

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.533 OF 2019

WITH

CIVIL APPLICATION NO.612 OF 2019

IN

APPEAL FROM ORDER NO.533 OF 2019

- | | | |
|--|---|--|
| 1. Neo Builder and Developers |] | |
| A Company incorporated under the |] | |
| Companies Act, 1956, through its Director |] | |
| having its registered address at |] | |
| 9, Sindhi Lane, Mumbai – 400 004 |] | |
| And with its head office at |] | |
| 16/17, 1 st Floor, Life Scapes Nilay C.H.S. Ltd., |] | |
| Permanand Wadi, Opp. Lohana Mahajan Wadi, |] | |
| Mumbai – 400 002. |] | |
| | | |
| 2. Naresh K. Mehta |] | |
| Adult, Indian Inhabitant, |] | |
| Being the promoter and Director of |] | |
| Neo Builder and Developers, with his office at |] | |
| 9, Sindhi Lane, Nanubhai Desai Road, |] | |
| Mumbai – 400 004 and at |] | |
| 16/17, 1 st Floor, Life Scapes Nilay C.H.S. Ltd., |] | |
| Permanand Wadi, Opp. Lohana Mahajan Wadi, |] | |
| Mumbai – 400 002. |] | |
| | | |
| 3. Neo Builders Ltd. |] | |
| A company incorporated under |] | |
| The Companies Act, 1956, |] | |
| Through its Director, having its |] | |
| registered address at |] | |
| 52/52A, Nanubhai Desai Road, |] | |
| 9, Mulji Thakarsi Building, 9 Sindhi Lane, |] | |
| Mumbai – 400 004. |] | ... Appellants /
Orig.Deft.Nos.1 to 3 |

Versus

- | | | |
|--|---|-------------------|
| 1. Mr. Umesh Kantilal Parikh, |] | |
| Adult, Indian Inhabitant, |] | |
| Through his Constituted Attorney, residing at |] | |
| 1615, Shripati Castle, 16 th Floor, B-Wing, |] | |
| Opp. Union High School, Khetwadi, |] | |
| Main Road, Mumbai – 400 004. |] | |
| 2. Mrs. Shaila Umesh Parikh, |] | |
| Adult, Indian Inhabitant, |] | |
| Through her Constituted Attorney, residing at |] | |
| 1615, Shripati Castle, 16 th Floor, B-Wing, |] | |
| Opp. Union High School, Khetwadi, |] | |
| Main Road, Mumbai – 400 004. |] | |
| 3. Mr. Mukesh Kantilal Parikh |] | |
| Adult, Indian Inhabitant, |] | |
| Residing at 25/C, Sonarika Building, B-Wing, |] | |
| 2 nd Floor, 29, Nanubhai Desai Road, |] | |
| Mumbai – 400 004. |] | |
| 4. Mrs. Anuradha Mukesh Parikh |] | |
| Adult, Indian Inhabitant, |] | |
| Residing at 25/C, Sonarika Building, B-Wing, |] | |
| 2 nd Floor, 29, Nanubhai Desai Road, |] | |
| Mumbai – 400 004. |] | |
| 5. Maharashtra Housing and Area Development |] | |
| Authority, Through the Chief Officer, |] | |
| Griha Nirman Bhavan, Kalanagar, |] | |
| Bandra (East), Mumbai – 400 051. |] | |
| 6. Municipal Corporation of Greater Mumbai |] | |
| through the Municipal Commissioner, MCGM |] | |
| Head Quarters, Mahapalika Marg, Fort, |] | ... Respondents / |
| Mumbai – 400 001. |] | Orig. Plaintiffs |

Mr. Aseem Naphade a/w Kausar Banatwala & Neuty N. Thakkar i/b Mr. Tushar Goradia for Appellants.

Mr. Anshok Daver i/b Parth P. Shah for Respondent Nos.1 and 2.

Mr. Rushabh Sheth i/b Saniya Patki for Respondent Nos.3 and 4.

Mr. Akshay Shinde for Respondent No.5 – MHADA.

Ms. Smita Tondwalkar for Respondent No.6 – MCGM.

