

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 417 OF 2022

WITH

CIVIL REVISION APPLICATION NO. 418 OF 2022

Darryl D'Monte (deleted since deceased)

and Ors.

... APPLICANTS

: VERSUS :

Vadilal Kunverji Gada & Ors.

.... RESPONDENTS

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**Mr. Nusrat Shah** with Mr. Kevin Gala, Ms. Sayali Ramugade i/b. Ms. Samaa Shah, for the Applicant in CRA-418/2022.

**Mr. N.V. Walawalkar, Senior Advocate** i/b. Ms. Samaa Shah for the Applicant in CRA-417-2022.

**Mr. Mayur Khandeparkar** with **Mr. Aseem Naphade**, Ms. Kausar Banatwala, Mr. Pratik Shah and Ms. Sneha Mahawar i/b. Mr. Tushar A. Goradia, for Respondent Nos.4 to 6 in CRA-417-2022.

**Mr. Rohan Savant**, with Mr. Ashish Dube, Mr. Ashok Chopra, Ms. Gayatri Gupta and Mr. Aman Saraf for Respondent No.2 in both CRA.

**Ms. Tasneem Azmi** I /b. Mr. Rajiv Mane, for Respondent Nos.7 to 10 in both CRA.

**Ms. Ema Almeida** with Ms. Archana Jha, for Respondent No.11 in both CRA.

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**CORAM : SANDEEP V. MARNE, J.**

**JUDG. RESD. ON : 17 March 2026.**

**JUDG. PRON. ON : 6 April 2026.**

**Judgment:**

1) These two Revision Applications challenge the common judgment and order dated 4 May 2022 passed by the Appellate Bench of the Small Causes Court in Appeal Nos. 27 of 2019 and 28 of 2019. By the impugned order, the Appellate Bench has allowed the Appeals and has set aside the judgment and order dated 3 November 2018 passed by the Learned Judge, Small Causes Court in Obstructionist Notice No. 15 of 2006 filed in T.E. & R. Suit No. 66 of 2002 and the said Obstructionist Notice filed by the Applicant has been dismissed. By its judgment and order dated 3 November 2018, the learned Judge of the Small Causes Court had allowed Obstructionist Notice No. 15 of 2006 filed by the Applicants/Plaintiffs and had directed Obstructionist Nos.1, 4, 5 and 6 to remove themselves from Gala No.1 i.e. Shop No.1 from the suit plot and handover vacant possession thereof to the Applicant/Plaintiffs. The Small Causes Court had further directed Obstructionist No.2 to remove itself from Gala No.2 i.e Shop No.2 in the suit plot and handover vacant possession thereof to the Applicants/Plaintiffs. Obstructionist No.3 was directed to remove itself from Gala No.3 i.e. Shop No.3 by handing over possession thereof to the Applicants/Plaintiffs. Plaintiffs were permitted to demolish Galas Nos.1 to 3 and secure vacant possession thereof by recovering costs of demolition from the respective obstructionists. The Trial Court had also directed conduct of separate enquiry into mesne

profits under Order XX Rule 12 of the Code of Civil Procedure, 1908 (**the Code**).

2) Applicants are Plaintiffs in T.E. & R. Suit No. 66 of 2002 in which consent decree has been passed for recovery of possession of the suit premises from original Defendant Nos.8 to 11. However, when decree was sought to be executed, obstruction was presented by the obstructionists/Respondent Nos.1 to 6 who claimed possession and accordingly Applicants took out Obstructionist Notice No. 15 of 2006 which was allowed by the Trial Court. The Appellate Court has however dismissed the same. The obstructionists' right to occupy the three Galas/Shops constructed in suit the suit property is thus upheld by the Appellate Court despite passing of the eviction decree against the Defendants in the Suit. Accordingly, the Applicants/Plaintiffs have preferred the present Revision Applications under Section 115 of the Code.

### **FACTS**

3) An open plot of land bearing Final Plot No. 650 at Bandra TPS-III being and situated at Ghodbunder Road (S.V. Road), Bandra, Mumbai Suburban District admeasuring about 450 sq.yards is '**the suit property**'. An Indenture of Lease was executed between Dominic A. D'Monte (lessor) and one Moogatlal J. Bhat, (lessee). The lease in respect of the suit property was granted for a period of 5 years and 5 months commencing from 1 March 1934 and ending on 31 July 1939. It is the case of Respondents No.1 to 6 that lessee Moogatlal Bhat started

operating a petrol pump on the demised land and had apparently constructed three temporary structures bearing Gala Nos.1, 2 and 3. He let out Gala No.1 to one Halimabai Madraswala for carrying out Motor Garage business called 'Apna Garage', whereas Gala Nos.1 and 2 were let out to Mr. Jagannath Tare.

4) Upon expiry of tenure of the first lease, a second lease was executed on 15 September 1949 between Cecil Joseph D'Monte (**lessor**) and Moogatlal J. Bhat (**lessee**) in respect of the demised land for a period of 15 years commencing from 1 June 1949 and ending on 31 May 1964. According to the Applicants, both leases contained a specific covenant for removal of all structures on the demised land upon expiration of the tenure of lease and for handing over of vacant land to the lessor in the same condition as the same was first let. Mr. Moogatlal Bhat passed away on 10 March 1954 before expiry of the second lease dated 15 September 1949.

5) Only 3 heirs of Moogatlal Bhat expressed intention for execution of fresh lease with the lessor and accordingly third Indenture of Lease was executed on 6 March 1959, by which 15 legal heirs of Moogatlal Bhat surrendered their leasehold right in respect of the demised land to the lessor. Under third lease dated 6 March 1959, a fresh lease was created in favour of only 3 heirs of Moogatlal viz. Parvatishankar Moogatlal Bhat, Madhusudan Moogatlal Bhat and Vijaykumar Moogatlal Bhat (**tenants**) for a period of 20 years from 1 January 1959. According to the Applicants, thus joint tenancy was created only in favour of Parvatishankar Bhat, Madhusudan Bhat and

Vijaykumar Bhat with a specific covenant that the expression 'tenant' would include surviving tenant and last surviving heir of the last surviving tenant. According to the Applicants, the third lease also contained a covenant for removal of all structures in the land and to return the land in the same condition as it was first let to Moogatlal Bhat.

6) The tenure of the lease expired on 31 December 1979. However, according to the Applicants no action could be taken for recovery of possession of the demised land from the three lessees, Parvatishankar Bhat, Madhusudan Bhat and Vijaykumar Bhat on account of application of provisions of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 (**Bombay Rent Act**) to open piece of land and the three lessees acquiring the status of protected tenants under the Bombay Rent Act. Madhusudan Bhat passed away on 3 July 1986. Parvatishankar Bhat passed away on 31 May 1995. According to the Applicants, Vijaykumar Bhat was the last surviving joint tenant and became the only tenant as per the covenants of the third lease dated 6 March 1959. Vijaykumar Bhat passed away on 10 January 1996 leaving behind his heirs (Respondent Nos. 7 to 10). Son of Vijaykumar viz. Parag Bhat had already predeceased him on 23 August 1985. According to the Applicants, as per the covenants of the third lease deed, only the four surviving heirs of Vijaykumar (Respondent Nos. 7 to 10) became entitled to inherit the leasehold/tenancy rights after demise of the three joint tenants.

7) On 16 November 1994, it is claimed that a Deed of Assignment was executed between Halimabai Madraswala and Girnar Griha Nirman Pvt. Ltd. in respect of Gala No.1. According to the Applicants, the said assignment was without the consent of the lessors and also in violation of provisions of Section 15 of the Bombay Rent Act. This is how Girnar Griha Nirman Pvt. Ltd claimed rights in respect of Gala No.1. It is claimed that the alleged rights of Girnar Griha Nirman Pvt. Ltd were taken over by the company 'White Rose Properties Pvt. Ltd.' (Respondent No.4). However Respondent No. 4 claims that only the name of company has undergone change.

8) After repeal of the Bombay Rent Act and on advent of the Maharashtra Rent Control Act, 1999 (**MRC Act**), the protection in respect of the tenancy laws no longer apply in respect of open land. Accordingly, Applicants filed T.E. & R. Suit No. 66 of 2002 under the provisions of Section 41 of the Presidency Small Causes Court Act,1882 (**PSCC Act**) against the heirs of the lessees (defendants). Defendant No.1- Jailaxmi/wife of Moogatlal, passed away during pendency of the suit. In the Suit, Written Statement was filed by Defendant Nos.2 to 9 (heirs of Madhusudan). However, Defendant Nos.2 to 7/heirs of Madhusudan filed additional Written Statement on 13 June 2005 stating *inter-alia* that they were not the tenants in respect of the demised land and only heirs of Vijaykumar remained tenants thereof. They also prayed for dismissal of suit against them. The suit was accordingly withdrawn against Defendant No.1 (Jailaxmi/wife of Moogatlal) and Defendant Nos.2 to 7 (heirs of Madhusudan) in view of additional Written

Statement dated 13 June 2005. The other Defendant Nos.8, 9, 10 and 11 (Respondent Nos.7 to 10 herein) executed Consent Terms with the Plaintiffs under which Defendant Nos.8 to 11 surrendered their rights in respect of the demised land. Plaintiff agreed not to press the claim for mesne profits against them. The suit was accordingly decreed on in view of consent terms dated 29 April 2006.

9) Plaintiffs put the decree for execution. However, they encountered obstruction by Respondent Nos. 2 to 6. Accordingly, Plaintiffs took out Obstructionist Notice No. 15 of 2006 against Wadilal Gada/White Rose Properties Pvt. Ltd. in respect of Gala No.1. Vaseem Kapadia and Sana Kapadia, Additional Directors of White Rose Properties Pvt. Ltd. were also impleaded them as Obstructionist Nos.5 and 6 in respect of Gala No.1 The Obstructionist Notice sought ouster of Sheela Madhukar Tare in respect of Gala No.2 and of Chandrakant Jagannath Tare in respect of Gala No.3. Affidavits in reply were filed by the Constituted Attorney of Vaseem Kapadia and by Sheela Tare and Chandrakant Tare. Issues were framed in the Obstructionist Notice on 19 January 2007. In the Obstructionist Notice, *status quo* order was passed. Plaintiff took out Interim Notice No.23 of 2008 alleging violation of status quo order. By order dated 30 April 2008, the learned Judge of the Small Causes Court restrained obstructionist from creating any third-party rights and carrying out any construction in permanent nature on the demised land. According to the Applicants, the obstructionists have made drastic structural changes to Gala No.1 in flagrant violation of the interim order.

**10)** The rival parties led evidence in support of their respective claims in the Obstructionist Notice. By judgment dated 3 November 2018, the Trial Court allowed the Obstructionist Notice in favour of the Plaintiff directing Obstructionists in respect of Gala Nos.1, 2 and 3, to remove themselves and to handover possession thereof to the Plaintiffs with further liberty to the Plaintiffs to demolish the three galas and recover costs of demolition from the Obstructionists. The Trial Court also directed conduct of inquiry into mesne profits under Order XX Rule 12 of the Code.

**11)** Two separate Appeals were filed against judgment and order dated 3 November 2018 passed by the Small Causes Court. Appeal No.27 of 2019 was filed by Respondent Nos.2 and 3 (Tares) in respect of Gala Nos.2 and 3 and Appeal No.28 of 2019 was filed by Respondent Nos.4, 5 and 6 (White Rose Properties and its directors) in respect of Gala No.1. By judgment and order dated 4 May 2022, the Appellate Bench of the Small Causes Court has allowed both the Appeals filed by the Obstructionists and has dismissed the Obstructionists Notice No. 15 of 2006 by setting aside the judgment and order dated 3 November 2018 passed by the Trial Court.

**12)** Aggrieved by the judgment and order dated 4 May 2022 passed by the Appellate Bench of the Small Causes Court, Applicants have filed the present Revision Applications. Revision Application No. 417 of 2022 challenges the order of the Appellate Bench passed in Appeal No. 27 of 2019 filed by Tares in respect of Gala Nos.2 and 3 and Civil

Revision Application No. 418 of 2022 is filed challenging the judgment and order of the Appellate Bench passed in Appeal No. 28 of 2019 filed by White Rose Properties Pvt. Ltd. and its directors in respect of Gala No.1.

