IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.759 OF 2014
WITH
CIVIL REVISION APPLICATION NO.760 OF 2014

Saga Department Stores Limited … Applicant
Vs.
Falak Home Developers Private Limited … Respondent

Mr. G. S. Godbole, Senior Advocate i/b. Mr. S. A. Sawant a/w. Mr. Ketan Joshi for Applicant in C.R.A.No.759 of 2014.
Mr. S. A. Sawant for Applicant in C.R.A.No.760 of 2014.
Mr. N. V. Walawalkar, Senior Advocate i/b. S. Mahomedbhai & Co. for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JUNE 22 & 24, 2016

P.C. :

Heard Mr. Godbole, learned Senior Counsel for applicant in C.R.A.No.759 of 2014, Mr. Sawant, learned Counsel for applicant in C.R.A.No.760 of 2014 and Mr. Walawalkar, learned Senior Counsel for respondent in both the Applications at length.

2. C.R.A.No.759 of 2014 arises out of the judgment and decree dated 23.04.2014 passed by the appellate Bench of the Court of Small Causes in Appeal No.212 of 2010. By that order, the appellate Court allowed the appeal preferred by the respondent herein - Falak Home Developers Private Limited and quashed and set aside the judgment and decree dated 18.08.2010 passed by the learned Judge presiding over Court Room No.32 of the Court of Small Causes in R.A.D. Suit No.52 of 2000. The appellate Court dismissed the Suit instituted by the applicant herein - Saga Department Stores Limited.

3. C.R.A.No.760 of 2014 arises out of the judgment and decree

dated 23.04.2014 passed by the appellate Bench of the Court of Small Causes in Appeal No.210 of 2010. By that order, the appellate Court quashed and set aside the judgment and decree dated 18.08.2010 passed by the learned Judge presiding over Court Room No.32 of the Court of Small Causes in L.E.&C. Suit No.6/12 of 2003. The appellate Court decreed the Suit instituted by the respondent herein and directed the applicant herein, their officers, servants, agents and workmen to remove themselves from the premises being basement, shops on the ground floor and commercial space on the six upper stories of the building at 257, S. V. Road, Bandra (W), Mumbai 400 050 (for short 'suit premises') and to handover vacant and peaceful possession to the respondent within three months. The appellate Court also directed holding of enquiry under Order 20, Rule 12 of C.P.C. for mesne profits in respect of the suit premises from the date of the Suit till handing over possession of the suit premises to the respondent by the applicant. For the sake of brevity, Applicant Saga Department Stores Limited / plaintiff in R.A.D. Suit No.52 of 2000, who is defendant in L.E.&C. Suit No.6/12 of 2003, is hereinafter referred as Saga. Respondent Falak Home Developers Private Limited / defendant in R.A.D.Suit No.52 of 2000, who is plaintiff in L.E.&C. Suit No.6/12 of 2003, is hereinafter referred as Falak.

4. Saga had instituted R.A.D.Suit No.52 of 2000 for declaration of their tenancy rights in respect of the suit premises and for perpetual injunction. Saga contended that Falak are the owners of the building situate at 257, S.V.Road, Bandra (W), Mumbai - 400 050, more particularly described in exhibit-A annexed to the plaint (for short 'said property'). Saga were not interested in taking the said property for short duration as they were intending to spend considerable amount for setting up their proposed business in the said property. They were interested in

taking the said property as tenants, duly protected under the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). Falak were also interested in giving the said property to Saga in order to have permanent monthly income from the said property. Falak, however, requested Saga to enter into an agreement purporting to be leave and licence agreement. Saga were initially hesitant to agree to the suggestion of Falak but they assured Saga that Falak have no hesitation in accepting Saga as their monthly tenant in respect of the said property and the tenancy created in favour of Saga was duly protected under the Act. It is under these circumstances, Saga were occupying the said property as monthly tenants of Falak. Relying on the assurance, Saga entered into the purported leave and licence agreement dated 15.03.1999 with Falak though according to them they are the monthly tenant of the said property. They were put in possession on 15.03.1999 as per the letter of possession of that date. Saga are in exclusive possession of the said property from 15.03.1999.

