

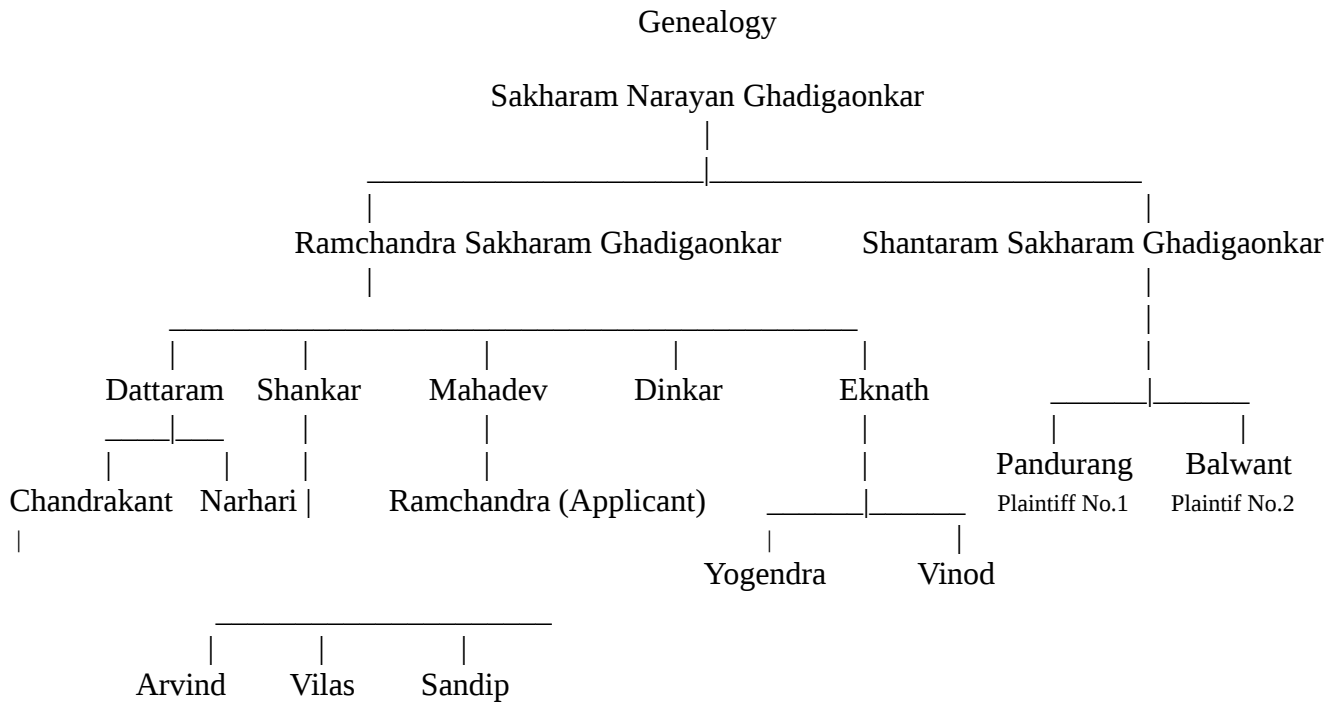
3. Pandurang Shantaram Ghadi and Balwant Shantaram Ghadi (for short 'plaintiffs') instituted suit against;

Defendant No.1 - Arvind Shankar Ghadigaonkar
Defendant No.2 - Mehfuzabai Abbasbhai Pardiwala
Defendant No.3. - Nafisa Akil Taher and
Defendant No.4 - M/s. Siddharth Developers

inter alia, praying for the following reliefs;

- (a) the plaintiffs are tenants of the suit premises;
- (b) the transfer of the tenancy/rent receipt of the suit premises in the name of defendant No.1 by defendants No.2 and 3 is illegal, bad in law and same is not binding upon the plaintiffs and the same be revoked, cancelled;
- (c) for mandatory and direction to defendants No.2 to 4 to revoke/cancel the rent receipt transferred in the name of defendant No.1 of the suit premises and further order and direction to defendants No.2 to 4 to transfer the tenancy, rent receipt of the suit premises in the name of plaintiff No.1 and
- (d) for ordering defendant No.1 to quit, vacate and handover possession of the suit premises to the plaintiffs by removing himself along with his family members and their belongings from the suit premises.

