

Ramjilal Vs. Gulabrao

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Court : Mumbai

Decided On : Jul-27-1978

Reported in : AIR1979Bom44; 1978MhLJ850

Judge : Tulpule, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 111, 112, 113 and 116

Appeal No. : Civil Revn. Appln. No. 315 of 1977

Appellant : Ramjilal

Respondent : Gulabrao

Advocate for Def. : V.G. Bhangde, Adv.

Advocate for Pet/Ap. : W.G. Deo, Adv.

Disposition : Revision application dismissed

Judgement :

ORDER

1. The facts in this revision application are no more in dispute and raise a short question of law.
2. The defendant was a tenant of the plaintiff in the premises in suit On 28th October 1974 the plaintiff served a notice to quit upon the defendant calling upon

him to quit and hand over possession on 30th November 1974. The rent agreed in respect of the premises was Rs. 50/-per month. On 1st November 1974 the defendant paid rent for the month of November 1974 which was received by the plaintiff. On 2nd December 1974 it is alleged a payment of Rs. 50/- was received by the plaintiff from the defendant. Later a cheque was also received from the defendant for a sum of Rs. 150/-on 25th March 1975. In the meantime, that is, before the receipt of the cheque for Rs. 150/- a suit had been filed by the plaintiff against the defendant on 17th Feb. 1975.

3. The plaintiff filed this suit for possession against the defendant and the defendant by his written-statement Ex. 17 raised several other pleas, including that the notice to quit was bad. With regard to the position arising from these facts the defendant stated that he paid on 2-12-1974 rent of Rs. 50/- to the plaintiff in cash and on 25-3-1975 sent a cheque for Rs. 150/- to cover the rent for January, February and March 1975, 'it is thus clear that the plaintiff having accepted the rent after the notice has been received has waived the notice.'

4. The short question which was raised before me in this revision application on behalf of the respondent was that the case of the defendant fell under Section 113 of the Transfer of Property Act and that by acceptance of rent there was a waiver on the part of the plaintiff-landlord of the notice to quit issued under Section 111, Clause (h). Mr. Deo who appeared for the defendant wanted also to rely upon illustration (a) to that section. Section 113 so far as is material is as under:--

'Waiver of notice to quit-- A notice given under Section 111, Clause (h), is waived with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.'

The analysis of that section would go to show that a notice given under Section 111 is said to be waived where there is 'express or implied consent of the person to whom it is given' and that merely is not enough but there must be an act 'on the part of the person giving it showing an intention to treat the lease as subsisting.'

5. Now of the two payments alleged on the part of the defendant, the one dated 2nd December 1974 of Rs. 50/- in cash which is after the notice to quit and which was received on 1-11-1974 has not been accepted and believed by the trial Court. The payment of Rs. 150/- by way of a cheque is admitted by the landlord which payment, as pointed out above, is after the institution of the suit.

6. Now since the alleged payment on 2nd December 1974 is not proved and there is no evidence which has been pointed out to me, which would make me think otherwise, the only question which I have to decide is whether upon a receipt of Rs. 150/- after the institution of the suit, the notice to quit given by the landlord on 28th October 1974 would be deemed to be waived. It was strenuously urged before me by Mr. Deo that a mere acceptance of an amount calculated according to him for the months of January, February and March 1975 by the plaintiff-landlord would mean that there was a waiver of the notice to quit. It is difficult to accept this contention.

7. This payment of Rs. 150/- by a cheque is said to have been accompanied by a letter dated 25th March 1975 alleged to be sent by the defendant to the plaintiff. On behalf of the defendant what is alleged to be an office copy of that letter is produced at Ex. 45, but the trial Court did not accept the story of the defendant that the cheque was sent along with that letter. It was observed that the defendant in his written-statement stated that a notice was sent by him on 25th March 1975 under a registered acknowledgment due letter and which was received on 28th March 1975. He further alleged in the written-statement to which I have made a reference that on 25th March 1975 he sent a cheque to cover the rent. The trial Court observed 'this itself shows that the notice under a registered cover as is alleged by the defendant in his deposition was not sent along with the cheque.' He did not accept the evidence in the form of Exs. 47 and 49 which did not tally with the defendant's evidence and, therefore, did not accept that any letter of the kind of Exhibit 46 was sent along with the cheque. In his cross-examination the plaintiff stated 'there was no letter along with the cheque sent by the defendant.' Considering the difference in the version of the defendant and the documents which he produced, it was rightly held that the payment of Rs. 150/- was unaccompanied by any letter, as contended in Ex. 47. The short question,

therefore, which remains to be decided and which was urged before me was on the basis of the fact of payment and acceptance by the landlord of Rs. 150/- after the institution of the suit.

