Now the trial Court has considered the said agreement to be not legal as it was executed without consent of the plaintiffs. Hence it is submitted on behalf of defendant no.3 that defendant no.3 is ready to handover the possession of newly constructed room, which is the permanent alternate accommodation, either to defendant nos.1 and 2 or even to plaintiffs, as this Court may decide. The anxiety of defendant no.3 is however that the defendant no.3 should get the possession of the old premises i.e. Room No.11 at the earliest as it has become not only dilapidated and dangerous but its possession is also necessary for the purpose of carrying out the redevelopment of the said property. Hence, it is requested that during the pendency of this appeal some way needs to be found out, so that the defendant no.3 will get the possession of Room No.11 for the purpose of redevelopment and defendant no.3 is ready to handover the possession of the permanent alternate accommodation either to the plaintiffs or to defendant nos.1 and 2 as this Court may deem fit.

8] Thus, the real crux of the dispute in this matter is whether the plaintiffs are entitled to get the possession of the permanent alternate accommodation or whether defendant nos.1 and 2 are entitled to get such possession in their capacity as occupants of the old premises

and as regards the plaintiffs in their capacity as legal heirs of the deceased tenant. In this respect the learned counsel for defendant nos.1 and 2 had relied upon ***Rule 33(7) and Appendix-III of the Development Control Regulations for Greater Mumbai, 1991*** which reads as follows:-

Rule 33(7) of the Development Control Regulations for Greater Mumbai, 1991

“Reconstruction or redevelopment of cessed buildings in the Island City by Co-operative Housing Societies or of old buildings belonging to the Corporation or of old buildings belonging to the Police Department:-

For reconstruction/redevelopment to be undertaken by Co-operative Housing Societies of existing tenants or by Co-op. Housing Societies of Landlords and/or Occupiers of cessed buildings existing prior to 30th September 1969 in Island City which attracts the provisions of MHADA Act, 1976 and for reconstruction/redevelopment of the buildings of Corporation, the Floor Space Index shall be 3.00 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-II whichever is more.

For reconstruction/redevelopment of building belonging to Police Department, Police Housing Corporation, Jail and Home Guard of Government of Maharashtra constructed prior to 1940, the Floor Space Index shall be 2.5 on the gross plot area or the FSI required for rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III whichever is more:

Provided further that, reconstruction/redevelopment undertaken by proposed Co-operative Housing Societies of Landlords and/or Occupiers of cessed buildings existing prior to 30th September 1969, and where Composite Development is undertaken by different owners of 5 or more plots the FSI required for Rehabilitation of existing tenants plus incentive FSI as specified in Appendix-III will be available.

[Emphasis supplied]

[Development Control Regulation No.33(7), Appendix-III]

1. (a) The new building may be permitted to be constructed in pursuance of an irrevocable written consent by not less than 70 percent of the occupiers of the old building.
 (b) All the occupants of the old building shall be reaccomodated in the redeveloper building.
2. Each occupant shall be rehabilitated and given the carpet area occupied by him for residential purpose in the old building subject to minimum fixed carpet area of 27.88 sq.mt. (300 sq.ft.) and maximum carpet area upto 70 sq.mt. (753 sq.ft.) as provided in the MHADA Act, 1976. In case of nonresidential occupier the area to be given in the reconstructed building will be equivalent to the area occupied in the old buildings:
 Provided that if carpet area for residential purpose exceeds 70.00 sq.mt. (753 sq.ft.) the cost of construction shall be paid by tenant/occupant to the developer. The cost of construction shall be as per Ready Reckoner rate of that year. However, the carpet area exceeding 70.00 sq.mt. (735 sq.ft.) shall be considered for rehab FSI but shall not be considered for incentive FSI.
3. The 1st of occupants and area occupied by each of them in the old cessed building shall be certificated by the Mumbai repairs and reconstruction board and the irrevocable written consent as specified in 1(a) above shall be certified by the Board.
4. The tenements in the reconstructed building shall be allotted by the landlord/occupants co-operative housing society to the occupiers as per the list certified by the Mumbai Repairs and Reconstruction B oard.
 The prescribed percentage of the surplus build-up area as provided in the Table in the Third Schedule of the MHADA Act, 1976, shall be made available to the MR & RB for accommodating the occupants in transit camps or cessed buildings which cannot be constructed on payment of an amount as may be prescribed under MHADA Act, 1976:
 Provided that the area equivalent to the market value (The Market Value shall be as per the Ready-Reckoner rate of that year) of area admissible as per the prescribed percentage of built-up area can be made available within the same Municipal ward of MCGM.
5. The FSI for rehabilitation of existing tenants/occupiers in a reconstructed building and incentive FSI that will be