4. Genealogy of the family is as under;



Defendant No.1

The plaintiffs contended that Shankar and his family had no roof to stay and, therefore, the plaintiffs allowed them to reside in the suit premises on humanitarian ground. The plaintiffs helped Shankar during his illness and also financially helped him. At that time, defendant No.1 was a child. The plaintiffs granted permission to Girijabai Shankar Ghadigaonkar (mother of defendant No.1) to stay in the suit premises along with her four children till her children are grown up and took their own house. In short, the plaintiffs contended that defendant No.1 is occupying the suit premises as a gratuitous licensee and claimed possession, among other reliefs.

5. Defendant No.1 filed written statement dated 7th November, 2007 resisting the suit. Defendant No.1 contended that since date of his birth i.e since 29th September, 1958, he is in exclusive use, occupation and possession of the suit premises. He has been born, brought up and educated at the suit premises. Defendant No.1 contended that the plaintiffs never gave permission

to reside in the suit premises till his own arrangement is made without making any payment to the plaintiffs.

6. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, by order dated 6th May, 2011, the learned trial Judge decreed the suit in the following terms;

- “2. Plaintiffs are hereby declared as lawful tenants of the suit premises i.e room No.26, Gr. Flr. Pardiwala Chawl No.89, Sitaram Jadhav Marg, Lower Parel, Mumbai – 13 but rent receipt thereof be issued in the name of Plaintiff Pandurang Shantaram Ghadi as such positive statement made by him in his evidence.
3. Rent receipt issued by erstwhile landladies and present landlord in the name of Defendant No.1 in respect of suit premises are hereby revoked and canceled.
4. Present landlord should consider the claim of Plaintiffs on proper footings and take appropriate legal steps so that after redevelopment of the property they will get accommodation in new building in lieu of suit premises according to law”.

7. The learned trial Judge held that the plaintiffs proved that they have inherited tenancy rights in respect of the suit premises and they further proved that defendants No.2 to 4 illegally transferred the rent receipt in the name of defendant No.1. The learned trial Judge further held that the plaintiffs are entitled to relief of declaration of tenancy rights.

8. In so far as entitlement for the relief of possession is concerned, the learned trial Judge has answered Issue No.4 in paragraph 11. In paragraph 11, the learned trial Judge observed;

“However, so far as possession is concerned, it reveals from the evidence of the parties that development agreement has been executed by the present landlord/Defendant No.4 with Defendant No.1. Therefore, Defendant No.1 is not in physical possession of the suit premises, his claim is under consideration before competent authority. In view of my findings to issue nos. (1) and (2) I think that present landlord and the competent authority concerned will consider the claim of Plaintiffs on proper footing and will take appropriate actions. So that they will get accommodation in new building. Therefore, I do not think it proper to pass order for possession of suit premises. Thus, this issue become redundant”.

9. It appears that the plaintiffs filed Review Application No.6 of 2011 under Order-XLVII, Rule-1 of the C.P.C on or about 6th July, 2011 seeking review only in respect of Issue No.4. In paragraph 4, the plaintiffs reproduced conclusions recorded by the learned trial Judge while answering Issue No.4 as regards defendant No.1 being in possession of the suit premises. The plaintiffs contended that the said finding arrived at by the trial Court suffers from the error apparent on the face of the record as defendant No.1 is still in possession of the suit premises. The plaintiffs further contended that there is no evidence led by defendant No.1 to show that defendant No.4 has entered into an agreement with defendant No.1. Nor defendant No.1 has produced any documentary evidence to show that defendant No.4 has executed agreement with him. In the absence of any such evidence available on record, the learned trial Judge came to the conclusion that defendant No.1 is not in physical possession of the suit premises.