CORAM :- SANDEEP V. MARNE, J.
RESERVED ON :- 01 DECEMBER, 2023
PRONOUNCED ON :- 06 DECEMBER, 2023

JUDGMENT :

1. *Admit.* With the consent of the learned counsel for parties, the appeal is taken up for hearing.

2. The Appeal is filed challenging the order dated 30 October 2018 passed by the City Civil Court partly allowing Notice of Motion No.1476/2018 filed by Respondent Nos. 1 to 4 / Original Plaintiffs. By the order impugned in the Appeal, the City Civil Court has restrained the Appellants from alienating or transferring or parting with possession of 5 flats in the new building with the aggregate area equal to 97.97 sq.mtr. The City Civil Court has further directed Defendant Nos.1 and 2 to deposit sum towards temporary alternate accommodation at the rate of Rs.130/- per sq.ft. from the month of April 2018 onwards during pendency of suit or till handing over possession of permanent alternate accommodation.

3. Plaintiffs were occupants and tenants of Room Nos.1, 2, 3 and 8 on 1st floor of the building 'Mani Bhavan' situated at 81/83, Nanubhai Desai Road, Girgaon Division, 'D' Ward, Mumbai – 400 004. Defendant Nos.1 to 3 are developers who are developing the building 'Mani Bhavan'. For redevelopment of the building, Permanent Alternate Accommodation Agreement (**PAAA**) dated 08 July 2010 came to be executed with the Plaintiffs. It appears that total area in occupation of the Plaintiffs in the building Mani Bhavan was 80.39 sq.mtr. (carpet area) which is equivalent to 97.97 sq.mtr. built up area. Plaintiffs are aggrieved by failure on the part of Defendant Nos.1 to 3 to allot permanent alternate accommodation with built up area of 97.97 sq.mtr. and

additional area out of fungible FSI sanctioned to the developers in respect of Plaintiff's old premises. Plaintiffs are also aggrieved by non-payment of transit rent as per PAAA executed with them. With these grievances, the Plaintiffs have filed Suit No.2588/2018 before the City Civil Court. In their Suit, Plaintiffs filed Notice of Motion No.1476/2018 for grant of temporary injunction. By order dated 30 October 2018, the City Civil Court has partly allowed Notice of Motion No.1476/2018 by passing the following order :

"1. The Notice of Motion No.1476 of 2018 is hereby allowed in following terms.

(i) By way of temporary injunction, pending the hearing and disposal of the suit, the defendants No.1 to 3 are restrained from alienating or transferring or parting with possession of at least 5 flats in the new building, the aggregate area of which should be equal to 97.97 sq. mtr. or more, to any any third party.

(ii) The defendants No.1 and 2 shall deposit in Court the sum towards temporary alternate accommodation as per clause (3) of the Permanent Alternate Accommodation dated 08.07.2010 at the rate of Rs.130 per square feet from the month of April 2018 onwards, pending the hearing and disposal of the suit or till possession of the permanent alternate accommodation is handed over to the plaintiffs or till further orders of the Court, whichever occurs first.

(iii) Rest of the prayers in the Notice of Motion shall stand rejected.

(iv) The Notice of Motion stands dismissed as against defendants No.4, 5 and 6.

(v) In these terms, the Notice of Motion stands disposed of accordingly."

4. Appellants are aggrieved by order dated 30 October 2018 passed by the City Civil Court and have filed the present Appeal.

5. Mr. Naphade would appear on behalf of the Appellants and submit that the City Civil Court has erred in passing the impugned order despite readiness and willingness on the part of the developers to allot permanent alternate accommodation of area in occupation of Plaintiffs in old structure i.e. 80.39 sq. mtr. carpet (97.97 sq.mtr. built up). Placing reliance on the provisions of Section 16 of the Maharashtra Rent Control Act, 1999 and Development Control Regulations for Greater Mumbai, 1991, Mr. Naphade would submit that the statutory entitlement of tenants

is to receive an area equivalent to the one in their possession in the demolished structure. That, the Appellants were always ready and willing to allot permanent alternate accommodation of such area to the Plaintiffs, who have refused to accept the same on various pretexts such as splitting of flats, non-grant of fungible area, etc. That, in the light of willingness expressed by the developers to hand over permanent alternate accommodation admeasuring 80.39 sq.mtr. carpet area, the City Civil Court could not have directed payment of transit rent to the Plaintiffs.