### **SUBMISSIONS**

13) Mr. Shah, the learned counsel appearing for the Applicants in Civil Revision Application No.418 of 2022 submits that the Appellate Bench of Small Causes Court has erred in reversing well considered decision of the Trial Court by which the obstructionist notice was allowed and Respondent No. 1 to 4 were directed to be removed from Gallas No. 1 to 3. He submits that the Appellate Bench of the Small Causes Court has committed an egregious error in assuming that there were 15 independent lessees/ tenants in respect of the demised land having independent rights and therefore the consent decree operates as 'surrender of partial tenancy' and is therefore an 'incomplete decree'. That this assumption on the part of the Appellate Court is factually incorrect from plain reading of Indenture dated 6 March 1959 which shows that 15 heirs of Moogatlal had surrendered their rights in respect of the demised land and therefore tenancy was created in respect of only three joint tenants namely Parvatishankar, Madhusudan and Vijaykumar with a specific provision for survivorship of the last survivor of them and the heirs of the last survivor. That admittedly Vijaykumar was the last surviving joint tenant and his heirs, who were Defendant Nos.8 to 11 in the suit (Respondent Nos.7 to 10) were the only persons who were entitled to inherit the leasehold rights in respect of the demised land.

That Respondent Nos.7 to 10 have signed the consent terms dated 29 April 2006. That therefore the very assumption of the Appellate Bench about existence of 15 tenants and termination of tenancy qua the heirs of only one joint tenant (Vijaykumar) is wholly erroneous. That therefore the Appellate Court has erred in holding that the decree was not sufficient in law in putting an end to an indivisible contract of lease in respect of or *qua* the other heirs of Moogatlal or the heirs of Moogatal's deceased heirs. He relies upon judgment of the Apex court in **Suresh Kumar Kohli Versus. Rakesh Jian and another**<sup>1</sup>, in support of his contention that it is not necessary for the landlord to implead all heirs of the deceased tenant. He however submits that all heirs of Vijaykumar were impleaded as party defendants in the suit.

14) Mr. Shah Further submits that none of the heirs of Vijaykumar or other heirs of Moogatlal have challenged the consent decree and that they have accepted the same. That the decree binds obstructionists who have failed to establish any independent right, title or interest in the property leased to the said joint tenants. He submits that the Executing Court cannot go behind the decree between the parties if it is erroneous in law or on fact as it has been held by the Apex Court in **Vasudev Dhanjibhai Modi Versus. Rajabhai Abdul Rehman and Others**<sup>2</sup>.

15) Mr. Shah further submits that the Appellate Bench has come to an erroneous conclusion that the land and the structure were

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1 2018 6 SCC 708

2 AIR 1970 SC 1475

surrendered and by second document dated 6 March 1953 land and tenants were let out to tenants, and that therefore the obstructionists have become lawful sub-tenants of the landlord. That the finding is in the teeth of specific covenants of the lease-deed under which only land was leased out and structure was put up by Moogatlal at his own costs. That the structure belonged to the lessee and not to Moogatlal and that therefore the question of surrender of structure/building to the landlord does not arise. That subject matter of lease was only in respect of open land and not the structure. He relies on judgment of this Court in **Goregaon Malayalee Samaj Versus. Popatlal Prabhudas**<sup>3</sup> in which it has been held that in a lease of open land, the structure constructed by lessee upon termination of lease of open land must be vacated and that there is no protection available to the tenant under Section 15A of the Bombay Rent Act. He submits that the subject matter of the case is covered by the principles of dual ownership as held in the case of **Dinkar S. Vaidya Versus. Ganpat S. Gore**<sup>4</sup> which is followed in **Ramkrishna G. Dode and others Versus. Anand Dovind Kelkar and Others**<sup>5</sup>. He relies on judgment of this Court in **Sanjay Ramchandra Parab Versus. Ashok D. Bhuta**<sup>6</sup> reiterating the said legal position regarding dual ownership. That therefore obstructions do not have any right, title or interest either to the land or the structure.

16) Mr. Shah relies on specific covenant in the 3 lease deeds requiring removal of structures upon expiration of term of lease. That

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3 1988 1 BCR 358

4 1981 Bom.C.R. 431

5 1999 1 Bom CR. 63

6 CRA No. 409 of 2023 decided on 25 July 2025

the first lease was in respect of open land without structure. That the structures were constructed in the year 1948. That since lease has expired in 1979, there was obligation to remove the structures and handover possession of vacant land to the lessors.

17) Mr. Shah submits that since there is no privity of contract between lessors and obstructionists and there was no question of joining them as parties. In support he relies on judgments in Balwant N. Vishwamitra and others Versus. Yadav Sadashiv Mule and others<sup>7</sup>, Rupchand Gupta Versus. Raghuvanshi Pvt. Ltd.<sup>8</sup>, B. Gangadhar Versus. B.G. Rajalingam<sup>9</sup> and Silverline Forum Pvt. Ltd. Versus. Rajiv Trust and Others<sup>10</sup>. That it is settled law that a sub-tenant cannot create further sub-tenancy without the consent and permission of the landlord and relies on judgment in Jay Singh Murarji and others Versus. M/s. Sovani Pvt. Ltd. And Others<sup>11</sup>.

18) Mr. Shah further submits that the case of acceptance of rent by the two joint tenants set up by Respondent Nos.1 to 4 is totally fallacious as rent receipts are not proved. That the Appellate Bench has erroneously framed Issue No.1 by placing entire burden of proof on the decree holder rather than requiring obstructionists to prove existence of independent right to occupy the structures. That it erroneously permitted obstructionists to question validity of decree without proving their independent right, title or interest in the suit property. That no

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7 AIR 2004 SC 4377

8 AIR 1964 SC 1889

9 1995 5 SCC 238

10 1998 3 SCC 723

11 AIR 1973 SC 770

notice was required to be issued under Section 106 of the Transfer of Property Act, 1882 to obstructionists with whom the Plaintiffs had no privity of contract and in support he relies on judgment in **Ganga Dutta Murarka Versus. Kartik Chandra Das and others**<sup>12</sup>. He also relies on judgment in **Virji Nathuram and others Versus. Krishnakumar**<sup>13</sup> in support of his contention that when a decree is sought to be executed in respect of the land which was subject matter of original lease, the status of tenants in the structure on the land is nothing more but of licensees. He submits that Obstructionist No.1 came in possession of Gala No.1 by Deed of Assignment in the year 1994 from alleged sub-tenant-Halimabai Madraswala without the consent of the landlord after expiry of the lease and it is in contravention to Section 15 of the Bombay Rent Act. That there is also specific bar in the third lease for subletting under Clause 1(h). That White Properties Pvt. Ltd. and its Directors have come in possession of Gala No.1 in 2007 by transfer from one Company to another which is also prohibited under Section 15 of the Bombay Rent Act and contrary to the law as declared in **General Radio and Appliances Co. Ltd. And others Versus. M.A. Khader**<sup>14</sup> which is reiterated in **Cox and Kings. Ltd Versus. Chander Malhotra**<sup>15</sup>. Mr. Shah would therefore submit that the obstructionists are bound by consent decree and must vacate the possession of the structures alongwith lessees.

19) Mr. Walawalkar, the learned Senior Advocate appearing for the Applicants in Civil Revision Application No.417 of 2022 would adopt

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12 AIR 1961 SC 1067

13 AIR 1985 Bom 429

14 1986 2 SCC 656

15 1997 2 SCC 687

the submissions of Mr. Shah. Additionally, he would submit that the Appellate Court has erroneously not taken into consideration definition of the term 'tenant' in the third lease deed which included only the last surviving tenant and last surviving heir of the last surviving tenant. He would take me through the dates of death of each joint tenant and their legal heirs to demonstrate that Respondent Nos.7 to 10 were the only last surviving tenants in respect of the leased land and who have validly surrendered the tenancy rights in respect of the land. He submits that the lease was only in respect of the open land and the Appellate Court has erroneously assumed that the same was also in respect of the building.

20) Mr. Khandeparkar, the learned counsel appearing for Respondent Nos. 4 to 6 would oppose the Revision Applications and support the judgment and order passed by the Appellate Bench. He submits that the Appellate Bench has rightly concluded that the lease contemplated constructed structures. That the lessors were aware of presence of sub-tenants in the structures. That consent decree for surrender of lease is faulty. That the decree does not result in valid surrender of leasehold rights and that the obstructionists are the lawful sub-tenants in respect of the structures. He submits that these findings are recorded after due appreciation of evidence on record and that in absence of any element of perversity therein, there is no warrant for interference in the findings recorded by the Appellate Court in exercise of revisionary jurisdiction under Section 115 of the Code.

21) Mr. Khandeparkar, would submit that the very frame of the suit filed by the lessors/landlords/plaintiffs was faulty as the suit proceeds on a footing that the same was in respect of only an open land and was therefore not governed by the provisions of the Maharashtra Rent Control Act,1999. The suit was erroneously instituted under the provisions of Section 41 of the PSCC Act, ignoring the position that there are structures on the land occupied by the Obstructionists. That the plaint itself refers to the structures standing on the property. That Applicant's witness admitted existence of structures during the cross-examination. That the Indenture dated 15 September 1949 specifically refers to the erected structures. That the last Indenture of 6 March 1959 expressly refers to petrol pump, as well as appurtenances. He relies on judgment of the Apex Court in *D.G. Gose and Co. Pvt. Ltd. Versus. State of Kerala and another*<sup>16</sup> in support of the contention that the term 'appurtenances' includes constructed structures as well. He relies on provisions of Section 108(d) of the Transfer of Property Act, 1882 in support of the contention that if any accession is made to the land during continuance of lease, such accession becomes part of the lease. He submits that the plaint proceeds on a fundamentally erroneous basis that the suit was in respect of open land. There is an admission in the plaint that the Defendants in the suit enjoyed protection of Bombay Rent Act after expiry of third Indenture in 1979. Admittedly, at that time,obstructionists, their predecessors in title were in possession of the structures on the leased land. That therefore the protection of the Bombay Rent Act extends to obstructionists as well. That therefore the suit could not have been filed as 'T.E. & R. Suit'. That therefore the

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16 1980 2 SCC 410

decree passed in the suit is a nullity as the same is passed by the Court having no jurisdiction.

22) Mr. Khandeparkar further submits that under Order XXI Rule 97 of the Code, Obstructionists Application is required to be adjudicated. Under Order XXI Rule 97 and 101 of the Code, Obstructionists Application is required to be adjudicated by deciding all questions between the parties to the proceedings which are 'relevant for adjudication of the application'. Therefore even questions regarding validity of the decree and executability can also be decided under Order XXI Rule 97 and 101. He relies on judgment of the Kerala High Court in **Koyakutty Thangal and others Versus. Kavunni Raja**<sup>17</sup> in support of the contention of scope of inquiry in an obstructionists application. He relies on judgment of the Apex Court in **Noorduddin Versus. Dr. K.L. Anand**<sup>18</sup> in which it has held that Order XXI Rule 101 is an efficacious remedy to prevent fraud and miscarriage of justice.

23) Mr. Khandeparkar further submits that his clients claimed tenancy rights in respect of the Shops/Galas through Halimabai Madraswalla who became a deemed tenant as on 1 February 1973. That his clients are assignees in respect of the tenancy rights from Halimabai. He relies on rent receipts in respect of Shop No.1 issued by the joint tenants under the last Indenture dated 6 March 1959. That Applicant's witness has admitted that Defendant Nos.8 to 11 were not even in possession of the suit property at the time of execution of the consent

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17 2014 SCC Online Ker 14819

18 1995 1 SCC 242

decree. That therefore the case involves conspiracy between the Plaintiffs and Defendants to the suit (Respondent Nos.7 to 10) for the purpose of ensuring eviction of the real occupants in the property. That there is also admission of obstructionists being the sub-tenants of Moogatlal in the evidence. That Defendant Nos.2 to 9 in the suit had initially filed Written Statement questioning maintainability of the Suit and specifically contended that provisions of Maharashtra Rent Control Act,1999 apply to the suit property. That the stand was subsequently changed by filing Additional written statement which was affirmed only by Defendant Nos. 2 to 7. That various admissions made by witnesses of Applicants when read conjointly with stand of Defendant Nos.2 to 7, it becomes clear that consent terms are outcome of collusion and fraud between Applicants and those Defendants.

