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contention. But I fail to understand why Mr. Chitale's client has been waiting all this time to urge this point. He never raised this point in the Court of first instance, nor in the appellate Court. He should have asked the trial Court long ago to strike his name off as being unnecessary as a party. Heremained on the record in the two Courts below, and the petitioner is right in bringing him on the record as a party.

Rule made absolute. Mr. Lokur's clients to pay the costs throughout.

Rule absolute.

M. W. P.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice.

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BALMUKUND & CO. (ORIGINAL PLAINTIFFS), PETITIONERS v.
 MANGALDAS TRIBHUVANDAS MEHTA AND ANOTHER,
 (ORIGINAL DEFENDANTS NOS. 1 AND 3), OPPONENTS.*

Bombay Rents, Hotel and Lodging House Rates Control Act, (Bom. LVII of 1947), ss. 12 (1), 13 (e), 15—Termination of contractual tenancy—Tenant continuing as statutory tenant—Subsequent assignment of tenancy rights and delivery of possession to assignee—Invalidity of assignment—Breach of condition of tenancy—Whether tenant entitled to protection of Rent Act—Presidency Small Cause Courts, Act (XV of 1882), Chap. VII—Difference between proceedings under Chap. VII and suits under s. 28 of Rent Act—Practice.

Under s. 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, there is an obligation upon the tenant, if he wishes to be protected by the Act, to observe and perform the conditions of the tenancy other than the payment of rent, so long as those conditions are not in any way inconsistent with the provisions of the Act. One of the most important terms and conditions of any tenancy is that the tenant must either be in possession himself or he must part with possession to an assignee, a sub-tenant or a transferee provided an assignment, sub-tenancy or transfer is permitted, or he may give the premises to an invitee or a licensee. But it is not open to him to part with possession of the premises to an unauthorised person or to a trespasser. If he does so, he commits a breach of the terms and conditions of the tenancy under s. 12 and cannot claim protection of the Act.

By a notice, dated June 26, 1947, the plaintiffs, who were the landlords of a shop situate at Bombay, terminated the tenancy of the defendant No. 1. On November 30, 1949, defendant No. 1 executed a deed of

* Civil Revision Application No. 885 of 1951.

assignment in favour of defendant No. 3, assigning to him his right, title and interest in the business which he was carrying on on the premises and also his interest in the tenancy, and parted with possession of the premises to him. The premises were covered by the proviso to s. 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and had the contractual tenancy been subsisting the assignment would have been valid in law. The plaintiffs upon coming to know of the assignment filed a suit in the Court of Small Causes, Bombay, for an order of ejectment both against their tenant, viz., defendant No. 1 and against defendant No. 3. The trial Court decreed the suit holding that inasmuch as defendant No. 1 had contravened the provisions of s. 13 (e) of the Rent Act the plaintiffs were entitled to possession. On appeal, an appellate bench of the same Court reversed the decree and dismissed the suit. In revision:—

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Held, (i) that s. 13 (e) had no application because it postulated an interest in the tenant which he could sub-let or assign or transfer, and as the defendant No. 1 had at the date of the assignment no interest in the premises he could not in law transfer or assign or sub-let the premises;

(ii) that s. 15 which was supplementary to s. 13 (e) also contemplated an interest in the tenant which he could assign or transfer, and it was the transfer of assignment of such interest which was prohibited by the section;

(iii) that the position of the defendant No. 3 was that of a trespasser or an unauthorised person and the defendant No. 1 by parting with possession of the premises to him had committed a breach of one of the conditions of tenancy within the meaning of s. 12 of the Rent Act;

(iv) that, therefore, the defendants were not entitled to the protection of the Rent Act and the plaintiffs' suit must be decreed.

Proceedings under Chapter VII of the Presidency Small Cause Courts Act, 1882, are not suits and ought not to be numbered as such because there is a fundamental distinction between those proceedings and suits filed under s. 28 of the Rent Act. An order under Chapter VII cannot be appealed from; it gives a right to the party aggrieved to file a suit under s. 47 of the former Act in the High Court. Moreover, there can be an order under Chapter VII against a trespasser or a licensee. Suits under s. 28 can only be as between landlord and tenant, the decision is appellable to the Court of appeal in the Small Causes Court, and there is no right to file a suit under s. 47 with regard to decrees passed under s. 28.

