
(1957) 07 BOM CK 0013
In the Bombay High Court
Case No : Second Appeal No. 127 of 1953

Chaturbhuj Sitaram

APPELLANT

Vs

Manjibai Hirachand and Another

RESPONDENT

Date of Decision : 25-07-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 111, 113

Citation : AIR 1959 Bom 292 : (1958) 60 BOMLR 377 : (1958) ILR (Bom) 820

Hon'ble Judges : S.P. Kotval, J;J.C. Shah, J

Bench : Division Bench

Advocate : C.P. Kalele, for the Appellant; R.N. Deshpande, for the Respondent

Judgement

J.C. Shah, J.—This appeal arises out of a suit filed by a landlord against a tenant for a decree in ejectment. The plaintiff is the owner of a shop on the western side of her house on nazul plot no. 459, sheet no. 25-B at Khamgoan. The defendants are the plaintiff's monthly tenants. The plaintiff applied for and obtained from the Rent Controller permission to serve a notice in ejectment upon the defendants under clause 13 of the C.P. and Berar Letting of Houses and Rent Control Order, 1949. On 21st July 1950 the plaintiff served a notice in ejectment on the defendants. By the notice, the plaintiff called upon the defendants to vacate and deliver possession by 22nd August 1950. After the notice was served the defendants by postal money order sent plaintiff rent for the period between 22nd July 1950 to 22nd October 1950. The rent was received by the plaintiff. The plaintiff then served another notice on the defendants calling on or about 24th February 1951 asking them to vacate the premises by 22nd March 1951. That notice was not preceded by permission in writing of the Rent Controller to serve the notice. The defendants having failed to vacate and deliver the premises occupied by them the plaintiff filed Civil Suit No. 208-A of 1951 in the Court of the Civil judge, Class II, Khamgoan, for a decree for possession against the defendants. The defendants, inter alia, contended that the plaintiff had waived the first notice by acceptance of rent for the period after the determination of the

tenancy and that before serving the notice dated 24th February 1951, the plaintiff had not obtained permission in writing of the Rent Control or to serve the notice. The learned trial Judge negatived the contentions raised by the defendant and decreed the plaintiff's suit for possession. That decree was confirmed in appeal to the District Court at Khamgaon. The defendants have come to this Court in second appeal.

2. Clause 13 of the C. P. and Berar Letting of Houses and Rent Control Order by the First Sub-clause provides:

"No landlord shall, except with the previous written permission of the Controller,

(a) give notice to a tenant determining the lease or determining the lease if the lease is expressed to be determinable at his option; or

(b) where the lease is determinable by efflux of the time limited thereby, require the tenant to vacate the house by process of law or otherwise if the tenant is willing to continue the lease on the same terms and conditions."

Sub-clause (2) provides the procedure for filing an application, and Sub-clause (3) prescribes the matters about which the Controller must be satisfied before giving permission under clause (1). Admittedly, the plaintiff did not before serving the notice dated 24th February 1951 obtain permission in writing of the Controller. But it is urged that the permission of the Controller had been obtained before serving the notice dated 21st July 1950, and that permission enured to the plaintiff and enable her to serve a second notice determining the tenancy. We are unable to accept that contention. It is true that before 21st July 1950 the plaintiff had obtained the permission in writing of the Rent Controller to give notice to the defendants determining the tenancy but that permission was exhausted when notice was served on 21st July 1950. Even though by the notice dated 21st July 1950 the lease was determined, by the conduct of the plaintiff in accepting rent from the defendants for a period subsequent to the date of the determination of the tenancy, the notice was waived. If the plaintiff desired again to determine the tenancy, in our judgment, a second permission of the Controller was required, and in the absence of such permission, the plaintiff's suit, relying upon a notice determining the tenancy of the defendants, was not maintainable.

3. It was urged by Mr. Deshpande that the institution of a suit without permission of the Rent Controller attracts the penal provisions of the Act, but determination of the tenancy by notice served without the permission is nevertheless valid. We are unable to accept the contention. The Legislature has imposed a condition precedent to the service of notice determining a tenancy, and if the condition precedent is not fulfilled, the tenancy cannot be regarded as determine. In our view, the plaintiff's suit was not maintainable.