24) Mr. Khandeparkar further submits that the plaint itself admits that Respondent Nos.4 to 6 were in occupation of the suit premises. Yet they were not made parties to the suit. That Respondent Nos.4 to 6 have become lawful subtenants after expiry of the leasehold rights of all the three lease deeds. He relies on judgment of the Apex Court in *Mahabir Prasad Verma Versus. Dr. Surinder Kaur*<sup>19</sup> in support of his contention that once sub-tenant is inducted, lawful possession of such sub-tenant becomes unlawful after expiry of tenancy of the head tenant. He relies on judgment of the Apex Court in *South Asia Industries Private Ltd. Versus. S. Sarup Singh and others*<sup>20</sup> in support of his contention that if sub-tenant is inducted with the consent of the

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19 1982 2 SCC 258

20 AIR 1966 SC 346

landlord, then in eviction suit, such tenant is a necessary party. He also relies on judgment of the Apex Court in **Habibunnisa Begum and others Versus. G.Doraikannu Chettiar and others**<sup>21</sup> in support of the contention that where a contract of tenancy is single indivisible contract and in absence of a statutory provision, the tenancy cannot split.

25) Lastly, Mr. Khandeparkar concludes by submitting that consent terms are entered into before a Court having no jurisdiction, the same are entered between the parties who were not in possession and the consent terms are put into execution to evict parties who are actually in possession. He therefore submits that the entire act of execution of consent terms is a result of collusion and fraud and relies on judgment of the Apex Court in **S.P. Chengalvaraya Naidu Versus. Jagannath and others**<sup>22</sup>. He submits that the decree itself is not executable since there is no lawful compromise between the parties within the meaning of Order XXI Rule 3 of the Code. He accordingly prays for dismissal of the Revision Application.

26) Mr. Savant, the learned counsel appearing for Respondent No.2 in both the Revision Applications (Tare's) also opposes the Revision Applications in addition to adopting the submissions canvassed by Mr. Khandeparkar. Mr. Sawant submits that there is express finding of Obstructionists being lawful sub-tenants of the Plaintiffs/landlords as recorded by the Appellate Court. He further submits that the ratio of the judgments of this Court in **Sanjay Ramchandra Parab** (supra) and of the

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21 2001 (1) SCC 74

22 1994 1 SCC 1

Apex Court in ***Jamnadas Dharamdas Versus. Dr. J. Joseph Farreira and another***<sup>23</sup> cannot apply to the present case since the judgment was not under the provisions of the Bombay Rent Act or Maharashtra Rent Control Act,1999 and the same was filed under Section 41 of the PSCC Act. That the law enunciated in ***Jamnadas Dharamdas*** and ***Sanjay Ramchandra Parab*** applies only when a suit is filed for eviction of statutory rent under the Bombay Rent Act or Maharashtra Rent Control Act,1999 and the decree passed under those legislation's can be enforced against the sub-tenant. That in the present case, the Plaintiff took a calculated risk of filing suit for eviction of lessee only in respect of open piece of land not covering structures or occupants of the structures. That therefore the principle of removal of occupants from structures erected by lessee/tenants cannot be applied to the present case.

27) Mr. Savant further submits that the Trial Court has failed to conduct any inquiry into sub-tenancy created in favour of the predecessor of Respondent No.2 and has proceeded to hold non-existence of independent right only on the basis of covenants of lease-deed dated 6 March 1959. That Respondent No.2 is a protected tenant under Section 15A of the Bombay Rent Act. That in ***Sanjay Ramchandra Parab*** this Court has specifically excluded cases where occupant is otherwise protected by the provisions of the Bombay Rent Act. That there is ample material to prove induction of Mr. Jagannath Tare prior to 1 February 1973. That both Indentures dated 15 September 1949 and 6 March 1959 clearly recorded existence of structures and therefore it cannot be contended that the lease was granted only in respect of the

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23 1980 3 SCC 569

vacant land. That the decree is not binding on sub-tenants and is otherwise a nullity.

**28)** Ms. Azmi has appeared on behalf of Respondent Nos.7 to 10 (heirs of original lessee) and the Defendants, who have signed the consent terms. She has submitted to the jurisdiction of this Court. Ms. Almeida, the learned Counsel appearing for Respondent No.1 has not canvassed any independent submissions.

### **REASONS AND ANALYSIS**

**29)** The issue which arose before the Trial and the Appellate Courts, and which again arises for consideration before this Court, is whether Respondent Nos.1 to 6, who have obstructed execution of the decree, have any independent rights in respect of Galas No.1 to 3 or whether they ought to be removed from those Galas with vacation of possession of the demised land by the tenants/lessees. Another issue for consideration, to which the Appellate Court has given much importance, is whether the decree is defective or inexecutable.

**30)** The Applicants are the owners of the demised land situated at a very prominent location at Bandra, Mumbai. The predecessor-in-title of the Applicants initially leased out the land in favour of Moogatlal by the first Indenture executed on 23 August 1934 for a tenure of 5 years and 5 months commencing from 1 March 1934 and ending on 31 July 1939. The lease was in respect of only open portion of land with a clear prohibition on erection of any structure thereon except after obtaining

necessary permission from the Collector and the Municipality. Under Clauses-5 and 6 of the first Indenture, Moogatlal agreed to deliver to the Lessors, vacant possession of the land by removing the constructed structures. It appears that in the year 1948, Moogatlal set up a petrol pump in the demised land and also constructed three temporary structures bearing Gala Nos.1, 2 and 3. He inducted Halimabai Madraswala in Gala No.1 for carrying out motor garage business. Gala Nos.2 and 3 were given to Jagannath Tare. On 15 September 1949, Lessors executed second Indenture in favour of Moogatlal granting lease for a period of 15 years from 1 June 1949 to 31 May 1964. This time, the second Indenture noticed construction of structures by Moogatlal after securing permission of Collector and Municipality. However, Moogatlal agreed to remove the said structure upon expiration of the lease and to hand back possession of vacant open land to the lessors. He was specifically prohibited in clause-8 from assigning, underletting or parting with possession of the demised premises or any building or structure thereon without the consent of the landlord. It would be apposite to reproduce second recital to the Indenture dated 15 September 1949 which reads thus:

(8) Not to assign underlet or part with the possession of the demised premises and/or any building or structure thereon or any part thereof without the consent of the Landlord in writing previously had and obtained provided that this covenant not to assign underlet or part with the possession of the demised premises and/or the buildings or structures thereon shall not prohibit the letting of any building or structure thereon or any part thereof (so long as such letting does not create any other interest in the demised premises or any building or structure thereon or any part thereof) to tenant on monthly tenancy;

(9) To keep the Landlord indemnified against all loss which he may suffer and all claims and demands which may be made against the Landlord by reason of anything done or omitted or permitted to be done by the Tenant in regard to the demised premises or any building or any structure thereon.

(10) Before the expiration of the term hereby created to remove the buildings and structures on the demised premises and at the expiration of the said term to yield up to the Land-lord the demised premises in the same condition in which it was at the time it was first let to him.

31) It appears that Moogatlal passed away before expiration of second lease dated 15 September 1949 and there were 15 legal heirs who inherited the leasehold rights. All the 15 legal heirs of Moogatlal executed the third Indenture dated 6 March 1959 and surrendered the leasehold rights in the land in favour of the lessors. By the same document, a fresh lease was executed by lessors in favour of only three legal heirs of Moogatlal i.e. Parvatishankar Moogatlal Bhat, Madhusudan Moogatlal Bhat and Vijaykumar Moogatlal Bhat for a tenure of 20 years. Thus, Parvatishankar, Madhusudan and Vjaykumar were the only three persons, who became tenants in respect of the demised land. The expression 'tenant' was defined under the Indenture dated 6 March 1959 as under:

Hereinafter to as the **Tenants** (which expression unless inconsistent with the context or meaning thereof shall be deemed to include **the survivors and lest survivor of them and the heirs executors and administrators of such last survivor** and their and his permitted assigns) of the Fourth Part.

*(emphasis added)*

32) The Indenture dated 6 March 1959, made a reference to the earlier Indenture dated 15 September 1949 and one of the recitals was as under:

AND WHEREAS by an Indenture of Lease dated 15th day of September 1949 made between the Landlord of the one part and the said Moogatlal in his own right of the other part and registered with the Sub-Registrar of Bandra under No.896 of Book No.1 on the 15 day of December 1949 the Landlord demised unto the said Moogatlal the land more particularly described in the Schedule thereunder written and hereinafter referred to as the said land with the appurtenances thereto for a term of 15 years from the 1st June 1949 to 31st May 1964 on a monthly rent of Rs.55 and on the other terms covenants and conditions therein mentioned And Whereas the said Moogatlal erected structure on the said land used as Petrol Pump now assessed by the Bombay Municipal Corporation under Ward No.H-5196 Street No.47B, Ghod Bunder Road

33) By Indenture dated 6 March 1959, surrendering of leasehold rights by 15 heirs of Moogatlal is recorded as under:

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the Lease hereinafter granted to the tenants the heirs of Moogatlal **do hereby surrender** and the administrator at the request and direction of the heirs of Moogatlal doth hereby confirm unto the Landlord ALL AND SINGULAR the land more particularly described in the Schedule hereunder written and other the premises comprised in and demised by the said Indenture of Lease dated the 15th day of September 1949 and all and singular the appurtenances thereto belonging AND ALL THE ESTATE right title interest claim and demand whatsoever of the heirs of Moogatlal and the administrator in to out of or upon the said premises TO THE INTENT that the residue of the said term of 15 years created by the said indenture of Lease dated the 15<sup>th</sup> day of September 1949 and all other estate and interest of the heirs of Moogatlal and the administrator in the said land and premises under or by virtue of the said Indenture may be merged and for ever extinguished in the reversion and inheritance of the said land and premises and the heirs of Moogatlal do hereby respectively covenant with the Landlord that notwithstanding any act deed or thing by them done or executed or knowingly suffered to the contrary they the tenants now have good right to **surrender** the said land and premises unto the Landlord in the manner aforesaid AND THAT **landlord shall and may at all times hereafter peaceably and quietly possess and enjoy the said land** and premises and receive the rents and profits thereof **without any lawful eviction claim or demand whatsoever from or by the heirs of Moogatlal** or any person or persons lawfully or equitably claiming from under or in trust for him or them or any of them AND THAT free from all encumbrances

whatsoever made occasioned or suffered by them or by any person or persons lawfully or equitably claiming as aforesaid.

*(emphasis added)*

**34)** Thus, under Indenture dated 6 March 1959, all the legal heirs of Moogatlal first surrendered the leasehold rights in the demised land. They did not continue to be the lessees in respect of the demised land on account of express surrender made by them by virtue of registered deed dated 6 March 1959. By the same document dated 6 March 1959, the lessors made new tenancy in favour of Parvatishankar, Madhusudan and Vijaykumar by recording in the Indenture as under:

AND THIS INDENTURE FURTHER WITNESSETH that in consideration of the above-mentioned surrender the Landlord doth hereby demise unto the tenants ALL THAT piece or parcel of land on Ghod Bunder Road, at Bandra being Final Plot No.650 of the Bandra Town Planning Scheme-III admeasuring about 450 square yards and more particularly described in the Schedule hereunder written and hereinafter referred to as the said land with the appertances thereto belonging except and reserved unto the Landlord all mines, minerals, earth, clay, gravel and sand in and upon the demised premises TO HOLD unto the Tenants for a term of 20 years on and from the 1st day of January 1959.

**35)** Clause-1(h) of the Indenture dated 6 March 1959 imposed restriction on subletting by stipulating as under:

(h) not to assign underlet or part with the possession of the demised premises and/or any building or structure thereon or any part thereof without the consent of the Landlord in writing previously had and obtained provided that this covenant not to assign under let or part with the possession of the demised premises and/or the buildings or structures thereon shall not prohibit the letting of any building or structure thereon or any part thereof (so long as such letting does not create any other interest in the demised premises or any building or structure thereon or any part thereof) to a tenant on monthly tenancy;

**36)** Under Clause-1(j), Parvatishankar, Madhusudan and Vijaykumar agreed to remove all buildings and structures before expiration of term of lease as under:

(j) before the expiration of the term hereby created to remove the buildings and structures for the time being on the said land and at the expiration of the said term to yield up to the Landlord the said land vacant and in in the same condition in which it was at the time it was first let to the said Moogatlal filled and properly levelled to road level;

**37)** The Schedule of Indenture dated 6 March 1959 is as under :

ALL THAT piece or parcel of land or ground admeasuring 450 square yards being Final Plot 650 of Bandra Town Planning Scheme-III lying being and situate on Ghodbunder Road in Bandra in the registration Sub-District of Bandra in the Bombay Suburban District.