6. Mr. Naphade would further submit that the Plaintiffs were not ready and willing to accept allotment of alternate accommodation of 80.39 sq.mtr. which is clear from the complaint addressed by them to the Executive Engineer, City-I, Building Proposal Department, MCGM on 24th July 2017. That, in the said letter, the Plaintiffs even described the flats which the developers were willing to allot to them. He would further invite my attention to the Appellants' letter dated 04 December 2017 addressed to the MCGM stating that Flat Nos.3 and 4 on 6th floor and Flat No.3 on 13th floor were allotted to the Plaintiffs. He would therefore submit that readiness and willingness to allot permanent alternate accommodation to the Plaintiffs of area equivalent to 80.39 sq.mtr. was demonstrated before the City Civil Court. Inviting my attention to the findings recorded by the City Civil Court in paragraph 6 of its order, Mr. Naphade would contend that the City Civil Court has also recorded findings that the permanent alternate accommodations were actually offered by Defendant Nos.1 to 3 to the Plaintiffs. He would submit that once a finding is recorded by the City Civil Court that the flats were offered, refusal to accept the same by the Plaintiffs cannot result in fastening of liability to pay transit rent on Defendant Nos.1 to 3. He would further submit that the part Occupancy Certificate of the building

has been issued on 29 June 2018 and since permanent alternate accommodations reserved for Plaintiffs were offered for allotment, the developers cannot be made to bear the liability for payment of transit rent. That, order of the City Civil Court results in a situation where the developer is made to bear huge liability of payment of transit rent to the Plaintiffs by keeping 5 flats vacant and unencumbered during pendency of the Suit. Mr. Naphade would further submit that the developers have not taken the benefit of fungible FSI in respect of structures of Plaintiffs and to demonstrate the same, he would rely upon the area statement showing deficit fungible built up area of 37.48 sq.mtr. against the structures of the Plaintiffs. He would submit that it is not mandatory for a developer to utilize the benefit of FSI in a case where there are restrictions on construction on account of height, etc. That, since the benefit of fungible FSI is not availed by the developers in respect of structures of the Plaintiffs, the demand of the Plaintiffs for allotment of additional fungible area over and above the area in their occupation is clearly misplaced. Till the determination of prayer of the Plaintiffs of additional fungible area, the developers cannot be made to bear the burden to pay the transit rent to the Plaintiffs.

7. Mr. Daver, the learned Counsel appearing for Respondent Nos.1 and 2 would oppose the Appeal submitting that the developers have never offered permanent alternate accommodations to the Plaintiffs in any manner. He would submit that the letter dated 04 December 2017 written by the developers to MCGM cannot be treated as an offer made to the Plaintiffs to accept the allotment of flats stated therein. He would submit that the part Occupancy Certificate of the building is issued on 29 June 2018 and there is not even a single communication on record to demonstrate that the developers ever offered allotment of any flat to the

Plaintiffs after issuance of the part Occupancy Certificate dated 29 June 2018. Mr. Daver would invite my attention to Plaintiff's letter dated 24 July 2017 to contend that the developers had actually not made any offer for allotment of flats and information about reservation of 3 flats for the Plaintiffs was dug out by Plaintiffs on perusal of amended approval plan submitted to MCGM on 07 June 2015. According to him, the letter dated 24 July 2017 was required to be submitted by the Plaintiffs after realizing the developers were not willing to actually allot any flats to the Plaintiffs and therefore they were left with no choice to raise an objection for issuance of Occupancy Certificate of the building.

8. Mr. Daver would further submit that the flats allegedly reserved for allotment to the Plaintiffs do not have Occupancy Certificate. That, therefore, even the Occupancy Certificate dated 29 June 2018 is inconsequential as flats with Occupancy Certificate are not even ready for allotment. He would therefore submit that the Plaintiffs are therefore entitled to receive transit rent till they are actually allotted due area as allotted to other tenants in the new building.

