FULL BENCH

APPELLATE CIVIL

Before Harbans Singh, C.J., Bal Raj Tuli and S. S. Sandhawalia, JJ.

SHIVJIT SINGH,—*Appellant.*

versus

CHARAN SINGH,—*Respondent.*

Regular Second Appeal No. 10 of 1970.

September 13, 1972.

Transfer of Property Act (IV of 1882)—Sections 111(h) *and* 113—*Two notices to quit issued one after the other by the lessor to the lessee—Issuance of second notice—Whether* per se *amounts to a waiver of the first notice—Tenancy—Whether terminates with the first notice—Illustration (b) to section* 113—*Whether to be read in the light of the language of the section itself—Interpretation of Statutes—Illustrations to a section of a statute—Whether can be interpreted to run counter to the section.*

Held, that from the plain language of the body of section 113 of Transfer of Property Act, it is evident that the crucial element from which a waiver of the earlier notice may be implied is the intention of the parties. This is particularised as an intention to treat the lease as a subsisting one. A two-fold requirement is visualised, namely, an act of one party showing an intention to treat the lease as subsisting and the express or implied consent of the other party. It is obvious, therefore, that the intention to treat the lease as subsisting has not to be merely a unilateral one but has to be bilateral. At one particular point of time, there must exist a mutual intention of the lessor and the lessee to continue the lease despite its earlier determination by a notice under section 111(h) of the Act. The language of the section 113 of the Act itself cannot be interpreted to mean that the mere issuance of a second notice to quit amounts to the waiver of the first notice. Illustration (b) to the section will come into play only if the lessor gives the second notice recognising the lessee as such. It is the legal character of the person to whom the second notice is given which is of significance. Moreover, according to the rule of harmonious construction, illustration (b) must be read in the light of the language of the section itself and, if necessary, be controlled thereby. Hence where two notices to quit are issued one after the other by the lessor to the lessee, the issuance of the second notice *per se* does not amount to the waiver of the first notice. The tenancy stands terminated with the issue of the first notice.

(Para 6).

Held, that it is the settled rule of construction that it is the provisions of the sections of a statute themselves which partake of the dominant character whilst the illustrations to a section are elaborations of the principle laid down therein. There is no manner of doubt that the illustrations appended to a section by the legislature itself are a very valuable guide to the interpretation thereof. Nevertheless an illustration cannot run counter to or be repugnant to the section itself. In an extreme and special case, an illustration may be rejected on the ground of its absolute repugnancy to the section itself. (Para 8)

Case referred by Hon'ble Mr. Justice Man Mohan Singh Gujral,—vide *its order dated 14th May, 1971 to a Full Bench for deciding an important question of law. The Full Bench consisting of Hon'ble the Chief Justice Mr. Harbans Singh, Hon'ble Mr. Justice Bal Raj Tuli and Hon'ble Mr. Justice S. S. Sandhawalia finally decided the case on 13th September, 1972.*

Regular Second Appeal from the decree of the Court of Shri Joginder Singh, District Judge, Chandigarh dated the 24th day of November, 1969 modifying that of Shri R. S. Gupta, Senior Sub-Judge, Chandigarh dated the 22nd May, 1969 (granting the plaintiff a decree for the possession of the house in dispute against the defendant and also granting the plaintiff a decree for the recovery of Rs. 1,104 against the defendant and further ordering that defendant shall pay to the plaintiff his proportionate costs of the suit) to the extent that the plaintiff is granted a decree for Rs. 777 more with costs on this amount throughout against the defendant-respondent.

MALOOK SINGH, ADVOCATE, for the appellant.

B. S. BHATIA AND V. K. DUGGAL, ADVOCATES, for the respondent.

ORDER

The order of this Court was delivered by:—

Sandhawalia, J.—(1) "Will the issuance of a second or third notice to quit the leased property, by the lessor to the lessee, *per se* amount to a waiver of the first such notice within the meaning of section 113 of the Transfer of Property Act ?"

(2) This is the primary legal question which arises for determination in this regular second appeal which is before the Full Bench on a reference. The point arises from facts which are neither complicated nor in serious dispute.

(3) Charan Singh plaintiff-respondent is the landlord of the premises in dispute and he served the notice Exhibit P. 1 dated the

22nd of November, 1967, on Shivjit Singh, defendant-tenant, directing him to vacate the leased premises by the 31st of December, 1967, without fail. The tenant ignored the notice and continued to remain in occupation. Consequently the landlord issued the second notice Exhibit P. 2 dated the 5th of January, 1968, directing that the house be vacated within one week of the receipt of the said notice, otherwise the defendant would be liable to pay a sum of Rs. 100 per mensem towards the use and occupation thereof besides the agreed rent of Rs. 92 per mensem till the date it is vacated. However, the tenant again ignored the second notice as well and on the 7th of August, 1968, the landlord issued a third notice Exhibit P. 3 reiterating his earlier two notices and demanding that he should vacate the house by the 30th of September, 1968, without fail. No response having been made to this notice either, the plaintiff landlord ultimately filed a suit for the possession of the premises and for the recovery of Rs. 2,044 as rent and damages for the use and occupation of the property.

