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margin of income allowing of an improvement in the estate by the use of some of the surplus together with what might be raised by the sale of a small portion for the purpose of acquiring more property and extending the estate, a sale might possibly be justified. In saying this, I am not laying down a rule but merely indicating circumstances which might justify the sale of a minor's estate by the guardian of his property.

But as I have already stated in discussing them, the facts here are not of this character. The effect of the guardian's transaction has been, to amalgamate what was the minor's separate and distinct property with that of the father, in such a way as to make it difficult for the minor to obtain his separate share, should he ever wish to do so, and the probabilities are, as I have shown, that if this sale is allowed to stand, the minor will be involved in litigation and his property will thereby be jeopardized.

I agree that the sale was effected for no necessity, and that it is unlikely to result in any benefit to the minor's estate. It must therefore be set aside.

Decree reversed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

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 GOPALJI UMERSEY (ORIGINAL DEFENDANT), APPLICANT v. DEVJI NARANJI THAKAR (ORIGINAL PLAINTIFF), OPPONENT.*

Bombay Rent (War Restrictions No. 2) Act (Bom. VII of 1918), section 17 (1) (a)—Premises, meaning of—Bombay Rent (War Restrictions No. 2) Act (Bom. II of 1918), section 2 (1) (b) (ii)—Effect of failure to annex to the plaint copy of Controller's order—Presidency Small Cause Courts Act (XV of 1882), section 41.

The defendant was a monthly tenant of the plaintiff since 1916-17, occupying a room on the second floor of the plaintiff's house in Bombay, at a rent of Rs. 7. This rent was subsequently raised to Rs. 17, which the defendant was unwilling to pay. The plaintiff accordingly filed a suit in ejectment in the Court of

*Civil Revision Application No. 292 of 1927.

Small Causes, Bombay, against the defendant, who contended that the suit could not be proceeded with, as the plaintiff had not annexed to the plaint a copy of the order of the Controller in force, determining that the premises were not small premises or fixing their standard rent, as required by section 17 of Bombay Act VII of 1918. The plaintiff on the other hand contended that the Court had jurisdiction to entertain the suit for ejection as the defendant had consented to the appointment of a Commissioner to decide the question whether the premises were old or new, that, as there was no order passed by the Controller under section 4 of the Rent Act, there was no order in force a copy of which could be produced with the plaint under section 17, and, lastly, that the premises were exempt from the operation of the Rent Act inasmuch as structural alterations had been effected in the building in 1926-27 with the result that the identity of the building was changed.

Held, that the structural alterations made in the year 1926-27 having had the effect of destroying the identity of the building, the premises in question did not fall within the definition of "premises" contained in section 2 (1) (b) (ii) of the principal Act (Bom. Act II of 1918), and the provisions of section 17 of Bom. Act VII of 1918 were, therefore, inapplicable.

Chapsey Umersey v. Keshavji Danji,⁽¹⁾ *Ibrahim v. Jan Mahomed*⁽²⁾ and *Stockham v. Easton*,⁽³⁾ followed.

As to the effect which the failure to comply with the provisions of that section would otherwise have had,—

Per *Patkar, J.* :—" I think that if the premises in suit were governed by the Rent Act, the lower Court ought to have insisted upon the production of an order in force under section 17 of the Bombay Rent Act, VII of 1918. If there was no order in existence, the plaintiff ought to have applied to the Controller and got an order and annexed it to the plaint, and though the objection based on section 17 of the Rent Act may not [*sc.* in view of section 41 of the Presidency Small Cause Courts Act (XV of 1882)] amount to want of jurisdiction in the Small Cause Court, it would, in my opinion, amount to material irregularity in the exercise of its jurisdiction."

Per *Murphy, J.* :—" I think the intention clearly was that the production of an order from the Controller should be a condition precedent in this case also, and that failure to fulfil it invites the penalty provided in sub-section (2), and consequently that the suit should have been dismissed, unless it could be shown that the 'premises' were new, and so did not come within these provisions of the Act; and this view is confirmed by the provision in sub-section (3) as to the effect of a rejection of the plaint under sub-section (2)."