8. As the analysis of Section 113 of the T. P. Act, to which I have made a reference, will go to show in the first instance, the person to whom the notice is given, namely, the defendant in this case, must either expressly or impliedly consent to the notice being waived. There is nowhere an allegation on the part of the defendant that he either expressly or impliedly consented to the notice being waived. A mere payment of money does not amount to a consent to waive the notice. The liability to pay some amount either by way of compensation or by way of rent would always arise, in the first case if the notice is waived and the lease is treated to be subsisting and in the second case if the lease is terminated but possession is not taken immediately. There must in the first place be a consent to have the notice waived. As I have pointed out there is nothing in the written-statement which would suggest that in making payment of Rs. 150/- the defendant either expressly or impliedly consented to the notice being waived by the plaintiff, at least on his part. It would then have been possible to read that by accepting the amount of Rs. 150/- as rent and coupled with the express or implied intention to have the notice waived, the landlord would have done something to indicate that the lease was subsisting.

9. It is not merely enough, as the section goes to say, that there must be an express or implied consent on the part of the person receiving the notice, but there must be some act on the part of the person (giving it) which would spell an intension on his part to treat the lease as subsisting. In other words the action on the part of the person giving the notice must be such that there was a clear intention to treat the lease as subsisting must be spelt out. In other words what is necessary even under the Section 113 is on the part of the recipient of the notice an intention or a consent to have the notice given to him waived and on the part of the person issuing the notice an intention to waive the notice and treat the lease as subsisting. The elements of contract, therefore, are clearly present. A waiver of a notice to quit cannot be spelt out or merely inferred by an act on the part of one and either one of the actions or any act which does not thereby spell a contract or

agreement between the parties to a particular effect spelling a waiver. Mr. Deo contended relying upon Section 113 along with Illustration (a) appended to that section, that on the mere fact of a tenant or recipient of the notice making a payment and giver accepting that payment, nothing further is necessary and that waiver would be presumed. According to Mr. Deo, waiver is a matter of conduct and an inference to be derived from that conduct and is not a matter of agreement. I do not think that that contention is right.

10. In support of his contention Mr. Deo relied upon some decisions to all of which it is not necessary to make a reference. In *Ram Dayal v. Jawala Prasad* AIR 1966 All 623 the question was not really decided and was left open. In *Pulin Behary Shaw v. Lila Day* : AIR1957 Cal627 it was observed that 'it is true that the law of waiver of a notice to quit is not the same in India as in England and that if a case comes under Illustration (a) of Section 113 it is not necessary to prove the creation of a new tenancy which is necessary under the English Law. The question, however, still remains whether under the Indian Law after the enactment of the Rent Control Acts mere payment and acceptance of rent after the termination of the contractual tenancy will constitute waiver of notice to quit.'

11. It is quite clear that the requirement of English Law that there was an intention to create a fresh lease and, therefore, a fresh contract, is not required to be proved under the Indian Law. But that does not mean that waiver is not a matter of agreement between the parties, even in regard to a waiver which is, in my opinion, a contract, what is necessary is on the part of one person to agree to have the notice waived and on the part of the other, namely, the giver to treat the lease as subsisting. The essence of the contract, namely, the parties being of one mind, which in this case would be to treat the lease as subsisting by the receiver of the notice agreeing to the continuation of the lease and the giver of the notice, namely, the lessor, agreeing to treat the lease as subsisting is essential and necessary.

12. The next decision upon which Mr. Deo relied is *Tayabali v. Ahasan and Co.* : [1970]2SCR554 . The facts in that case were entirely different and upon the findings of facts which were reached in the Supreme Court, which are in no way applicable to the facts before us, I do not think that it was possible to urge that the

first notice was not waived. In the second notice which the landlord gave he himself treated the period between the two notices as the period during which the lease was subsisting and, therefore, it was held that the first notice was waived by an act on the part of the landlord which clearly showed an intention to treat the lease as subsisting. Here also what the Supreme Court observed with reference to Section 113 was that for bringing about a waiver under Section 113 of the T. P. Act it is wholly unnecessary to decide whether for bringing about a new tenancy an express or implied agreement must come into existence. There is a distinction between a 'new lease' and continuation of a 'subsisting lease'. While it may be necessary to prove a fresh agreement of lease, according to English Law, the same may not be necessary and is not necessary under the Indian Law.

13. In *Calcutta Credit Corporation Ltd. v. Happy Homes (Private) Ltd.* : [1968]2SCR20 it was emphasized that the person who receives the notice is also entitled to insist upon the notice and it cannot be withdrawn 'without the consent of both'. The consent of the parties makes a new agreement and the rent becomes due under the new agreement. Unless, therefore, there was a new agreement it cannot be said that by the force of the fact of acceptance of rent alone brings about a waiver and a new relationship or contract between the parties. In the circumstances of the present case if it were to be considered whether there was any intention which could be inferred on the part of the landlord by acceptance of Rs. 150/- from the erstwhile tenant to a continuation of the lease or an intention to treat the lease as subsisting, then I think that intention runs counter to the institution of the suit which he did on 17th February 1975. Where the landlord had filed a suit and there is nothing to show that after the receipt of the money he abandoned the suit, and on the contrary there is other evidence to show that he diligently prosecuted that suit, an intention which is a requisite under Section 113 'to treat the lease as subsisting' would be entirely absent. The entire conduct of the landlord would be inconsistent with that intention both in his institution of the suit and its prosecuting. If the matter were, therefore, left merely to an inference then I do not think that it can be said that on the facts which are proved in the present case there was even after the receipt of Rs. 150/- any intention on the part of the landlord to treat the lease as subsisting. If that intention cannot be so spelt or inferred, then it follows there is no scope for invocation for Section 113, and the