CIVIL REVISION APPLICATION against the decision of M. D. Lalkaka, Chief Judge, and P. S. Badami, Judge, Court of Small Causes, Bombay, reversing the decision of M. V. Pradhan, Judge, Court of Small Causes, Bombay.

Suit in ejectment.

Balmukund & Co. (plaintiffs), a firm doing cloth business in Mulji Jetha Market at Bombay, were the tenants of one of the shops in the Market. In 1946, the plaintiffs sub-let a loft in

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the said shop to one Mangaldas (defendant No. 1), who also carried on a similar business in the premises let to him. Thereafter by a notice dated June 26, 1947, the plaintiffs terminated the tenancy of the defendant No. 1 on the ground that they required the loft for their own use and occupation, and filed a suit in ejectment. That suit was finally dismissed on July 21, 1949, on the ground that the defendant No. 1 was entitled to protection of the Bombay Rent Act of 1939.

On November 30, 1949, defendant No. 1 executed a deed of assignment in favour of one Mohanlal (defendant No. 3), assigning to him, the right, title and interest in his business and his interest in the tenancy, and parted with possession of the premises to him.

On February 9, 1950, the plaintiffs filed the present suit against defendants Nos. 1 and 3 in the Court of Small Causes, Bombay, for an order in ejectment. The trial Judge held that the defendant No. 1 had committed a breach of the provisions of s. 13 (e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and therefore on October 18, 1950, he decreed the suit.

On appeal, a Division Bench of the same Court on July 3, 1951, reversed the decree and dismissed the plaintiffs' suit.

The plaintiffs applied in revision to the High Court.

N. A. Mody with *H. J. Kania* and *M. H. Kania*, for the petitioners.

C. K. Shah, for opponent No. 1.

CHAGLA C. J. The petitioners who are the landlords terminated the tenancy of the first defendant by a notice dated June 26, 1947. Therefore it is clear that after the notice became effective the first defendant ceased to be a contractual tenant and became a statutory tenant. On November 30, 1949, the first defendant executed a deed of assignment in favour of the second opponent who was defendant No. 3 in the suit, assigning to him his right, title and interest in the business which he was carrying on and also his interest in the tenancy. The plaintiffs then filed this suit in the Small Causes Court for an order of ejectment both against their tenant and against defendant No. 3. The trial Court held in favour of the petitioners, but the appellate Court, the Small Causes Court, has reversed the decision of the trial Court. It is from that decision that this revision application is preferred.

Now, certain positions that arise in law are beyond dispute. As the contractual tenancy had already terminated, the first defendant had no interest in the premises which he could transfer or assign to the third defendant. He had only a personal right under the Rent Act to be protected in possession of the premises and that personal right could not be transferred or assigned. Therefore in law there was no valid assignment in favour of the third defendant. Section 13 (e) of the Act provides that a landlord shall be entitled to recover possession of any premises if the Court is satisfied that the tenant has, since the coming into operation of this Act, sublet the whole or part of the premises or assigned or transferred in any other manner his interest therein, and the trial Court held that inasmuch as the tenant has contravened the provisions of s. 13 (e) the landlord was entitled to possession and the decree against the third defendant went as a decree against a trespasser. The learned Judges of the appellate Court have taken the view, and in my opinion rightly, that s. 13 (e) has no application because s. 13 (e) postulates an interest in the tenant which he could sublet or assign or transfer. There must be a contractual tenancy and having an interest in the tenancy if he assigns or transfers or sublets then he contravenes the provisions of s. 13 (e) and he is liable to be evicted. But in this case the tenant not having any interest in the premises could not in law transfer or assign or sublet the premises, and therefore if the landlords sought ejectment on the ground that their case fell under s. 13 (e) they were liable to fail. But the learned Judges of the appellate Court have taken this rather startling view that although a tenant can be ejected if he assigns his premises while the contractual tenancy is subsisting, if the contractual tenancy has come to an end and he purports to assign that premises and parts with possession and has no control left over the premises and no interest left in the premises, he is protected under the Rent Act and the landlord is helpless and he cannot get possession from him. Unless one is driven to such a conclusion it would be anomalous to hold that a tenant's rights are greater when he hands over possession to an unauthorised person than when he legally assigns the premises to a third party.