available shall be as under:-

(a) In case of redevelopment of cessed building existing prior to 30th September 1969 undertaken by landlord and/or Co-operative Housing Societies of landlord and/or occupiers, the total FSI shall be 3.00 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI whichever is more.

(b) (Deleted)

(c) (Deleted)

(d) In case of composite redevelopment undertaken by the different landlords and/or Co-op. Housing Societies of landlords and/or occupiers jointly of 2 or more plots but not more than 5 plots with cessed buildings existing prior to 30th September, 1969 the FSI permissible will be 3.00 or FSI required for rehabilitation of existing occupiers plus 60% incentive FSI whichever is more:

Provided, however, that if the number of plots jointly undertaken for redevelopment is six or more the incentive FSI available will be 3.00 or FSI required of rehabilitation for occupiers plus 70% incentive FSI whichever is more.

(e) In case of redevelopment undertaken by Co-operative Housing Society of Occupiers of building, which was earlier "A" category cessed building but thereafter due to its purchase/acquisition by Co-operative Housing Society of Occupiers it exempt from payment of cess and which have been declared unsafe by BHAD Board/BMC, the total FSI shall be 2.5 of the gross plot area or the FSI required for rehabilitation of existing occupiers plus 50% incentive FSI, whichever is more.

6. The entire FSI available under clause 5 shall be allowed to be utilised on plot/plots under redevelopment scheme. However, if the owner/society so desire can avail the incentive FSI in the same plot or can avail the benefit of transferable development rights to be used in suburbs or extended suburbs in accordance with the regulations as given in appendix VII.

7. Construction or reconstruction of old building falling under reservation/zones contemplated in the development plan shall be permitted in accordance with the provision of notification No.TPB 4392/4080/RDP/UD-11 dated 3 June 1992 issued under Section 31 of the MR & TP Act.

(a) Redevelopment/reconstruction in any zone shall be allowed to be taken in site without going through the

process of change of zone. For the Industrial user the existing segregating distance shall be maintained from the existing industrial unit.

(b) Any plot under no-buildable reservations admeasuring only upto 500 sqmts. May be cleared by shifting the existing tgenants from that site.

(c) The stipulation of 33 percent of area under non-bujildable reservation may be reduced by the Government/Commissioner to the extent necessary where there are height and such other restrictions.

(d) For other buildable reservations on lands where guidelines approved by Government under Section 31 of the Maharashtra Regional and Town Planning Act are not available, built-up area equal to not more than 15 percent area of the entire plot or 25 percent of the area under reservation in that plot, whichever is less, shall be made available free of cost for the municipal corporation or for any other appropriate Authority.

(e) Where a Development Plan Road passed through redevelopment scheme area, the entire FSI admissible under this regulation for the area of the road may be given in the same site, on the remainder of the plot.

(f) Contravening structures in town planning scheme regulations shall be included in the redevelopment scheme FSI for the same will be as under Development Control Regulation 33(15) or as provided in this regulation whichever is more.

8. Relaxation in building and other requirements for rehabilitation:

Notwithstanding anything contained in these regulations, the relaxations incorporated in regulation No.33(10) of these regulations shall apply. No further relaxations shall be applicable.

9. 20% of the incentive FSI can be used for non-residential purposes otherwise permissible in the Development Control Regulations.

10. [(a) In the case of Redevelopment Scheme in progress and such schemes where LOI has been issued and if, then Owner/Developer/Co-op. Housing Societies with the prior approval of Govt. may convert the proposal in accordance with modified regulations only regarding size of tenements and loading of FSI insitu. However, such conversion is optional and shall not be binding.]