Question whether in such a case the objection could be waived, considered by *Patkar, J.*, and *Ledgard v. Bull*,⁽⁴⁾ referred to.

APPLICATION to set aside an order of ejection passed by the Judge of the Court of Small Causes at Bombay, in Suit No. 17126 of 1927.

Suit in ejection.

⁽¹⁾ (1920) 45 Bom. 744.

⁽²⁾ (1927) 29 Bom. L. R. 1439.

⁽³⁾ [1924] 1 K. B. 52.

⁽⁴⁾ (1886) L. R. 13 I. A. 134 at p. 145.

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The defendant had been a monthly tenant of the plaintiff since 1916-17, occupying a room on the second floor of house No. 55 situate at Guncarriage Street, Colaba, the rent of which was Rs. 7. On this rent being subsequently raised to Rs. 17, the defendant refused to pay, and the plaintiff filed a suit in ejectment in the Court of Small Causes, Bombay, after giving notice to the defendant to vacate. The defendant pleaded protection under the Rent Act and took an objection to the suit being proceeded with on the ground that the plaintiff had not annexed to the plaint, under section 17 of the Bombay Rent Act, VII of 1918, any copy of an order of the Controller in force, determining that the premises were not small premises or fixing their standard rent, the monthly rent not exceeding thirty rupees. The plaintiff on the other hand contended that structural alterations had been effected in the whole building in 1926 with the result that the whole identity of the building had been changed and that consequently the premises were new and as such were not governed by the Bombay Rent Act, VII of 1918.

The trial Judge was of opinion that the Controller had no power under section 4 to determine whether the premises were new or old though he may have to do so incidentally, and referred the question whether the premises were new or old to Mr. B. S. Sanjana as Commissioner with the consent of the parties. The Commissioner visited the premises, took evidence and held that the premises in question were new in that by reason of the alterations made in 1926-27 the premises had lost their identity, and the Rent Act no longer applied. The trial Judge accepted the report of the Commissioner and ordered the defendant to vacate by October 31, 1928. The defendant thereupon applied to the Full Court, which rejected

the application on the ground that it had no jurisdiction. The defendant applied to the High Court under section 115 of the Civil Procedure Code.

K. N. Koyaji, with *R. B. Paymaster*, for the applicant.

H. C. Coyajee, with *S. E. Bamji*, for the opponent.

PATKAR, J. :—In this case the plaintiff landlord brought a suit against the defendant for ejectment in the Court of Small Causes. The defendant was occupying a room on the second floor the rent of which was Rs. 7 which was subsequently raised to Rs. 17. The defendant contended that the suit could not be proceeded with as the plaintiff had not annexed to the plaint a copy of the order in force determining that the premises were not small premises or fixing their standard rent under section 17 of Bombay Act VII of 1918. The plaintiff contended that structural alterations had been effected in the building in 1926 and 1927 with the result that the identity of the building was changed and the premises became new premises exempt from the operation of the Rent Act. The trial Judge was of opinion that the Controller under section 4 had no power to determine whether the premises were old or new though he may have to do so incidentally. The question as to whether the premises were old or new was referred by consent to Mr. B. S. Sanjana as Commissioner. The Commissioner visited the premises, took evidence and held that the premises in question were new. The Small Cause Court Judge, who tried the case, accepted the report and ordered the defendant to vacate by the 31st of October.

It is urged on behalf of the defendant that the lower Court had no jurisdiction to decide the case but ought to have rejected the plaint under section 17 clause (2), on the ground that the plaintiff had not annexed to the plaint a copy of the order in force determining that the

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premises were not small premises or fixing their standard rent. It is urged on the other hand that the defendant consented to the appointment of Mr. Sanjana as Commissioner to decide the question whether the premises were old or new, that the Small Cause Court had jurisdiction to entertain the suit for ejection, and that as there was no order passed by the Controller under section 4, there was no order in force a copy of which could be produced with the plaint under section 17.