5. Falak thereafter offered the said property to Saga for sale and agreement of sale in respect of the said property was drawn up by the parties on 01.04.1999. Saga further came with the case that T.D.R. was also purchased by them for utilization of the same in the said property and to that extent, a tripartite agreement was entered into on 03.11.1999 among - (1) Athithi Builders & Construction Private Limited as a transferor, (2) Falak as a transferee and (3) Saga as a confirming party.

6. On 03.11.1999, Falak made it clear that the additions and alterations have been made pursuant to the leave and licence agreement and will remain property of Falak. After purchase of T.D.R. and after making structural changes, Saga applied to the Municipal Corporation of Greater Mumbai (for short 'Corporation') for regularization of the work

carried out by them. The Corporation was processing the proposal of regularization. As Falak found that the entire work was carried out and the said property is completed in all respect by Saga by spending crores of rupees, Falak through their Advocate issued letter dated 12.01.2000 to Saga purporting to terminate the leave and licence agreement and threatened the dispossession of Saga.

7. It is further asserted that proposal for regularization of the work was accepted by the Corporation and order was issued subject to payment of fees. However, Falak in order to deprive Saga benefit of the Indian Easements Act, 1882 (for short 'Easement Act'), withdrew the proposal for regularization. In view thereof, the Corporation issued notice to Saga intimating and calling upon them to demolish the construction.

8. Saga specifically asserted that pursuant to the leave and licence agreement, the additions and construction which are of permanent nature have been made in the property and same cannot be separated from the suit property. They have spent more than Rs.4 crores for these additions and construction. They have also purchased T.D.R. for Rs.3,01,13,920/-. Saga reiterated that they are protected monthly tenant in respect of the said property and as Falak are disputing their status, they are entitled to protection under the Act. Saga, therefore, sought declaration that they are the lawful monthly tenants of Falak and for perpetual injunction.

9. Falak filed written statement at exhibit-34 inter alia contending that under the leave and licence agreement dated 15.03.1999, Saga are not the tenants. As they have committed breach of terms and conditions of leave and licence agreement, by letter dated 12.01.2000, they have terminated leave and licence agreement and have instituted L.E.&C. Suit

No.6/12 of 2003 for recovery of possession in pursuance of termination of the licence. Falak also relied upon clauses 2(b) and 10(b) of the leave and licence agreement. It is further contended that the rights of Saga as intending purchasers came to an end because of committing breach of the agreement for sale and that Saga had accepted termination of agreement for sale by letter dated 07.04.2000. Saga suppressed letter dated 29.05.1999 confirming that they were bound by the terms and conditions of the leave and licence agreement dated 15.03.1999 and that the additions and alterations intended to be carried out by them were in pursuance of the said agreement. In short, it is the contention of Falak that additions and alterations carried out by Saga were not in pursuance of leave and licence agreement and that they were not acting under the leave and licence agreement.

10. Falak had instituted L.E.&C.Suit No.6/12 of 2003 inter alia contending that prior to 15.03.1999, the building consisted of basement, ground and five upper stories. Leave and licence agreement was entered into by and between Falak and Saga on 15.03.1999. Saga is a Public Limited Company and claims to be a tenant in respect of the suit premises. As the paid up share capital of Saga is more than Rs.1 crore, they are not protected in view of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 (for short 'Maharashtra Rent Act'). The leave and licence agreement was to expire on 31.12.2004. Falak relied upon clauses 2(b) and 10(d) and contended that Saga agreed and undertook not to carry out structural additions and alterations to the suit premises without the written permission of Falak. Falak contended that agreement of sale was executed by them on 01.04.1999 in favour of Saga. Falak alleged that they have terminated the agreement of sale on 07.04.2000. It is contended that on 29.05.1999, Saga in the capacity as licensees had sought permission for carrying out additions and

alterations, changes proposed by them, at their own cost. It is the case of Falak that they did not give permission for carrying out additions and alterations. Saga commenced the work of structural additions and alterations and interior decoration without permission of the Corporation.