(b) In case of redevelopment of building undertaken by

MHADA, where construction is in progress, whether the area of new tenement should be 20.90 sqmt. Or otherwise the question shall be decided by MHADA in each case. However, if area of tenements is not increased to 20.90 sq.mt. then development will have to be carried out as per approved plan and FSI.

- 11. The FSI as in sub-regulation (7) of Regulation 33, should be allowed by the commissisoner only after Mumbai Repairs and Reconstruction Board is satisfied that the said redevelopment proposal fulfils all conditions to be eligible for the benefits under these Regulations.*
- 12. In case of redevelopment of cessed buildings, the concessions regarding exclusion of area from computation of FSI for general buildings stipulated in Regulation 35(2) of DCT for Greater Mumbai 1991 shall apply.*
- 13. Since the permission FSI in clause 5 of this Appendix is dependent upon the number of occupiers and the actual area occupied by them, no new tenancy created after 13-6-1996 shall be considered. Further unauthorised constructions made in the cessed buildings shall not be considered while computation of existing FSI. However, the occupier may be allotted to declared whether the tenement is residential or non residential.*
- 14. For smooth implementation of the redevelopment scheme undertaken by owners and/or co-operative housing society of the occupieres, the temporary transit camps may be permitted on the same land or land situated elsewhere belonging to the same owner/developer with the concessions permissible under SRS project under regulation 33(1)0 of these Regulations. Such transit camps should be demolished within one month from the date of occupation certificate granted by the corporation for the reconstructed buildings.*
- 15. An amount of Rs.5000/- per sq.mt. shall be paid by the owner/developer/society as additional development cess for built up area over and above the normally permissible FSI, for the rehabilitation and free sale components. This amount shall be paid to the Corporation in accordance with the time schedule for such payment as may be laid down by the Commissioner, MCGM provided the payment of instalments shall not go beyond the completion of completion of construction. This amount shall be used for Scheme to be prepared for the improvement of off-site infrastructure in the area around the development. The*

above development cess shall be enhanced @10/00% every three years.

- 16. As per the provision of clause 2, each residential/non residential occupant shall be rehabilitated only for carpet area mentioned in the said clause No.2 and such areas shall be clearly shown on the building plan submitted to the Corporation/MHADA.*
- 17. A corpus fund is to be created by the Developer which will take care of the maintenance of the building for a period of 10 years.*
- 18. Restriction on transfer of tenements shall be governed by provision of Rent Control Act till Co-op. Society is formed and after that the same shall be governed by the provision of Maharashtra Co-op. Society's Act.*
- 19. Non Deduction of non-cessed structure area in the scheme of 33(7) for FSI purpose.*

In case of mix of the structures i.e. cessed & non cessed structures and if the area of non cessed structures existing prior to 30th September 1969 area of land component under non-cessed structure works out upto a limit of 25% of plot area, then FSI shall be considered on total plot area. If this area exceeds 25% of the total area, then area above 25% shall be deducted from plot area. FSI for deducted area shall be as per regulation 32 and the remaining plot area shall be as per 33(7).

Note :- All the regulations/modifications mentioned above shall not be applicable to the areas which are affected by coastal regulation zone notification issued by Ministry of Environment dated 19 February, 1991 and orders issued from time to time.”

[Emphasis supplied]

9] Thus according to Rule No.33(7) read with Appendix-III of the said Development Control Regulations, 1991, it is submitted that it is the “occupant” who is entitled to get the possession of permanent alternate accommodation as the builder is required to execute an agreement of development with the “occupant”. It is submitted that

except when the tenant is an occupant, then the agreement can be executed with the tenant but not otherwise. The learned counsel for defendant nos.1 and 2 has in this respect relied upon the definition of the “occupier” as given in Section 2(25) of the MHADA Act, 1976 which reads as follows ;