9. Mr. Daver would further submit that the developers are deliberately practicing discrimination *qua* the Plaintiffs. That, the developers have granted additional fungible FSI to all the tenants and the Plaintiffs are deliberately being offered lesser area than their entitlement under the PAAA. That, the City Civil Court has therefore rightly arrived at a finding that the developers must pay compensation towards temporary alternate accommodation from the date of filing of its Suit. He would pray for dismissal of the Appeal.

10. Mr. Sheth, the learned Counsel appearing for Respondent Nos.3 and 4 would adopt the submissions made by Mr. Daver.

Additionally, Mr. Sheth would contend that Flat No.5 on 4th floor admeasuring 20.67 sq.mtr. allegedly reserved by the Appellants for Plaintiffs is actually in violation of the stipulations of NOC issued by the MHADA under which the developers are under obligation to provide minimum carpet area of 37.88 sq.mtr. to each of the occupants. Mr. Sheth would further submit that the Appellants are in arrears of rent to the extent of about Rs.60 Lakhs and in view of the conduct exhibited by the Appellants, the present Appeal cannot be entertained.

11. I have also heard Mr. Shinde for Respondent No.5 – MHADA and Ms. Tondwalkar for Respondent No.6 – MCGM.

12. Rival contentions of the parties now fall for my consideration.

13. The City Civil Court has restrained the Defendant Nos.1 to 3 from alienating or transferring or parting with possession in favour of any third party of at least 5 flats in the new building with aggregate area of 97.97 sq.mtr. There appears to be few errors in this direction. Firstly, it is not clear as what is the exact reason for selecting the number '5' for reservation of flats for Plaintiffs. If the area of 97.97 sq.mtr. is divided by 5, it would mean that each of the 5 flats would admeasure 19.5 sq.mtr. It is not known whether the developers have constructed flats with such small area in the building. The second error in direction no.(i) appears to be non-specification as to whether the area of 97.97 sq.mtr. is 'carpet' or 'built up'. In fact, the City Civil Court has not specified the exact nature of area of permanent alternate accommodation anywhere in its order. The figure 97.97 sq.mtr. appears to have been picked up from the area statement prepared by MHADA. This is clear from the observations of the City Civil Court in paragraph 2 of its order that "*It is submitted that as per the survey of defendants No.4 and 5 authorities, the plaintiffs No.1 to 4*

had a old premises totally admeasuring 97.97 square meters.” The area statement certified by MHADA would indicate that the area of 97.97 sq.mtr. in occupation of Plaintiffs was ‘built up area’. The corresponding ‘carpet’ area in Plaintiffs’ occupation was 80.39 sq.mtr. Thus, if 5 flats totally admeasuring 97.97 built up area are indeed to be reserved as per the direction no.(i) of the City Civil Court, it would mean that the area of each of such 5 flats would be actually 19.5 sq.mtr. built up equivalent to 210 sq.ft. built up (175 sq ft carpet). Thus the number ‘5’ appears to have been chosen by the learned Judge on an assumption that flats of built-up area of 210 sq ft or carpet area of 175 sq ft are constructed by the Appellants. The error on the part of the learned judge in assuming so is dealt in subsequent paragraphs of the judgment.

14. In direction no.(ii), the City Civil Court has directed the Appellants to deposit transit rent at the rate of Rs.130/- per sq.ft. from the month of April 2018 on Defendant Nos. 1 and 2 either during pendency of the Suit or till handing over possession of permanent alternate accommodation. There is a great deal of debate between the parties about entitlement of Plaintiffs to receive transit rent as directed by the City Civil Court.

15. Under the PAAA executed with the Plaintiffs, the developers had liability to pay transit rent to the tenants till the date of handing over possession of permanent alternate accommodations. The developers / Appellants contend that the permanent alternate accommodations in the form of Flat Nos.3 and 4 on 6th floor and Flat No.3 on 13th floor were offered to the Plaintiffs before 24 July 2017 who refused to accept the same. Alternatively, it is the submission of the developers / Appellants that they had liability to pay transit rent only till the issuance of

Occupancy Certificate dated 29 June 2018. It would, therefore, be necessary to examine whether the Plaintiffs were indeed offered allotment of permanent alternate accommodation by the developers or not. To determine this issue, contents of letter dated 24 July 2017 addressed by the Plaintiffs and 4 December 2017 addressed by the developers would be relevant. It would, therefore, be necessary to reproduce both the letters, which read thus :

"From :

*Mukesh K. Parikh
Room No. 8, Bldg. No. 81-83,
Mani Bhavan, 1" Parsiwada Lane,
Dr. Nanubhai Desai Road, Mumbai - 400 004.*

Date – 24.07.2017.