Under section 4 of the Rent Act, VII of 1918, the Controller has the power, after such enquiry as he may think fit, (a) to determine whether any premises are or are not small premises, and (b) from time to time to fix the standard rent of the premises. "Small premises" have been defined by section 2 clause (d), as any premises the standard rent of which does not exceed twenty rupees a month. Under section 17 of the Bombay Rent Act, VII of 1918, in every suit for rent or ejection in respect of any premises of which the monthly rent does not exceed thirty rupees, the plaintiff shall annex to the plaint a copy of the order in force determining that the premises are not small premises or fixing their standard rent, and under sub-section (2) if the plaintiff fails to comply with the terms of sub-section (1) the plaint shall be rejected. The monthly rent in sub-section (1) (a) of section 17 does not mean standard rent. See *Krishnarao v. Virji*.⁽¹⁾ If the premises in suit were governed by the Rent Act, the monthly rent of the premises being Rs. 17 it would be necessary for the plaintiff to annex to the plaint a copy of the order in force determining that the premises were not small premises or fixing their standard rent.

It is urged, however, that there is no order of the Controller in existence, and therefore, the plaintiff

⁽¹⁾ (1927) 29 Bom. L. R. 395.

could not annex to the plaint a copy of the order in force. An order in force means an order which has not been set aside in appeal under section 6 of Bombay Rent Act, VII of 1918. If an order is not in existence, the plaintiff ought to have applied to the Controller for a certificate under section 4 (1) (a) of the Bombay Rent Act, VII of 1918. Under the rules relating to the subsidiary Rent Act, VII of 1918, made under section 13 and published in the *Bombay Government Gazette*, 1923, Part I, pp. 368-370, dated February 22, 1923, provision is made for fees to be paid on an application for fixing or altering the standard rent under section 4 (1) (b), and also for fees on an application for a certificate of the Controller under section 4 (1) (a). The rules, therefore, contemplate an application to be made to the Controller to make an enquiry under section 4. The plaintiff, therefore, must annex to the plaint a copy of the order after making an application to the Controller to determine whether the premises are or are not small premises or to fix their standard rent, under section 4 (1) (a) and (b).

The next question is whether the failure to annex to the plaint a copy of the order under section 4 (1) (a) deprives the Small Cause Court of the jurisdiction to decide the suit or is an irregularity which can be waived by the defendant. It is urged on behalf of the plaintiff that the Small Cause Court had jurisdiction to decide the suit for ejectment, and that the defendant had consented to the appointment of the Commissioner to decide the question whether the premises were old or new, and therefore, must be considered to have waived the objection based on the failure to annex to the plaint a copy of the order under section 4 (1) (a).

Under section 41 of the Presidency Small Cause Courts Act, the suit for ejectment was cognizable by the

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Small Cause Court as the annual rent did not exceed Rs. 2,000. In a similar case, *Krishnarao v. Virji*,⁽¹⁾ where the defendant was occupying the premises but they were not the same premises but different as they were let for the first time in October 1925, it was held that the point with regard to section 17 of the Bombay Act, VII of 1918, did not make it one of jurisdiction, and that even if the lower Court arrived at a wrong conclusion of fact or law, there would be no ground to interfere in revision under section 115 of the Civil Procedure Code. It might amount to an irregularity in procedure in the exercise of its jurisdiction. The lower Court had jurisdiction over the subject-matter, but in the exercise of the jurisdiction a particular rule of procedure had to be followed, e.g., obtaining leave of the Collector in a suit to which sections 4 and 6 of the Pensions Act, XXIII of 1861, are applicable, (see *Nawab Muhammad Azmat Ali Khan v. Mussumat Lalli Begum*),⁽²⁾ or leave under section 17 of the Civil Procedure Code, 1882, (see *Narayan Shankar v. Secretary of State*),⁽³⁾ or consent of the Governor General in Council for the institution of a suit against a ruling chief under section 433 of the Civil Procedure Code, 1882, (see *Chandulal v. Awad bin Umar Sultan*).⁽⁴⁾ The question whether in such a case the objection can be waived by the party has been considered by the Privy Council in *Ledgard v. Bull*⁽⁵⁾ where it was held as follows (p. 145) :—