Section 2 (25) “occupier” includes -

- “(a) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;*
- (b) an owner in occupation of, or otherwise using, his land or building;*
- (c) a rent free tenant of any land or building;*
- (d) a licensee in occupation of any land or building; and*
- (e) any person who is liable to pay to the owner damages for the use and occupation of any land or building.”*

10] It is submitted that this definition is quite wide and it covers even a licensee in occupation of the premises. The learned counsel for defendant nos.1 and 2 then relied upon the List of the occupants, which was prepared by MHADA and in which the name of defendant nos.1 and 2 has been shown to be the “occupants” and the name of late Raghunath Shankar Sawant is appearing in the column of the “tenant”. It is submitted that the names of the plaintiffs were never appearing in the said column as tenant, even if, they were daughters of the deceased tenant. Whereas the names of the defendant nos.1 and 2

were appearing in the occupancy column. The reliance is also placed on the earlier order dated 2nd August, 2013 passed in Notice of Motion No.787 of 2012 when the suit was pending, to show that it was categorically held therein that defendant nos.1 and 2 are in possession of the Room No.11 and therefore, it was further held that they will be entitled to get the possession of permanent alternate accommodation, in the newly developed building.

11] Per contra, the learned counsel for the plaintiffs has relied upon the judgment of this Court, in the case of ***Smt.Sulochana Rajaram Gurav widow of Rajaram Tatyua Gurav and another vs. Harishchandra Shivram Gurav and others***¹, to submit that except for the tenant, no other person, even the occupant residing with the tenant cannot be entitled to get the permanent accommodation. Attention of this Court is drawn by the learned counsel for the plaintiffs to paragraph 15 of the said judgment wherein it is observed that the person who is claiming to be residing with the tenant cannot become entitled to get such possession as he has not acquired the status of the tenant. Thus, it is urged by learned counsel for the plaintiffs that only the tenant can be entitled to get the permanent accommodation and not

¹ First Appeal No. 246 of 2009, dated 10/06/2011

the licensee. Hence, even under the provisions of Development Control Regulation Rule No.33(7) read in the context of Appendix III, defendant nos.1 and 2 in their capacity either as licensee or as relative of the tenant, cannot become entitled to get permanent alternate accommodation.

12] The learned counsel for the plaintiffs has then placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Hamid Khan vs. Ashabi and others***² to submit that so far as licensee of the premises is concerned, he cannot claim any independent title or legal possession. Here in the case, it is urged that as defendant nos.1 and 2 have not yet established that they are the tenants of the suit room and as their possession, at the most, even if, considered to be that of a licensee or that of a relative, they cannot have any independent right as such over the suit premises so as to get the possession of the alternate premises in the newly constructed building.

13] The learned counsel for the plaintiffs has also placed reliance on the landmark decision of the Hon'ble Apex Court in the case of ***Maria Margarida Sequeira Fernandes and others vs. Erasmo Jack De Sequeira (Dead) through LRS***³ wherein the Hon'ble Apex Court

² 2009(3) MH.L.J. 2

³ (2012) 5 SCC 370

was pleased to lay down following principles of law in paragraph 97 of the judgment.

- “1) No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.*
- 2) Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.*
- 3) The courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.*
- 4) The protection of the court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or licence agreement in his favour.*
- 5) The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”*

14] It is submitted that, in this judgment also, the Hon'ble Apex Court has categorically held that the Court is not justified in protecting the possession of the caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant. It was further reiterated in this judgment that such person who holds property on behalf of the principal does not acquire any right or interest whatsoever for himself in such property irrespective of his long stay or possession.

15] In the instant case, it is submitted by the learned counsel for the plaintiffs that, even though defendant nos.1 and 2 continued to be in occupation and possession of the suit room, in the light of the legal principles laid down by the Hon'ble Apex Court in the above said authority, their possession cannot be crystallized into any legal right and such possession therefore cannot be protected as it is at the most the possession of a relative.