4. It was also urged that there was no waiver of the previous notice, and the repetition of a demand for possession was not required to be preceded by a fresh permission of the Controller. We are unable again to accept that contention. It is

true that waiver has to be inferred from the intention of that landlord or from by his conduct. Section 113 of the Transfer of Property Act provides that a notice given u/s 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. Waiver can evidently be inferred from the conduct of the person serving notice indicating an intention to treat the lease as subsisting. But in the absence of any other circumstance, acceptance of rent which has become due in respect of the premises since the expiration of the notice amount to waiver of the notice. That is made clear by illustration (a) to Section 113. That illustration says: " A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived." It must, therefore, be held that in this case, by acceptance of rent by the plaintiff for a period after the date of the expiry of the notice, the notice served by the plaintiff on which she claimed that she should be absolved from the liability which arose by reason of her conduct in accepting rent was that she was a female and that she unknowingly and out of simplicity, accepted the postal Money Order sent by the defendant, without appreciating the legal consequences of the acceptance. Ignorance of law does not, in our judgment, bespeak an intention of the plaintiff not to waive the notice.

5. Reliance was sought to be placed by Mr. Deshpande upon an unreported judgment of the Nagpur High Court in Amratrao v. Nimbabai, Second Appeal No. 43 of 1948 D/- 17-2-1948. In that case, Mr. Justice Pollock of the Nagpur High Court is reported to have taken the view that if a landlord obtains permission of the Rent Controller and gives notice to the tenant to quit and subsequently accepts rent by Money Order for a period after the expiration of the notice and to have treated the lease as subsisting, and that no new lease was created by the waiver. He observed that a notice served by a landlord upon his tenant determining the tenancy relying upon the permission previously given is valid; and that the permission given by the Controller is not exhausted by the first notice and continues so long as the tenancy to determine which the permission was given subsists. Now, the learned Judge has not expressly referred in his judgment to the terms of clause 13 of the Letting of Houses and Rent Control Order, and he appears to have assumed that for termination of a tenancy, the Rent Controller need be approached only once, and if permission is given by the Rent Controller, whatever be the ground which persuaded him to give permission it is open to the landlord to serve as many notices as he likes and to continue to waive them as circumstances justify. That assumption made by the learned Judge, in our view, is plainly contrary to the words used in clause 13 of the Rent Control Order. As we have already observed, it is to the service of a notice to tenant determining a lease that the obtaining of the permission of the Rent Controller is made condition precedent, and once the lease is determined, the subsequent waiver of determination of the lease has not the effect of absolving the landlord from the necessity of obtaining a fresh permission for a fresh

determination of the lease.

6. In *Ambadas v. Purushottam* (Second Appeal No. 597 of 1950 D/- 26-12-1950 (Nag)) on which also reliance was placed by counsel for the Respondent has in our judgment no bearing on his case. In that case Mr. Justice Deo observed -- and with respect, rightly -- that illustration (a) to section 113 of the Transfer of Property Act does not warrant the contention that acceptance of rent in every case is evidence to prove the intention to treat the lease as subsisting especially when a suit in ejectment is instituted. That case, in our judgment, has no application, because in the present case the acceptance of rent was prior to the date of the institution of the suit by the plaintiff. Reliance was also sought to be placed upon a judgment of the Division Bench of the Bombay High Court in *Navnitlal Chunilal Vs. Baburao* (No. 1), . In that case after determining the tenancy of his tenant the landlord instituted a suit for possession. The landlord then received an amount of money sent by the tenant and expressly accepted it as compensation for use and occupation, and the Court held that acceptance of the amount could not be regarded as waiver of the notice. We are unable to see how the principle of that case can have application to the facts of the present case.

7. In our view, the plaintiff having failed to serve a notice after obtaining written permission of the Rent Controller, the plaintiff's suit was liable to fail. We, therefore, set aside the decree of the Courts below and dismiss the plaintiff's suit with costs throughout.

8. Appeal allowed.