“When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

⁽¹⁾ (1927) 29 Bom. L. R. 895.⁽³⁾ (1906) 30 Bom. 570.⁽²⁾ (1881) L. R. 9 I. A. 8 at p. 20.⁽⁴⁾ (1896) 21 Bom. 351.⁽⁵⁾ (1886) L. R. 13 I. A. 134.

The present case does not come strictly within these authorities, because the defendant's plea was stated before issue was joined on the merits, and, in reliance of that plea, he objected to the case being tried, and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the District Judge."

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In the present case, the objection based on section 17 of the Bombay Rent Act, VII of 1918, was taken at the outset by the defendant, and though he consented to the appointment of Mr. Sanjana as a Commissioner to try the question whether the premises were new or old, he cannot be said to have waived the objection based on section 17. I think that if the premises in suit were governed by the Rent Act, the lower Court ought to have insisted upon the production of an order in force under section 17 of the Bombay Rent Act, VII of 1918. If there was no order in existence, the plaintiff ought to have applied to the Controller and got an order and annexed it to the plaint, and though the objection based on section 17 of the Rent Act may not amount to want of jurisdiction in the Small Cause Court it would, in my opinion, amount to material irregularity in the exercise of its jurisdiction.

The principal question, however, in the case is whether the premises in suit are governed by the Rent Act. The word "premises" occurring in section 17 (1) (a), though not defined in Bombay Act VII of 1918, is defined in the principal Act, Bombay Act II of 1918, and has the meaning assigned to it in that Act. Under section 2 (1) (b) (ii) of the principal Act, Bombay Act II of 1918, the word "premises" does not include any building or part of a building or land which has not been at any time let as aforesaid before the 1st day of October 1922. It has been found by the Court that these premises were altered in 1926, and the report of the Commissioner is that the buildings have lost their identity and

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that they are new premises. In *Chapsey Umersey v. Keshavji Damji*⁽¹⁾ it was held that the godown, which was reconstructed, was for all practical purposes a new godown and the standard rent for the same was the rent at which it was "first let" after January 1, 1916. In *Ibrahim v. Jan Mahomed*⁽²⁾ it was held by Madgavkar, J., following the decisions in *Chapsey Umersey v. Keshavji Damji*⁽¹⁾ and *Stockham v. Easton*,⁽³⁾ that where a landlord entirely reconstructs a wall which has fallen down and makes extensive structural alterations in the house at considerable cost, the premises so renewed are new premises which fall within section 2, clause (a) (ii), of the Bombay Rent (War Restrictions) Act, 1918, and he is at liberty to charge any rent for letting out the premises. The reasoning underlying the above decisions would equally apply to section 2, clause (1) (b) (ii), of Bombay Rent Act, II of 1918.

The lower Court having accepted the report of the Commissioner and found that the premises were new premises as they were reconstructed in 1926, they are not governed by the Bombay Rent Act. The word "premises" in section 17 of the Bombay Rent Act, VII of 1918, would not include the premises in suit, as in their present condition they were first let after October 1, 1922. In the present case, the whole house including the second floor was entirely changed and lost its identity. The finding of the lower Court, based on the evidence and the report of the Commissioner, that the premises in suit were new premises must be accepted in revision. We think, therefore, that section 17 of the Bombay Rent Act does not apply to the premises in suit.

We, therefore, discharge the rule with costs.

⁽¹⁾ (1920) 45 Bom. 744.

⁽²⁾ (1927) 29 Bom. L. R. 1439.

⁽³⁾ [1924] 1 K. B. 52.

The defendant should vacate on or before December 22, 1928.

