

(2006) 08 KAR CK 0026

In the Karnataka High Court

Case No : C.R.P. No's. 1045 and 1046 of 2005 and 153 and 170 of 2006

Sri Vasanthkumar D. Shah

APPELLANT

Vs

Smt. Sugandha Raman and Sri G. Rajnarayan

Hindustan Dealers Ltd Vs Devanga Sangha
 N.
Lakshmichand Sidh Vs B.M. Somasundara Sharma

RESPONDENT

Date of Decision : 29-08-2006

Acts Referred:

Transfer of Property Act, 1882 — Section 106, 111 (h), 112, 113, 116

Citation : (2007) 2 KarLJ 1 : (2006) 4 KCCR 2541

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : S.K.V. Chalapathy, Srinatha G.B., B.S. Raghu Prasad and V. Ramesha Babu, in CRP No. 170/2006, K. Raghavendra Rao, A. Madhusudhana Rao, V. Vidya and Sunitha, in CRP Nos. 1045 and 1046/2005 and San Associates in CRP No. 153/2006, for the Appellant; L.S. Venkatakrishna in CRP No. 170/2006, D.R. Basavarajappa in CRP Nos. 1045 and 1046/2005 and K.M. Chandra Prasad in CRP No. 153/2006, for the Respondent

Final Decision : Dismissed

Judgement

Ram Mohan Reddy, J.—Common questions of law and that of fact arise for decision making in all these petitions, hence with the consent of the learned Counsel for the parties, the petitions are clubbed, heard together and are disposed of by this common order.

2. Facts in brief:

I CRP 170/2006:

The petitioner on 8.6.1967 and 24.6.1968 was inducted as a tenant of shop premises No. 217/D and 217/C, 27th cross, 8 "F" main, 3rd Block, Jayanagar, Bangalore-11, respectively, under the respondent-landlord, who issued a notice dated 17.6.2002 determining the tenancy w.e.f. 31.7.2002 to which the petitioner caused a reply dated 23.7.2002. The landlord on 18.12.2002 instituted

SC 2078/2002 before the Chief Judge, Court of Small Causes, Bangalore, for ejectment, which was opposed by filing a written statement of the petitioner inter alia contending that the two tenancies being separate and distinct, on two dates, are protected by the Karnataka Rent Act, 1999 and that there is a waiver of notice to quit.

The 2nd plaintiff examined himself as PW-1 produced four documents marked as Ex.P-1 to P-4 while the petitioner-defendant examined himself as DW-1 produced two documents marked as Exts.D-1 and D-2. The trial court having considered the evidence both oral and documentary allowed the suit by judgment and decree dated 19.1.2006 granting two months time to the petitioner to vacate and hand over vacant possession of the property.

II CRP 1045/2005

The petitioner's tenancy over a portion of the ground floor of the non-residential premises No. 35, K.G. road, Bangalore, under the respondent landlord when determined by the quit notice dated 17.3.2003, was responded to by a reply dated 3.4.2003, Non compliance of the demand in the notice, impelled the landlord to institute SC 815/2003 for ejectment, before the Chief Judge, Small Causes Court, Bangalore.

The petitioner entered appearance and opposed the suit by filing written statement dated 4.9.2003 inter alia contending that the quit notice is contrary to law and the failure to demolish, reconstruct and redeliver possession of parties of the premises, in terms of the compromise recorded in the order in an earlier petition for eviction in HRC 80/1980 filed by the respondent against M/s Lakur & Company and another tenant under the Karnataka Rent Control Act, 1961, the respondent was disentitled to a decree for ejectment.

The landlord Sangha examined its Secretary as PW-1, produced three documents marked as Exs.P-1 to P-3 while the petitioner examined its Accountant and Power of Attorney Holder as DW-1 produced 11 documents marked as Exts.D-1 to D-11. The Trial court allowed the suit by judgment and decree dated 21.9.2005 granting two months time to vacate and hand over vacant possession of tenanted premises.

III CRP 1046/2005

The petitioner's tenancy over a portion of the ground floor and 1st floor of the non-residential premises No. 35, K.G road. Bangalore, belonging to the respondent landlord, when determined by quit notice dated 17.3.2003 was responded to by a reply dated 3.4.2003. Failure to vacate and hand over vacant possession of the said premises impelled the landlord to institute SC 813/2003 for ejectment, before the Chief Judge, Small Causes Court, Bangalore.