16] The submission of the learned counsel for the plaintiffs is thus to be effected that looked at from any angle, defendant nos.1 and 2 cannot become entitled to get possession of permanent accommodation in the newly constructed building. In support of this submission, the learned counsel for the plaintiffs has also relied upon the impugned judgment and order of the trial Court. It is submitted that the trial Court has categorically held that the development agreement executed by defendant no.3 the developer, in favour of defendant nos.1 and 2 was sham and bogus. Hence, it is urged that on the basis of such sham and bogus agreement of development, defendant nos.1 and 2 cannot be held entitled, even on the ground of equity, to get possession of the new premises. The learned counsel for the plaintiffs has also pointed out that the plaintiffs have produced on record several rent receipts to show

that they are paying the rent regularly and therefore, they are entitled to get the permanent accommodation in the newly constructed premises.

17] Now coming first to the observations made by the learned trial Court in the judgment which is impugned and challenged in this appeal, that the development agreement executed by defendant no.3 with defendant nos.1 and 2 is sham and bogus. Even if one takes a *prima facie* look at those observations, then it appears that those observations are made merely because in the List prepared by MHADA the name of plaintiffs' father Raghunath was appearing in the list of column of the tenants and hence the trial Court has held that it was necessary for the defendant no.3 to issue notice to the tenant or his legal heirs, before executing an agreement of development with defendant nos.1 and 2. Needless to state that, merely on the basis that the defendant no.3 the developer has not issued the notice to the legal heirs of the tenant, namely the plaintiffs, the agreement of development executed by defendant no.3 with defendant nos.1 and 2 who were occupying the suit premises, cannot be termed as sham and bogus. As stated above, in view of DCR Rule 33(7) and Appendix-III, the builder developer is to execute the agreement with the "occupants" and the fact that defendant nos.1 and 2 were occupying the said room is not

disputed in the instant case. For that purpose, one can also refer to the admission given in by plaintiffs' witness no.1 Sunetra Volvaikar in her cross examination wherein she has stated that “defendant nos.1 and 2 are occupying the said room for last 38 years and during the said period neither she herself nor any of her sisters resided in the suit room”. Therefore, it is clear that as defendant nos.1 and 2 were occupying the suit room, the development agreement was executed with them. Admittedly, the tenant Raghunath has expired long back in the year 1975 and the names of his legal heirs i.e. the plaintiffs herein, were not brought on record in any way. Even in the record of MHADA the name of original tenant Raghunath was appearing as can be seen from the List prepared by MHADA. The names of the plaintiffs were not appearing therein as legal heirs of Raghunath in the tenant column. Therefore, it cannot be said that defendant no.3 the developer has committed any grave irregularity in entering into an agreement with the defendant nos.1 and 2, who were the occupants. As required by the Development Control Regulation Rule 33(7), also such an agreement is expected to be executed with the “occupants”, who hand over the possession of the old premises to the developer.

18] As rightly submitted by the learned counsel for respondent

no.3 the developer, if the developer is to take the search of the legal heirs of the tenant, who has already expired, then no development agreement or for that matter no redevelopment project can ever take place. Therefore, merely because the trial Court has branded the development agreement as sham and bogus, it cannot become sham and bogus. On the own admission of the plaintiffs, when the possession of the suit room was with defendant nos.1 and 2 as occupants since last several years altogether and the names of the plaintiffs never appeared in the tenancy column, then it cannot be said that an agreement of development executed by defendant no.3 with defendant nos.1 and 2 should not be relied upon, at this interim stage.

19] As regards the authorities on which the reliance is placed by the learned counsel for the plaintiffs, it is pertinent to note that in the judgment of this Court in ***Smt.Sulochana Rajaram Gurav (Supra)*** it was held that when the tenant is available, he has superior right over the other occupants and then it should be the tenant alone who will be entitled to get possession of the newly constructed premises and the person who is residing with the tenant cannot be then called as the occupant. In the instant case it may be true that the plaintiffs being the daughters, are the legal heirs of the original tenant Raghunath.