**38)** After expiration of tenure of the third Indenture on 5 March 1979, the three lessees namely, Parvatishankar, Madhusudan and Vijaykumar apparently acquired the status of protected tenants under the Bombay Rent Act, which also applied to vacant lands. However, under the Indenture dated 6 March 1959, it was expressly agreed that tenants would only include the last survivor of Parvatishankar, Madhusudan and Vijaykumar, as well as heirs, executors and administrators of such last survivor or their permitted assignees. Madhusudan passed away on 3 July 1986, Parvatishankar passed away on 31 May 1995. This left only Vijaykumar as the last surviving tenant in terms of Indenture dated 6 March 1959 and he became the sole tenant. Vijaykumar passed away on 10 January 1996. Vijaykumar had total five legal heirs at the time of his death viz Mukta (Wife), Manjiri, Sona and Mala (daughters) and Parag (Son). Parag had already passed away on 23

August 1985. Thus, Mukta, Manjiri, Sona and Mala became the last surviving tenants in respect of the demised land.

**39)** Since Mukta, Manjiri, Sona and Mala remained protected tenants under the Bombay Rent Act and therefore, it appears that the lessors did not file suit under Section 41 of the PSCC Act for ejection of those lessees, who remained in possession of the demised land even after expiration of tenure of lease. After coming into force of the Maharashtra Rent Control Act, 1999 protection in respect of the tenancies of vacant lands was not continued and provisions of Maharashtra Rent Control Act, 1999 did not apply to tenancies of open lands. After loss of protection of Rent Act in respect of the suit land, the owners instituted T.E. & R. Suit No. 66 of 2002 for ejection of the lessees under Section 41 of the PSCC Act. The suit was instituted against 11 Defendants, which apparently included several legal heirs of Moogatlal. Defendant No.1 to the suit was Moogatlal's wife Jailaxmi. Defendant No.2 to the suit is son of Madhusudan (Ashok). Defendant No.3 was daughter of another son of Moogatlal named, Shantooram. Defendant No.4 was Shakuntala (wife of Madhusudan). Defendant Nos.5 to 7 were the three sons of Madhusudan named, Jitendra, Hemendera and Mukesh. Defendant Nos.8 to 11 were legal heirs of Vijaykumar.

**40)** It appears that Moogatlal's wife-Jailaxmi passed away during pendency of the suit. Defendant Nos.2 to 7, who had initially opposed the suit by filing written statement, filed additional written statement pleading that they did not have any right, title or interest in

respect of the suit premises. They pleaded in the additional written Statement that they were not tenants of the suit premises nor were occupying the same. They relied on definition of the term 'tenants' in the last Indenture dated 6 March 1959 to contend that only the last surviving tenant and legal heirs of the last surviving tenant could fit into definition of the said term. Since Vijaykumar was the last surviving tenant, only legal heirs of Vijaykumar remained tenants in respect of the demised land. In my view, the stand taken by Defendant Nos.2 to 7 was in accordance with the contractual stipulations under the Indenture dated 6 March 1959. This is not a case involving any collusion between Plaintiffs and Defendant Nos.2 to 7. If Defendant Nos.2 to 7 were to claim any rights in respect of the suit property, they would have incurred liability to pay mesne profits in the event of passing of decree for ejectment. Defendant Nos.2 to 7 rightly did not claim any rights in the demised land by filing additional written statement.

41) Thus, the tenancy in the demised land was claimed only by Defendant Nos. 8 to 11, who were the legal heirs of the last surviving tenant-Vijaykumar. Vijaykumar also had a son named, Parag who had passed away on 23 August 1985 and therefore there was no question of his impleadment. Vijaykumar's wife, Mukta and children, Manjiri, Mala and Sona were impleaded as Defendant Nos.8 to 11 to the suit. Defendant Nos.8 to 11 executed Consent Terms with the Plaintiffs on 29 April 2006. Under the Consent Terms they accepted termination of tenancy and agreed for passing of decree for ejectment subject to the condition of Plaintiffs not claiming any mesne profits from them. In view

of the Consent Terms dated 29 April 2006, Small Causes Court passed order dated 6 May 2006 decreeing the suit in view of the Consent Terms.

42) It is contended by the Obstructionists that the suit was collusive in nature and that the same was compromised in an illegal manner. It is contended that the suit was filed deliberately against the persons not in occupation of the suit property and Defendant Nos.8 to 11 had no authority in law to surrender tenancy rights. I am not inclined to accept these submissions for following reasons:

- (i) *Firstly*, the obstructionists attempted to expand the scope of enquiry under Order XXI Rules 97 and 101 of the Code by virtually questioning the correctness of the decree. In those proceedings the Executing Court deciding the Obstructionist Notice has a limited remit of inquiry to conduct, which is mainly about existence of independent right of the obstructionist to occupy the property. The Court cannot really expand the scope of its inquiry and examine validity of decree sought to be executed. In an obstructionist notice, the Executing Court is not ordinarily suppose to enter into the realm of merits of the decree. In a case like present one, the inquiry under Order XXI Rule 97 and 101 would yield positive outcome for obstructionists only if they can demonstrate independent right in respect of the property in question.
- (ii) *Secondly* even if it is assumed *arguendo* that the Executing Court can determine validity of decree in obstructionist proceedings, it is seen that the Suit was rightly filed only

against the lessees/tenants without impleadment of obstructionists. The tenancy/lease was created only in respect of the vacant land and not in respect of the constructed structures. (*This is discussed in greater details in latter part of the judgment*). The Obstructionists were therefore not necessary or even proper parties. The Suit was thus not collusive. It was genuinely filed for recovery of possession from the lessees who had contractual obligation to demolish the constructed structures and hand back vacant possession of the demised land.

- (iii) *Thirdly* the compromise is lawful one within the meaning of Order XXIII Rule 3 of the CPC. In a suit filed against the lessees for ejection, it is lawful for the lessees to vacate possession by entering into consent terms. The Suit was filed in the year 2002, after protection of Bombay Rent Act ended in the year 1999, and was compromised by filing consent terms on 29 April 2006. It is thus a lawful compromise.
- (iv) *Fourthly*, it cannot be concluded in the facts and circumstances of the present case that Defendant Nos.8 to 11 have acted illegally or in collusive manner. As observed above, Plaintiffs had unnecessarily impleaded all the legal heirs of Moogatlal though the tenancy had survived only in favour of the last surviving tenant being Vijaykumar, and after his death, in favour of his legal heirs. Madhusudan or Parvatishankar or their heirs did not have any tenancy rights in the demised land. Parvatishankar had already passed away issueless on 31 May

1995. Moogatlal's son-Shantooram was not a tenant under the Indenture dated 6 March 1959. Madhusudan's legal heirs, Defendant Nos.2, 4 to 7 had not inherited the tenancy rights as per the stipulations of the Indenture dated 6 March 1959. They rightly gave up claim in the demised land by filing the additional written statement. Heirs of Vijaykumar (Defendant Nos.8 to 11), who were the lessees, gave up tenancy claims in the demised land by entering into consent terms. Entering into consent terms by Defendant Nos.8 to 11 needs to be understood in the context of provisions of Maharashtra Rent Control Act,1999 which no longer applies to vacant lands. Irrespective of contention of Obstructionists that there were structures on the land at the time of execution of Indenture dated 6 March 1959, it was the responsibility of the lessees to remove the structures constructed on the demised land upon expiry of the lease. Not only the Indenture spoke of creation of lease in respect of only vacant land, but both Plaintiffs, as well as lessees (Defendant Nos.8 to 11) understood it to mean creation of lease only in respect of vacant land to which provisions of Maharashtra Rent Control Act,1999 did not apply. Defendant Nos.8 to 11 thus carried the risk of occupying the suit property (*either by themselves or through obstructionists*) and to pay mesne profits in respect of the land in the event of passing of decree for ejection. Considering the time taken for decision of suits before the Small Causes Courts at Mumbai, as well as location of the land at prime spot in Bandra at Mumbai, in my

view, Defendant Nos.8 to 11 rightly used the common and commercial sense and consented for passing of ejectment decree on condition of Plaintiff not claiming any mesne profits. If Defendant Nos. 8 to 11 were to continue contesting the suit, such an act had the potential risk of incurring of liability to pay mesne profits running into crores of rupees. It therefore cannot be contended that the act of Defendant Nos. 2 to 7 in giving up tenancy claims and of Defendant Nos.8 to 11 in filing the consent terms is an act of fraud or collusion. The compromise therefore cannot be treated as unlawful in any manner.

- (v) *Fifthly* the contention of obstructionists that the suit was deliberately filed against Defendants who were not in actual physical possession is without substance. The lessors-Plaintiffs had no privity of contract with the obstructionists. The lease was created in favour of Moogatlal, who operated a Petrol Pump on the demised land and had constructed three sheds/*galas* possibly for auxiliary services such as tyre shop, garage, etc. How such small *galas* can occupy the whole of the land after discontinuation of Petrol Pump is difficult to comprehend. Mr. Shah has alleged gross encroachments by the obstructionists over open plot. He has contended that Gala No. 1, there are unauthorised transfers and what stands at the site is a swanky showroom. Be that as it may. That issue is raised in the separate proceedings pending before this Court. From the contention raised on behalf of the obstructionists, it is apparent that the entire plot is occupied by them. The case thus

involves, induction by the lessee of third persons in small structures for providing auxiliary services and such third persons preventing the owners of land from enjoying the same even after the lessee has surrendered possession of the land. In my view, there was no need to implead the Respondents as party Defendants to the suit. In any case, the alleged right of occupation of the structures has been adjudicated in the inquiry under Section 101, which is akin to an inquiry in the suit.

**43)** Now I proceed to examine the manner in which the Trial and Appellate Courts have dealt with the matter. The Trial Court had made the Obstructionists Notice absolute by judgment and order dated 3 November 2018. The Trial Court held that there was no privity of contract between Plaintiffs and Obstructionists in respect of 3 galas. The Trial Court further held that obstructionists could not prove any independent right to occupy the three galas and that since they were inducted by the tenants, they were under obligation to remove themselves after passing of ejectment decree against the tenants.

**44)** The Appellate Court has however reversed the decree passed by the Trial Court. Perusal of the judgment of the Appellate Court would indicate that the same proceeds on a fundamentally erroneous assumption that the tenancy subsisted in favour of 15 legal heirs of Moogatlal and that the decree was passed only against some of the tenants and not against all. This is clear from following findings recorded by the Appellate Bench of the Small Causes Court:

13. This point goes to roots of this matter. The decree is not against any of the obstructionist. **Decree is against only a few of tenants of land.** It is a cardinal principle of Rent Act that, if there are more than one tenant, tenancy of all the tenants should come to an end. There is another fundamental rule of tenancy that tenancy comes to an end only by way of legitimate recognized modes of termination, that is to say, by decree of Court, by surrender or by forfeiture followed by decree for possession.

16. **If the exact wordings of second lease deed dated 6/3/1959 are read, there are 15 independent lessees, who are co-tenants of land simultaneously, having independent tenancy rights.** All of them belongs to one family is just incidental. So far as their rights are concerned, each of the tenant has independent tenancy right, and law expects termination of right of each of the tenant.