The petitioner entered appearance, opposed the suit by filing statement of objections dated 4.9.2003, inter alia contending that the quit notice is contrary to law and the failure to demolish, reconstruct and re-deliver possession of the

portions of the premises in terms of the compromise recorded in the order in an earlier eviction petition No. HRC 80/1980, filed by the respondent landlord against M/s Lakur and Company and another tenant, under the Karnataka Rent Control Act, 1961, the respondent was disentitled to a decree for ejectment

The Landlord-Sangha examined its Secretary as PW-1 produced six documents marked as Exs.P-1 to P-6 while the petitioner examined its Accountant and Power of Attorney Holder as DW-1 produced thirteen documents marked as Exts.D-1 to D-13. The Trial court allowed the suit by judgment and decree dated 21.9.2005 granting two months time to vacate and hand over vacant possession of the tenanted premises.

IV CRP 153/2006

The petitioner's tenancy over shop premises No. 2094/1 (K 33) Thyagaraja circle, K.R. Mohalla, Mysore, when determined by a quit notice dated 1.2.2003 was responded to by a reply dated 22/2.2003. The petitioner having not complied with the demand in the quit notice, impelled the respondent landlord to institute SO 157/2003 for ejectment, on the file of the Judge, Court of Small Causes, Mysore which was opposed by filing written statement dated 20.10.2003 of the petitioner, inter alia contending, that the deposit of monthly rents into the bank account of the landlord even after filing of the suit tantamount to waiver of notice to quit

The Trial court recorded the depositions of the landlord as PW-1 who produced four documents marked as Ex.P-1 to P-4; while that of the petitioner - tenant as PW-1 who produced one document marked as Ex.P-1 and also recorded the depositions of the Court Commissioner CW-1 and marked documents Ex.C-1 to C-4. By judgment and decree dated 22.12.2005, the Trial court directed the petitioner to vacate and hand over vacant possession of the premises within three month's time thereof.

3. For the purpose of convenience, I think it proper to deal with the contentions touching upon the facts in each of the petitioners, in the first instance.

4. Learned Counsel for the petitioner in CRP 170/06 contends thus:

That the premises No. 217/d was taken on lease under lease agreement dated 8-6-1967 - Ex.P-1 and the receipt Ex. D-1 of even date, while premises No. 217/c was taken on lease on 24-6-1968 under receipt Ex, D-2 of even date, being two separate and independent transactions of lease, the quit notice and the suit for ejectment were unsustainable.

5. Per contra, learned Counsel for the respondent /landlord contends that the two tenancies commenced on 2 different dates, nevertheless, the tenant in his reply notice dated 23-7-2002 Ex. P-4 admitted that the monthly rental was Rs. 1,500/- for both the shops, put together and in his oral evidence admitted the removal of the common wall between the two shops and its merger by the tenant for beneficial use and occupation, as a single unit, coupled with the payment of

Rs. 1,500/- as monthly rent, demonstrates that the lease was always construed as one tenancy.

6. This being the very same contention advanced before the trial Court was considered in great elaboration, as animated by the Judgment and Decree impugned. There is considerable force in the submission of the learned Counsel for the respondent landlord that the contents of the reply notice Ex. P-4 admitting the tenancy of the two shops "on a monthly rental of Rs. 1,500/-" coupled with the testimony of D.W. 1 admitting the removal of the common wall in between the two shops, for convenient and better enjoyment of the same as one unit, and in the absence of evidence of two separate, individual tenancies existing as on the date of the quit notice, as also lack of evidence to substantiate separate rent receipts for two tenancies, as admitted in the deposition of D.W. 1, there can be no doubt in my mind that the trial Court was fully justified in concluding the existence of one tenancy as on the date of quit notice, in respect of the two shops, together measuring more than 14 sq. metres used for commercial purposes and its jurisdiction to try the suit, not barred by The Karnataka Rent Act, 1999.

