Bombay High Court Hind Rubber Industries Pvt. Ltd. vs Tayebhai Mohammedbhai ... on 3 July, 1996 Equivalent citations: AIR 1996 Bom 389, 1996 (4) BomCR 414, (1996) 98 BOMLR 87 Bench: R Lodha JUDGMENT 1. In this petition preferred under Section 115 of the Code of Civil Procedure, 1908, the Petitioner who is ori-ginal defendant No. 1 in the suit, seeks to challenge the order dated 29-11-1991 passed by the City Civil Court, Bombay holding that the suit filed by the plaintiffs (Respondents No. 1 and 2 herein) was triable by that Court and that the said Court has jurisdiction to entertain and try the suit. 2. The original plaintiffs who are respondents No. 1 and 2 herein filed a suit against the present petitioner/defendant No. 1 and the Municipal Corporation of Greater Bombay. It was inter alia averred in the said suit that the plaintiffs were owners in respect of the property being land bearing City Survey, No. 370(B) admeasuring about 12090 Square meters and structures standing thereon. One portion of such property comprising of a structure consisting of ground and first floor, was let out to the defendant No. 1. The tenancy was only with regard to the structure and not of land and it was let out to the defendant No. 1 for the purposes of commercial use only. The said structure which was let out to the defendant No. 1 caught fire on 25th August 1995 and the complete structure occupied by the defendant No. 1 was gutted and destroyed. The case of the plaintiffs further was that on destruction of the structure let out to the defendant No. 1, the tenancy rights came to be extinguished and/or stood in abeyance at the option of the tenant. The plaintiffs averred in the plaint that defendant No. 1 was not entitled to carry on any work of construction and/or further construction on the said premises and the Bombay Municipal Corporation (B.M.C.) has also issued notice under Section 354A of the Bombay Municipal Corporation Act, 1888. The plaintiffs stated in the plaint that the suit did not attract any of the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Aci, 1947 (for short Bombay Rent Act), and, prayed for the reliefs that B.M.C. be directed by a mandatory order to issue further notices under Section 351 of the B.M.C. Act, 1888 to the defendant No. 1, and defendant No. 1 be restrained from carrying on any work of construction and/or further construction on the disputed land in any manner whatsoever and/or from entering upon the said property through their contractors and/or instructing their contractors, developers to carry on any work of construction of any nature whatsoever. 3. In the said suit the defendant No. 1 prayed for framing a preliminary issue whether the suit filed by the plaintiffs could be entertained and tried by the said Court and by the impugned order dated 29-11-1991 the trial Court held its jurisdiction in the affirmative giving rise to the present revision application. 4. The learned counsel for the parties have been heard by me at considerable length. 5. Mr. Thakkar, learned counsel appearing for the petitioner strenuously urged that on destruction of the tenanted property by fire the tenancy rights of the defendant No. 1 did not come to an end and that the defendant No. 1 was entitled to remain in possession and while remaining in possession, the tenant was entitled to carry on necessary construction and repairs for protection of its tenancy rights. According to learned counsel for the Defendant No. 1, the claim or question pertaining to repairs of construction

by the defendant No. 1 is a claim of question arising out of the provisions of the Bombay Rent Act and is, therefore, within exclusive jurisdiction of Court of Small Causes at Bombay under Section 28 of the said Act and the joinder of the B.M.C. as defendant No. 3 to the suit between landlord and tenant filed for adjudication of such claim or question cannot take away the jurisdiction of the Court of Small Causes. In support of his contentions Mr. Thakkar the learned counsel for the defendant No. 1 relied upon the Division Bench Judgment of this court in Krishna Lzxman Yadav v. Narsinghrao Vilhalrao Sonawane, 1973 Bom 358. Mr. Thakkar also relied upon judgment of the Apex Court in Sushila Kashinath Dhonde v. Harilal Govindji Bhogani, and, Division Bench judgment of this Court in Mirabelle 'Hotel Company Private Ltd. v. Manu Subedar, . Two unreported judgments were also relied upon by the learned counsel for the petitioner; (i) Captain Nanda v. Amarnath.P. A.F.O. No. 50 of 1986 decided on 17-9-1990 by Hon'ble H. Suresh J. and (ii) M/s- Tide Water Oil Company. (India) v. Kulsumbaj Mahomed-bhai. A. Madraswalla in Appeal No. 54 of 1984 decided by Division Bench. 6. Responding to the contentions of the learned counsel for the defendant No. 1, on the other hand Mr. M.M. Sakhardande, the learned counsel for plaintiffs vehemently contended that on destruction of the entire tenanted property in fire, the tenancy in favour of the defendant No. 1 was exting-uished and consequently there was no subsisting relationship of landlord and tenant between the plaintiffs and defendant No. 1 and, therefore, Section 28 of the Bombay Rent Act was not at all attracted. It was also argued by Mr. Sakhardande that even if it be assumed that tenancy of the defendant No. 1 was not extinguished by the said fire and it survived, still the relief claimed in suit is of injunction to the effect that any repair or reconstruction in the premises has to be done after obtaining necesssary permission and sanction from B.M.C. and such repairs and reconstruction has to be done in accordance with Sections 337 to 346 of the B.M.C. Act and, therefore, the jurisdiction of the City Civil Court was not excluded. In support 9f his contentions, the learned counsel for the plaintiff relied upon the Division Bench judgment of the Kerala High Court in Dr. V. Siddharthan, v. Pattiori Ramdasan,_ , Article 59 of American jurisprudence para 2066 of Woodfall on Landlord and Tenant Dinkar S. Vaidya y. Ganpat S. Gore, , and, unreponed judgment of the Division Bench of this Court in Appeal No. 557/52 Mehta & Patel Bros. v. Bai Hajrabai w/o Janmahomed decided on 24-6-1953. Mr. Sakhardande, the learned counsel for the plaintiffs further contended that the concession made by the learned counsel for the plaintiffs before the trial court that the tenancy of the defendant No. 1 has not been extinguished was a result of mistaken notion of law and, therefore, was not binding on the plaintiffs. The learned counsel for the plaintiffs contended that such concession cannot bind the party if it has been made under mistake of law. Mr. Sakhardande thus supported the impugned order and submitted that the trial Court did not commit any error in holding that it has jurisdiction to entertain and try the suit. 7. Question, the first and foremost, that arise for consideration is whether on destruction of the tenanted premises by fire, the tenancy rights of the defendant No. 1 were extinguished and came to an end. 8. Chapter V, of the Transfer of Property Act, 1882 (for short T.P. Act) deals

with leases of immovable property. Section 105 defines lease as "Section 105 – Lease defined – A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms." 9. Rights and liabilities of lessor and lessee in the absence of a contract or legal usage to the contrary are incorporated in Section 108 of the T.P. Act. Section 108(e), of T.P. Act reads thus- "Section 108 – Rights and liabilities of lessor and lessee. – In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased; (e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantial and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void: Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision; 10. Lease is determined by any of the modes under Section 111 of the T.P. Act and notice to quit under Section 106 is one of the modes of the determination or case. Sections 112 and 113 of the T.P. Act deals with waiver waiver of forfeiture and waiver of notice to quit. Indisputably lease is a transfer of rights in immovable property and the T.P. Act provides the mode of transfer of such right by way of lease and also makes provision how leases are made. Once a right is created in an immovable property, by way of lease, such right and interest which has been transferred in favour of lessee only reverts to the lessor on determination of such right and interest in accordance with the provisions of T.P. Act. Right of lease and tenancy, therefore, in the leased property once transferred by lessor in favour of lessee comes to an end, and, is determined only in accordance with the provisions of the T.P. Act ordinarily and does not revert to the lessor landlord in ordinary circumstances, except upon termination of such interest in accordance with the provisions of the T.P. Act. 11. The aforesaid legal position has come up for consideration before various Courts. In Krishn Laxman Yadav v. Narsinghrao Vithalrao Sonawane, the issue before the Division Bench of this Court was whether as a result of the floods the house occupied by the tenant was excessively damaged and was later on removed by the Municipal Corporation as dangerous to human lives and landlord commenced to construct a new building at the site of the old house could tenants maintain a suit under Section 28 of the B.R. Act seeking the declaration that the tenancy has not been extinguished and that they were entitled to occupy as tenants in newly constructed tena- merits at the place equivalent to the original tenaments occupied by them. Answering the said question, the Division Bench of this Court held that the destruction of the house did not determine the tenancy and rights of occupation was incidental to the contract of tenancy which continued to exist between the parties. A strong plea was made by the counsel in the said case that the tenanted house having collapsed and