11. On 20.10.1999, the Corporation issued stop work notice. On 22.10.1999, Corporation issued show cause notice regarding illegal work over the suit premises. On 03.11.1999, tripartite agreement was executed for purchase of Transfer of Development Rights (T.D.R.). On 29.12.1999, Corporation issued notice under Section 351-A of the Mumbai Municipal Corporation Act, 1888 for removal of the construction. Falak further alleged that Saga failed and neglected to pay installments of consideration, which were due on 31.12.1999 and further committed consecutive defaults in payment of licence fee for the months of November 1999 and December 1999. In view thereof, on 12.01.2000, Falak terminated the leave and licence agreement dated 15.03.1999 with effect from 16.01.2000. Falak have, therefore, instituted Suit for possession of the suit premises on the ground of termination of leave and licence agreement and also compensation of Rs.2 lacs per day from Saga.

12. Saga resisted the Suit by filing written statement exhibit-9. Saga admitted that by letter dated 29.05.1999, they sought permission to construct or made additions or alterations. Saga contended that they have become tenant of the suit premises and in the alternate, even if it is held that that they are the licensees, the licence cannot be revoked as it is irrevocable.

13. On the basis of the pleadings of the parties, the learned trial Judge

framed necessary issues on 23.08.2004 at exhibit-10. The learned trial Judge partly decreed R.A.D.Suit instituted by Saga, as indicated earlier. The learned trial Judge held that Saga failed to establish that they are the tenants of Falak in respect of the suit premises. In other words, the relief of declaration of tenancy rights of Saga was specifically denied by the learned trial Judge. The learned trial Judge dismissed L.E.&C. Suit No.6/12 of 2003 filed by Falak. Falak preferred appeal No.212 of 2010 against the decree passed in R.A.D.Suit No.52 of 2000. It also preferred appeal No.210 of 2010 against the dismissal of their L.E.&C. Suit. The appellate Court allowed the appeals and dismissed R.A.D. Suit filed by Saga and decreed L.E.&C. Suit filed by Falak. It is against these decisions, above Civil Revision Applications are filed.

14. Mr. Godbole submitted that Saga were claiming that the leave and licence agreement dated 15.03.1999 in substance is a tenancy agreement. The learned trial Judge, while deciding R.A.D. Suit, did not grant that declaration and held that Sagas are licensees. Saga did not prefer appeal against that decision as they elected the option and proceeded on the premise that being the licensees, the licence is irrevocable. In other words, Saga accepted that they are not tenant in the suit premises.

15. In support of C.R.A.No.759 of 2014, Mr. Godbole invited my attention to clauses 2, 3, 4 and 10 of the leave and licence agreement dated 15.03.1999 as also the tripartite agreement dated 03.11.1999. He submitted that by letter dated 15.03.1999, Falak recorded that they have granted Saga permission to use and occupy the property mentioned in the leave and licence agreement on the terms and conditions contained in the said agreement dated 15.03.1999. He invited my attention to the communication dated 01.04.1999 addressed by Falak to Saga recording

the arrangement between the parties. It is set out therein that with reference to the agreement for sale dated 01.04.1999, it was agreed that the consideration mentioned in clause 2(b) of the said agreement of the sum of Rs.2 crores will become payable after 30 days from the date of execution of the said agreement subject to - (a) the Advocate for the purchaser (Saga) being satisfied about the title of the vendor (Falak) in the manner stated in the said agreement; (b) vendor (Falak) completing the balance basic works of the building as per the list thereof at annexure - A and further (c) vendor (Falak) obtaining no objection from their lenders (except M/s. Govind Vallabh Financial Services Private limited). On behalf of Saga, its Director confirmed the arrangement being acceptable to them. Along with that communication, annexure-A setting out a list of basic works pending and required to be completed was annexed.