18. If the names of tenants are compared with defendants, following picture emerges. (Lessee No. 1 to 15 are referred to as number given against their respective names in paragraph No. 4 of this judgment).

i. Jaylakshmi w/o Moogatlal is lessee No. 1; she is not party to the suit after her death. Her tenancy right devolves upon all her legal heirs and just deleting her name will not serve purpose unless all her legal heirs on whom her tenancy right devolves surrenders their tenancy right. Her legal representatives were then necessary party to the suit.

ii. Parvatishankar s/o. Moogatlal is lessee No. 2; he is not party to the suit.

iii. Vijaykumar s/o Moogatlal is lessee No. 4; he is not party to the suit. He died prior to the suit. But his widow is defendant No. 8 to the suit. She has surrendered her right, which she inherited after Vijaykumar. But, Vijaykumar's entire tenancy rights will not devolve upon his widow. He has one son Parag (lessee No. 13) and two daughters viz. Mala (defendant No. 10) and Malini (lessee No. 10). The third daughter who has compromised the suit appears to have born subsequent to the lease deed dated 6/3/1959. His widow and three daughters surrendered their rights but tenancy right which Parag Viajaykumar received by inheritance prior to date of suit (on death of Vijaykumar) has not been surrendered. Likewise the right of Parag. which he holds as lessee No. 13 has not been surrendered.

iv. Madhusudan (lessee No. 3), his children Hemendra Madhusudan (lessee No. 5), Ashok Madhusudan (lessee No. 6), Jitendra Madhusudan (lessee No. 7), Kirti Madhusudan (lessee No. 9), Malini Madhusudan (lessee No. 10), Jitiksha Madhusudan (lessee No. 11) and Kalpana Madhusudan (lessee No. 12). Neither of them is party to the suit, nor they have surrendered their tenancy rights.

v. The defendants No. 1 to 9 were deleted from array of defendants. Ashok Moogatlal (defendant No. 2), Nutan S. Bhat (Defendant No. 3), Shakuntala M. Bhat (defendant No. 4), Jitendra M. Bhat (Defendant No. 5), Hemendra M. Bhat (Defendant No. 6) and Mukesh M. Bhat (Defendant No. 7) were parties to suit. But point to be noted is that these defendants No. 2 to 4 were not parties to the lease deed. Those were improperly made parties. Therefore, defendants No. 2 to 4, being as defendant or not being there on deletion won't made any difference to the merits of the suit.

**19. To be precise, there were 15 tenants of land.** Out of them, Smt. Jayalaxmi (defendant No. 1) died and Mala Vijaykumar (defendant No. 10) surrendered tenancy absolutely. Manjiri Varde Defendant No. 9) and Sona Rajiv Kapadiya (Defendant No. 11) are daughters of late Vijaykumar Moogatlal Bhat. Out of 14, tenancy is surrendered by 3 i.e. defendant No. 9 to 11 as defendant No. 8 is not tenant in her own right, still tenancy of nine tenants remains with them. Likewise, tenancy of Jaylakshmi (tenant No. 2) and Vijaykumar (tenant No. 4) remains in part as all the legal heirs have not surrendered the tenancy rights which is transmitted on them.

21. The proposition is simple. On perusal of only two documents i.e. consent decree dated 6/5/2006 and Lease deed dated 6/3/1959 (Exhibit No. 93 in suit). **This can be understood by any man of ordinary prudence that consent decree is valid surrender of tenancy to the extent of (partial) tenancy of the signatory to consent terms. Obviously, the tenancy rights of all other parties to lease deed dated 6/3/1959 (Exhibit No. 93) still remains with them** and they all are unaware of this T.E. & R. Suit No. 66 of 2022 as well as consent decree and these subsequent proceedings for simple reasons that the plaintiff choose to not to make them party. Only branch of Late Vijaykumar signed Consent Decree. Four signatory to consent terms are widow and three daughters of Vijaykumar Moogatlal Bhat. **His son Parag Vijaykumar Bhat has not surrendered his tenancy.**

23. Decree of possession of land on termination of lease can be enforced as a whole or it cannot be executed. **Considering the limited**

**surrender of three tenants out of 14 tenants, it is valid decree to the extent of surrender of tenancy rights of signatory individuals. However, it is not a decree which can be executed to take possession of the suit land. Unless there is decree against all the tenants or their legal heirs, it cannot be an executable decree. Consent binds only the signatory. For rest 11 out of 14 tenants, the landlord should get a separate decree and only thereafter both the decrees can be executed as once and not otherwise.**

24. A specific query was put to learned advocate for plaintiff/decree holder as to how it can be executed unless all the tenants signs consent decree, to which learned advocate replied that there is indemnity clause where the signatory to consent decree has undertaken to Court to indemnify other tenants if any problem arises.

45) Thus, the Appellate Court has proceeded on a fundamental erroneous assumption that the Indenture dated 6 March 1959 created tenancy in favour of 15 tenants and that the surrender was made only by 3 tenants. The above findings recorded by the Appellate Bench are perverse to the core and depicts misreading on the part of the Appellate Court of the third Indenture dated 6 March 1959, which created tenancy only in favour of three persons, namely Parvatishankar, Madhusudan and Vijaykumar. It read only the names of 15 heirs on the Indenture without bothering to read what those 15 heirs did by signing the Indenture. Their names appear in the Indenture not for creation of any rights in their favour but only for recording of an act by them of surrender of rights in the land. The Appellate Court however has erroneously assumed that the 15 persons named in the Indenture dated 6 March 1959 became tenants of the demised land. The Appellate Bench did not even bother to read contents of Indenture dated 6 March 1959 which had the effect of surrender of tenancy by the 15 heirs of Moogatlal and creation of tenancy in favour of only 3 tenants. The finding of the Appellate Court in

para-16 of the Judgment that '*if the exact words of second lease deed dated 6 March 1959 are read, there are 15 independent lessees, who are co-tenants of land simultaneously*' is so egregiously perverse that even Mr. Khandepakar has not made any attempt to support the same. He fairly admits the error on the part of the Appellate Court in assuming that tenancy was created in favour of 15 lessees by Indenture date 6 March 1959.

**46)** It would also be necessary to take note of few more perverse findings recorded by the Appellate Court. In para-21 of the judgment, the Appellate Court has held that '*His son, Parag Vijaykumar Bhat has not surrendered his tenancy*'. This finding is perverse and is recorded in ignorance of the fact that Parag Vijaykumar Bhat had passed away on 23 August 1985. In para-18 of its judgment the Appellate Court has analysed as to how the suit filed was flawed on account of non-impleadment of all the lessees. Again, this analysis is premised on a fundamental erroneous assumption that the tenancy was created in favour of 15 tenants (heirs of Moogatlal). This is clear from the overarching finding recorded in opening part of Para 18 before commencing the analysis that '*If the names of tenants are compared with defendants, following picture emerges. (Lessee No. 1 to 15 are referred to as number given against their respective names in paragraph No. 4 of this judgment)*'. Thus, the Appellate Court's analysis in clauses (i) and (v) of Para 18 is premised on fundamentally wrong assumption that tenancy was created in favour of 15 tenants by the Indenture dated 6 March 1959.

**47)** This is how the impugned judgment of the Appellate Court is replete with numerous errors. The Appellate Court has dismissed the Obstructionist Notice by allowing the Appeals filed by the Obstructionists on a fundamentally flawed foundation that the decree was not validly passed as surrender was only by 3 out of the 15 tenants. The entire judgment is built upon by the Appellate Court on this fundamentally flawed assumption. Since the basic assumption itself is defective, the entire judgment is rendered grossly erroneous and the same is liable to be set aside only on this ground. In fact, this is the reason why attempts were made on behalf of the obstructionist towards the end of the hearing for seeking remand of the Appeals for fresh decision. Though remand of the Appeals for fresh decision could have been an easy course of action for this Court, I am not inclined to adopt the said course of action since the Appellate Court has walked a step ahead and has also recorded findings on independent rights of the obstructionists. Also, obstructionists have been resisting the execution of the decree for the last 20 long years, and an order of remand would obviously enure to their benefit by continuing to occupy the structures. Since findings are recorded both by the Trial and the Appellate Courts on right of the obstructionists to occupy the structures, it is appropriate that this Court determines correctness of those findings.

**48)** Now I proceed to examine the issue of establishment of independent right by the obstructionists to occupy the structures constructed on the demised land. It is sought to be contended by Respondent Nos.4 to 6 that the Executing Court is bound to decide all the issues that are relevant for adjudication of the application under

Order XXI Rule 101 of the Code. This submission is canvassed essentially to support the exercise undertaken by the Appellate Court for determining validity of compromise decree under Rule 97 of Order XXI. If execution of decree is obstructed by any person in possession of the property, the decree holder can make an application to the Executing Court complaining of such obstruction. Rule 101 of Order XXI deals with questions to be determined by the Executing Court in Obstructionist Notice and provides thus:

**101. Question to be determined—**

All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Bombay.-In Order XXI, in rule 101, insert the following proviso, namely:-

"Provided that when the Court is not competent to decide such question due to want of pecuniary jurisdiction the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge, shall deal with it in the same manner as if the case had been originally instituted in that Court."

49) Thus, under Rule 101 of Order XXI, the Executing Court can decide 'all questions' including the question relating to right, title or interest of the Obstructionist in the property and the one which are relevant to the adjudication of the application and that the same cannot be adjudicated by a separate suit. Thus, every question relating to right, title or interest in the property arising between the parties to

Obstructionist Notice, but which are relevant to the adjudication of the application are to be determined by the Executing Court itself. This would essentially mean that if a question relating to right, title or interest to the property between an obstructionist and decree holder arises in application filed under Order XXI Rule 97, the same has to be decided by the Executing Court and cannot be left open to be decided in a separate suit. This essentially means that if obstructionist can prove his title to the land in respect of which decree for possession is secured, the Executing Court can decide the said issue relating to title. Similarly, if obstructionist can prove his right to occupy the property (without title), that right can also be determined by the Executing Court under Rules 97 and 101 of Order XXI.

50) This would not necessarily mean that in an inquiry under Rule 101, the Executing Court can also determine the issue of right, title or interest between the decree holder and defendant in the suit. Use of the words '*arising between the parties to a proceeding on application under Rule 97 or 99*' and more particularly the words '*and relevant to the adjudication of the application*' would mean that only such questions that are relevant to adjudication of Obstructionist Notice can be decided by the Executing Court, which may not necessarily mean the right, title or interest between the Plaintiff and Defendant. Only the questions relevant to adjudication of the 'application' filed under Rule 97 or 99 can be determined by the Executing Court. Rule 101 does not confer power on the Executing Court to reopen the decree and redetermine the issues answered between the parties to the suit while deciding the same. Since

obstructionist is not heard while deciding the suit, only the questions relating to right, title or interest in the property ‘*arising between the parties to a proceeding on an application under rule 97 or rule 99*’ and the ones that are relevant to the adjudication of the ‘*application*’ can be decided in inquiry under Rule 101 of Order XXI. Thus, the question of right, title or interest in the property must be germane to the ‘objection application’ filed under Rule 97 of Order XXI. The questions which are germane to decision of ‘suit’ cannot be reopened in inquiry under Rule 101. The real objective behind Rule 101 is to prevent multiplicity of litigation. It provides for remedy for determination of questions between decree holder and third parties. It ensures that questions of title or interest of third parties need not be determined in a separate suit and can be determined in Rule 101 inquiry itself. The Executing Court cannot hold that the obstructionist must secure declaration of title or entitlement of possession from another Court and must determine that issue in Rule 101 inquiry. However, this would not mean that Rule 101 is aimed at reopening the inquiry in the Suit between Plaintiff and Defendant and redetermination of issues that are already decided in the suit. Rule 101 envisages adjudication of disputes between decree holder and third parties.

51) In support of the contention that the Executing Court can decide the issue of validity of compromise executed between the Plaintiff and Defendants to the Suit, Mr. Khandeparkar has relied on judgment of Kerala High Court in ***Koyakutty Thangal*** (supra) in which it has held in paras-69 and 70 as under :

69. Regarding the burden of proof relating to obstructions, divergent views have been expressed in similar matters. One view is that the burden is entirely on the obstructionist for a determination of his right, title or interest to be adjudicated. Another view is that, the decree-holder, even though he is clothed with a decree which is not inter parties, cannot be absolved from his burden to prove his right or title over the property. When the obstructionists are capable of showing that they have some rights, title or interest over the immovable properties, which are to be adjudicated within the meaning of Order XXI Rule 101 CPC, it cannot be said that the decree-holders, who are clothed with a decree which is not inter parties, have no burden in the matter. An adjudication under the complete code contained in Order XXI Rule 97 and the related provisions is admittedly in the form of a suit and the determination through such an adjudication has the effect of a decree within the meaning of Order XXI Rule 103 of the Code. In such case, this Court is of the view that an obstructionist has even the right to challenge the title of the decree-holder also. Further, such an obstructionist has the right even to challenge the executability or otherwise of the decree. If by any means, the decree has become inexecutable, it cannot be said that an obstructionist cannot raise such a question. He can validly challenge the executability of the decree

70. A decree-holder cannot always rest in an arm chair by possessing a decree by saying that he has got title, even when the decree contains it. Article 129 of the Limitation Act specifies the period of limitation for filing an application for possession after removing resistance or obstruction to delivery of possession of immovable property, as 30 days. When the law says that such an application is for possession, it involves an adjudication of his right to possession. When it has to be considered as a suit, it cannot be said that such an applicant has no burden at all.