destroyed, the tenancy was extinguisheid but the Division Bench of this Court negatived the said plea and on consideration of various judgments thus held-"9. With reference to the first two contentions, it is necessary to notice that there can be no dispute that a lease and a tenancy involves transfer of rights in immovable properties and the interest transferred will not revert to the landlord in ordinary circumstances except upon termination of such interests in accordance with the provisions in Section 106 read with Sections 111, 113 and the other relevant sections in Chapter 5 of the Transfer of Property Act. There is no law preventing letting out and/or lease of broken and tumbled down and/or damaged houses. It is also well settied that contracts for transfer of immovable properties including agreements for lease are liable to be specifically enforced. In other words, parties to such contracts and agreements will be subjected to such orders as are necessary for specific performance of such contracts and agreements. These rights existed in favour of the lessees and/ or tenants in ordinary law and in that connection protection under the Rent Restriction Act was never necessary. The protection that was given under the above Act was against the ejectment of tenants. It is important to notice that under Sections 16 and 17 to enable a landlord to rebuilt a new property ejectment of tenants was authorised. In Sections 17B and 17C provision was made for giving specific rights to tenants concerned to reoccupy the repaired and/or newly built-up premises. The provisions in the Act go to indicate that even under the Act tenants' right to reoccupy repaired or newly constructed building-premises has been recognised. The above discussion goes to show that even prior to the above Act and thereafter also the normal rights of a tenant for specific performance have always been recognised at Law. The only condition for specific enforcement would be such as provided in the the Specific Relief Act. In other words, for getting specific performance the tenant must be ready and willing to perform his part of the covenants in the lease and/or otherwise agreed between the parties. It is, therefore, clear that a tenant who is willing to satisfy the above condition must always be entitled to relief of specific performance in cases in which there is no physical impediment in granting such relief. In this connection reference can be made to the two English cases on which reliance has been placed on behalf of the petitioners. In the case of (1948) 1 All ER 306. Denning, J. as he then was, in connection with the rights of the lessee of a house destroyed in any enemy action, made the following observations: "The position at common law is plain. She had a contractual tenancy, and that tenancy had never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands ..... No doubt, the landlord still has the contractual right to determine the tenancy ..... The tenancy, therefore, remains in being. The fact that a new house has been erected on the site does not make any alteration to the legal position ..... That house is substantially the same as the old one. It is annexed to and part of the land which was let under the tenancy and, therefore, it is now included in the tenancy which has never been determined. The tenant, Mrs. Simper, is still the tenant of the premises, and is entitled to

possession of them." It appears from the observations in the case cited that in the appeal against the decision of Denning, J. before the House of Lords, the above legal proposition have not been questioned. The case of (1948) 2 All ER 141 also related to a dwelling house which was destroyed by enemy action and was let out on a monthly tenancy. The landlord erected a new house on the site of the old one and when the new house was fit for occupation, the tenant's attempt to reoccupy the same was defeated by the landlord. The landlord then served a notice to quit on the tenant determining the contractual tenancy and the tenant filed his action for specific performance of his right as a tenant and claimed possession. The Court found that at the date when the house was destroyed by enemy action the tenancy had not been determined and the Court would not permit the landlord to exclude the tenancy from the protection of the Rent Restriction Act by taking advantage of his wrongful act in refusing the tenant physical occupation and then terminate the tenancy by notice to quit. The Court observed that the rights created in a tenant could not come to an end by frustration. The contract of tenancy continued between the parties inspite of the destruction of the house and as already stated above granted specific performance to tenant plaintiff by directing the landlord to deliver possession. In that connection, Lord Justice Tucker observed- ". . . . . I think it is clear from all the authorities . . . . . that broadly speaking the proposition has long been recognised that only an occupying tenant can claim the protection of the Rent Restriction Acts but, in my view, the tenant here is not primarily claiming protection under the Acts. He is claiming to be put into possession of premises of which, at the material date, Feb. 17, he was the contractual tenant. It is the landlord who is really seeking to make use of Rent Restriction Act by saying"Because at a date subsequent to Feb. 17 I gave you a notice to quit and you are, through my own act not the occupying tenant, I am entitled to claim the benefit of the notice to quit and you on your part are not entitled to claim the benefit of your tenancy." I think that that would be a position which would be contrary to one's ideas of justice and equity and that any Court must have power in circumstances such as the present to order that the landlord shall put the tenant back into the position in which he should have been on Feb. 17. He having been put into that position, the subsequent rights of the parties can, no doubt, be worked out in the approprite proceedings to ascertain how they stand under the provisions of the Rent Restriction Act. . . . . " 12. In M/s. Tide Water Oil Company (India) Ltd. v. Kulsumbai Mahomedbhai A. Madraswaila, Appeal No. 54/84, the Division Bench of this Court held as follows- "The plaintiffs and defendants who are landlords of the building objected to the repairs being carried out on the ground that the tenants have no right to carry out any structural alternations or make any reconstruction. They are at the most statutory tenants and they cannot be permitted to carry out any construction of the premises, we have heard the learned counsel for the parties, we have heard the learned counsel for the parties at length. The appellants and the respondents 7 to 8 are the tenants. Whatever disputes there may be among the landlords, the fact remain that the appellant and respondents 7 and 8 are the statutory tenants of the ground floor portion of the building 'B' and notwithstanding the fact that the

building has been extensively damaged on account of the fire that gutted it on 7th August, 1982, they continued to be the statutory tenants of the building and cannot be evicted by the landlords or even by the Court Receiver. When the tenants are entitled to continue in the premises, they can certainly protect themselves and their property by carrying out such repairs as are necessary for the purpose. May be the proposed repairs are extensive and expensive, it is contended that what the tenants wish to carry out is not merely repairs, but that it really amounts to construction and that they are not entitled to do. We are however, of the opinion that when a statutory tenant is entitled to continue in the premises notwithstanding the damage to the building and the landlords have no right to evict him otherwise than in accordance with law, the tenant cannot be prevented from protecting himself and his goods on the premises by carrying our repairs as are necessary. The required to be carried out in the circumstances may even amount to construction, it is unnecessary for us to go into that question. May be these repairs involve heavy expenditure but when the tenants are prepared to carry out the repairs at their own expenses and without claim for reimbursement and are also agreeable to the structure being removed, when the landlords or their successors in interest intend to rebuild the structure after obtaining due permission, we see no reason why the tenant should not be granted permission. Any such repairs of reconstruction does not amount to causing any damage to the property. On the contrary, it amounts to improvement of the suit property without any detriment to the interests of the landlords. The fact that those do not constitute minor repairs, but according to the reports of the Architects major repairs according to other reconstruction requiringthe permission of the Municipal Corporation under Section 342 of the Bombay Municiplal Corporation Act. No detriment is unused to anyone by allowing the repairs to be carried-out under the supervision of the Court Receiver's Architects. In our view, it is just and necessary to permit these repairs to be carried out. Of course, before carrying out these repairs the appellants and the respondents 7 and 8 shall obtain such permission as is required under law from the Municipal Corporation. The Court Receiver himself is not placed in possession of such funds as are sufficient to carry out these repairs. Muchless, he is in a position to reconstruct the entire building 'A'and 'D'. By refusing permission to carry out the repairs proposed to building 'B', a situated cannot be created to compel the statutory tenant to vacant the building when they are entitled under law to occupy. Refusal to consider the present proposal for the repair or reconstruction of the entire building would in effect amount to that the operation of this order be stayed for a period of six weeks. We, however, see no reason for stay the operation of the entire order. It would be sufficient to direct that while steps may be taken in pursuance of the order just now pronounced, the construction or repairs may be commenced till the expiry of period of six weeks from today." 13. Mr. Sakhardande, learned counsel for the Plaintiff/ Respondent strongly relied upon the judgment of Kerala High Court in Dr. V. Sindharthan v. Pattiori Ramadasan, wherein the Kerala High Court held thus - "The more substantial point in dispute is the impact of the total destruction of the subject-matter of the lease. Section 108(e), T. P. Act, provides :"If by fire,