7. Learned Counsel for the petitioners in CRP. 1045 & 1046/2005 contend that the respondent landlord having instituted eviction proceedings against tenants of other portions of the premises in question, under the Karnataka Rent Control Act, 1961, concluded in a compromise whereunder the landlord was bound to demolish the existing structure, reconstruct and redeliver portions of the new building to those tenants, in the year 1980, hence the suit for ejectment is not maintainable.

8. Per contra, learned Counsel contends that after the promulgation of the Karnataka Rent Act, 1999, the tenanted premises is excluded from the application of the said rent legislation entitling the respondent to initiate legal proceedings for ejectment after issue of quit notice determining the tenancy.

9. This contention need not detain the Court for long. The Karnataka Rent Act, 1999, admittedly has no application to the premises in question and the petitioner's tenancy is not protected by the said Act Hence, in the absence of a legal bar to a decree for ejectment, the contention must necessarily fail.

10. Learned Counsel for the respondent in CRP. 153/2006 contends that the trial Court fell in error in accepting the Court Commissioner's report that the suit premises, measures more than 14 sq. mtrs. According to the learned Counsel, the Court Commissioner ought not to have taken into account the area comprising the staircase and the common passage leading to the tenanted premises to arrive at the plinth area of the premises.

11. Per contra, learned Counsel for the respondent landlord contends that the petitioner in his written statement did not take up the plea of either lack of jurisdiction of the Court or that the premises measures less than 14 sq. ruts. According to the learned Counsel by way of abundant caution, a Court

Commissioner was appointed, at the instance of the landlord, and the measurements taken established that there were steps leading to the entrance door at a distance of 3" from the footpath, in the open court yard (jagali) and that the actual plinth area of the premises when measured exceeded 14 sq. mts. Learned Counsel hastens to add that nothing was elicited in the cross-examination of C. W. 1 to discredit his evidence.

12. It is not disputed and cannot be disputed that the tenant petitioner in his written statement did not advance a plea of lack of jurisdiction of the Court to try the suit or that the premises measures less than 14 sq. mts. The petitioner also did not claim that the tenancy was protected under the Karnataka Rent Act, 1999. The mahazar Ex. C-2 prepared by the Court Commissioner and signed by all the parties including the petitioner discloses that; the plinth area of the premises measures 26 "6" x 27 "5". in other words more than 14 sq. mts. The cross-examination of C. W. 1 does not disclose incriminating evidence to disbelieve his testimony, and the learned Counsel is unable to point out to the statements in cross-examination to discredit the evidence of C.W. 1. The trial Court in my considered opinion cannot be said to have committed any error of law or fact in recording a finding and arriving at a conclusion that the premises measured more than 14 sq. mts. The contention of the learned Counsel for the petitioner is without merit and is accordingly rejected.

13. It is the common contention advanced by all the petitioners in the revision petitions that the landlord having accepted the rents after the termination of the tenancy, without prejudice, tantamounts to waiver of notice to quit. Learned Counsel for the petitioners adopt the contentions advanced by Sri. S.K.V. Chalapathy, learned Counsel for the petitioner in CRP. 170/06. Learned Counsel, points out to illustration (a) to Section 113 of the Transfer of Property Act, 1982 (for short the T.P. Act"), to contend that the acceptance of rent by the landlord after issue of the quit notice amounts to waiver of notice and a fresh tenancy is brought into existence; testimony of the petitioner, with regard to payment of rents after the notice to quit having remained unchallenged in the cross-examination, is a pointer to the intention of the respondent landlord in extending consent for a new lease. Learned Counsel in support of his contention placed reliance upon the following reported decisions:

- 1) Karnani Industrial Bank Limited Vs. The Province of Bengal and Others,
 - 2) B.K. Narayana Iyengar v. H.V. Subba Rao and Anr. AIR 1958 MYS 113
 - 3) Bhawanji Lakhamshi and Others Vs. Himatlal Jamnadas Dani and Others,
- and
- 4) The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah,

14. Per contra, learned Counsel for the respondent in CRP 170/2006 contends that PW1 in his cross-examination denied the only suggestion that the rent was received with an intention to continue the tenancy.