However, in view of the provisions of **Section 7(15)(d) of the Maharashtra Rent Control Act, 1999**, the tenancy does not automatically transfer to the legal heirs but it goes to the person or the legal heirs or the relative who was residing with tenant at the time of his death. Here in the case there is no evidence brought on record by the plaintiffs to show that they were residing with their father Raghunath at the time of his death so as to inherit the tenancy right. They have also not filed any suit to that effect in the Small Causes Court to get the relief of declaration of their tenancy. Admittedly, as per their own evidence, they were not in possession of the suit room since last more than 38 years and it was the defendant nos.1 and 2 who had all along continuously remain in possession of the suit room. Therefore, only when the plaintiffs succeed in proving that they have inherited the tenancy rights, they may become entitled to get permanent accommodation in their capacity as tenant. Till then, it cannot be said that they have proved their tenancy. Therefore, the law laid down in the other two authorities of the Hon'ble Apex Court, that of **Hamid Khan (Supra)** and **Maria Margarida Sequeira Fernandes (Supra)**, relied upon by the learned counsel for the plaintiffs also, cannot have any application. The legal principles laid down therein will be applicable only when it is proved that the plaintiffs are the tenants and the

possession of the defendant nos.1 and 2 is only that of the licensee or that of the relative, caretaker or friend. Otherwise the said legal principles can have no application to the facts of the present case.

20] As regards the contention of the plaintiffs, that they are paying the rent of the suit room to the landlord, the rent receipts produced by them on record reveal that till today the name of the original tenant Raghunath stands in the rent receipts and not that of the name of the plaintiffs. Therefore, as on today, there is no evidence to show that the plaintiffs have inherited the tenancy right over and their claim stands above the claim of defendant nos.1 and 2, who *prima facie* appears to have inherited the tenancy rights, as they were residing alongwith their uncle, the original tenant at the time of his death, in view of the provisions of **Section 7(15)(d) of the Maharashtra Rent Control Act, 1999.**

21] Therefore, the position which stands as on today is that the possession of the suit room was taken over from defendant nos.1 and 2; the agreement of development was also executed by defendant no.3 the developer builder with defendant nos.1 and 2, as they were the occupants of the room and their names were appearing in the List prepared by MHADA. The plaintiffs have yet to establish that they had

inherited the tenancy rights from their father, the original tenant. In such situation at this interim stage it has to be held that defendant nos.1 and 2 become entitled to get the possession of the permanent accommodation in the newly constructed building.

22] This finding at the interim stage has become essential though the judgment and decree passed by the trial Court is yet to be tested on merits and the rights of the parties are yet to be crystallized, because the condition of the suit room has become dilapidated and dangerous, as can be seen from the additional affidavit filed by the defendant no.3 the builder developer alongwith photographs thereof. This fact has not been disputed by the plaintiffs also. Since, the suit was filed in the year 1999, the same fact reiterated again and again, even in the Notice of Motion filed before the trial Court also. The passing of this order has also become essential at this interim stage on the ground that defendant no.3-the builder developer requires the suit room to be demolished for the purpose of carrying out reconstruction. Now when already the room to be allotted in the newly constructed building is ready for being handed over, and it is under lock and key, there is no point in keeping it so and thereby delaying the project of reconstruction.

23] As the appeal is of the year 2014, it is not likely to be heard in the near future. Therefore, allowing these premises to remain idle and thereby get damaged and at the same time delaying the redevelopment, no purpose is going to be served. It is pertinent to note that when the Notice of Motion was decided in the trial Court, during the pendency of the suit, at that time also the specific order was passed by the trial Court allowing the possession of permanent accommodation to be given to defendant nos.1 and 2 as and when the reconstruction was to get complete. It may be true that the said order was stayed in the appeal and thereafter the suit itself came to be decided. But the fact remains that the arrangement which was made during the pendency of the suit, as on today also appears to be a correct, just and legal arrangement, so that till rights of the parties are decided finally, no one should suffer because of the judicial delay; neither the development project should be stalled; nor the suit room which is in dilapidated and dangerous condition be allowed to remain as it is; nor the room to be allotted in the newly constructed building should remain under the lock and key. It is always desirable that someone should occupy the said room. As per the position as it stands today, the defendant nos.1 and 2 appear to be entitled to occupy the same, compared to the plaintiffs who

had yet to establish that they had inherited the tenancy rights from the original tenant. It is so because according to their own admission they are out of occupation and possession of the premises since last 38 years and there is no evidence to show that at the time of the death of the original tenant, they were residing alongwith him. As against it, there is evidence to show that defendant no.1 and 2 were residing in the said room alongwith original tenant and even on the date of agreement of development and as on today also they are in possession of the suit room.