tempest or flood or violence of any army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void." This clause only provides that in the circumstances detailed therein the lessee shall be void at the option of the leases. The reason behind this option appears to be if the leasehold is destroyed or rendered unfit for the purpose of the lease it would be pointless for the lessee to pay the rent but if he chose, he could continue to pay it. This clause is one of the clauses dealing with the rights and liabilities of the lessee and does not describe the effect of the destruction of the subject of the lese upon the tease itself. 9. Turning to case law, in Simper v. Coomba, (1948) 1 All 306 the question arose whether a tenancy was extinguished by the destruction of the building by bomb during the war, Denning, J. held that it was not. The learned Judge observed : "The position at common law is plain She had a contractual tenancy and that tenancy has never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands." This statement does not explain whether the destruction of a house will destroy the tenancy of the house itself but only indicates its effect on the tenancy of the land on which it stands, Woodfalls' Law of Landlord and Tenant, 28th edition, Vol. I para 1-2056, page 928 states : "A demise must have a subject-matter, either corporeal or incorporeal. If the subject-matter is destroyed entirely, it is submitted that the lease comes automatically to an end, for there is no longer any demise. The mere destruction of a building on land is not total destruction of the subject-matter of a lease of the land and building. So demise continues." This last sentence is based upon Simper v. Coombs, (1948) 1 All ER 306, and is inapplicable. The earlier part of the passage however fully supports the appellant's contention. 10. In , a workshop which was the subject of a monthly tenancy was completely destroyed by fire through the negligence of the tenant and another. The landlord sued far arrears of rent, eviction and recovery of damages as well as an injunction restraining the tenant from constructing any unauthorised structure in the property. So far as relevant, the tenant contended that notwithstanding the destruction of the workshop the tenancy continued and that the landlord was entitled to none of the reliefs. The learned Judge held, following , that by the destruction of the building the lease could not be said to have become void and thus discharged. We however hold following 1976 Kerala LT 859 that where the subject-matter of a lease like the building is totally destroyed, the tenant is not entitled to squat on the ground where the building stood or construct a new building in its place or require the landlord to put up a new structure. The learned Judge concluded (at p. 160 of AIR): "The lease being a transfer to enjoy the property transferred, with the total destruction of the property the lease cannot be considered as continuing. There cannot be a lease subsisting in regard to a property not in exisience. In this case the appellant has not been able to establish that what has been leased out is not only the building but also the land on which the building stood." In taking this view, the learned Judge

expressed full agreement with the observations which we have already extracted from Mahadeo Prasad v. Calcutta D. & C. Co., . In George v. Varghese, 1976 Ker LT 859 a building which was the subject of a lease was destroyed by fire. The lessee vacated the premises and started his business in another building. The landlord constructed a new building in place of the old. The former tenant thereupon brought a suit for directing the landlord to let the new building to him on the ground that the old tenancy still subsisted. Refusing the prayer the learned Judge held that he had neither a contractual nor a statutory right to compel the landlord to surrender possession of the new building to him. 11. In the referring order the learned Judge had expressed a tentative view that there was some conflict between . The former case arose in totally different circumstances under the Buildings (Lease and Rent Control) Act and has no bearing as we indicated above on the present controversy about the impact of the destruction of the leasehold on the continuance of the tenancy. We do not therefore think it worthwhile to discuss the former case any further. 14. In Article 592, of American Jurisprudence relied on by Mr. Sakhardande the following statement is made - "592. Complete destruction. The common-law rule that a lessee is not relieved of his obligation to pay rent through the accidental destruction of the buildings demised to him presupposes that some part of the premises remains in existence for occupation by the tenant, irrespective of the destruction. If the destruction of the premises is complete – nothing remaining, the subject matter or thing leased no longer existing then the liability of the tenant for rent cases. This is because rent is a profit issuing out of the lands or tenements as compensation for the use of occupation. Hence, if the principal is gone, the interest or incident cannot continue to exist. Thus, it has been held that the destruction of the property extinguishes the liability for rent, as under a lease of a river front and landing consisting of a narrow footing at the base of a bluff without any wharf, dock, or pier, where the unprecedented ravages of the river effectually took away the use of the landing by washing away all but a shallow fragment of the lot. Likewise, the liability of a tenant for renl subsequently to accrue under a lease of a building, which does not include the freehold, is terminated upon the destination of the building. Upon the termination of a lease in advance of the expiration of the term, by reason of the destruction of the leased premises, the lessor is entitled to recover such part of the rent for the entire terms as is proportionate to the period of occupancy by the lessee." 15. Woodfall on Landlord and Tenant was also pressed into service by the learned counsel for the Plaintiffs and particularly para-2066 of the said book which reads thus - "2066. Total destruction of subject-matter. A demise must have a subject matter, either corporeal or incorporeal. If the subject-matter is destroyed entirely, it is submitted that the lease comes automatically to an end, for there is no longer any demise. The mere destruction of a building on land is not total destruction of the subject-matter of a lease of the land and building, so fhe demise continues. But if by some convulsion of the nature the very site ceases to exist, by being swallowed up altogether or buried in the depths of the sea, it seems clear that any lease of the property must come to an end. This view is consistent with the lessee's entitlement to an apporlionment of rent in the event of the total loss of