15. Learned Counsel for the respondents in CRP. 1045 AND 1046/2005 points out to the written statement filed by the tenant in the suit to contend that the plea of waiver of notice to quit was not advanced and being a mixed question of fact and law cannot be permitted to be raised in the Revision Petition. Learned counsel hastens to add that the receipts Exs. D-2 to D-11 in S.C. 815/05 and Exs. D-4 -13 in S.C. 813/03 were issued for the period after the determination of the lease disclose the use of words "without prejudice" which means that the landlord did neither consent nor express any intention to either waive the notice to quit or continue the tenancy.

16. Learned Counsel for the respondents in CRP. 153/06 contends that standing instructions were issued to the tenant to deposit the monthly rent into the bank account of the landlord, before the termination of the lease and not after. In the absence of evidence to the contrary, the landlord did not express any intention to either waive the notice to quit or to continue the tenancy.

17. The common contention advanced by the learned Counsel for the respondent landlords in these petitions is that the respondents having instituted proceedings for ejection of the respective tenants is sufficient proof of no intention to continue the lease. It is further contended that though Section 113 of the T.P. Act and the illustration (a) provides for waiver of notice to quit after the termination of the lease, in the facts and circumstances of the case, none of the landlords have by receipt of rents shown any intention to continue the tenancy as subsisting or that the tenant has extended his consent either express or implied thereof According to the learned Counsel, illustration (a) has to be read in consonance with the main Section 113 which states that there must be consensus ad idem between the parties in order to establish waiver of notice to quit, which is not forthcoming, from the facts and circumstances of the case.

18. Learned Counsel for the respondents would make reference to several reported decisions of different High Courts as well as the decisions of the Supreme Court of which I would make reference, to a few, which in my opinion are necessary for the decision making.

19. By way of reply Sri. S.K.V. Chalapathy, learned Counsel for the petitioners contends that illustration (a) to Section 113 of T.P. Act was not considered in the decisions referred to by the learned Counsel for the respondents and are per incuriam. In support of the said contention reliance is placed upon the decision of the Apex Court in Government of Andhra Pradesh and Anr. v. B. Satyanarayana Rao (Dead) By L.Rs. and Ors. AIR 2000 SC 1729. The learned Counsel further contends that illustration (a) to Section 113 of the T.P. Act being a part of the section helps to elucidate the principle in the section that receipt of rents after termination of tenancy is an implied consent to continue the tenancy as subsisting.

20. In the light of the rival contentions, having carefully considered the pleading and the material on record, the question for decision making is:

Whether in the facts and circumstances of these cases, the acceptance of rents by the landlord for the period after termination of the lease tantamounts to waiver of notice to quit ?

21. Chapter V of T.P. Act deals with leases of immovable property. Section 111 provides for determination of lease of which Sub-sections, (a) (g) & (h) are relevant for our purpose and are extracted below:

(a) by efflux of the time limited thereby;

(g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; (or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event); and in (any of these cases) the lessor or his transferee (gives notice in writing to the lessee of) his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

22. Section 112 deals with waiver of forfeiture u/s 111(g) and reads thus:

A forfeiture u/s 111, Clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting;

23. Section 113 is Waiver of notice to quit" u/s 111(h) which reads thus:

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.

24. The effect of holding over is provided for u/s 116 which reads thus:

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

25. The quit notices in all these cases are admittedly issued u/s 106 of the T.P. Act, in the absence of a contract, i.e, a lease of immovable property for commercial purposes and deemed to be a lease from month to month terminated by the lessor by 15 days notice. Thus the termination of the lease being under Clause (h) of Section 111 of the Act attracts a waiver of the said notice, if conditions specified u/s 113 of the Act are satisfied.

26. In the case of Karnani Industrial Bank (1) supra, 3 learned Judges of the

Supreme Court having regard to the fact situation that the lessee had not made out a case of holding over and as the rents were accepted prior to the date of lease, rejected the plea of the lessor of applicability of Section 116 of the Act, the bench noticed the decision of the Federal Court in *K.B. Capadia v. Bai Arbai* 1949 O.C.R. 262 wherein it was held thus:

that where rent was accepted by the landlord after the expiration of the tenancy by efflux of time, Section 116 applied even though the landlord accepted the amount remitted to him as "part deposit towards his claim for compensation for illegal use & occupation & without prejudice to his rights

It is further observed thus:

A reference to Section 116, T.P. Act, will show that for the application of that section, two things are necessary: (1) the lessee should be in possession after the termination of the lease; & (2) the lessor or his representative should accept rent or otherwise assent to his continuing in possession. The use of the word "otherwise" suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee "continuing in possession" until the lease has expired, & the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent & its acceptance should be made at such a time & in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession.