*To,
The Executive Engineer City-I,
Building Proposal Department,
MCGM, New Building,
Bhagwan Valmicky Chowk,
Opp. Hanuman Mandir,
Vidyalankar Marg, Antop Hill,
Vadala (E), Mumbai – 400037*

Sub : Complaint against the Developer Mr. Naresh K. Mehta, developer of the property bearing CS. No. 710, 711 & 712 of Girgaum Division, 81-83, situated at 1 Parsiwada Lane, Dr. Nanubhai Desai Road, Mumbai - 400 004, known as "Mani Bhavan".*

Ref. - 1) NOC issued by the Chief Officer/M.B.R. & R. Board vide letter bearing No.R/NOC/F-1794/1601/MBRRB-10 dated 25.04.2010.

2) IOD issued by your office vide letter No. EB/5774/D/A dated 31.10.2012.

3) Amended Plans Approved by your office vide letter No. EB/5774/D/A dated – 07.06.2016.

Respected Sir,

I the undersigned Mr. Mukesh K. Parikh the certified tenant/occupant of Room No.1,2,3 & 8 of above subjected property want to make complaints against the Developer Mr.Naresh K. Mehta as follows :

1) As per the condition No. 21 of NOC issued by MHADA, the developer has to execute Agreement with all tenants/occupants and submits the same to MHADA before issue of NOC for commencement certificate issued from MCGM. Now in this case the developer has not executed any Agreement with us, but the MCGM has issued the commencement certificate for entire work according to that the construction work of building is almost completed.

2) As per the NOC, MHADA has (clubbed our tenement and considered a single residential unit. But in the amended approved plans issued by your office vide letter No. EB/5774/D/A dated 07.06.2016 the developer has shown that they will allot us the flat No.3 & 4 on 6' floor and flat No. 3 on 13 floor. According to this it is found that the developer is splitting our entitled area without our consent or specific NOC of MHADA.

3) As per the amended approved plans issued by your office vide letter No.EB/5774/D/A dated 07.06.2016, it is found that the developer has proposed fungible area to all tenants/occupant except us, which is bed in the law.

I hereby request your goodself to do not issue any occupation certificate to the developer till our matter is resolved. Kindly help us to get our premises as early as possible as the developer is not co-operate with us. Kindly do the needful and oblige.

Thanking you,
Yours Faithfully,

(Mukesh K. Parikh)”

“The Resident Executive Engineer,
M.B.R. & R. Board, MHADA,
Kalanagar, Bandra (East),
Mumbai.

Date : 4.12.2017

The Assistant Engineer (Building Proposal) City III,
Municipal Corporation of Greater Mumbai
New Municipal Building, C.S.No.355B,
Bhagwan Walmiki Chowk, Vidyalanker Marg,
Opp.Hanuman mandir, Salt Pan Road,
Antophill, Wadala (East),
Mumbai - 400 037.

Respected Sirs,

Sub: 1. Your Notice No. R/NOC/CF-1794/7898/MBRRB-17 dated 15th November 2017.

2. Redevelopment of property at C.S.No. 710 & 711 of Girgaon Division, Building No.81-83, Mani Bhavan, Parsiwada 1st Lane & Building No.70 Parmar Building, Khetwadi Main road, cess no. D-17-- & D-1817 situated at Khetwadi Main road Mumbai – 400.004.

1. We have received your reference letter dated 15th November 2017 with enclosure letter dated 6.9.2017 of Assistant Engineer and complaint letter dated 25th July 2017 of Mukesh K. Parikh and in reply thereto we submit as under :-

2. We have executed Agreement dated 1st July 2010 with Umesh K.Parikh, Shaila U. Parikh and A.M. Parikh and another Agreement dated 8th July 2010 with Mukesh K: Parikh in respect of Room Nos.1 to 3 and Room No.8. Both the Agreements are signed by the parties. As per both the Agreements we have agreed to provide new premises. The said Agreements are not registered.,

However, we are ready to register the Agreement with the Complainant Mukesh K. Parikh & Ors. as per the sanction plan.