part of the demised land. Likewise since a demise of part of a building above the ground necessitates the definition of a physical subject-matter by walls, floors and ceilings, there being no such thing in law as a demise of a volume of space above the surface of the earth unbounded by physical walls, floors or ceilings, it is submitted that the demise of part of a building, without any of the soil upon which the building stands can survive such a destruction of the building as leaves physically defined subject-matter of the demise." 16. In my view, the correct legal position in this counlry appears to be that the destruction of the tenanted structure does not extinguish the tenancy and the right of occupation of the tenant under the contract of tenancy continues to exist between the parties. Merely because the tenanted structure has been destroyed or demolished, the right transferred under the lease cannot be said to have come to an end, and the relationship of lessor and lessee continues to exist. The destruction of the tenanted premises does not destroy the tenancy rights nor does it bring to an end the relationship of lessor and lessee or for that matter landlord and tenant. The lessee continues to be lessee in the property leased even after its destruction by fire or such like event unless the lessee exercises his option of treating such lease as void. It may be observed that Section 108 of the T.P. Act deals with the rights and liabilities of lessor and lessee and Part-B and clause (e) of Section 108 provides that if the property leased in wholly destroyed or rendered substantially and permanently unfit for the pur-poses for which it was leased by fire, tempest or flood or violence of any army or of a mob or other irresistible force, such lease may be rendered void at the option of the lessee provided of course that such injury to the lease property has not been occasioned by the wrongful act or default of the lessee. That means that right of the lessee in the leased property subsists even if the leased properly has been destroyed by fire, tempest or flood or violence of an army or of a mob or other irresistible force unless the lessee exercises his option that on happening of such events the lease has been rendered void. By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end unless the lessee exercises such option. The express provision in clause (e) of Section 108 leaves no manner of doubt that on destruction of leased property by fire, the lease cannot be said to be extinguished, automatically and in this view of the matter the statement of law made in Article 592 of American Jurisprudence and para 2066 of Woodfall on landlord and tenant and relied upon by the learned counsel for the Plaintiff/Respondent cannot be applicable in our country. The view of the Kerala High Court in Dr. V. Siddharthan's case (supra) is also not acceptable because of no proper construction given to Section 108(e) of the T.P. Act. 17. Mr. Sakhardande, learned counsel for the Plaintiff/Respondent strenuously urged that the judgment of this Court in Krishna Laxman Yadav's case (supra) is inconsistent with another Division Bench judgment of this Court in Appeal No. 557/92 Mehta & Patel Brothers v. Bai Hajrabai w/ o Janmahomed decided on 24-6-1953 and, therefore, the matter deserves to be referred to the larger bench for authoritative pronouncement. 18. In Appeal No. 557/92 M/s. Mehta & Patel Brother v. Bai Hajrabai

w/o Janmahomed, the Division Bench of this Court was confronted with the question whether on 18th June when the contractual tenancy expired there were any premises as defined in Rent Restriction Act of which the Defendants were in possession and in respect of which protection can be given as provided in the Rent Restriction Act, and, Division Bench held thus - "Now, the contention of Mr. Kapadia is that the defendants were at all times in possession of the premises and on the expiry of the contractual tenancy on the 18th June, 1947 the defendants became statutory tenants and their tenancy was protected by the Rent Restriction Act and therefore they were entitled to the possession of the premises, and when they revoked the leave and licence of the plaintiff, an order of possession was rightly made in their favour. As against this, Mr. Shah urges upon us that what we have to consider is whether on the 18th June, 1947 when the contractual tenancy expired there were any premises as defined in the Rent Restriction Act of which the defendants were in possession and in respect of which protection can be given as provided in the Rent Restriction Act. Now, there are certain facts to which attention might be drawn. Unfortunately for the defendants they made a char admission in an affidavit dated the 1st June, 1947 to the following effect :"However, before the tenancy terminating notice is sent and before the suit is filed and decided against my firm land the entire build- ing along with the shop which were occupied by my firm has been pulled down and demolished by the petitioner". Therefore, if this admission is correct, then on the 1st June no building was in existence and what was left was merely the land on which the structure stood. Mr. Kapadia has pointed out that Nemchand, a partner of the defendants' firm has stated in his evidence that the statement mentioned in the affidavit was incorrect and Mr. Kapadia has drawn our attention to the evidence of the defendants' architect Marathe, which evidence has been accepted by the learned Judge below, and, Mr. Kapadia rightly says that on a technical question like the state of the building on a particular date the evidence of a professional gentleman should be preferred to the admission made by the defendants. But again unfortunately for the defendants when we turn to the evidence of Marathe he does not specifically state that two side walls of the shop stood on the relevant date and the whole building was not pulled down. The farthest the evidence of Marathe goes is that in the side walls which are now constructed there to be found some work which goes to show that in the walls not only bricks were used but karel was also used.- Naturally Marathe was not in a position to say what exactly was the condition of this structure on the 18th June, 1947 because he went to inspect the building on the 11th February 1947, and his deductions were dependent upon the observation he made on that date. He did remove the plaster work of these two walls and did find that the structure of the two walls was not entirely new. But we are not told and indeed we cannot be told as to what the position of these two walls was on the relevant date viz. 18th June, 1947. Mr. Kapadia has then said that there is no evidence that the flooring was demolished and a new flooring was put in the new structure that was put upon the 18th June, 1947. But the only evidence on the record is that the building was pulled down to the plinth level. In our opinion, that does not suggest that the flooring was not demolished. We have only got

to took at the dimensions and the nature of the new building that was put after the old building was demolished to find that really the building that now exists, in respect of which the defendants have made a claim, is undoubtedly a new building and not in any way connected with the old building because the evidence shows.that the width of the ground floor has been increased by three feet, that the height of the ground floor is 22 feet as against the height of 9 feet and 6 inches and that whereas the old building..and a ground floor and three storeys, the new building has only a ground floor with a mezzanine flooring. Therefore, we agree with the view taken by the learned Judge that the new building cannot be in any way identified with the old building which was let out to the defendants. There is clear authority in favour of Mr. Shah in Ellis & Son, Amalgamated Properties Ltd. v. Sisman, (1947) 1948, 1 KB.653. In that case Lord Justice Tucker had to consider a similar plea made by the tenant before him. There a house was destroyed by enemy section. The contractual tenancy was continued; a new building was put up which was not completed and then the contractual tenancy was terminated. The question that arose was whether the tenant could claim statutory protection and the answer that was given by Lord Justice Tucker was that the material date to consider was when the contractual tenancy was terminated and that as on that date there was no dwelling house in existence of which it could be said that the tenant was in possession, the tenant was not entitled to protection under the Rent Restriction Acts. In a dwelling house, under our law that is protected is 'premises' as defined in the Act and the 'premises' as defined by the Act is"any building or part of a building let separately including any land appurtenant thereto". Now, it is not possible to take the view that if the land exists without the building, it would still be 'premises' within the meaning of the Act. In the English case also the dwelling house was defined as including any land which was let with the dwelling house and Lord Justice Tucker refused to accept the, argument that if the dwelling house, was destroyed and the land remained without the dwelling house, the tenant could claim statutory protection only in respect of the land. Therefore, if on the 18th June, 1947 there was no building in existence, we cannot say that the tenant could claim statutory protection only with regard to the land which was in existence on that date". 19. In Krishna Laxman Yadav's case (supra), the Division Bench considered the judgment of Mehta & Patel Brothers v. Bai Hajrabai w/o Janma-homed in Appeal No. 557/52 delivered on 24-6-1853 (supra) extensively and held that the observations made in the said judgment were on the basis of the fact that it was admitted in that case that contractual tenancy between the landlord and tenant in that case came to an end. The Division Bench dealing with the previous Division Bench judgment of this Court in Appeal No. 557/52 held thus - "7. Though at first blush the above observations appear to be in favour of Mr. Mhamane, the ratio of the above observations has not that effect. The reason for this finding is that the above observations came to be made on the basis of the fact that it was admitted in that case that contractual tenancy between the landlord and the tenant in that case had come to an end. The tenant's claim for protection as regards the possession of the premises was based on the provisions in the Rent Restriction Act. It was for this reason that the