16. Mr. Godbole invited my attention to the tripartite agreement dated 03.11.1999 entered into among Atithi Builders and Constructors Private Limited as a transferor, Falak as a transferee and Saga as a confirming party. Clause (5) of the recital recorded that the transferee and confirming party have made their own inquiries as to the utility of the Development Rights Certificate (D.R.C.) for its own use and purpose independently and after being satisfied with the said D.R.C. can be utilized by the transferee, the transferee and the confirming party have approached the transferor to purchase the D.R.C. to the extent of 350 sq.mtrs. out of 8511 sq.mtrs., to which the transferor have agreed to sell to the transferee and confirming party at or for the price and on the terms and conditions, more particularly recorded therein. It also recorded that the confirming party, namely Saga are desirous that the transferee Falak do acquire the said TDR for the purpose of utilization by the confirming party on the said property and that the confirming

party has agreed to pay the said consideration for T.D.R. and the transferees in turn pay to the transferor for acquisition of the said T.D.R. Mr. Godbole submitted that there is no dispute that in pursuance of the tripartite agreement, Saga being the confirming party has paid the total consideration to the transferee, namely Atithi Builders and Constructors.

17. Mr. Godbole also invited my attention to various clauses of the tripartite agreement. He also invited my attention to the communication dated 03.11.1999 addressed by Falak to Saga. By that communication, Falak inter alia confirmed having allowed Saga to carry out at their cost, internal changes, alterations, additions and interior decorations, broadly identified in this letter, in the subject matter of leave and licence agreement dated 15.03.1999 and more particularly, clause (c), namely, a cafeteria provided in the east side terrace of the building and in the east side terrace modifications. In other words, this letter clearly shows that Falak confirmed having allowed Saga to complete construction of sixth floor. Thus, Saga had paid entire consideration for purchasing D.R.C. as also Falak had permitted Saga to construct sixth floor. He, therefore, submitted that this is a case of irrevocable licence and Falak could not have terminated the licence in view of Section 60(b) of the Easements Act.

18. He invited my attention to paragraphs 22 to 24 of the examination-in-chief of P.W.1 Farid Siddiqui examined by Saga. He submitted that for purchasing the D.R.C., Saga had made huge expenditure. He submitted that the learned trial Judge partly decreed R.A.D.Suit and issued injunction against Falak. The learned trial Judge dismissed L.E.&C. Suit instituted by Falak. However, the appellate Court committed serious error in dismissing R.A.D.Suit and decreeing L.E.&C. Suit. He further submitted that from the conduct of the parties,

it is evident that Falak had permitted Saga to construct sixth floor and as Saga has acted under the licence, it amounts to the irrevocable licence. The appellate Court, therefore, was not justified in decreeing the Suit instituted by Falak.

19. In support of C.R.A.No.760 of 2014, Mr. Sawant adopted the submissions of Mr. Godbole and further reiterated the submissions made before the Courts below.

20. On the other hand, Mr. Walawalkar supported the impugned order. He relied upon Section 60(b) of the Easements Act and contended that the licence may be revoked by the grantor unless a) it is coupled with a transfer of property and such transfer is in force; b) the licensee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution. Mr. Walawalkar submitted that the learned trial Judge partly decreed R.A.D.Suit. The learned trial Judge, however, did not grant declaration sought by Saga that they are tenant in the suit premises. In other words, the learned trial Judge held that Saga are licensees in the suit premises. Saga has not challenged this part of the order by filing cross-appeal or cross-objections. In other words, Saga has accepted that they are licensees in the suit premises. The question, therefore, will be whether in the facts and circumstances of the present case, it can be said that the licence is irrevocable. As the learned trial Judge has held that Saga is not a tenant and is merely a licensee, obviously, licence is not coupled with the transfer of property as contemplated by clause (a) of Section 60. As per clause (b) of Section 60, Saga has to establish that acting upon the licence, they have executed the work of a permanent character and incurred expenses in the execution. It may be that the Saga has executed the work of permanent character and also incurred expenses in

purchasing T.D.R, however, the question is whether Saga have acted upon the licence in the facts and circumstances of the present case.

21. Mr. Walawalkar invited my attention to amended paragraphs of the plaint in R.A.D. Suit No.52 of 2000 instituted by Saga. Plaint was amended in 2003. In the amended paragraph 30(A) of the plaint , Saga alleged that a maximum part of the said property was incomplete and the said property was in the form of a shell when the possession of the same was handed over to them. The entire construction and finishing of the said property was to be made by Falak so as to make the said property fit for running a departmental store. Falak showed their inability to complete the construction work. Besides, Falak told Saga that since the said property was to be used by them, Saga will be in a better position to complete the construction and make the finishing in such a manner so that the said property is fit for running of a departmental store. Pursuant to the said understanding, a formal letter was issued by Saga on 29.05.1999 to Falak requesting them to allow Saga to make alterations, additions, changes, etc. The said letter specifically stated that these alterations, additions, changes are being made on the basis of the leave and licence agreement dated 15.03.1999.