52) The judgment in *Koyakutty Thangal* does not assist the case of the obstructionists in contending that the Executing Court can also decide the issue of validity of compromise decree made between the Plaintiffs and Defendant Nos.8 to 11. It is held by the Kerala High Court in *Koyakutty Thangal* that when obstructionists are capable of showing that they have specific right, title or interest over the property, it cannot be said that the decree holders have no burden in the matter to prove his right, title or interest and that obstructionist can also challenge title of

the decree holder. The Kerala High Court has further held that a decree holder cannot always rest in an arm chair by possessing a decree representing that he has certificate of title. I am in respectful agreement with the view expressed by the Kerala High Court. To illustrate, if Plaintiff secures a decree against the Defendant-Vendor for specific performance and as a result of such decree, seeks to remove another person in possession through execution and such person in possession sets up a case of title of having purchased the property much before execution of agreement of sale-deed in favour of plaintiff, the Plaintiff cannot rely upon mere decree and obstructionist is entitled to challenge Plaintiff's title over the property. However, this principle does not mean that an obstructionist, who merely claims possessory right in respect of the structures on demised land, can question validity of ejectment decree passed against lessee who inducted them.

53) If an obstructionist claims possession through lessee, he will have to necessarily remove himself with ejectment decree passed against the lessee. On the other hand, if obstructionist is in a position to claim independent right to occupy the structure, he needs to establish that right rather than questioning the legality of ejectment decree passed against the lessee who inducted him. This means that if a tenant inducts sub-tenant without the consent of the landlord, but that sub-tenant has a statutory right/protection from being removed, he can obstruct execution of decree passed against the tenant by establishing his independent statutory right to occupy the property. In such a case, it is not necessary for a sub-tenant, who has statutory right to occupy the

property, to question legality of ejection decree passed against the head tenant. In an inquiry under Order XXI Rule 101, such obstructionist can prove his statutory right to occupy the property and defeat execution of the decree, instead of filing a separate suit.

54) Reliance is also placed on behalf of obstructionists on judgment of the Apex Court in *Nooruddin* (supra) in which it is held that the provision under Order XXI Rule 101 of the Code is an efficacious remedy to prevent fraud and miscarriage of justice. Again, there can be no dispute in respect of the proposition enunciated by the Apex Court in *Nooruddin*. However, the Apex Court has held that person presenting obstruction must establish independent right than that of judgment debtor. The independent right must be own right of the obstructionist to possess the property. Therefore, even as per the judgment of the Apex Court in *Nooruddin* it was incumbent for the Obstructionists to establish their independent right to occupy the three Galas on the demised land in the inquiry under Rules 91 and 101 of Order XXI of the Code. They unnecessarily made an attempt before the Trial and the Appellate Courts, and which attempt is also repeated before me, in poking holes in the manner in which the Suit was filed and the manner in which the same is compromised. May be the obstructionists could question their own non-impleadment to the suit and to this limited extent, they could have raised issues relating to the manner of filing and compromising the suit. However, they cannot question validity of the decree on the ground that all the Defendants in the suit had tenancy rights and only few of them surrendered the same. Once some of the Defendants admit that they are not the tenants and the rest of Defendants, claiming tenancy,

surrender the possession of the demised land, obstructionists cannot seek to establish in Rule 101 of Order XXI inquiry that each and every Defendant had tenancy rights and some of them could not have filed additional written statement giving up claim of tenancy. Also, the Executing Court could not have gone into the issue of validity of surrender of tenancy rights by finding out who all were the tenants, etc in the inquiry under Rule 101 of Order XXI.

55) It must be noted that the other heirs of Moogatlal have not questioned the manner in which the suit is compromised. They do not claim any right, title or interest in the demised land or in respect of the structures standing thereon. It is only the obstructionists who are attempting to protect their possession by pointing out the defects in the suit and the decree. Thus the attempt to poke holes in the decree is aimed at somehow defeating execution of decree and latch on to possession by obstructionists when the Defendants have no objection to the decree. It is quite another aspect that this Court is unable to notice any defect in the Suit or in the compromise decree for the reasons discussed in the preceding paras. Thus, the only way left for the obstructionists in the present case was to establish their independent right to occupy the 3 galas constructed on the demised land.

56) Coming back to the main issue about existence of independent right of obstructionists to occupy the three galas on the demised land, the Trial Court has held that they could not establish such independent right. The Appellate Court, on the other hand, has held that the obstructionists became lawful sub-tenants of the plaintiff. The

findings recorded by the Appellate Court in this regard in paras-27, 28 and 29 as under:

27. By the date of second lease deed dated 6/3/1959, heirs of Moogatlal surrendered the land to landlord Cecil Joseph D'Monte. Second lease deed is an independent contract dated 6/3/1959. It is not continuation or renewal of earlier lease deed. On 6/3/1959, where new lease deed was created, the land already had building over it, and the obstructionist, who were tenants of Moogatlal were in possession of building in the capacity of tenants. Before death of Moogatlal, they were tenants of Moogatlal. On death of Moogatlal on 10/3/1954, they become tenants of all the legal representatives of Moogatlal.

28. On the date of second lease deed dated 6/3/1959, prior to signing of second lease deed, there was surrender of rights by legal representatives of Moogatlal. Moogatlal was owner of buildings. He was tenant of land. Obstructionists claim that land as well as building structures were surrendered to landlord. Plaintiff/deed holder says only tenancy of land was surrendered.

29. If the case of obstructionists is believed, land and structure were surrendered, and by second document dated 6/3/1953, land and structure were let out to tenant. In that event, lessee would become tenant of land as well as tenant of building. **If these 14 members (tenants) as abovestated are tenants of building, the obstructionists become lawful subtenants of plaintiff/landlord.**

(emphasis added)

57) Thus, the Appellate Court has held that the Indenture dated 6 March 1959 created a lease noticing that there were structures occupied by inductees of Moogatlal, that such inductees were tenants of Moogatlal and that after Moogatlal's death, the inductees became tenants of legal heirs of Moogatlal. The Appellate Court further held that the land and structures were surrendered by Indenture dated 6 March 1959 and fresh lease was created in respect of the land and structures on 6 March 1959 and that therefore obstructionists became lawful subtenants of the Plaintiffs. This is the only finding in the entire judgment

of the Appellate Court for establishing alleged independent right of the Obstructionists to occupy the 3 galas on the demised land.

58) As observed above the entire judgment of the Appellate Court is built upon and premised essentially on non-surrender of tenancy by all 15 tenants resulting in an imperfect decree. It has briefly meandered into the issue of existence of independent right of obstructionists to occupy the structures and had returned to its core inquiry into imperfect decree. Thus after cursory findings recorded in Paras 27 to 29 of the Judgment on the issue of existence of independent right of obstructionists to occupy the structures, the Appellate Court went on to hold in para-30 of the judgment that the decree was not for possession of 100% leasehold rights since the surrender was not by all tenants. Thus, after sketchily holding that obstructionist had become sub-tenants, the Appellate Court once again went on to its original track, and has held in paras-30 and 31 of the judgment as under:

30. But even otherwise, leaving the case of sub-tenancy aside, landlord cannot enforce a decree for possession against the obstructionist (tenant of land lessee) unless the lease of lessee is terminated by decree. Tenant of the premises (obstructionist) has right to resist the execution unless the right of the land lessee (his landlord) is lawfully terminated by the decree which is sought to be executed.

31. For the abovestated reasons, it is held that the Consent Decree in T.E. & R. Suit No. 66 of 2002 cannot be enforced against any of tenants in building until the landlord acquires right to demolish this structure. Right to demolish the structure is not the part of the decree but an incidental consequence of decree for possession of open land. Unless the landlord/plaintiff gets a decree terminating rights of all 14 tenants, he will not have right to obtain possession of land beneath the building; and unless the landlord gets that kind of decree, it is a stage premature for the landlord to seek vacant possession of shop

(structure) possessed by obstructionist. It is an attempted misfeasance on part of the plaintiff/decreed holder by exceeding beyond the scope of decree. It is well within rights of the obstructionist to obstruct execution of decree beyond the authority of decree. For this reason, it is held that, as the decree is not for possession of 100% of the lease right, it cannot be enforced for seeking possession of suit premises from obstructionists for purpose of demolishing the building to get possession of open land, which is subject matter of suit.

59) Thus, the Appellate Court has not conducted an in-depth inquiry for upholding the independent right of obstructionists to occupy the structures. After recording stray finding of lawful sub-tenancy in para-29 of the judgment, there is no further inquiry into establishment of independent right to occupy the structures. The judgment is essentially rendered on the footing that the decree was incomplete and inexecutable against the obstructionists. This is clear from further findings by the Appellate Court in paras-50 and 53 of the judgment as under:

50. It will be improper if this Court decides or makes observation at this stage over nomenclature of alleged right of obstructionists to be in possession of premises. But, they have right to be evicted only by following due process of law. There should be a valid and complete decree for possession. Complete decree is not a legal term. This Court therefore try to explain it with a general illustration to convey how the Court tries to distinguish between a complete decree and incomplete decree.

53. For the abovestated reasons, it is held that the decree in T.E. & R. Suit No. 66 of 2002 cannot be enforced against the obstructionists. Accordingly, point No. 1 is answered in the negative.

60) Thus, except recording a stray finding of lawful sub-tenancy in paras-27 to 29, the entire judgment from paras-13 to 25 and 30 to 55 is

based on the finding that the decree itself was ineffective and could not be executed.

61) However, since the Appellate Court has recorded finding of lawful sub-tenancy in favour of the obstructionists, *albeit* in a sketchy manner, I proceed on an assumption that it has recognized some independent right of the obstructionists to occupy the structures. However, it must be observed at the very outset that the manner in which the Appellate Court has recorded the conclusion of lawful subtenancy is not very convincing. No provision of law is discussed, nor any case law is examined for holding the obstructionists to be lawful subtenants. Since Appellate Court is totally silent on any provision in law about sub-tenancy of obstructionist, Mr. Khandeparkar and Mr. Savant have strenuously placed reliance on provisions of Sections 15 and 15A of the Bombay Rent Act. It is submitted that the obstructionists were inducted by the erstwhile lessees into the structures well before 1 February 1973 which is the datum line prescribed under Sections 15 and 15A of the Bombay Rent Act and that therefore the obstructionists/their predecessor in title became lawful tenants in respect of the structures who enjoy protection of the rent control legislation.

62) However, the issue in this regard appears to be squarely covered by the judgment of this Court in ***Sanjay Ramchandra Parab*** (supra) in which, the obstructionists had challenged orders passed by the Small Causes Court and its Appellate Bench directing their removal from structures in execution proceedings taken out by decree holders, who had secured decree for eviction against the lessee of the land. The

Plaintiff had granted lease in respect of the vacant land for a period of 25 years in favour of the lessee who was permitted to put up buildings, structures or sheds on the demised land. The lessee was also entitled to assign the buildings and structures alongwith leasehold interest in the land. The Plaintiffs filed R.A.E. & R. Suit before the Small Causes Court for recovery of possession of land alongwith shed located thereon. The R.A.E. & R. suit was dismissed but the Appellate Court allowed the Appeal and passed eviction decree for possession of the suit premises. When decree was put in execution, possession warrant was obstructed by 56 different persons claiming possession in respect of the various structures constructed on the demised land. Plaintiffs therefore took out Obstructionist Notice, which was resisted by the 56 obstructionists claiming independent right in respect of the structures. The issue before this Court was whether the obstructionist had any independent right to possess the structures erected by the original lessee in view of permission granted to them under the clauses of lease. This Court noted the ratio of the judgment in **Ramkrishna Girishchandra Dode and Ors. Versus. Anand Govind Kelkar and another**<sup>24</sup> which in turn had relied upon judgment in ***Goregaon Malayalee Samaj*** (supra) and This Court held that if the tenants of the demised land constructed structures and inducted third parties, their status *vis-a-vis* the land is necessarily that of licensees and that they do not enjoy protection of provisions of Section 15A of the Bombay Rent Act. This Court also referred to the judgment of the Apex Court in ***Jamnadas Dharamdas*** (supra) in which it was held that the landlord is entitled to claim relief of possession of land without recognizing rights of obstructionists who were inducted by the

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tenant in structures constructed by him. This Court held in **Sanjay Ramchandra Parab** in paras-16 to 19 as under :