3. So the complaint of Mukesh K. Parikh that we have not executed any Agreement with them is not correct.

4. The said Complainant also made complaint that we have allotted flat no. 3&4 on 6th Floor and flat no. 3 on 13th floor. Since there are two Agreements we have made to allot for 3 flats in the new building. It is true that as per the N.O.C. of MHADA tenants were clubbed. However, in view of amended approved plan & the proposal is in DCR 33(7) & due to planning constraints we have allotted 3 flats on two different floor i.e. two flats on 6th floor & 1 flat no. on 13th floor.

5. As regards complaint of fungible area we have submitted the plan and due to the application we have not taken any benefit on FSI of the fungible area in respect of Complainant's old premises.

6. Hence we have not violated any terms and conditions of N.O.C., I.O.D. and C.C. The building is almost completed and we have applied for Occupation Certificate to M.C.G.M.

7. We therefore humbly submit that we are ready to register the Agreement with the Complainant with another option that we are ready proposed for to shift the said flat no. 3 of 13th floor (area 20.04 sq.mtr) on 4th floor with same area (i.e. 20.04 sq.mt) and earlier proposed two nos. of flats i.e. 3 & 4 of 6th floor will remain same i.e. on 6th floor; if agreed. Hence there is no substance in the complaint made by Mukesh K. Parikh. We therefore request you to ignore the complaint of Mukesh K. Parikh in view of our above reply.

8. For your ready reference we are enclosing herewith xerox copies of two Agreements dated 8th July 2010.

Yours faithfully

*For, M/s. Neo Builder & Developers
(Authorized Signatory)"*

16. Thus, from the letter dated 24 July 2017, it appears that the Plaintiffs had acquired knowledge that Flat Nos.3 and 4 on 6th floor and Flat No.3 on 13th floor were reserved for allotment for them. However, it appears that the Plaintiffs were not happy with the allotment of said 3 flats for two reasons. Firstly, the Plaintiffs stated that MHADA had clubbed their old tenement and considered the same as single residential area whereas the developers had split the same into 3 flats without their consent. The second grievance of the Plaintiffs was that the developers were granting fungible area to all the tenants except to the Plaintiffs. By raising these two complaints, the Plaintiffs attempted to obstruct issuance of Occupancy Certificate to the building. The letter dated 24 July 2017

thus clearly indicates that the Plaintiffs were not willing to accept the 3 flats reserved for them towards permanent alternate accommodation.

17. By letter dated 4 December 2017, the developers, while justifying their action in splitting the area of permanent alternate accommodation into 3 flats, had expressed willingness to provide another option to shift flat no.3 on 13th floor to a flat on 4th floor along with flat nos.3 and 4 on 6th floor. So far as allotment of fungible area is concerned, the developers specifically stated that they had not availed benefit fungible area for FSI in respect of Plaintiffs' old premises. Thus, combined reading of letters dated 24 July 2017 and 4 December 2017 would indicate that 3 flats were reserved for allotment to the Plaintiffs, who were apparently not willing to accept the same.

18. It appears that despite objection raised by the Plaintiffs for issuance of Occupancy Certificate, part Occupancy Certificate was issued in respect of the building on 29 June 2018. Before issuance of the part Occupancy Certificate, the Plaintiffs allegedly lodged Suit No.2588/2018 before the City Civil Court in March 2018. Since the dispute became *sub judice* before the City Civil Court, apparently no correspondence has taken place between the parties after filing of the Suit. In April 2018, the developers filed a Written Statement in the Suit expressing readiness and willingness to allot flats on 5th and 6th floor in the new building to the Plaintiffs. The developers contended in paragraph 7 of their Written Statement as under :

“7. These Defendants further submit that since the Plaintiffs refused to accept the possession and allotment of Flat Nos. 3 & 4 on 6th Floor and Flat no.3 on 13th Floor and therefore these Defendants have allotted the said flats to the tenants/purchasers. These Defendants submit that these Defendants are ready and willing to allot the new flats to the Plaintiffs on 5th and 6th floors of the new constructed building. These Defendants therefore submit that the present suit is liable to be dismissed with cost.”