10. In paragraph 6, the plaintiffs asserted that they took out application Exhibit 5 for injunction restraining the defendants from parting with possession of the suit premises or creating third party interest in the suit premises and also restraining from demolishing the suit premises and disposing

of the same in any mode till final disposal of the suit by way of temporary injunction. On 11th April, 2008, the learned trial Judge allowed the application and restrained all the defendants from;

- [1] parting with possession of the suit premises;
- [2] creating third party interest in the suit premises;
- [3] demolishing the suit premises and disposing of the same in any mode till final disposal of the suit by way of the temporary injunction.

11. The plaintiffs further contended that defendant No.4 filed application for setting aside order dated 11th April, 2008 on the ground that defendant No.4 intends to demolish the suit premises in redevelopment. The said application was rejected by the trial Court on 11th February, 2011. The plaintiffs further contended that these facts reveal that the suit premises is in existence and defendant No.1 is residing in the suit premises and the same is not demolished by defendant No.4. The plaintiffs therefore contended that finding against Issue No.4 deserves to be substituted and the decree of eviction is required to be passed against defendant No.1 directing defendant No.1 to remove himself along with his family members from the suit premises.

12. It appears that defendant No.1 filed appeal sometime in August, 2011. Since there was delay in filing the appeal, defendant No.1 took out application for condonation of delay. During pendency of the appeal, the plaintiffs also filed Cross Objection at Exhibit 10 on 11th January, 2016. The plaintiffs contended that they received notice of hearing of the appeal on 11th January, 2015 and the Cross Objections filed on 11th January, 2016 are within limitation. By the order dated 11th April, 2019, the Appellate Court dismissed the appeal and allowed the Cross Objections at Exhibit 10 filed by the

plaintiffs. The Appellate Court partly set aside the trial Court's decree in respect of Issue No.4 and directed defendant No.1 to hand over possession of the suit premises to the plaintiffs or or before 11th August, 2019. It is against this order, defendant No.1 has instituted the present C.R.A.

13. In support of this application, Mr. Tendulkar invited my attention to the finding recorded by the learned trial Judge in paragraph 11 against Issue No.4 as also discussion of the Appellate Court from paragraph 15 onwards. He also invited my attention to notice dated 4th May, 2007 issued by the plaintiffs through Advocate to defendant No.4 and Chief Executive Officer of Maharashtra Housing Area Development Authority (for short 'MHADA') and in particular paragraphs 6 and 7 thereof. He submitted that in the plaint, the plaintiffs specifically asserted in paragraph 5 that permission was given to defendant No.1 to reside in the suit premises till he makes his own arrangement. However, while issuing notice on 4th May, 2007, it was asserted by them that defendant No.1 is a gratuitous licensee who was allowed to reside in the suit premises without conferring any legal right in his favour. He submitted that no notice was issued by the plaintiffs revoking the licence. He invited my attention to evidence of P.W.1 and in particular his cross-examination. In the cross-examination, P.W.1 admitted that the plaintiffs and defendant No.1 are from one and the same family. The plaintiffs are using their surname as "Ghadi" and defendant No.1 is using the surname as "Ghadigaonkar". There is their residential house and farm at his native in joint and they are acting as joint family. Relying on this portion of cross-examination of P.W.1, Mr. Tendulkar submitted that defendant No.1 is member of the plaintiffs family and after the death of tenant Shankar, he has also inherited tenancy rights.

14. Mr.Tendulkar further submitted that the plaintiffs filed Review Petition before the trial Court seeking review of the finding recorded by the learned trial Judge against Issue No.4 which was rejected on 3rd May, 2012. The plaintiffs should have challenged the order dismissing the review petition instead of filing Cross Objections. Even otherwise, the Cross Objection filed by the plaintiffs is not maintainable. He submitted that Order-XLI, Rule-22 of the C.P.C lays down that the plaintiff can support the eviction decree and attack finding recorded by the trial Court. In the present case, eviction decree is not passed. The plaintiffs, therefore, could not support the eviction decree and attack finding recorded against Issue No.4. He, therefore, submitted that the Appellate Court committed serious error in entertaining and allowing the Cross Objection filed by the plaintiffs. He, therefore, submitted that the application requires consideration.