Division Bench at more than one place referred to the fact that the contractual tenancy had come to an end and the material date was subsequent to the date of the termination of contractual tenancy and that then a dwelling house of which it could be said that the tenant was in possession was not in existence. This was the main basis on which finding was made that the tenant was not entitled to protection under the Rent Restriction Act. Now, it requires to be noticed that in the present case, at all stages, including the arguments before us, both sides have repeatedly mentioned that the contractual tenancies of the Petitioners had never been put to an end. The case of the Petitioners was that the law of the land is that whenever a landlord puts up a new construction in the place of the old construction and the tenancy of the tenant has not been ended, the tenant has a right to claim the tenancy in the newly constructed building in respect of the portion which is at about the same site as the tenement in the destroyed house. The plaint in the suit is on the assumption of the above being correct position in law. There was no dispute between the parties that the new building that the Respondent No. 1 wasabout to construct was to consist of small rooms which were essentially to be let out to third parties on tenancy. Now, these rooms in the new building, therefore, could justifiably be described as premises within the meaning of that phrase in sub-clause (b) of clause (8) of Section 5 of the Rent Act. This clause runs as follows :–"Premises" means - (a) ..... (b) any building or part of a building let separately....." We have no doubt that the Petitioner's claim for declaration relates to the building which would be within the meaning of the above phrase as defined in clause (8) of Section 5. The claim on the footing that the Petitioners were tenants of the premises in respect whereof the declaration was claimed. There was no dispute by the Petitioners that in respect of such premises they would be liable to pay rents as tenants. 20. For the aforesaid reasons, I fully concur with the view of Division Bench of this Court in Krishna Laxman Yadav's case (supra). 21. It would be pertinent to note here that during the course of argument before the trial Court, it was in unambiguous terms conceded by the learned counsel for the parties that the Plaintiffs and Defendant No. 1 stand in the relationship of landlord and tenant with respect to entire suit premises and that the tenancy of the Defendant No. 1 does not stand extinguished by fire. The learned counsel for the Plaintiffs did not dispute the correctness of the aforesaid statement recorded in the impugned order, but his contention is that the admission made by the lawyer on question of law is not binding on the client and such admission of the counsel based on erroneous opinion of question of law before the trial Court can always be challenged in appeal. In support of this . contention, the learned counsel for Plaintiffs relied upon Division Bench Judgment of this Court in Punjabai Bhilasa v. Bhagwandas Kisandas, AIR 1929 Bombay 89 and Division Bench judgment of Allahabad High Court in Shiv Singh v. The State Transport Appellante Tribunal, . 22. In Punjabai Bhilasa's case (supra) this Court per Patkar, J. held that the pleader's admission on a pure question of law is not binding on his client and amounts to no more than his view that the question is unarguable. The Allahabad High Court in Shiv Singh's case (supra) after considering Section 115 of the Evidence Act in the said report observed

that it was well-settled that erroneous admission on a ques- tion of law made by a party or his agent was not binding and did not preclude the party from making assertion contrary to the admission and from seeking the relief to which on a proper construction of law he was entilled. 23. The proposition that an erroneous admission on question of law made by a party or his agent is not binding admils of no two opinions and that legal position can be taken to be well-settled. However, on the face of the provisions of Section 108(e) of the T.P. Act and the Division Bench judgment of this Court in Krishna Laxman Yadav's case (supra) can it be said that the admission made by the counsel for parties that Plaintiff and Defendant No. 1 stand in the relationship of landlord and tenant and that the tenancy of Defendant No. 1 has not been extinguished by fire is erroneous opinion of law by counsel and, therefore, not binding on the parties. Certainly my answer is in the negative. How can the said concession made by the learned counsel for the parties be said to suffer from any erroneous opinion of law when it is based on proper consideration of the view of the Division Bench judgment of this Court in Krishna Laxman Yadav's case (supra) and other cases and the statutory provisions of Section 108(a) of the T.P. Act. 24. The learned counsel for the Plaintiffs then assailed the correctness of the Division Bench judgment of this Court in Krishna Laxman Yadav's case (supra) and urged that the said judgment was not binding and the observations made in the said judgment were per incuriam and suffer from vice of sub-silentio decision. In support of this contention, the learned counsel relied upon the decisions of the Apex Court in (i) Municipal Corporation of Delhi, v. Gurnam Kaur, ; (ii) State of U.P. v. Synthetics and Chemicals Ltd., . 25. Dealing with the binding nature of the decisions of the Supreme Court with reference to Article 141 of the Constitution of India, the Apex Court in Municipal Corporation of Delhi v. Gurnam Kaur's case (supra) observed that obiter dicta, per incuriam and sub-silentio decisions and orders have no binding force and so are the orders made with the consent of the parties and with the reservations that the same should not be treated as precedent. Reiterating the same legal position, the Supreme Court in State of U.P. v. Synthetics and Chemicals Ltd.'s, case (supra) proceeded to further lay down that the per incuriam and sub-silentio judgments and orders are exceptions to rule of precedent and such decisions which are not express nor founded on reasons nor proceeding on consideration of the issue can be deemed as law declared under Article 141 of the Constitution of India. Doctrine of precedent has been well explained by the Apex Court time and again and in para Nos. 40 and 41 of the State of U.P. (supra), the Apex Court observed that - "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered 'in ignoratium of a statute or other binding authority'. Young v. Bristol Aeroplane Co. Ltd. Same has been accepted, approved and adopled by this Court while interpreting Article 141 of the Conslifution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu y. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England

incorporating one of the exceptions when the decision of an appellate Court is not binding. 41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words, can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio."A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point-of-law involved in the decision is not perceived by the Court or present to its mind". (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. Tt was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur . The bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion Is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondichery it was observed, 'it is trite regard to its ratio and the priciples, laid down there in'. Any declaration or conclusion arrived at without application of mind or preceded without any reason cannot he deemed to be declaration of law or authority of a general nalure binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law." - 26. Upon perusal of the judgment of the Division Bench of this Court in Krishna Laxman Yadav's case (supra) I have no manner of doubt to hold that the said judgement has been rendered by the Division Bench not only with extensive reasoning but also the conclusions have been reached on due consideration of relevant statutory provisions of Chapter-V of T. P. Act and the various authorities cited at bar including the judgment of Division Bench of this Court in Appeal No. 557/52/M/s. Mehta & Patel Brothers's case (supra) decided on 24-6-1953. I find myself in full agreement with the said view not only for uniformity and consistency but the correct exposition of law as well. 27. Decks being clear now that the Plaintiffs and Defendant No. 1 stand on the relationship of landlord and tenant and that on destruction of leased property the tenancy rights of the Defendant No. 1 have not been extinguished, the important question that falls for adjudication is whether present suit filed by the Plaintiffs is covered by Section 28 of the Bombay Rent Act and accordingly the said suit is exclusively triable by the Court of Small Causes, Bombay and that the City Civil Court has no jurisdiction. 28. It need not be emphasised that to find out the jurisdiction of the Court to try the suit primarily the pleadings in the plaint alone should be looked into. For ascertaining the jurisdiction, the plaint should be read as a whole and on meaningful and fair reading of the plaint, the Court should endeavour to find the substance of the claim in the plaint. Whatever be