27. *B.K. Narayana Iyengars case*(2) *supra*, was one of notice terminating a contractual tenancy entitling the tenant to become a tenant under the Rent Control legislation and the receipt of rent by the landlord for the period post termination of the lease, the tenant claimed to be a tenant holding over u/s 116 of the Act, or at any rate, a continuance of tenancy by placing reliance on Section 113 of the Act. The learned single Judge making reference to Section 111(a) to Section 113 held that waiver means giving up a right which is contractual in its content, and must be intentional and not accidental. There must be *ad idem* between the contracting parties. Waiver pre-supposes that the parties to the contract were conscious of their rights and one of the parties who is entitled to certain rights had deliberately given up the same with the consent of the other. The learned Judge further held thus:

The payment of rent by the tenant for a period subsequent to the termination of the tenancy and acceptance of the same has been laid down as a statutory proof of the intention of both the parties to treat the lease as subsisting, Undoubtedly it is one of the modes of proof of the agreement to treat the lease as subsisting. It is a conclusive proof. The reason is obvious. Once the lease is terminated and tenant becomes a trespasser. There is no question of payment of any rent. If the tenant pays any rent as such, it is clear that he intends to continue as a tenant. Conversely the landlord is not entitled to any rent for that period. Hence, his receiving of any rent must be only on the basis that he is willing to treat the

lease as subsisting.

28. In *Bhawanji Lakhamshi's case*(3) *supra*, the question that arose for consideration was as to what constitutes holding over as u/s 116 of the T.P. Act. His Lordship Mathew J. speaking for the bench observed thus:

The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplated is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. In AIR 1949 124 (Federal Court) , the Federal Court had occasion to consider the question of the nature of the tenancy created u/s 116 of the Transfer of Property Act and Mukherjea, J. speaking for the majority said, that the tenancy which is created by the "holding over" of a lessee or under lessee is a new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it. Patanjali Sastri J., in his dissenting judgment, has substantially agreed with the majority as regards the nature of the tenancy created by Section 116 of the Transfer of Property Act, and that is evident from the following observations:

Turning now to the main point, it will be seen that the section postulates the lessee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and when the lessor assents to the lessee so continuing in possession, he tacitly accepts the tatter"s offer and a fresh tenancy results by the implied agreement of the parties. When, further, the lessee in that situation tenders rent and the lessor accepts it, their conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy.

Mere acceptance of amounts equivalent to rent by a landlord from a tenant in possession after a lease had been determined, either by efflux of time or by

notice to quit and who enjoys statutory immunity from eviction except on well defined grounds as in the Act, cannot be regarded as evidence of a new agreement of tenancy.

29. The Apex Court in *Jumma Masjid's case*(4) supra seized of the question as to the value to be attached to an illustration appended to a section in ascertaining its true scope, extracted the observations of the Judicial Committee in 43 Ind App 256 : AIR 1916 PC 242 which reads thus:

It is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves, it would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired.

30. Shifting the focus as to what "waiver" means, the Supreme Court in the case of *Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh*, held that 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.

31. The Division Bench of the Bombay High Court in the case of *Laxmibai Kisanrao Tamhane and Others Vs. Trivenibai*, dealing with the fact of receipt of rent by the landlord after issuing notice terminating the tenancy, following the decision of another co-ordinate Bench in *Navnitlal Chunilal Vs. Baburao* (No. 1), held thus:

...there is a fundamental difference between a waiver of a forfeiture, which is a matter which can be done at the election of the landlord alone, and what is inaccurately referred to as the waiver of a notice to quit, which can only proceed on the basis that the landlord and tenant are *ad idem* in making a new agreement. In other words, mere acceptance of rent by the landlord even after the date of notice does not make the notice ineffective. It has been held by the Division Bench that a fresh agreement must be proved, so as to create a new tenancy after the termination of the old one.