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MURPHY, J. :—The Court of Small Causes in Bombay passed an order of eviction against the applicant on September 2, 1927, in Suit No. 17126 of 1927: and applicant challenges its correctness in revision.

He alleges that he has been occupying, from time to time, a room on the second floor of house No. 55 in Guncarriage Street, Colaba, formerly at a rent of Rs. 7 per mensem and latterly at Rs. 17 per mensem. The opponent, who farms the rents of this building, served applicant with a notice to vacate, and in due course filed the suit which ended in the order to vacate against the applicant.

At the trial, the applicant pleaded that there being no order annexed to the plaint in the terms of section 17 of the Bombay Rent Act (VII of 1918), determining that the premises were not "small premises" and fixing a standard rent, the suit could not be proceeded with. The opponent pleaded that extensive structural alterations having been effected in 1926, the premises were thereby converted into "new" ones, and consequently that the Rent Act did not apply.

On these allegations the Court appointed a Commissioner to determine whether the premises were old or new, and adopting the Commissioner's report, passed the order which aggrieves the applicant.

The applicant's point is that since the monthly rent of the premises does not exceed Rs. 30 the Court had no jurisdiction to entertain the plaint, which it should have rejected, under section 17, clause 2, of the Act.

At the outset, the learned Judge of the Small Cause Court recorded an opinion that the Controller, under section 4, had no power to determine whether the

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premises were old or new, and then by consent appointed Mr. B. S. Sanjana, Commissioner, to inquire into this point.

It was on his report that an order was passed, to the effect that it was confirmed, and that applicant was to vacate by October 31, 1927.

Looking to the frame of Act VII of 1918, it appears to me that the intention, broadly speaking, was to have the rents of all "small premises," within the defined meaning of that expression, and where there was a dispute, fixed by the Controller on the application of either party—see section 2 (*d*) for the definition, and section 4 (1) (*a*) and (*b*) for the determination of the two points, whether the premises are, or are not, "small premises," and if they are, for determining the standard rent.

The sections of the Act following section 4 provide for a certain case (section 5), for determining objections (section 6), for a penalty for receiving rent in excess of the standard rent (section 7), for excluded premises (section 7A), for a penalty for disturbance of easements (section 8), for the recovery of excess payments (section 9), and for the accrual of rent (section 10). Sections 11 and 12 then confer certain legal powers on the Controller, section 13 gives power to make rules, and section 14 lays down that the Controller is not a Court, while section 15 bars legal proceedings in certain matters. Sections 16 and 17 appear to be connected. Section 16 forbids the issue of a distress warrant, unless the person applying for it produces a copy of an order in force, either determining that the premises are not small premises, or that the standard rent has been fixed. In such cases the production of the order is a condition precedent. Similarly, section 17 (1), with which we are concerned,

prescribes that, in certain cases, including that of a suit for ejection out of premises rented at less than Rs. 30, there shall be annexed to the plaint a similar order.

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Sub-section 2 provides that if the plaintiff fails to comply with the terms of the sub-section (1) the plaint shall be rejected.

On these facts, what is the effect when no order from the Controller has been applied for?

I think the intention clearly was that the production of an order from the Controller should be a condition precedent in this case also, and that failure to fulfil it invites the penalty provided in sub-section (2), and consequently that the suit should have been dismissed, unless it could be shown that the "premises" were new, and so did not come within these provisions of the Act; and this view is confirmed by the provision in sub-section (3) as to the effect of a rejection of the plaint under sub-section (2). The next question is whether these premises are "new," or not. It is not absolutely clear from the report that the applicant's own room has been altered, but there is no doubt that the whole building has been remodelled and modernized and provided with better amenities, in which the applicant must be participating, and in the circumstances it can, I think, reasonably be argued that the reconstruction amounts practically to a rebuilding of the whole house.

This being so, it does not appear to me that there is any case for revision, and I agree that the application must be dismissed with costs.

Rule discharged.

B. G. R.