16) The facts of the present case appear to be somewhat similar to the facts involved in **Ramkrishna Girishchandra Dode** in which the Single Judge of this Court (A.V. Sawant, J.) has noted the plight of the landlord/decree holder trying to execute the decree in petitions filed by the obstructionists. The suit premises therein comprised of open piece of land in respect of which, a registered lease-deed was executed in favour of the lessee for a period of 50 years. The lease was terminated by issuance of notice and suit was instituted for recovery of possession. One of the grounds for eviction was carrying out construction on the plot and induction of outsiders without prior consent of the landlords. The suit was decreed on 4 October 1978 directing the Defendants/Tenants to vacate the suit property. When the decree was put in execution and warrant of possession was issued, the bailiff returned the warrant with a report that execution of decree was obstructed by 80 obstructionists claiming possession in respect of various constructed portions in the suit property. The decree holders took out obstructionist notice which came to be made absolute and the order of the Executing Court was upheld by the Appellate Bench. In the above facts, this Court considered the right of occupants of structures constructed on the leased land in respect of which decree of eviction was passed against the original lessee. This Court referred to judgment of Division Bench in **S.R. Shetty vs. Phirozeshah Nusserwanji Colabawala** decided on 21 November 1962 in which the question of right of obstructionists in respect of the structures put up by the tenants of the plot was considered. This Court held in para-17 of the judgment as under:

17. As far back as on 21st November, 1962, a Division Bench of this Court in C.R.Equity Text AA. No. 1511 of 1960 of S.R. Shetty vs. Phirozeshah Nusserwanji Colabawala and another was considering the question of the right of the obstructionists in respect of the structures put up by the tenant of the plot belonging to landlord owner of the plot. Whatever right the obstructionists may have against the owner of the structures, it was held that it was almost impossible to accept the suggestion that after the structure is built and the sub-tenant has been inducted by the tenant, such a sub-tenant also becomes the subtenant of the land belonging to the landlord. The sub-tenant of the structure erected by the tenant had only right to occupy the said structure without any right to occupy the land on which the structure was erected. This was all the more so in a case

where a multi-storeyed building is erected on a plot of land where it would be difficult to decide as to which subtenant of which structure had right to occupy the particular portion of the plot of land in dispute which was leased by the landlord to the tenant who had erected the super structure may be a multi storeyed structure. This view expressed by the Division Bench in S.R. Shetty vs. Phirozeshah Nusserwanji Colabawala, was considered in a series of judgments rendered by this Court while dealing with the right of the obstructionists in the proceedings under the Rent Act.

17) In *Ramkrishna Girishchandra Dode*, this Court also relied upon judgment in *Goregaon Malayalee Samaj vs. M/s. Popatlal Prabhudas and Sons* wherein again the same issue was decided and this Court held in para-21 as under:

21. In *Goregaon Malayalee Samaj vs. M/s. Popatlal Prabhudas and Sons*, 1987 Mah.Rent Control Journal 701, A.C. Agarwal, J. had occasion to consider the same question. Originally the tenancy was in respect of the land. The tenant of the land constructed structures thereon and inducted third parties. The question arose whether such a third party could become subtenant of the landlord in respect of the land beneath the structure and claim protection of the provisions of section 15A of the Rent Act. It was held that persons so inducted on the structures would be the tenants in respect of the super structure on the land only. Their status vis-a-vis the land is necessarily that of a licensee only and not any higher status. Where a decree is sought to be executed in respect of land which was subject matter of the original lease, the status of the tenants of the structure on the land was nothing more than that of mere licensees. **The right of the occupants of the structures on the land was nothing more than that of a mere licensee. Such licence must necessarily come to an end when the landlord obtains a decree for eviction of his tenant and the occupants have got to be evicted from the land which could not be done unless they are also evicted from the structures which stand on the land.** All subsidiary interests that would have been created by the original lessee of the land pursuant to the lease deed must necessarily come to an end unless the occupant was otherwise protected by the provisions of the Rent Act. **On the question as to whether such an occupant would be protected by the provisions of section 15A of the Rent Act, this Court gave the answer in the negative.**

18) This Court further held in para-23 and 24 as under :

23. I must now make a reference to the judgment of the Apex Court which sets at rest the entire controversy and to which a reference has been made in some of the decisions of this Court referred to above. In ***Jamnadas Dharamdas vs. Dr. J. Josheph***, AIR 1980 SC 1605, the Apex Court considered identical situation where the obstructionists were claiming protection after the tenant had suffered a decree for eviction under section 12(3) of the Rent Act. **On consideration of some of its earlier decisions, Apex Court held in para 18 of the judgment at page 1610 that the landlord was entitled to claim relief of possession of his land and in effect the decree for possession of the land would mean that the land should be delivered to him without structures.** The tenant had committed defaults in payment of rent. Reference was made by the Apex Court to the decision of this Court in ***Ramchandra Raghunath Shirgaonkar vs. Vishnu Balaji Hindalekar***, AIR 1920 Bom. 87 where it was held that ordinary rule of law is that **tenant must give up vacant possession of the land demised at the end of the term and that if he builds on the land of the tenancy, he builds at his own risks. At the end of the term, he can take away his building but if he leaves it there it becomes the landlord's property.** A reference was also made to another decision on this Court in ***Khimjee Thakersee vs. Pioneer Fibre Co. Ltd.***, AIR 1941 Bom. 337 where it was held that on determination of the lease the lessees were required to deliver over possession of the demised premises to the lessors and the lessees were entitled to remove the structures which they might have erected during the continuance of the tenancy. In para 21, the Apex Court concluded that the plaintiff was entitled to ask for relief as to the possession of the land and he was also entitled to ask for demolition of the structures and for grant of vacant possession of the plots.

24. In the light of the above legal position, I will consider the contentions raised by the petitioners. The first contention is that, in the facts of this case, since the lessee of the plot Kelkar was permitted to put up or erect structures, the licensees of the structures inducted by the lessee Kelkar were also entitled to become the tenants of the land underneath the structures. Reliance was placed on the observations of a learned Single Judge Bhasme, J. in *Mangharam Chubarmal vs. B.C. Patel*, 1971 Mh.L.J. 369=73 BLR 140 where it was held that in a suit against the tenant, if other persons are joined on the allegation that they are sub-tenants and if eviction is sought only on the grounds which are personal to the tenant (sections 13(1)(a), (b),

(c), (d) and (e) of the Rent Act) then decree in ejectment against him will result in conferring the direct tenancy rights on the lawful sub tenant. It was further held that if sub-tenants are not impleaded in such a suit, then the landlord, after obtaining the decree against the tenant, will have to file a fresh suit against the subtenants who had by then become his direct tenant by virtue of section 14 of the Rent Act. This view expressed by Bhasme, J., need not detain me any longer since it is contrary to the earlier Division Bench decision of this Court in S.R. Shetty's case (C.R.A. No. 1511 of 1960 decided on 21st November, 1962). The view expressed by Bhasme J. has also been dissented by P.B. Sawant, J. in Damji Nansi's case, 1979 BCR 670 by Sharad Manohar, J. in Dinkar Vaidya's case, AIR 1981 Bom. 190 by S.J. Deshpande, J. in Mrs. Suman Damani's case 1986 Mah. R.C. J. 376 and by A.C. Agarwal, J. in Goregaon Malayalee Samaj's case 1987 Mah.R.C. J. 701. More over in view of the decision of the Apex Court in Jamnadas Dharamdas vs. Dr. J. Joseph, AIR 1980 SC 1605, with respect it is not possible for me to agree with the view expressed by Bhasme, J. that the sub-tenants or licensees of the structures inducted in the structures by the lessee of the plot will still be entitled to claim protection of the provisions of section 14 or 15-A of the Rent Act despite the decree for eviction being passed against the tenants under the provisions of the Rent Act. There is thus no substance in the first contention advanced on behalf of the obstructionists.

19) Thus it is settled position of law as expounded by the Apex Court in *Jamnadas Dharamdas* (supra) that obstructionist claiming protection after suffering of decree of eviction by a tenant cannot defeat landlord's entitlement to claim possession of his land and if any structure is built on the land, such structure is at the risk of the tenant and at the end of the term, the land must be returned to the landlord and persons inducted in such structures cannot oppose execution of the decree. Thus, if Defendant-M/s. Bhide Textile Industry has inducted Applicants/their predecessor-in-title in the constructed portion of the suit property during pendency of the suit, the tenant has done so at its own risk and Applicants/predecessor-in-title have occupied the structures at their own risk. **Their status vis-a-vis the land is necessarily that of lessee and they cannot claim any higher status. Once the tenant is directed to vacate, his licensee must also vacate the structures on the land.** This position of law is repeatedly expounded in various other judgments relied upon by Mr. Jahagirdar.

*(emphasis and underlining added)*

63) In *Virji Nathuram* (supra) the Single Judge of this Court has held in para-9 of the judgment as under:

9. The argument is highly attractive. Though this argument had not been advanced in such terms in the Court below, since it is based on the facts already on record and it is raised in the form of a legal proposition, I have heard Mr. Walavalkar at length on the same. In my opinion, though, as mentioned above, the argument is highly attractive, it ignores one basic ingredient in the dual relationship which has come into existence as a result of the lease deed executed by the respondent in favour of the original lessee and the law laid down by the long line of decisions to which I have already made reference earlier. The original lessee has naturally got to be evicted pursuant to the decree passed in the suit preferred by the respondent. The original lessee has to be evicted from the entire land which was the subject-matter of the lease which has now been determined. **Undoubtedly, as has been pointed out repeatedly, the original lease has permitted the erection of a superstructure on the land and the induction of third parties in the said superstructure. The persons so inducted were no doubt the tenants of the superstructure which was erected. The status of the persons who were inducted, though legally, in the superstructure vis-a-vis the land is necessarily that of licensees and not any other higher status.** At present the decree is being sought to be executed in respect of the land which was the subject-matter of the original lease and upon which the status of the petitioners is nothing more than that of licensees. **The correct legal position is that on the determination of the lease or other interests which are created on the land including the superstructure, the interest, if it can be so called, of the licensees has necessarily to come to an end.** The decree which is being executed by the respondent cannot be properly executed unless the status of the petitioners as licensees on the land also comes to an end. It is in this sense that the petitioners have got to be evicted from the suit land. This cannot be done unless naturally they are also evicted from the structure which is standing on the land in question. **Therefore, in execution of the decree by the respondent inexorably the possession of the petitioners of the land as licensees must also come to an end.** The petitioners cannot remain in possession of the structure unless they have a right to remain in possession of the land as licensees, which they are not entitled to do in view of the decree which has been validly passed against the lessee. The petitioners, therefore, cannot resist the execution of the decree which had been undoubtedly passed validly against the original lessee. All the subsidiary interests which were created, even if legal, by the original lessee pursuant to the lease deed must necessarily come to an end

unless otherwise they are protected under the provisions of the Bombay Rent Act. The possession of a licensee in the year 1964 when the suit was filed could not survive the determination of the lease in respect of the land on which the licence was created. It is thus that the petitioners do not enjoy any protection even in respect of the structure in which they have been inducted legally pursuant to the term of the lease.

*(emphasis added)*

64) In ***Virji Nathuram*** this Court has recognised the principle that mere permission to erect a superstructure on the land, and induction of the parties in the superstructure does not create a right in favour of occupier of such superstructure to obstruct execution of decree.

65) In ***C. Albert Morris Versus. K. Chandrasekaran and others***<sup>25</sup> the Apex Court has held in para-40 of the judgment as under :

40. We have already referred to the arguments advanced by both the parties in regard to the nature of tenancy and the statutory protection. It is abundantly clear from the recitals in the plaint, the Schedule to the notice and to the plaint and also of the lease deed that what was "leased out" was only a vacant site to put up a petrol bunk with accessory constructions thereon. **The mention of a small shed in the current lease undoubtedly belonged to the tenant himself and, therefore, the building put up by the tenant situated in the vacant site belonging to the landlord cannot be said to be the building of the landlord in order to attract the statutory protection of the Rent Control Act.** This issue is, therefore, answered against the tenant.

*(emphasis added)*

66) Thus, in ***Ramkrishna Girishchandra Dode, Jamnadas Dharamdas, C. Albert Morris, Sanjay Ramchandra Parab and Virji Nathuram*** it is repeatedly held that a person, inducted by the lessee in structure constructed by him as per permission granted under the lease,

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is not entitled to claim protection of possession of structures constructed by the lessee and that he must vacate the structure when decree against the lessee is executed.