22. In paragraph 30(B), Saga contended that T.D.R. was purchased by them for the utilization of the same in the said property and to this extent, a tripartite agreement was made on 03.11.1999. By letter dated 03.11.1999, Falak made it clear that the additions and alterations have been made pursuant to the leave and licence agreement and will remain the property of Saga. In paragraph 30(C), Saga contended that after the purchase of T.D.R. and after making structural changes, additions and alterations of the property, Falak applied to the Corporation for the regularization of the work carried out by Saga. Corporation processed

the application for the regularization of the said work. In paragraph 30(D), Saga contended that Falak found that the entire work was carried out and the said property was completed in all respects by Saga by spending the Crores of rupees. Falak through their Advocate's letter dated 12.01.2000 purportedly terminated the leave and licence agreement and threatened dispossession of Saga.

23. In paragraph 30(E), Saga contended that they had challenged the termination by instituting Suit No.219 of 2000 on the Original Side of this Court and also took out Notice of Motion No.185 of 2000. Falak raised the objection as regards jurisdiction, and therefore, Saga were advised to withdraw the Suit and to continue with R.A.D. Suit.

24. In paragraph 30-F, Saga contended that Falak had approached Corporation for the regularization of work made by Saga in the building. The proposal for regularization was accepted by the Corporation and order of regularization of the work was issued subject to the payment of the fee. However, Falak in order to deprive Saga from seeking benefit of Section 60 of the Easements Act, withdrew the request of regularization and also requested demolition of the work made by Saga. On the basis of withdrawal of the application, Corporation issued a notice to Falak intimating them that since the order of regularization of work was issued on the basis of the application made by Falak themselves and now as they are withdrawing the said application and asking demolition of the said construction, the said notice is issued. Saga have instituted Suit No.52 of 2000 in the City Civil Court and approached the Corporation for regularization of the construction. Falak also instituted Suit No.3860 of 2000 before the City Civil Court seeking a direction to the Corporation not to regularize the construction and to demolish the same. Both the Suits are clubbed together and are pending.

25. In paragraph 30-G, Saga contended that it is admitted case that pursuant to the leave and licence agreement, the additions / constructions which are of permanent nature have been made in the said property which additions / constructions cannot be separated from the said property. For the purpose of additions / constructions, Saga have spent more than Rs.4 crores. Saga have purchased T.D.R. for Rs. 30,13,920/-. Saga have also made payment of house tax, repairs, maintenance of the said property and payments of about Rs. 3 crores to Falak. In paragraph 30(H), Saga contended that the licence in their favour has become irrevocable as already they have carried out works of permanent nature in the said property.

26. Mr. Walawalkar invited my attention to paragraphs 23 and 24 of the evidence of P.W.1 Farid, examined by Saga. In paragraph 23, he deposed that Saga commenced development work in anticipation of acquiring T.D.R. It is not in dispute and is a matter of record that T.D.R. was acquired on 03.11.1999. In other words, prior to 03.11.1999 tripartite agreement, Saga could not have commenced the development work. In view of Clause 10(b) of the leave and licence agreement, Saga could not have commenced the development work without prior permission in writing of Falak. He, therefore, submitted that Saga did not carry out the development work acting upon the licence, as contemplated by Section 60(b) of the Easements Act.

27. In support of his submissions, Mr. Walawalkar relied upon decision of the Apex Court in the case of ***Shankar Gopinath Apte Vs. Gangabai Hariharrao Patwardhan***, **(1976) 4 SCC 112** to contend that even assuming that Saga had executed the work of permanent character, it cannot be said that they have done so "acting upon the licence", as

required by Section 60(b) of the Easements Act. If they have really improved the property by executing the work of a permanent character, they did so in the belief that they have agreed to purchase the said property from Falak. The execution of work would be in the capacity as a prospective purchaser and not in their capacity as a licensee.