19. Thus, readiness and willingness to allot permanent alternate accommodation to the Plaintiffs was expressed by the developers in their Written Statement filed in April 2018 before issuance of part Occupancy Certificate on 29 June 2018. Therefore, there was no question of the developers once again writing to the Plaintiffs for allotment of permanent alternate accommodation after 29 June 2018. To this extent, the submission canvassed by Mr. Daver and Mr. Sheth about failure on the part of Defendant Nos.1 to 3 to offer allotment of permanent alternate accommodation after issuance of part Occupancy Certificate deserves to be rejected.

20. It is thus *prima facie* established that the Appellants / developers were always ready and willing to allot 3 flats towards permanent alternate accommodation to the Plaintiffs right since the year 2017. In fact, in the present Appeal, the Appellants have given the exact details of the 3 flats offered to the Plaintiffs as under :

*“Flat No. 3, 6th floor : The area allotted is 28.90 sq.mt.
Flat No. 4, allotted 6th Floor The area is 31.22 sq.mt.
Flat No. 5, 4th Floor The area allotted is 20.67 sq.mt.
Total Carpet area is 80.79 sq.mt. equivalent to 96.94 Sq. mt. built-up area.”*

21. Thus, the total area of 3 flats offered by the Appellants to the Plaintiffs is 80.79 sq.mtr. carpet area, which is equivalent to 96.94 sq.mtr. of built up area, which almost matches the area in occupation of the Plaintiffs in the old building. The City Civil Court has not correctly appreciated the fact that Defendant Nos.1 to 3 were always ready and willing to allot 3 flats of size equivalent to the area in occupation of the Plaintiffs in the old building. Without correctly appreciating this aspect, the City Civil Court has rendered following erroneous finding :

“In this letter, the defendants have mentioned that each of the flat No.3 on 13th floor and flat No.4 on the 4th floor and flats No.3 and 4 on the 6th floor shall be admeasuring 20.4 square meters. This area of these four flats collectively is not

into equal of 97.97 square meters and it is lesser than 97.97 square meters. Plaintiffs are entitled to 97.97 square meters. Thus, it is clear from the aforesaid material on record that the defendants are not offering the plaintiffs this much area in the new building.”

22. Thus, the City Civil Court has considered carpet area of flat on the 4th floor of 20.04 sq.mtr. to assume as if the carpet area of the other two flats on 6th floor is also same. As a matter of fact, the carpet area of flat nos.3 and 4 on 6th floor is 28.90 sq.mtr. and 31.22 sq.mtr. respectively. Furthermore, the City Civil Court has erroneously compared carpet area of alternate accommodation with built up area of old structure which again is a clear error.

23. In my view, therefore, the finding recorded by the City Civil Court about failure on the part of Defendant Nos.1 to 3 to offer equivalent area of 97.97 sq.mtr. to the Plaintiffs in the form of permanent alternate accommodation is erroneous, unsustainable and liable to be set aside.

24. Having arrived at a conclusion that Defendant Nos.1 to 3 / developers were ready and willing to hand over permanent alternate accommodation of area equivalent to 96.94 sq.mtr. (almost matching to 97.97 sq.mtr. in occupation in old building), the next issue is whether the Defendant Nos.1 to 3 / developers can be saddled with the liability for payment of transit rent. In my view, since the Plaintiffs have refused to accept the 3 flats offered by the Defendant Nos.1 to 3, the Plaintiffs cannot be permitted to take benefit of their own wrong. However, though the Defendant Nos.1 to 3 were willing to offer 3 flats to the Plaintiffs, the allotment and occupation of such flats could not materialize till issuance of Occupancy Certificate, which appears to have been issued on 29 June 2018. Though the Occupancy Certificate in respect of the 3 flats reserved to the Plaintiffs is not yet issued, Mr. Naphade has explained the unique

concept of non-issuance of Occupancy Certificates in project involved in the present case without actual allotment to a particular tenant. I do not find any reason not to accept the said justification offered by Mr. Naphade at this stage. Therefore, it will have to be presumed that the Plaintiffs could have occupied the 3 flats offered to them after 29 June 2018 when part Occupancy Certificate was issued for the building. Therefore, the liability to pay transit rent is required to be restricted only till 29 June 2018.