(Emphasis supplied)

32. To my mind the case which deals with the question exhaustively with reasoning is *Saleh Bros. Vs. K. Rajendran and Another*, wherein a learned Single Judge of the Madras High Court considered all important earlier judicial pronouncements which have a bearing on the decision making. In this regard it

is necessary to extract paragraphs 12, 14 & 15 which read as follows:

12. I shall next consider the scope of Section 113, i.e. the receipt of rent by the landlord accruing due subsequent to the notice determining the lease followed by a suit in ejectment. 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. It is the intention of the lessor to treat the lease as subsisting which is the predominant and deciding factor in bringing about a waiver and not any particular act by itself. Illustration (a) must, therefore, be understood and applied in consonance 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. Illustrations are useful aids to construction and for securing the proper meaning of the section, but they cannot control the plain meaning of the section; see *Koylash Chunder Ghose v. Sonatun Chung Barooie* ILR (1881) Cal 132. Illustrations appended to sections of a statute are useful to show how sections may operate and are of relevance and value in construing the text. They should only be rejected as repugnant to the section as the last resort of construction: vide *Maxwell on Statutes*, p. 43: *Mohamed Syedol Ariffin v. Yeoh Ooi Gark* ILR (1916) AC 575 and *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, . I do not see any repugnancy between the operative portion of Section 113 and the Illustration (a) as there is no difficulty in understanding the Illustration in consonance with the section. The context in which a particular act is referred to in Section 113 shows that the rent should be received at such time and in such manner as to be equivalent to the landlord assenting to the lessee continuing in possession. The receipt of rent may only create a presumption and cannot by its own force amount to a waiver. Section 113 consists of two limbs: (a) the express or implied consent of the person to whom notice is given and (b) "the act of the person giving the notice showing the intention to treat the lease as subsisting". 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, and I find no justification for reading the Illustrations as being repugnant to the section. Every effort should be made to interpret the Illustration in conformity with the main section. The principle underlying Section 116 of the Act will also apply in applying Section 113 as this is also a case of continuance of the lease restoring the old tenancy. The English law regards the effect of waiver as creating a new tenancy, but the language of Section 113 points to a restoration of the old tenancy. As observed earlier, this is really a distinction without difference because, in either case the essential point to be considered is whether the other party is continuing in the relationship of a lessee, either under the old lease restored, or under a new tenancy, subject to the same terms and

conditions of the prior lease, as specified in Section 116. It is in this connection, that reference must be made to the following observations of the Supreme Court in *Karnani Industrial Bank Limited Vs. The Province of Bengal and Others*,

There can be no question of the lessee "continuing in possession" until the lease has expired, and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession".

14. An examination of the cases, which have dealt with the scope of Section 113, read with Illustration (a) thereto, shows 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. Whether the conduct of the party justified such an inference would undoubtedly turn upon the facts and circumstances of each case.

15. In this connection I may refer to the following observations of Lord Greene, M.R in *Booker v. Palmer* (1942) 2 All ER 674:

To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule.

of the Judgment, His Lordship extracted the opinion of the Patna High Court in the case of *Puran Mal Jaiswal Vs. Onkar Nath Choudhary and Others*, which reads thus:

Notice to quit was given by the landlord on 1st June, 1946, and a suit in ejectment was filed in November, 1946, in which there was also a claim for arrears of rent from February, 1946, up to the date of suit and future profits. A second suit for the same relief was filed in December, 1949, claiming arrears of rent from December, 1946 to November, 1949. Both the suits in which there was a denial of title were decreed. In the High Court, the plaintiff was permitted to amend the plaint deleting the claim for rent. On behalf of the tenant, an argument was advanced that, notwithstanding the deletion of the prayer for recovery of rent, the landlord must be deemed to have waived in view of his having previously claimed rent in both the suits for the period subsequent to the notice to quit.

34. The Apex Court in the case of *C. Albert Morris v. K. Chandrasekaran and Ors.* 2005 (8) SC 72 beneficially looked in to the decision in *Saleh Bros's case supra*

in support of the contention that

...mere continuance in occupation of the demised premises after the expiry of lease, notwithstanding the receipt of an amount by the quondam landlord would not create a tenancy so as to confer on the erstwhile tenant the status of a tenant or a right to be in possession.