15. On the other hand, Mr. Banerjee supported the impugned order. He relied on paragraph 14 of **Kailashbhai Shukaam Tiwari Vs. Jostna Laxmidas Pujara, (2006) 1 Supreme Court Cases 524** to contend that defendant No.1 cannot claim to be a member of the plaintiffs family. The mere fact that he was permitted to reside with the tenant for the sake of convenience, will not make him member of the family of the tenant in the context of Rent Control Legislation.

16. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that Shantaram was the tenant in respect of the suit premises. I have already reproduced genealogy in the earlier part of the order. A perusal of the genealogy shows that Sakharam died leaving behind him two sons; Ramchandra and Shantaram. The plaintiffs are sons of deceased Shantaram.

Ramchandra had five sons, Dattaram, Shankar, Mahadev, Dinkar and Eknath. Defendant No.1 is one of the sons of Shankar.

17. The plaintiffs came with the case that tenancy of the suit premises was standing in the name of their father Shantaram Sakharam Ghadi. In paragraph 3 of the written statement, defendant No.1 admitted that Shantaram was paying monthly rent of the suit premises during his lifetime and after his death, the plaintiffs are paying rent to defendants No.2 and 3. The plaintiffs further contended that as Shantaram and his family members have no roof to stay and, therefore, the plaintiffs allowed them to reside in the suit premises on humanitarian ground. Defendant No.1 was permitted to occupy the suit premises as gratuitous licensee without making any payment to the plaintiffs.

18. The learned trial Judge considered Issues No.1 to 3 from paragraph 9 onwards. In paragraph 9, the learned trial Judge observed that real controversy between the parties is whether the plaintiffs have inherited tenancy after the death of their father or defendant No.1 is entitled to the same either as a family member of the deceased tenant or by virtue of provisions of section 15-A of the Act. Defendant No.1 did not dispute relationship. For the purpose of section 5 (11) (c) of the Act, defendant No.1 cannot be said to be a member of family of the deceased tenant. The learned trial Judge thereafter proceeded to consider whether under section 15-A of the Act, defendant No.1 can claim to be a deemed tenant of the suit premises during lifetime of his father and when he was minor. The learned trial Judge further noted that the rent receipts were standing in the name of deceased tenant till October, 2000 which falsifies claim of defendant No.1 that he was recognized as lawful contractual monthly tenant of the suit premises by the erstwhile landladies. Defendant No.1 admitted that erstwhile landladies transferred the tenancy in

his name in the year 2007. In paragraph 17 of his affidavit of evidence at Exhibit 39, defendant No.1 admitted that his mother and other brothers have acquired their premises and permanently shifted there. Mother and brother of defendant No.1 have filed affidavits of evidence at Exhibit 33 and 34 and supported the plaintiffs. The very fact that Girijabai and other children have shifted to their premises corroborates the case of the plaintiffs that the suit premises was given to Shankar and Girijabai temporarily without charge. Defendant No.1 has also admitted during his cross-examination that Shantaram did not charge any amount for occupying the suit premises. The learned trial Judge, therefore, held that defendant No.1 or his parents were not lawful tenants and after the death of the original tenant, they did not become directly deemed tenant of the erstwhile landladies.

19. In so far as the Appellate Court is concerned, the Appellate Court has considered points No.1 to 6 from paragraphs 9 onwards. After re-appreciating the entire evidence on record in paragraph 25, the Appellate Court concluded that the plaintiffs have proved that they inherited the tenancy rights in the suit premises being heirs and legal representatives of the original tenant Shantaram. Defendant No.1 miserably failed to prove that he got the tenancy rights in the suit premises as a tenant and became deemed tenant.