waiver thereunder. Waiver essentially pre-supposes an election by the landlord and also on the part of the tenant where the tenant consents to the notice being waived. An election is not a matter of inference, but a matter of positive choice. It would be difficult to say that an election should be inferred merely from the circumstances that after the institution of the suit for ejectment payment was received by the landlord. It is not, therefore, possible to accept the proposition advanced by Mr. Deo that on the mere fact that the payment is received after the institution of the suit may be ascribable to a certain party after the notice, a waiver must be implied and held.

14. Mr. Deo relied principally upon a decision of Calcutta High Court in *Manicklal v. Kadambini* AIR 1926 Cal 763 and other cases following that case. As I shall presently show that case has not been followed by some of the other High Courts, while it was disapproved in *Navnitlal v. Baburao* AIR 1945 Bom 132. I would in this context refer to a decision of the Supreme Court in *Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh* : [1968]2SCR548 which define? what is waiver. The head-note in that case reads thus:

'A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.'

As I stated above, waiver can only be after a person becomes aware of all the rights he has and the facts enabling him to make a decision on those facts as regards the action which he would take, namely, in such a case whether to continue the lease or otherwise. As I pointed out an element of election is involved in waiver, and as such an election can only be after full knowledge of facts and rights. I have already pointed out that there is no pleading in this case specifically setting out a case of a waiver.

15. The next case to which a reference may be made is that reported in *Koti Bai v. Kastoori Bai*. That case clearly brings out the circumstances in which Section 112 of the T. P. Act would be attracted and cases which therefore, do not come under Section 112 and will, therefore, come under Section 113. In that case also there

was no pleading to the effect that the landlord had an intention of treating the lease as subsisting and his Lordship Mr. Justice Shinghal observed 'in the absence of such a plea, it is not permissible for the learned counsel to argue that there was a waiver of the notice under Section 113, for if such a plea had been taken, it would have been decided on the basis of the evidence of the parties.'

16. Perhaps the most important case which to my mind deals with this question exhaustively and fully and with the reasoning of which, with respect, I am inclined to agree, is that reported in *Saleh Bros. v. K. Rajendra* : AIR1970 Mad165 . That case makes a review of almost all the cases on the point and takes note of all the arguments which could be advanced and which have been advanced before me. That case also considers the full and relative scope of Sections 112 and 113 of the T. P. Act. The relevant head-note in that case reads as follows:--

'The principles that once an election has been made and the lease determined the election is irrevocable, would apply even when the election is not followed by a suit in ejectment and if the lessor had merely given a notice in writing of his intention to determine the lease as provided in Section 111(g). If rent is subsequently received by the lessor, the rights of the parties will have to be determined in accordance with the provisions of Section 116 of the T. P. Act.'

I would, however, refer to some other pertinent observations made by his Lordship Justice Ramamurti in that case. Referring to payment of rent after a suit is filed, it was pointed out 'acceptance of rent which has become due since the forfeiture is regarded as waiver of forfeiture under the main operative portion of Section 112, because the acceptance of rent is an affirmation that the lease was subsisting at the time when the rent became due after the forfeiture. But this acceptance of rent, after the suit in ejectment is filed, is not regarded as a waiver, because once the matter has come to the Court, the election has become irrevocable.' Adverting to Section 113 and Illustration (a) thereunder upon which considerable reliance has been placed in this case his Lordship observed (at p. 170).

'The plain language of Section 113 indicates that a waiver does not ipso facto result from any act of omission or commission on the part of the lessor, but the act must be such as clear evidence of the lessor's intention to treat the lease as

subsisting,' With regard to Illustration (a) it was pointed out that (at p. 170)-

'Illustration (a) must, therefore, be understood and applied in consequence with the principle underlying the section with due reference to the intention of the lessor. There is no warrant for the view that mere receipt of rent, whatever may be the intention of the lessor, should of its own force, divorced from the circumstances of the case be regarded as amounting to a waiver.'

As to what is waiver and what constitutes waiver and what must be established, his Lordship pointed out (at pp. 170, 171),--

'In order to constitute a waiver, both the limbs must concurrently operate, which means, that an act by itself and of its own force, without reference to the intention of the parties, cannot bring about a waiver, So much is quite clear from the plain language of the section, which embodies the basic principles,'

After referring to the number of cases and the sections his Lordship pointed out -- 'that the preponderance of the weight of authority is that in addition to the receipt of rent by the landlord there should be proof that the receipt was with the intention to treat the lease as subsisting. According to the decisions, there should be either an express contract or conduct of the parties justifying the inference that, after the determination of the contractual tenancy, the landlord's intention was that the occupation of the premises was as a tenant.'

17. The result is that the decree passed by the trial Court must be affirmed and the revision application dismissed with costs. Four months' time is given to the defendant to vacate.

18. Revision application dismissed.

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