Reference has also been made in the judgments of the learned Judges below to s. 15 and that section provides that notwithstanding anything contained in any law it shall not be lawful, after the coming into operation of this Act, for any tenant to

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sublet the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. This provision really is supplementary to what is contained in s. 13 (e), and s. 15 also contemplates just as s. 13 (e) does that there is an interest in the tenant which he can assign or transfer, and it is the transfer or assignment of such interest which is forbidden and prohibited by s. 15. There is a proviso to s. 15 which lays down that the State Government may by notification in the official Gazette permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the notification, and it is common ground that the premises with which we are concerned are covered by the proviso. Therefore if there had been a contractual tenancy subsisting, it would have been open to the tenant to assign these premises without coming within the mischief of s. 15. But as there was no contractual tenancy subsisting, the tenant cannot avail himself of the protection given to him by the proviso. That is also the view taken by the learned Judges below.

Therefore the short question that I have to consider is whether a tenant can part with possession of premises let to him to an unauthorised person and still claim the protection of the Rent Act. It is clear in this case that the third defendant is not a licensee of the first defendant nor is he an invitee. I can understand the position where a tenant may permit a licensee or an invitee to stay on the premises and continue to remain a tenant and pay rent. It is true that in this case the first defendant does pay rent, but the position of the third defendant is not that of an invitee or a licensee. Both the first defendant and the third defendant have relied on a deed of assignment and therefore the third defendant claims to be in possession of the property by virtue of a title which he says he has obtained under the deed of assignment. Therefore, on these facts it is clear that the third defendant is a trespasser or an unauthorised person. It is also clear that the first defendant has handed over possession of the premises let out to him to a trespasser or an unauthorised person. Now, can a tenant do that with impunity and still claim the protection of the Rent Act? I should have thought on general principles that a tenant is to be protected under the Rent Act provided he is in possession of the premises. What the law seeks to protect is the possession of the statutory tenant. The object of the Rent Act is not to permit landlords to eject their tenants except on the grounds laid down

in the Act. But if the tenant himself is not in possession, it is difficult to understand what is attempted to be protected under the Rent Act. If he himself has given up his possession and he does not want that possession, is it open to him to urge before the Court that he should be protected under the Rent Act? But apart from general principles, I think the answer to this which seems to be a conundrum is to be found in s. 12 (1) because that section provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act. Therefore there is an obligation upon the tenant, if he wishes to be protected by the Act, to observe and perform the conditions of the tenancy other than the payment of rent, so long as those conditions are not in any way inconsistent with the provisions of the Act. One of the most important terms of a tenancy is that the tenant must be in a position to hand over possession of the property on the expiration of the lease or the termination of the tenancy. He would undoubtedly be committing a breach of the term or condition of the tenancy if he puts himself in such a position that when the tenancy is terminated he would not be in a position to hand over possession to the landlord. In this case admittedly the tenant has put himself in such a position. He has parted with the possession of the premises under a deed of assignment and he is not in a position to hand over the possession of the premises to the landlord, assuming the landlord becomes entitled to possession. Therefore in my opinion one of the most important terms and conditions of any tenancy is that the tenant must either be in possession himself or he must part with possession to an assignee, a sub-tenant or a transferee provided an assignment, sub-tenancy or transfer is permitted, or he may give the premises to an invitee or a licensee. But it is not open or competent to a tenant to part with possession of the premises to an unauthorised person or to a trespasser. In the eye of the law the third defendant is a trespasser, and, as I said before, the first defendant admits that he has parted with possession of the premises to a trespasser. If he has done so, he has committed a breach of the terms and conditions of the tenancy under s. 12 and he is not entitled to be protected.