25. Thus, the liability to pay transit rent of Defendant Nos.1 to 3 is required to be restricted during the period from April 2018 till 29 June 2018.

26. So far as the direction No.(i) granting injunction against the Defendant Nos.1 to 3 from alienating / transferring or creating third party rights in respect of 5 flats is concerned, I am of the view that no purpose would be served in keeping the 3 flats offered by the developers to the Plaintiffs locked and unoccupied during pendency of the Suit. The Plaintiffs shall accordingly accept allotment and possession in respect of Flat Nos.3 and 4 on 6th floor and flat no.5 on 4th floor without prejudice to their rights and contentions. So far as the grievance of the Plaintiffs about non-grant of additional fungible area is concerned, the grievance can be considered by the City Civil Court at the time of final hearing of the Suit. No opinion is expressed in that regard.

27. It appears from the Plaint that the Plaintiffs have complained about non-payment of transit rent from April 2016 onwards. Even from the statement tendered by Mr. Sheth, it appears that the developers are in arrears of transit rent since April 2016 onwards. The City Civil Court has however directed payment of transit rent from the date of filing of the

Suit i.e. April 2018 without recording any reasons as to why the direction is not issued for payment of transit rent from April 2016. Though the Plaintiffs have not challenged the order dated 30 October 2018, there appears to be an obvious error in the order of the City Civil Court directing payment of transit rent from April 2018. The developers are already offered solace by restricting the liability for payment of transit rent up to 29 June 2018. The present appeal is filed essentially to restrict the liability to pay the transit rent up to the date of issuance of Occupancy Certificate. Therefore, I do not see any reason why Plaintiffs can be denied transit rent from April 2016. The only difficulty appears to be that the Plaintiffs have not challenged the order of the City Civil Court to the extent that it does not grant transit rent for the period from April 2016 to June 2018. Therefore, though ordinarily, the Appellate Court is not supposed to grant relief in favour of Plaintiffs in an appeal filed by Defendants, the equities need to be balanced while granting relief to Appellants in the present appeal. Plaintiffs are expecting additional fungible area on par with other tenants and this relief can only be granted at the time of final hearing of the Suit. In the event Plaintiffs succeed in their suit, one does not know whether the developers would have any additional area for allotment to Plaintiffs at the time of final decision of the suit and in such a situation, grant of monetary compensation as an alternate relief may have to be resorted to. In the process, apart from residing in smaller area till decision of the suit, Plaintiffs may be denied their right to reside in flats of higher areas forever. In such circumstances, Plaintiffs right to receive transit rent during April 2016 to June 2018 cannot be kept pending till decision of the Suit. In that view of the matter and with a view to balance the equities, the transit rent is required to be paid by the Defendant Nos.1 to 3 to the Plaintiffs from April 2016 till the date of receipt of part occupancy certificate.

28. The Appeal accordingly partly succeeds and I proceed to pass the following order:

- (i) The order dated 30 October 2018 passed by the City Civil Court is set aside.
- (ii) It shall be open to the Plaintiffs to accept allotment and possession of Flat nos.3 and 4 on 6th floor and Flat no.5 on 4th floor without prejudice to their rights and contentions. The Appellants shall forthwith offer allotment of said 3 flats and complete the necessary formalities for handing over possession thereof to the Plaintiffs within 4 weeks from today.
- (iii) The Appellants shall pay transit rent at the rate of Rs.130/- per sq.ft. to the Plaintiffs for the period from April 2016 to 29 June 2018 within 4 weeks from today.
- (iv) The order passed by the City Civil Court shall stand modified to the above extent.
- (v) Hearing of the Suit is expedited. The City Civil Court shall proceed to decide the suit as expeditiously as possible, preferably within 1 year, without being influenced by any of the observations in this judgment.

29. With the above directions, the Appeal is disposed of.

30. In view of disposal of Appeal, Civil Application does not survive and the same is also disposed of.

(SANDEEP V. MARNE, J.)