24] Now the question is whether any terms and conditions are to be imposed on defendant nos.1 and 2 before allowing them to occupy the room constructed in new building. It is submitted by the learned counsel for defendant nos.1 and 2 that they are ready to give undertaking that if the decision of this appeal goes against them, they will hand over the possession of the said premises to the plaintiffs. Till then they will pay all the dues, taxes etc. of whatsoever nature. They will also vacate the said premises at any time in between as and when directed by this Court. In my considered opinion, this undertaking will suffice the purpose.

25] Though it is submitted by the learned counsel for the

plaintiffs that defendant nos.1 and 2 had not sought the possession of the new room but they had only asked for stay to the implementation and operation of the impugned judgment and order of the trial Court, in my considered opinion, the very fact that they are asking for the stay to the implementation and operation of the judgment and order of the trial Court, necessarily implies that if that order is stayed, they become entitled to get possession. Secondly, defendant no.3-the builder developer has made prayer to that effect in its application seeking permission to hand over possession of the room to the plaintiffs or defendant nos.1 and 2 as this Court may deem fit. The plaintiffs have also in their application asked for possession of this room, which prayer is resisted by defendant nos.1 and 2 strongly. Therefore, ultimately this Court has to decide the question as to who is entitled to get possession. As the claim of the plaintiffs is out weighed by the claim of defendant nos.1 and 2, at this interim stage the possession of the permanent alternate accommodation needs to be granted to defendant nos.1 and 2, in pursuance of the development agreement executed by defendant no.3 with them.

26] Accordingly, the Civil Application No.1019 of 2015 filed by defendant no.3-the developer is allowed, whereas the Civil

Application No.1017 of 2015 preferred by the plaintiffs is dismissed. The Civil Application No.3850 of 2014 preferred by the defendant nos.1 and 2, to this limited extent, is also allowed.

27] In the result the following order is passed;

- a) Defendant nos.1 and 2 are directed to handover possession of Suit Room no.11, Building No.7, J.K. Building, Harishchandra Goregaonkar Road, Gamdevi, Mumbai to defendant no.3 developer within a period of two weeks from the date of this order, for the purpose of demolishing the same.
- b) Simultaneously, defendant no.3 developer is also directed to handover possession of Flat No.2902, Ad-measuring 225 sq. feet (Carpet area) on the 29th Floor of building known as J.K. Tower, “A” wing situated at Harishchandra Goregaonkar Road, Gamdevi, Mumbai to defendant nos.1 and 2.
- c) Defendant nos.1 and 2 shall furnish the undertaking within two weeks from the date of this order that they will hand over the possession of the newly constructed Flat No.2902, Ad-measuring 225 sq. feet (Carpet area) on the 29th Floor of building known as J.K. Tower, “A” wing situated at Harishchandra Goregaonkar Road, Gamdevi, Mumbai to the plaintiffs, if ultimately the decision in the appeal goes against them.

- d) Defendant nos.1 and 2 shall also furnish undertaking that they shall vacate the said flat upon being directed by this Court at any time.
- e) Defendant nos.1 and 2 shall further undertake that they shall pay all the dues, taxes, charges and claims etc of whatsoever nature in respect of this new Flat No.2902.
- f) Further they shall also undertake not to create any third party right in respect of said flat during the pendency of this appeal.

All the three Civil Applications are accordingly disposed of finally.

28] At this stage, the learned counsel for the plaintiffs seeks stay to the execution of this order for a period of six weeks. The learned counsel for defendant no.1 & 2 and 3 strongly resists this prayer. However, in the interest of justice, in order to enable the plaintiffs, to approach the Hon'ble Supreme Court, the stay is granted to the execution of this order for a period of five weeks, from the date of this order.

(DR.SHALINI PHANSALKAR-JOSHI, J.)