28. He also relied upon the decision of this Court in the case of ***Bhaurao Vs. Geetabai***, **2013 (4) Mh.L.J. 196** to contend that burden is upon the person who claims the benefit of Section 60(b) of the Easements Act to establish that - a) he has executed the work of a permanent character, b) he did so acting upon the licence, and c) he has incurred the expenses in doing so. Merely because, there is a work of permanent character executed by incurring expenses, would not by itself be enough to establish that the licence was irrevocable. But the third condition that it was so done by acting upon the licence, is also required to be established. From the material on record, it cannot be said that Saga had acted upon the licence and consequently, the licence has become irrevocable.

29. Mr. Walawalkar submitted that P.W.1 admitted that the amounts paid up-to-date for renovating the suit premises have been debited to Loans & Advances account. This amount is also reflected in their audited balance sheet under the heading Loans & Advances. The balance sheet shows that Saga has spent a sum of Rs.2,84,27,342/- for putting up permanent structures, renovations and improvement on the suit property. The appellate Court has observed in paragraph 61 that Saga themselves produced on record their audited balance sheet, exhibit-7, wherein they have mentioned that they have expended amount of Rs.3,65,94,171/- till date on behalf of Falak towards completion of the building and this amount is recoverable from Falak. He, therefore,

submitted that no case is made out for invocation of powers under Section 115 of C.P.C. Learned Counsel appearing for the parties did not advance any argument based on Section 53-A of the Transfer of Property Act, 1882 as also did not advance any argument as regards agreement dated 01.04.1999 as the Suit for specific performance of that agreement is pending on the Original Side of this Court.

30. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the trial Court partly decreed R.A.D.Suit on 18.08.2010 and declared that Saga are irrevocable licensees of Falak in respect of the suit building. The learned trial Judge specifically declined other reliefs. In other words, the prayer made by Saga to declare them tenant is specifically rejected. Mr. Godbole submitted that Saga did not challenge refusal on the part of the trial Court in declaring them as tenant as Saga elected option by accepting that they are licensees and in the present case, the licence is irrevocable. It is not in dispute that Saga did not challenge this decree. In other words, Saga accepted that they are not tenant in the suit premises and are continuing in the suit premises as licensees only.

31. The only question would be whether in the facts and circumstances of the present case, the licence is irrevocable as claimed by Saga or not. In order to appreciate this controversy, it is necessary to refer to Section 60 of Easements Act and the leave and licence agreement dated 15.03.1999. Section 60 of the Easements Act reads thus,

> 60. License when revocable.- A license may be revoked by the grantor, unless-
>
> (a) it is coupled with a transfer of property and such transfer is in force;
>
> (b) the licensee, acting upon the license, has executed a

> work of a permanent character and incurred expenses in the execution.

32. Clauses 2(b) and 10(b) of the said agreement are relevant and they read thus,

> "2. It is expressly agreed by and between the parties hereto and it being the essence of this Agreement that:
> a. …
> b. nothing herein contained shall create or be deemed or construed as creating any lease or sub-tenancy or any other interest in favour of the Licensee in respect of the said land and the said building or any portion thereof (including any further / future Floor Space Index that may be granted in respect of the said land and building), it being the clear and unequivocal intention of the parties that the relations between them shall be strictly confined to the leave and licence of the said premises for the purposes of the business of the Licensee for the period set out herein;
>
> 10. The Licensees agree and undertake:
> a. …
> b. not to carry out any structural alterations and / or improvements to the said building without the previous written permission of the Licensor, which shall not be unreasonably withheld. Unless otherwise agreed upon between the parties hereto, the expenses of such permitted alterations and / or improvements shall be borne and paid by the Licensee and such permitted alterations and / or improvements shall ultimately become part and parcel of the property of the Licensor and the Licensee shall not have nor make any claim whatsoever against the Licensor in respect of the same or any part thereof:"