the form of relief claimed, the substance ot the claim churned out after thorough scan should prevail over form of the claim. The substance of the claim should not be allowed to be disguised by the form of the relief claimed and if careful, fair and meaningful reading of the plaint makes-out the case exclusively triable by Special Court or exclude the jurisdiction of the ordinary civil court, then such conclusion has to be reached. 29. Section 28 of the Bombay Rent Act reads as follows- "Section 28 – Jurisdiction of Courts. (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction, – (a) in Greater Bombay, the Court of Small Causes, Bombay, (aa) in any area for which, a Court of Small Causes is established under the Provin- cial. Small Cause Courts Act, 1887, such Court and) (b) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge the Court of the Civil Judge (Senior Division) having ordinary jurisdiction, shall have jurisdicion to entertain and try suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Parly apply (or between a licensor and a licensee relating to the recovery of the licence fee or charge) and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and (subject to the provisions of sub-section (2), no other Court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question. (2)(a) Notwithstanding anything contained in clause (aa) of sub-section (1), the District Court may at any stage withdraw any such suit, proceeding or application pending in a Court of Small Causes established for any area under the Provincial Small Cause Courts Act, 1887, and transfer the same for trial or disposal to the Court of the Civil Judge (Senior Division) having ordinary jurisdiction in such area). (b) Where any suit, proceeding or application has been withdrawn under clause (a), the Court of the Civil Judge (Senior Division) which thereafter tries such suit, proceedings or application, as the case may be, may either retry it or proceed from the stage at which it was withdrawn. (c) The Court of the Civil Judge trying any suit, proceeding or application withdrawn under clause (a) from the Court of Small Causes, shall, for purposes of such suit, proceeding or application, as the case may be, deemed to be the Court of Small Causes). Explanation:– In this section"proceeding" does not include an execution proceeding arising out of a decree passed before the coming into operation of this Act. 30. The cases covered under Section 28 of the Bombay Rent Act could be exclusively entertained and tried by the Court of Small Causes, Bombay so far as jurisdiction of Greater Bombay is concerned. Not only Section 28 of the Bombay Rent Act excludes the jurisdiction of ordinary Civil Court but also confers the exclusive jurisdiction on the Court of Small Causes, Bombay within the jurisdiction of Greater Bombay to entertain and try suit or proceeding between a landlord and a tenant which relates to either for recovery or possession of any premises to which the provisions of the Bombay Rent Act apply or between a licensor and licencce relating to the recovery of licence fee or charge or to decide any appli-

cation made under the Act or to deal with any claim or question arising out of the Rent Act or any of its provisions. Sec. 28 of the Bombay Rent Act thus excludes the jurisdiction of all Courts other than the Courts of Small Causes to try any suit, proceeding or application between a landlord and tenant and to deal with any claim or question as are referred to in the section. It may also be observed that Sec. 28 of the Bombay Rent Act confers exclusive jurisdiction upon the Special Court not only to decide questions referred to in the section but also all matters which are incidental and ancillary to the determination of sub questions. The words "relating to recovery of rent or possession" are wide and comprehensive and would include any suit or proceeding in connection with or having a clear bearing on the question of possession of the premises. Even if the suit apparently is not framed for possession but the relief claimed in the suit appear to be in regard to or in respect of recovery of possession or has direct bearing on tenant's right to hold possession of rented premises, such suit would fall within the ambit of Section 28 and would be covered accordingly. As observed by me above, it is the substance of the claim which is material and not the form and if any suit in which the plaintiff seeks to deprive the tenant from possessing the tenanted premises or from enjoying the possession of leased property by claiming any injunction or such like relief and not directly decree for possession, it would be covered by Sec. 28 of the Bombay Rent Act and such claim would exclusively be entertained and tried by the Court of Small Causes as provided in Section 28. 31. In Captain Nanda v. Amarnath, AFO 59/86 decided on 17-9-90, the question was, upon entire tenanted premises having been collapsed during monsoon whether the plaintiff owner-landlord was entitled to declaration that the tenants have no right to enter upon the suit premises and whether the Civil Court has jurisdiction to entertain and try the said suit on the face of the provisions of Section 28 of the Bombay Rent Act, H. Surcsh, J. while considering the said question held thus- "4. It appears that during the monsoon, on 5th of August, 1983, the entire building collapsed and the entire structure including the premises in occupation of Defendants 1 and 2 came down and completely collapsed. The plaintiff says that since the area where the suit premises is situated, is being used as a dumping house by the plaintiff and the other owners of the property, and the salvaged material has been kept and stored in the said portion. The plaintiff says that the Bombay Municipal Corporation has not allowed reconstruction of any structure on the said property. All the plans submitted by the plaintiff and Defend ants 4 to 13 have not been passed by the Bombay Municipal Corporation. 5. Strangely, the plaintiff submits that as a result of the collapse of the house and destruction of the structure, all the rights in'respect of Defendant No. 1 stood extinguished and that Defendants 1 and 2 have no right of any nature over the suit premises or any part thereof, and/or over the salvaged material stored in the suit premises. It is further submitted that in any event, Defendants 1 and 2 have no right of any nature to enier upon the suit land and/or put up any construction of any nature on the suit premises. Thereafter the plaint proceeds to say that Defendants Nos. 1 and 2 intend to remove the salvaged material and to carry out permanent construction on the said land by entering on the same. It further

says that on 27th September, 1988, Defendants 1 and 2 brought building material like cement, bricks, etc., for carrying out repairs, additions, and alterations at site. If further says that as on Sth March, 1984 the plaintiff observed that Defendants 1 and 2 had between 7th March, 1984 and 8th March, 1984 broken wells of the building plaster. The plaintiff, therefore, submits that he is entitled to a declaration that Defendants 1 and 2 have no right to enter upon the suit premises and to occupy the same. The rest of the averments are not necessary for the purpose of deciding the question of jurisdiction. Prayer (a) of the plaint is for a declaration the Defendants 1 and 2 have no right of any nature to enter upon the property of the plaintiff and Defendants 2 to 13 and/or occupy the suit premises. Prayer (b) of the plaint is for a permanent order of injunction restraining the Defendants 1 and 2 their servants and agents from trespassing or entering upon the plaintiff's property, the said Akash Deep. The remaining prayers are for consequential reliefs..... 7. On the basis of these statements in the plaint, the learned Judge came to the con- clusion that the present suit is a suit between an owner of a property and a trespasses, namely, Defendant No. 2 and that, therefore, the Bombay City Civil Court has jurisdiction to entertain and try the suit, 8. What is lost sight of by the learned Judge is that the tenancy has not been determined. The plaint proceeds on fundamental fallacy that on the destruction or collapse of the building, the tenancy came to an end. It is settled principle of law, that a mere destruction of the tenanted house by virtue of fire, flood, fair or otherwise would not bring the tenancy to an end, so the case of Krishna Laxman Yadav v. Narsinghrao Vithalra Sonewane 10. Again the prayer is for injunction, which is granted, has the effect of the tenant losing possession of the premises for ever. Therefore, it is a suit between a landlord and a tenant relating to recovery of possession of the premises. Thus, in substance, this is a suit between a landlord and a tenant and person claiming through a tenant for recovery of possession of the premises. Incidentally, for the purpose of obtaining a relief as against Defendant No. 2, the Court will also have to hold whether Defendant No. 2 has been lawfully inducted into the premises or not which question is again a question which would fall within the scope of Sec. 28 of the Bombay Rent Act. ..... 12. Whatever be the immediate cause of action, which compelled the plaintiff to go to the Court of law, still the question of jurisdiction has to be decided on the basis of the substance of the plaintiff's case. In substance, in the present case, the plaintiff wants to evict Defendants 1 and 2 from the suit premises on the assumption that Defendant No. 2 is a trespasser on the property. 32. The Apex Court in Sushilabai Kashinath Dhonde v. Harilal Govindji Bhogani, held that-"Having due regard to the aspects mentioned above and the provisions of Ss. 18(3) and 28(1), in our opinion, it is not necessary that there should be a relationship of landlord and tenant in respect of all the matters covered by S. 28(1) of the Act, so as to give jurisdiction to the Court of Small Causes. No doubt, one type of action contemplated under that section, viz. a suit or proceeding for recovery of rent or possession of any premises to which any of the provisions of Part II apply may be between a landlord and a tenant; but in respect of the other matters dealt with in that sub-section, it is not necessary that the relationship of landlord