20. Thus, after appreciating the evidence on record, the Courts below have concurrently found that defendant No.1 is a gratuitous licensee. The Courts below also found that after the death of Shantaram, the plaintiffs inherited the tenancy rights in the suit premises and that defendants No.2 and 3 illegally transferred tenancy rights including rent receipt in the name of defendant No.1. The Courts below also held that defendant No.1 cannot claim tenancy rights under section 5 (11) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The finding recorded by the Courts

below are based on evidence on record. Even otherwise, defendant No.1 has not substantiated his claim that he was paying any amount to plaintiffs for occupying the suit premises. Thus, status of defendant No.1 is that of a gratuitous licensee in the suit premises.

21. I have already reproduced operative part of the trial Court's order as also the finding recorded by the learned trial Judge against Issue No.4. It is no doubt true that initially the plaintiffs filed review petition in the trial Court. in so far as finding recorded by the learned trial Judge against Issue No.4 and the same was rejected on 3rd May, 2012. After service of the notice of the appeal, the plaintiffs filed Cross Objection. Mr. Tendulkar submitted that the Appellate Court committed error in maintaining and allowing the Cross Objection as the Cross Objections were not maintainable.

22. Order-XLI, Rule-22 of the C.P.C reads thus;

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal._ (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow".

[Explanation._ A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of the respondent.]

- (2) **Form of objection and provisions applicable thereto._**
Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
- (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.
- (5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule”.

23. A perusal of Rule-(2) of Order-XLI, Rule-22 shows that Cross Objection are to be filed in the form of a memorandum and the provisions of rule 1 of Order-XLI so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto. Order-XLI, Rule-1 (2) lays down that the memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or

narrative, and such grounds shall be numbered consecutively. A perusal of Order-XLI, Rule-22 further shows that the respondent being aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

24. In the case of **Banarsi Vs. Ram Phal, (2003) 9 Supreme Court Cases 606**, the Apex Court has considered Order-XLI, Rule-22. In paragraph 7, the Apex Court reproduced unamended and amended provisions of Order XLI, Rule 22 of C.P.C. 9. In paragraph 9, 10 and 11, the Apex Court has observed thus;

9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant, the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in **Sahadu Gangaram Bhagade Vs. Special Dy. Collector, Ahmednagar and Anr., (1970) 1 SCC 685** that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to

the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

10. The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-
 - (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
 - (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
 - (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

25. In view thereof, I do not find any merit in the submission of Mr. Tendulkar that the Cross Objections filed by the plaintiffs were not maintainable and the Appellate Court committed error in maintaining and allowing the Cross Objections. In any case, it is settled principle of law that the provisions of the C.P.C are procedural and not substantive. In the case of **State of Punjab and Haryana Vs. Shamlal Murari**, AIR 1976 SC 1177, the Apex Court has observed in paragraph 8 thus,

“8. We must always remember that procedural law is not to be a tyrant but a servant, not an, obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the

handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After, all Courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time."

26. Mr. Tendulkar submitted that defendant No.1 being a family member had inherited tenancy rights. I do not find any merit in this submission. Defendant No.1 cannot claim to be member of the plaintiffs family merely because as the relative he was permitted to stay in the suit premises. Defendant No.1 is not in a position to demonstrate that the findings recorded by the Courts below are perverse being based on no evidence or that they are contrary to the evidence on record. Defendant No.1 is not in a position to demonstrate that on the basis of the evidence on record, no reasonable or prudent person would have reached conclusions arrived at by the Courts below. Hence, no case is made out for invocation of powers under Section 115 of the C.P.C. In the result, C.R.A fails and the same is dismissed.

27. At this stage, Mr. Tendulkar orally applies for stay of the eviction decree for a period of 8 weeks from today. He submits that defendant No.1 is not in possession of the suit premises and the building where suit premises is situate is being demolished. He has tendered photographs to substantiate this statement.

28. In view thereof, oral application made by Mr. Tendulkar for stay is rejected.

[R.G. KETKAR, J.]