33. Perusal of clause 10(b) shows that the licensees (Saga) agreed and undertook not to carry out any structural alterations and / or improvements to the said building without the previous written permission of the licensor (Falak), which shall not be unreasonably withheld. Unless otherwise agreed upon by the parties thereof, the expenses of such permitted alterations and / or improvements shall be borne and paid by the licensee and such permitted alterations and / or improvements shall ultimately become part and parcel of the property of Falak and Saga shall not make any claim whatsoever against the Falak

in respect of the same or any part thereof. Even while decreeing the Suit, the learned trial Judge has considered in paragraph 59, the deposition of the witness of Falak to the effect that Saga commenced work from 15.04.1999 and carried upto 31.01.2000. Apart from that, in paragraph 23 of examination in chief, P.W.1 Farid deposed that Saga commenced development work in anticipation of acquiring T.D.R. In other words, this conclusively shows that prior to entering into tripartite agreement dated 03.11.1999, Saga had commenced the development work. In view of clause 10(b) of the leave and licence agreement, Saga could not have commenced the development work without written permission of Falak. Saga have not brought on record any written permission permitting them to put up the sixth floor.

34. Mr. Godbole heavily relied upon the communication dated 03.11.1999 and in particular, clause (c) thereof. The relevant portion of that letter reads thus,

> "c. A cafeteria provided in the east side terrace of the building and in the east side terrace modifications."

35. It is relevant to note that this was in context of the letter dated 29.05.1999 addressed by Saga to Falak. In that letter, it is set out that Saga intend to start a departmental store and to suit their requirement, they need to carry out certain internal changes, alterations / additions and interior decoration and the list thereof was annexed to that letter.

36. Mr. Godbole submitted that when Saga took the premises on leave and licence basis, the building was in a shell form and therefore, Saga were required to incur huge expenditure. It is in that context, this letter is to be viewed. Letter dated 29.05.1999 has to be read in the context of letter dated 01.04.1999 addressed by Falak to Saga. Along with this letter, annexure-A is enclosed giving the list of basic works

which were pending. Perusal of this list of basic works that were pending at the time of execution of leave and licence agreement does not even remotely suggest construction of sixth floor in the said building. It is also relevant to note that by the time letter dated 03.11.1999 was addressed by Falak to Saga, Saga had already commenced development work. In other words, the development work was not carried out in pursuance of tripartite agreement dated 03.11.1999 as also letter dated 03.11.1999. Thus, the development work was carried out by Saga contrary to clause 10(b) of the leave and licence agreement dated 15.03.1999. In other words, Saga were not acting under the liecence.

37. Perusal of deposition of P.W.1 and in particular cross-examination shows that P.W.1 Farid admitted that the additional FSI was required to be acquired due to additional work carried out by Saga. He further admitted that he was not aware of Saga having obtained written permission for that purpose. He further admitted that the additional work was not the part of the original agreement namely, leave and licence agreement dated 15.03.1999. He further admitted that he was not aware as to what basic work was pending in December 1999. That apart, P.W.1 Farid examined by Saga admitted that the amounts paid up-to-date for renovating the suit premises have been debited to Loans and Advances Account. This amount is also reflected in their audited balance sheet under the heading Loans and Advances. In paragraph 61, the appellate Court also noted that Saga themselves produced on record their audited balance sheet, exhibit-7, wherein they have mentioned that they have expended amount of Rs.3,65,94,171/- till date on behalf of Falak towards completion of the building and this amount is recoverable from Falak.

38. In addition to this, it is also not possible to hold that acting upon

the licence, Saga have executed work of a permanent character. In this regard, it is necessary to refer to clause 10(b) of the leave and licence agreement dated 15.03.1999 and letter dated 03.11.1999 addressed by Falak to Saga. I have already extracted clause 10(b) in the earlier part of the order. Clause 10(b) provides that "unless otherwise agreed upon between the parties, the expenses of such permitted alterations and / or improvements shall be borne and paid by the licensee **and such permitted alterations and / or improvements shall ultimately become part and parcel of the property of the Licensor (Falak) and the Licensee (Saga) shall not have nor make any claim whatsoever against the Licensor (Falak) in respect of the same or any part thereof.**" As against this, last paragraph of letter dated 03.11.1999 reads thus,