Now, Mr. Shah contends that if the third defendant is a trespasser, the proper proceedings that the landlords should have

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taken was to have proceeded against him under Chapter VII of the Presidency Small Cause Courts Act. Undoubtedly they could have done so, but what would have been the position? They would have got an order of ejection against the third defendant but as far as the first defendant was concerned he would have continued to be a statutory tenant. He would have been a statutory tenant without any premises of which he was a tenant. Such an order passed by the Small Causes Court under Chapter VII would have led to a most extraordinary result and consequence. Therefore, in my opinion, the present suit filed by the petitioners is a proper suit because they have filed a suit to eject the first defendant who was their tenant and who is now a statutory tenant, and they have made defendant No. 3 a necessary party so that the decree which they might obtain against the first defendant should be made effective and can be carried out against the third defendant.

I should like to make one observation with regard to the practice followed by the Small Causes Court in suits under the Rent Act and proceedings under Chapter VII. An attempt was made by Mr. Mody to argue that this particular matter before me was a proceeding under Chapter VII and not a suit under s. 28. It is clear that there is a right of appeal given under s. 29 from a decree or order made by a Court of Small Causes exercising jurisdiction under s. 28 and there is no right of appeal against an order made under Chapter VII. Therefore there is a fundamental distinction between a suit filed under s. 28 and proceedings taken under Chapter VII, and when an appeal was entertained from the decision of the trial Court by the learned Chief Judge and his brother Judge, I assume that it was from a decree or order passed by the trial Judge under s. 28 and not against an order passed in proceedings taken out under Chapter VII of the Act. Mr. Mody draws my attention to the fact that considerable confusion is caused in the Small Causes Court by the fact that both proceedings under Chapter VII and suits under s. 28 are numbered as suits and no separate record is kept of suits and proceedings. In my opinion, this is entirely irregular. As I said before, the distinction between proceedings under Chapter VII and suits under s. 28 is vital and must always be borne in mind. An order under Chapter VII cannot be appealed from and an order under Chapter VII gives a right to the party aggrieved to file a suit under s. 47 in the High Court. There can be an order under Chapter VII against a trespasser or a licensee. Suits

under s. 28 can only be suits between landlord and tenant, the decision is appealable to the Court of appeal in the Small Causes Court, and there is no right to file a suit under s. 47 with regard to decrees passed under s. 28. These distinctions are well known, but I am surprised that a scope is left for any confusion to be caused between proceedings under Chapter VII and suits under s. 28. I do not understand what difficulty there is in numbering proceedings under Chapter VII as applications and suits under s. 28 as suits. Proceedings under Chapter VII by no stretch of imagination are suits and I see no reason why the practice of numbering them as suits should be continued in the Small Causes Court.

I would therefore set aside the order of the appellate Court of the Small Causes Court and restore the order passed by the trial Judge. There will be no order as to costs of this revision application. Opponents must pay the costs of both the Courts below.

Mr. Shah gives an undertaking to this Court on behalf of his clients that he will vacate and give possession of the premises on or before November 30, 1952, and will pay compensation as and when it falls due. On this undertaking Mr. Kania agrees not to execute the decree till November 30, 1952.

Rule absolute.

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Before Mr. Justice Rajadhyaksha and Mr. Justice Chainani.

PRABHAKAR BHASKAR SHIDORE (ORIGINAL PLAINTIFF), APPELLANT
v. USHA PRABHAKAR SHIDORE (ORIGINAL DEFENDANT), RESPONDENT.*

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Bombay Hindu Divorce Act (Bom. XXII of 1947), ss. 2 (a), 5, 5A, 13—Suit for divorce filed in District Judge's Court—Bombay Matrimonial (Transfer of Cases) Act (Bom. XXVI of 1950), s. 4—District Judge transferring suit to Civil Judge after enactment of Bom. XXVI of 1950—Decree by Civil Judge—Appeal from decree—Forum of appeal—Appeal whether to High Court or to District Court—Bombay Civil Courts Act (Bom. XIV of 1869), ss. 8, 16, 17, 26.

In respect of suits under the Bombay Hindu Divorce Act, 1947, instituted prior to May 27, 1950, an appeal lies direct to the High

* First Appeal No. 576 of 1951.