and tenant should exist between the parties before the Court. 33. The Supreme Court went on further in Sushilabai Kashinath Dhonde's case (supra) case and ihus observed- "We may also refer to a decision of this Court in Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewata. The landlord in that case had instituted the suit in the Court of Small Causes, Bombay, against his tenant and the sub-tenant for recovery of possession of the premises and also for compensation. According to the landlord the tenant had sub-let the premises without his previous consent and contrary to the terms of the tenancy. The trial Court granted a decree in favour of the plaintiff. The defendants filed an appeal under S. 29 of the Act and before the appellate Court they raised an additional plea that the Court of Small Causes had no jurisdiction to entertain the suit in so far as it related to Defendant No. 2, the sub-lessee. The Appellate Bench of the Small Causes Court dismissed the appeal. The sub-lessee moved the High Court unsuccessfully in revision under S. 115, Civil Procedure Code. He came up to this Court by special leave and the only contention raised was that the Small Causes Court had no jurisdiction to entertain the suit under S. 28 of the Act. The contention of the sub-lessee was that his sub-lease has not been recognised by the landlord and there was no relationship of landlord and tenant between him and the plaintiff and therefore the Small Causes Court had no jurisdiction to entertain the suit. After holding that so far as the plaintiff and Defendant No. 1 (the tenant) were concerned, the suit being between a landlord and tenant, the only Court com- pete nt to entertain the suit under S. 28 was the Court of Small Causes, ihis Court observed (p. 230):"....Section 28 confers jurisdiction on the Court of Small Causes not only to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of the premises but also 'to deal with any claim or question arising out of this Act or any of its provisions'. There is no reason to hold that 'any claim or question' must necessarily be one between the landlord and the tenant. In any case, once there is a suit between a landlord and a tenant relating to the recovery of rent or possession of the premises the Small Causes Court acquires the jurisdiction not only to entertain that suit but also 'to deal with any claim or question arising out of the Act or any of its provisions' which may properly be raised in such a suit." In the above extract, this Court, in our opinion, has clearly laid down that when the Court of Small Causes under S. 28 of the Act is invited "to deal with any claim or question arising out of this Act or any of its provisions" the relationship between the parties to such proceedings need not be that of a landlord and a tenant. Mr. Hattangadi no doubt stressed the latter part of the observations in the above extract wherein, according to him, this Court has emphasised that in that particular case the suit was between the landlord plaintiff and the first-defendant tenant and, in consequence, held that the Small Causes Court had jurisdiction. In our opinion, this is not a proper understanding of the principle enunciated by this Court. This Court has categorically held that the claim or question which the Small Causes Court is called upon to consider need not necessarily be between a landlord and a tenant. After having so held, this Court gave only an additional reason for upholding the jurisdiction of the Small Causes Court on the ground that the suit was between

the landlord and Defendant No. 1 who was admittedly a tenant. Having due regard to the aspects discussed above, the first contention of Mr. Hattangadi cannot be accepted." 34. The Division Bench of this Court in Mirabelle Hotel Company Private Ltd. v. Manu Subedar (supra) was also seized of the question about the jurisdiction of the Civil Court in a suit filed by the landlord for permanent injunction restraining tenant from committing breach of conditions of lease and Division Bench while construing expression "any claim or question arising out of this act or any of its provisions" in Sec. 28(1) of the Bombay Rent Act held that the claim of the landlord arose out of Sec. 12 of the Bombay Rent Act and it was the Bombay Small Causes Court alone which was invested by Sec. 28(1) of the said Act to deal with the claim and had exclusive jurisdiction to try the claim. The Division Bench on extensive consideration of the relevant provisions held- "The question involved is to be decided with reference to the relevant terms of S. 28(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, referred to hereafter as"the Bombay Rent Act". Under subsec. (I) of S. 28, the Bombay Court of Small Causes has exclusive jurisdiction in Greater Bombay"to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part (Part II of the Bombay Rent Act) apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions." Thus under S. 28(1) the Courts specified in that section have exclusive jurisdiction in three classes of matters; (i) any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which the provisions of Part II of the Bombay Rent Act apply, (ii) decide any application made under the Bombay Rent Act and (iii) deal with any claim or question arising out of the Bombay Rent Act or any of its provisions. The present suit does not fall in the first two of these three classes. The question is whether the subject matter of suit falls in the third class that is, whether any claim or question arising out of the Bombay Rent Act or any of its provisions is involved in this suit. As noticed above the suit has been filed by the plaintiffs for enforcing the terms and conditions of the lease dated 8th June, 1968. In paragraph 4 of the plaint, which we have quoted above the plaintiffs specifically alleged that, although the defendants have ceased to be contractual tenants, they are in possession of the premises as statutory tenants and that, even in that capacity they are bound by the terms and conditions of the said lease. In claiming that the defendants are bound by the terms and conditions of the lease even in their capacity as statutory tenants, the plaintiffs obviously rely on S. 12(1) of the Bombay Rent Act. That provision lays down 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 standard rent and permitted increases, and "observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act." In substance and in effect, S. 12(1) provides that after the termination of a contractual tenancy by efflux of time or by a notice to quit, the relation of landlord and tenant will continue between the parties and that the tenant will be bound by the conditions of the

contractual tenancy in so far as they are consistent with the provisions of the Act. Since the statutory tenant is thus bound by operation of law to observe and perform the conditions of the contractual tenancy, he can be restrained by a permanent injunction from committing a breach of any of these conditions. Thus the claim of the plaintiffs in the present suit for permanent injunctions against the defendants "arise out of" S. 12(1) of the Bombay Rent Act and the Bombay Court of Small Causes has been invested by S. 28(1) of the said Act with the exclusive jurisdiction of dealing with that claim. Considerable support to this view is available from the decision in Wolfe v. Clarkson. There a tenant whose contractual tenancy had been terminated, and who was in possession as a statutory tenant, was sued in a County Court for damages for breach of covenants to repair contained in the tenancy agreement and for arrears of rent. It was found that the amount of damages claimed by the landlord exceeded the ordinary pecuniary jurisdiction of the County Court and the question arose whether the County Court had jurisdiction to deal with the claim by virtue of S. 17(2) of the Increase of Rent and Mortgage Interest (Restrictions) A.ct, 1920. Section 17(2) of that Act provides : "A County Court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a County Court. The Court of Appeal held that the contractual obligation of the tenant was converted into a statutory obligation by virtue of S. 15(1) of the said Act and that therefore the landlord's claim arose out of the said Act and was, triable by the County Court. The effect of this decision is thus summarised in Woodfalis on Landlord and Tenant, 27th Edition, at Article 1527, page 676 : Where there is a statutory tenancy under the Rent Acts the landlord is entitled to sue for breach of the covenant to repair in the County Court, whatever the amount of damages claimed, as it is a breach of statutory obligation to comply with the covenants of the contractual tenancy and therefore the claim arises out of the Rent Acts." Section 15(1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is similar to, but not identical with, S. 12(1) of the Bombay Rent Act. Section 15(1) of the English Act says : "A tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long . as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and. . .. ." It will be noticed that whereas S. 12(1) of the Bombay Rent Act provides that the tenant is bound to perform the condilions of the contractual tenancy, S. 15(1) of the English Act lays down that the tenant is not only liable to perform the conditions of the contractual tenancy but is also entitled to the benefit of any of those conditions. This difference between S. 15(1) of the English Act and S. 12(1) of the Bombay Rent Act was noticed by the Supreme Court in. Anand Nivas (P.) Ltd. v. Anandji. The difference, however, has no bearing on the question which falls for determination in the present case. Just as the obligation of a statutory tenant to perform the conditions of the original agreement of tenancy arises under S. 15(1) of the English Act, so the obligation