**67)** In the present case, the obstructionists/their predecessors were apparently inducted by Moogatlal who was operating a petrol pump in the demised land. In the 3 galas that he constructed on the land, he inducted Tare's in 2 galas and Halimabai Madraswala in 1 gala. Each of the Indentures mandated Moogatlal to deliver possession of demised land in the same condition as it stood at the time of creation of lease. Even in clause 1(j) of the last Indenture dated 6 March 1959, the three lessees were under obligation to handover possession of vacant land by removal of structures standing thereon. Thus the case does not involve induction of Obstructionist by the lessee who were tenants in any premises. Therefore Section 15 and 15A would have no application in this case. The induction is by the lessee's in structure with obligation to demolish the structures at the expiry of the lease. In that view of the matter provisions of Sections 15 or 15A of the Bombay Rent Act would have no application and it cannot be concluded that Obstructionist became lawful subtenant of the structure.

**68)** It is sought to be contended on behalf of Respondent Nos.4 to 6 that the last Indenture dated 6 March 1959 was not only in respect of the land but also in respect of the appurtenances and that the term 'appurtenances' also included constructed structures. It is therefore sought to be suggested that the lease was in respect of constructed structures as well. Reliance is placed on judgment of the Apex Court in

**D.G. Gose and Co Pvt. Ltd.** (supra). The judgment is rendered by the Apex Court while interpreting taxation law in the State of Kerala and in that context, the Apex Court has held that if some land is included as appurtenances to a building, it forms integral part of the building for the purpose of application of the taxation statute. In my view, the judgment cannot be relied on in support of an abstract proposition that when lease is granted in respect of open land alongwith the appurtenances, the lease is also in respect of the constructed structures or that the lessor has accepted structure occupiers to be sub-tenants. The Schedule to the Indenture dated 6 March 1959 clearly envisaged creation of lease only in respect of vacant land. In fact, there was specific prohibition under Clause-1(h) of the Indenture from assigning, under letting, or parting with possession of the demised premises or any building or structure without the consent of the landlord. As observed above, Clause-1(h) imposes obligation on the tenants to handover possession of the demised land after removal of the structures and in the same condition as the same was let out to Moogatlal initially. The Indenture must be read as a whole. When the lessee had obligation to remove the structures at the end of the lease, it cannot be contended that the lessor had any intention of creating lease in respect of constructed structures, that too in favour of the obstructionists.

69) In my view, therefore the ratio of the judgment of this Court in **Sanjay Ramchandra Parab** would squarely apply to the present case. Inductees in the structures constructed by a tenant do not automatically become the tenants/sub-tenants of the lessor. They are merely licensees

of the inductor/lessee. The alleged license arrangement between the tenant/lessee and his inductee does not bind the lessor and the inductees have a right to occupy the structure only during currency of the lease. The moment the lessee is required to vacate the land by removing the structures, the right of the inductee to occupy the structure automatically comes to an end. Section 15 and 15A of the Bombay Rent Act cannot apply to a situation where tenant has constructed a structure on open land which is demised to him. When the lessor permits construction of structure with obligation for removal thereof at the end of tenure of the lease, the violation of such obligation by the lessee (in not removing the structure at the end of the lease) does not create a right in favour of lessee's inductees to occupy the structures forever. There can be no lawful subtenancy in such case.

70) In leases comprising of vacant land, the lessor may permit the lessee to put up construction with obligation to remove the same at the end of tenure of the lease. In such a case, the lessee is permitted to enjoy rent/license fees from inductees in structures constructed by him. Those inductees can occupy the structures only till their inductor/lessee has the right to occupy the land. The moment lessee's right to occupy the land terminates, inductees right to occupy the structure also gets terminated. It is incomprehensible that a lessee can be permitted to create a contractual relationship between the lessor and third parties. In the present case, the Trial Court has rightly held that there is no privity of contract between the Plaintiffs and the Obstructionists. The Appellate Court has thus egregiously erred in attempting to establish relationship of lawful sub-tenancy between obstructionists and Plaintiffs.

71) Reliance by Respondent Nos.4 to 6 on judgment of the Apex Court in ***Mahabir Prasad*** (supra) does not cut any ice. The case before the Apex Court involved subletting of tenanted premises by the tenant to sub-tenants. The issue for consideration was whether creation of such sub-tenancies was valid. In the facts of that case, the Apex Court held that subletting by a tenant with consent in writing of the landlord does not become unlawful. In the facts of that case, it was found that there was consent of the landlord for creation of sub-tenancies. The judgment has no application to the facts of the present case, where the lessees were not the tenants of any structures and the induction by them of obstructionists in the structures was without lessor's consent.

72) Respondent Nos.4 to 6 have relied upon judgment of the Apex Court in ***South Asia Industries Private Ltd.*** (supra) in support of the contention that sub-tenant is a necessary party where his induction is with the consent of the landlord. The case again involved suit for eviction in respect of the premises let out to a tenant. The case did not involve the issue of creation of lease in respect of vacant land and right of third parties to occupy the structure constructed by the tenant. The judgment therefore would have no application to the facts of the present case.

73) Respondent Nos.4 to 6 have also relied upon judgment of the Apex Court in ***Bhatia Coopeative Housing Society Limited Versus. D.C. Patel***<sup>26</sup> in support of the contention that the structure constructed

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26 1952 2 SCC 355

by the lessee becomes part of the lease. However, the judgment is rendered in the light of the peculiar facts of that case where the lease itself was found to be in respect of the land, as well as in respect of the building standing thereon. The structure was constructed by the lessee for use and benefit by the lessor. In case before the Apex Court, an MOU was incorporated which required the tenant to construct a building for the benefit of the lessor. After completion of construction of the building, the Indenture of lease was executed not only in respect of the land but also in respect of the building. The judgment in **Bhatia CHSL** (supra) is thus rendered in the light of peculiar facts of that case where the lease was also in respect of the building. In the present case, there is nothing on record to indicate that any leasehold rights were created in favour of the lessees in respect of the constructed structures on the demised land. The structures are not constructed by the lessees for benefit of the lessor. On the other hand, the lessees were under obligation to remove all constructions put up on the demised land and to deliver possession of vacant land to the landlord.

74) Mr. Savant has relied upon judgment of the Apex Court in **Jamnadas Dharamdas** in support of his contention that the decree is not binding on obstructionists, who are sub-tenants. It is contended by Mr. Savant that both the judgments in **Jamnadas Dharamdas** and **Sanjay Ramchandra Parab** involved filing of eviction suits under the Rent Act, whereas the suit was filed by Plaintiffs in the present case under Section 41 of the PSCC Act. Firstly, the judgment of the Apex Court in **Jamnadas Dharamdas** has been taken into consideration by this Court in **Sanjay**

**Ramchandra Parab.** Secondly, mere filing of suits for ejectment under the Rent Act would not make the judgment in **Jamnadas Dharamdas** or in **Sanjay Ramchandra Parab** inapplicable to the facts of the present case. The present suit was filed for recovery of possession of vacant land by removal of the structures and therefore following observations of the Apex Court in para-18 of the judgment in **Jamnadas Dharamdas** would be apt in the present case:

**18. The decisions referred to above will show that that the plaintiff/ landlord of the land is entitled to claim the relief for possession of his land and in effect the decree for possession of the land would mean that the land should be delivered to him without the structures.** Apart from the relief under the lease deed, the plaintiff is entitled to succeed as he has established that there was default of payment under the provisions of the Bombay Rent Act. The jurisdiction of the Small Cause Court to grant an effective decree for possession of the land cannot be denied. Equally untenable is the contention of the respondent that as the plaintiff has sought two reliefs one under the Bombay Rent Act and another under the Contract, the entire plaint must be rejected. As we have already observed so far as the relief of possession of the premises i.e. the land, is concerned, it is exclusively within the jurisdiction of the Small Cause Court. **In asking for the relief for possession of the land, the plaintiff is entitled to incidental and consequential reliefs such as for taking possession of the plot without the structures.** The prayer in the plaint asking for possession of the land including the structures would not take the suit out of the competence of the Small Cause Court. In this view it is not necessary for us to go into the question as to whether the terms in the contract regarding the forfeiture can be enforced by the Small Cause Court. It is sufficient for the purpose of this suit to hold that the plaintiff is entitled to seek for possession of the land which is the premises in the suit, and in getting possession of the land, he is entitled to ask for possession of the land without any superstructures. In this connection reference may be made to the nature of the relief which the plaintiff is entitled to. **In Ramchandra Raghunath Shirgaonkar v. Vishnu Balaji Hindalekar Z it was held that the ordinary rule of law is that the tenant must give up vacant possession of the land demised at the end of the term and that if he builds on the land of the tenancy he builds at his own risk. At the end of the term he can take away his building but if he leaves it there, it becomes the landlord's property.** The court further held

that the tenant who had been in possession of land for a large number of years and built a costly and substantial house on the land of the tenancy with the knowledge of the landlord, is entitled to some compensation.

*(emphasis added)*

75) Reliance by Respondent Nos.4 to 6 on judgment of the Apex Court in ***Habibunnisa Begum*** is also misplaced as the judgment is on the issue of single indivisible contract of tenancy. In case before the Apex Court, the suit premises were leased out by a single lease deed to the Respondent and part thereof was acquired for construction of road, resulting in premises being separated by such road. The suit for ejectment was decreed but the High Court partly allowed the tenant's revision directing partial ejectment. It is in the context of these peculiar facts that the Apex Court held that the Court did not have power to order partial ejectment by splitting single indivisible tenancy. The present case does not involve the issue of surrender of part of tenancy by few tenants. All the surviving tenants have lawfully surrendered the tenancy by entering into consent terms. The case therefore does not involve the issue of splitting of single tenancy into multiple parts. In fact the Appellate Court erroneously held that the tenancy was joint in the names of 15 lessees and that the surrender was only by few lessees. The argument of impermissibility to split single indivisible tenancy into parts is thus premised on the erroneous assumption on the part of the Appellate Court.

## CONCLUSIONS

76) Considering the overall conspectus of the case, I am of the view that the Appellate Court has grossly erred in reversing the decision of the Trial Court by erroneously assuming that ejectment decree was invalid or inexecutable. The Appellate Court has based its judgment mainly on the issue of the 15 tenants not surrendering the tenancy rights. The assumption on the part of the Appellate Court about subsistence of tenancy rights in the name of the 15 tenants itself is factually incorrect. Since the judgment is mainly based on erroneous assumption of non-surrendering of tenancy by all tenants, the judgment is unsustainable and liable to be set aside. As observed above, most of the findings recorded by the Appellate Court revolve around its erroneous assumption that the third Indenture dated 6 March 1959 created tenancy in favour of 15 legal heirs of Moogatlal. The Appellate Court has very sketchily held that the Obstructionists have become lawful subtenants, which finding is also found to be erroneous. The finding of the Trial Court about absence of any independent right in favour of the obstructionists to occupy the premises has been erroneously set aside by the Appellate Court. The obstructionists have thoroughly failed to establish any independent right to occupy the structures constructed on the demised land. They were inducted by the lessee-Moogatlal, who had obligation to hand back possession of demised land by removal of structures. His three children, in whose favour only the last lease was executed, and who permitted the inductees of Moogatlal to continue to occupy the structures, also had the obligation to remove the structures and hand back possession of vacant

land. Therefore, the occupants of the structures must walk out with surrender of demised land by the lessees. Resultantly, the impugned judgment and order passed by the Appellate Court is liable to be set aside and the judgment and order passed by the Trial Court deserves to be upheld.

**77)** I accordingly proceed to pass the following order:

- (i) Judgment and order dated 4 May 2022 passed by the Appellate Bench of the Small Causes Court in Appeal No.27 of 2019 and Appeal No. 28 of 2019 is set aside.
- (ii) Judgment and order dated 3 November 2018 passed by the Court of Small Causes at Mumbai in Obstructionist Notice No.15 of 2006 is confirmed.

**78)** Civil Revision Applications are allowed in the above terms. Considering the facts and circumstances of the case, there shall be no order as to costs.

**[SANDEEP V. MARNE, J.]**

**79)** After the judgment is pronounced, the learned counsel appearing for the Respondents-Obstructionists, prays for stay of the judgment for a period of eight weeks. The prayer is opposed by the learned counsel appearing for the Applicants. Considering the nature of

findings recorded in the judgment, I am not inclined to stay the judgment. The request for stay is accordingly rejected.

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**[SANDEEP V. MARNE, J.]**