35. Thus the summary of the aforesaid judicial pronouncements indicates that having regard to the main provision of Section 113 of the T.P. Act that notice can be waived only by an act on the part of the person giving it showing an intention to treat the lease as subsisting and in the absence of a provision similar to what is contained in Section 112 of the Act, the acceptance of rent subsequent to the filing of the suit will not operate as a waiver in the usual course as the landlord having instituted the suit for ejectment, the election is irrevocable.

36. Section 113 indicates that the act of lessor must be such as to constitute a clear evidence of his intention to treat the lease as subsisting and illustration (a) ought to be applied in consonance with the principle underlying the section with due reference to the intention of the lessor.

37. A waiver u/s 112 depends upon the intention of the lessor whereas a waiver u/s 113 depends upon the intention of both the lessor and the lessee. The unilateral decision of the lessor u/s 112 is the decisive factor for waiver is specific to the said section. Such a proviso is not found u/s 113 of the T.P. Act and therefore, mere acceptance of rent by the lessor subsequent to the notice to quit would not constitute waiver.

38. The Madras High Court having considered all relevant authorities in Saleh Bros, case, 1 fully agree with the reasons, which is the answer to the question raised in this petition. The observation of the learned single Judge of this Court in B.K. Narayana Iyengar's case shows that the decision is not irreconcilable and must be understood in the context of the points and questions raised in it and the background of the factual matrix. The contention of the learned Counsel for the petitioners that illustration (a) of Section 113 of T.P. Act was not considered in any other judgment and that the judgments other than B.K. Narayan Iyengar's case. ought to be considered as per incuriam, with great respect, cannot be countenanced.

39. The contention that the acceptance of rents by the respondents subsequent to the quit notice must be held to be a waiver is unacceptable. To constitute waiver u/s 113 not only the parties must coalesce but there should a consensus ad idem. Hence the use of the words "by any act" on the part of a person giving the notice shows an intention to treat the lease as subsisting and such act must be with the express or implied consent of the person to whom the notice is given. The question as to what was the intention of the parties is a pure question of fact. The evidence of the respondents clearly discloses that they were not aware of the legal consequences except for the respondent in CRP 1045 & 1046/2005 who issued rent receipts "without prejudice". There is also no

evidence to support and establish the animus to nullify the notice to quit by acceptance of the rent by the respondents, constituting an act on the part of the lessor to treat the lease as subsisting. In addition there is no evidence of the petitioners that they construed the receipt of rents by the respondent as an act of waiver. The fact that the landlords filed suits for ejectment, prosecuted the same and, on the contrary, there being no clinching evidence to establish that after receipt of the rents, the landlord abandoned the suit, it is too far fetched for the petitioners to contend that the landlords treated the lease as subsisting.

40. The petitioners in CRP 1045 & 1046/2005 did not advance a plea of waiver in the written statement before the trial Court but raised the same in this petition for the first time. The plea of waiver being a mixed question of fact and law and having not pleaded so in the trial Court, the plea deserves to be rejected, following the observations of the Supreme Court in Mangal Sen Vs. Kanchhid Mal, , which in the circumstances is apposite:

After hearing the counsel on both sides, we are satisfied that the District Court was perfectly right in its view that there had not been any conduct on the part of the plaintiff which would constitute a waiver by him of the demand for surrender of possession made as per the notice dated October 9, 1972 which was served on the tenant on October 19, 1972. As rightly observed by the District Court, the defendant had not put forward any plea of waiver in the written statement filed by him before the trial Court and in the absence of any specific pleading in that behalf, the trial Court was not really called upon to go into the question of waiver.

41. The contentions advanced by the petitioners are without merit and are accordingly rejected.

In all the cases, the premises in question are used for commercial purposes and are located in predominantly commercial areas. The time granted by the trial Court ranges between 2 & 3 months and the orders impugned are of the later part of 2005 and early 2006. Having regard to the fact that the petitioners are carrying on their business to eke out there livelihood in the said premises, it is appropriate to extend time to vacate the premises in occupation up to 31st Dec, 2006 subject to the petitioners filing the necessary affidavit undertaking to hand over vacant possession of the premises on or before 31st Dec. 2006. Undertaking to be filed within two weeks.

The revision petitions are accordingly rejected.