> "We confirm that all funds for these additions and alterations were provided by Saga **and remain the property of Saga and consequently at the time of conveying the said property to you (Saga), we (Falak) will not ask for any additional consideration on account of these additions and alterations made by you (Saga).**"

39. Whereas under clause 10(b) though the expenses of such permitted alterations and / or improvements were to be borne and paid by Saga, such permitted alterations and / or improvements were ultimately to become part and parcel of the property of Falak and Saga were not to make any claim whatsoever against Falak in respect of the same or any part thereof. Under the letter dated 03.11.1999, it was agreed that additions and alterations were to remain the property of Saga as Saga had provided the funds and at the time of conveying the said property to Saga, Falak will not ask for any additional consideration on account of the additions and alterations made by Saga. In view thereof also, it cannot be said that Saga were acting upon the licence, as contemplated by Section 60(b) of the Easements Act. That apart, the witness examined by Falak was also not confronted with letter dated

03.11.1999 so as to elucidate that the construction of sixth floor is included in clause (c) of that letter.

40. Perusal of the plaint in its entirety shows that Saga claimed that thought the leave and licence agreement was entered into between the parties on 15.03.1999, in effect, it was a tenancy agreement. That apart, Falak offered to sell the said property to them and negotiations took place between the parties. Finally, on 01.04.1999, the agreement of sale in respect of the said property was drawn up by the parties. Thus, Saga executed the work of permanent character in the capacity as a prospective purchaser and not in their capacity as a licensee. In the case of **Shankar Gopinath Apte** *(supra),* the Apex Court has held that if the party had really improved the property by executing a work of a permanent character, they do so in the belief that they have agreed to purchase the said property. The execution of work would be in the capacity as a prospective purchaser and not in their capacity as a licensee. In the case of **Bhaurao** *(supra),* this Court held that for claiming benefit under Section 60(b) of the Easements Act, the person has to establish three things - (i) that he has executed the work of a permanent character, (ii) that he did so acting upon the licence, and (iii) that he has incurred the expenses in doing so. In my opinion, decisions in **Bhaurao** *(supra)* and **Shankar Gopinath Apte** *(supra),* apply on all fours to the facts of the present case.

41. In the present case, Saga has not established that they carried out the development work while acting so upon the licence. As the basic ingredient lacks in the present case, Saga cannot claim that it is a case of irrevocable licence. No other contention was advanced. In view thereof, I do not find that the appellate Court committed any error in allowing the appeal. Saga were not in a position to demonstrate that the

findings recorded by the appellate Court are perverse being based on no evidence or that they are contrary to the evidence on record. Hence, no case is made out for invocation of powers under Section 115 of C.P.C. C.R.As fail and the same are dismissed.

42. At this stage, Mr. Sawant orally applies for continuation of the ad-interim order dated 16.07.2014 for a period of 12 weeks from today. By that order, clause 3A of the operative part of the order dated 23.04.2014 passed by the appellate Bench of the Small Causes Court was stayed. By clause 3A, the appellate Court directed Saga to remove their officers, servants, agents and workmen to remove themselves from the premises being basement, shops on the ground floor and commercial space on the six upper stories of the building at 257, S. V. Road, Bandra (W), Mumbai 400 050 and to handover vacant and peaceful possession to Falak within three months.

43. Mr. Walawalkar submits that in case the Court is inclined to continue the ad-interim order, it may be subject to conditions.

44. In view thereof, notwithstanding dismissal of these C.R.As, Clause 3A of the operative part of the order dated 23.04.2014 shall remain stayed for a period of 12 weeks from today subject to applicants and their Directors filing usual undertaking in this Court, within 2 weeks from today, after giving advance copy to the other side, incorporating therein that,

(i) they are in actual possession of the suit premises and nobody else is in possession;

(ii) they have so far neither created third party interest nor parted with possession of the suit premises;

(iii) they will hereafter neither create third party interest nor part with possession of the suit premises;

(iv) in case they are unable to obtain suitable orders within twelve weeks from today from the higher Court, they will handover vacant and peaceful possession of the suit premises to Falak forthwith.

45. List the Applications for compliance after three weeks.

(R. G. KETKAR, J.)

Minal Parab