of the statutory tenant to perform the conditions of the tenancy arises under S. 12(1) of the Bombay Rent Act. It follows that the landlord's claim to enforce the conditions of the contractual tenancy against his statutory tenant is covered by S. 28(1) of the Bombay Rent Act and can be dealt with by the Special Court specified in that section:" 35. In view of the aforesaid legal position, it remains to be determined whether the present suit filed by the plaintiffs seeking permanent injuricuon against the Defendants and particularly Defendant No. 1 from carrying on any work of construction and/or any further construction on the suit land is covered by Sec. 28 of the Bombay Rent Act and that the relief claimed against the Defendant No. 3 B.M.C. makes any difference to the substance of the claim made by the plaintiffs. In the plaint and more particularly in para. 5 of the plaint the plaintiffs have stated that one portion of the property bearing No. CTS 38(B) is occupied by Defendant No. 1 as tenant and that the tenancy so created was in respect of structure consisting of ground and first floor terrace. It is further stated in the said para that such structure was let-out to Defendant No, 1 many years ago and that the said letting was for purpose of commercial use. In para. 6 of the plaint, the plaintiffs have averred that the struclure which was let-out to Defendant No. 1 caught fire on 25-8-85 and that in the said fire the total structure occupied by Defendant No. 1 was gutted, destroyed and burnt down. The grievance of the plaintiffs on the aforesaid facts is that the structure which has been burnt down if re-erected, reconstructed or repaired by the Defendant No. 1, would be unauthorised, illegal and contrary to the provisions of law and particularly provisions of the B.M.C. Act, 1888. The plaintiffs in para. 13 of the plaint have stated that the Defendant No. 1 intends to carry-out unauthorised work under the guise of injunction order obtained from Bombay City Civil Court and if such work is allowed to be continued, the plaintiffs would suffer irreparable loss. The entire case of the plaintiffs appears to be built-up on the premise contained in para. 14 of the plaint wherein the plaintiffs have averred that on the structure being burnt down the tenancy rights of Defendant No. 1 have extinguished and determined and the Defendant No. 1 has no right to put up structure. On meaningful and fair reading of the plaint and after churning out the irrelevant and immaterial pleading, the crux of the averments in the plaint is that the Defendant No. 1 has no right to carry-out reconstruction or re-erection of the structure leased out to him which had burnt in fire. At this stage it would be relevant to refer to the tenancy agreement made between the parties on 20-11-1964. Clause 2 of the terms agreed between the parties stipulate that the tenant shall comply in all respects with all the municipal and other rules and regulations affecting the structure. Clause 6 of the said agreement provides the tenant to keep in good repair and tenantable condition the leased premises. According to the terms of the agreement, therefore, the tenant has been required to keep the leased premises in good repair and tenantable condition and it is also required to comply in all respects with all the municipal rules and regulations affecting the structure. Thus the duty has been cast on the tenant regarding the upkeep of the leased premises and also for compliance of all municipal rules and regulations affecting the structure. Sec. 23 of the Bombay Rent Act casts duty on the landlord to keep premises

in good repair in the absence of an agreement to the contrary by the tenant. In the present case there is an agreement to the contrary by the tenant in the lease agreement that he would keep in good repair and tenantable condition the leased premises and it is his duty to comply in all respects of the municipal and other rules and regulations affecting the structure. Obviously, therefore, a dispute between the plaintiffs and Defendant No. ! about repairs, reconstruction and re-erection of the lease structure which has been destroyed in fire is a dispute covered by the expression "any claim or question arising out of this Act or any of its provisions" in Sec. 28(1) of the Bombay Rent Act. It may be observed that statutory obligation of the landlord to keep premises in good repair under Sec. 23 of the Bombay Rent Act is subject to a contract otherwise by the tenant and, therefore, the tenant's obligation under the agreement to keep premises in good repair and tenantable condition and that he would comply with all municipal rules and regulations affecting the structure in all respects, is covered by statutory provision of Sec. 23 of the Bombay Rent Act and that contractual obligation of the tenant in law is converted into a statutory obligation and, therefore, dispute and claim of the landlord can be said to be arising out of the provisions of the Bombay Rent Act. Relief of permanent injunction claimed by the plaintiff against the Defendant No. 1 in substance, therefore, is a claim arising out of the Bombay Rent Act, though the plaintiff has disguised the claim as the claim against the Defendant No. 3 which on careful scan and scrutiny of the plaint does not turn out to be so. In substance, if the injunction claimed by the plaintiff is granted, it would naturally affect the tenant's tenancy rights and occupation as tenant for all times to come and, and therefore, in substance it is a suit between a landlord and tenant relating to recovery of possession of the premises. The exclusive jurisdiction conferred on the Court of Small Causes to entertain and try the suit covered under Sec. 28 cannot be allowed to be taken away by the apparent frame of the plaint when the substance of the claim appears to be covered by the provisions of Sec. 28. Pertin-tently as has been held above, the relationship of landlord and tenant has not been extinguished between the Plaintiffs and Defendant No. 1 and thetenancy of Defendant No. 1 has not come to an end and, therefore, obviously present suit is a suit between the landlord and tenant. The suit has been filed by the Plaintiffs who are thus landlord and it is against the Defendant No. 1 who is tenant. The substance of the claim made by the Plaintiff, if decreed would result in depriving Hie tenant from his possession and occupation as tenant and, therefore, the present suit has direct nexus and bearing with the question relating to the recovery of possession. Moreover, the suit for permanent injunction as framed by the Plaintiffs against Defendant No. 1 restraining the Defendant No, 1 from erecting or reconstructing the leased structure which has been destroyed in fire if decreed would also result in depriving the Defendant No. 1 from discharging his contractual obligations in clauses 2 and 6 of the lease agreement and such obligations having been converted in statutory duty under Secion 23 of the Act is also covered by expression "any claim or question arising out of the Act or any of- its provision" in Section 28(1) of the Bombay Rent Act. Merely because some relief has been sought against Defendant No. 3 B.M.C., in substance, it does not alter the

character of the suit against the Defendant No. 1 and, jurisdiction of the court of Small Causes is not taken away since the substance of the claim is directed against the Defendant No. 1 affecting his tenancy rights and possession and occupation as tenant. 36. For all the aforesaid reasons, I have no hesitation to conclude that the suit filed by the Plaintiffs is clearly and squarely covered by Section 28 of the Bombay Rent Act and, therefore, can only be entertained and tried by the Court of Small Causes, Greater Bombay and the City Civil Court has no jurisdiction to entertain and try the suit filed by the Plaintiffs and registered as Long Causes Suit No. 1407 of 1991. 37. Before I close, it may be stated that though the Civil Revision Application was ordered to be heard along with Appeal from Order No. 1406/91 and 1407/91, the learned counsel for the parties submitted that since the decision on this Civil Revision Application shall have vital bearing on Appeal from Order No. 1406/91 and 1407/91 and, therefore, before hearing the said appeals, the . Civil Revision Application should be heard and decided and, accordingly the Civil Revision Application was heard first. 38. In the result, this Civil Revision. Application is allowed. The order passed by the City Civil Court, Bombay on 29-11-1991 in Notice of Motion No, 4860/91 is quashed and set aside, and, it is held that the City Civil Court at Bombay has no jurisdiction to entertain and try the Long Cause Suit No. 1407/91 and that the said suit is exclusively triable by Court of Small Causes, Greater Bombay. The City Civil Court, Bombay is accordingly directed to return the plaint of Long Cause Suit No. 1407/91 to the Plaintiffs for presentation to the competent court having jurisdiction in the matter viz., Court of Small Causes, Greater Bombay. 39. No costs. 40. Revision allowed.