(4) The suit was resisted by the defendant tenant *inter alia* on the ground that no valid notice was served upon him for terminating the tenancy and that the plaintiff was not entitled to recover any damages or enhanced rent for use and occupation. He stated his willingness to pay the agreed rent of Rs. 92 which was alleged to be the prevailing rent in locality for similar accommodation and also made claims in regard to the electricity and water charges etc. On these pleadings the following issues were framed:—

(1) Has the tenancy been terminated by means of a valid notice?

(2) Is the plaintiff entitled to recover additional money of Rs. 100 per mensem from 18th January, 1968 onwards?

(3) Is the defendant entitled to make adjustment of Rs. 86 on account of electricity charges etc. as claimed?

(4) Relief.

The trial Court held on the material issue No. 2 that the tenancy had terminated with effect from the 30th of September, 1968, which was the date mentioned in the third notice Exhibit P. 3. Consequently it held that the plaintiff was entitled to recover damages at the rate of Rs. 184 per month for the use and occupation of the premises in question with effect from that date. In the result he passed a decree

in favour of the plaintiff-respondent for possession of the premises in question and for the recovery of Rs. 1,104 with proportionate costs. The plaintiff landlord went up in appeal before the District Judge and the sole question which was argued there, as also before us and the learned referring Judge, is whether the tenancy had terminated with effect from the 31st of December, 1967, in accordance with the terms of the first notice Exhibit P. 1 or on the 30th of September, 1968, which was the date mentioned in the third notice Exhibit P. 3. The District Judge, disagreeing with the trial Court, held that the tenancy had in fact been terminated with effect from the date in the first notice, that is, the 31st of December, 1967. Consequently he granted a decree for the recovery of Rs. 777 more in favour of the plaintiff-respondent with costs on this amount throughout. The defendant-tenant is now the appellant in this appeal.

(5) The argument on the basic legal issue raised by Mr. Malook Singh, learned counsel for the defendant-appellant, is that giving of the subsequent two notices (in particular Exhibit P. 3 irrespective of the contents thereof) amounts to waiver of the first notice Exhibit P. 1. Reliance of the learned counsel is on illustration (b) of section 113 of the Transfer of Property Act, 1882, and on those premises it is contended that the defendant-tenant having remained in possession the same must be deemed to be permissive till September 30, 1968, as mentioned in the last notice Exhibit P. 3.

(6) As the argument centres around section 113 of the Transfer of Property Act and, in particular, around illustration (b) thereto, it is necessary to notice the provisions thereof:—

> "113. 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.
>
> Illustrations.
>
> (a) * * * * *
> * * * *
>
> (b) A, the lessor gives B, the lessee, notice to quite the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

Adverting first to the plain language of the body of the section above-said, it is evident that the crucial element from which a waiver of the earlier notice may be implied is the intention of the parties. This is particularised as an intention to treat the lease as a subsisting one. A two-fold requirement is visualised, namely, an act of one party showing an intention to treat the lease as subsisting and the express or implied consent of the other party. It is evident, therefore, that the intention to treat the lease as subsisting has not to be merely a unilateral one but has to be bilateral. At one particular point of time, there must exist a mutual intention of the lessor and the lessee to continue the lease despite its earlier determination by a notice under section 111(h) of the Act. Equally clear it is from the language of the provision itself that this intention may be inferred from conduct (i.e., it need not necessarily be express) or as the statute says from any act of the party. Similarly the consent of the other party may be expressed or implied. This construction flows from the plain language of the section and is supported by the Division Bench authority of Stone, C.J. and Kania, J. in *Navitlal Chunilal* v. *Baburao and another* (1). Therein Kania, J. (as his Lordship then was) observed as follows :—

> "The structure of section 113 is entirely different. It is expressly provided that there must be the consent of the person to whom property was given on lease to bring about a waiver of the notice to quit. On the side of the landlord it is provided that he must do an act showing an intention to treat the lease as subsisting. It is, therefore, clear that under section 113 there has to be an agreement between the two parties, and the waiver of a notice to quit cannot be brought about by an action either of the tenant alone or of the landlord alone."

Stone, C.J. has this to say on the point—

> "* * * * * *
>
> and, in my judgment, 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.

(1) A.I.R. 1945 Bom. 132.

The difference is well stated in the following passage in Woodfall's 'Law of Landlord and Tenant'.

* * * * *".

To repeat for purposes of emphasis, the crucial thing, therefore, required by the statute is the intention to treat the lease as subsisting by one party and an express or implied consent thereto by the other. It is obvious that the mere giving of a second notice by itself is of no great consequence except for the purpose of arriving at and determining the intention of the parties. It is, therefore, evident that the language of the section itself gives no support or aid to the contention on behalf of the appellant that the mere issuance of second or third notice will amount to the waiver of the first notice. Indeed the statute negatives any such contention.

(7) However, the primary reliance of the appellant is on illustration (b) quoted above. As already noticed, had the section stood alone, there was no foundation for the appellant's contention. Nevertheless a closer analysis of illustration (b) relied upon will show that it can hardly advance the case of the appellant. The crucial thing in the sentence "A gives to B *as* lessee a second notice to quit" appears to be the word '*as*'. It is only if the lessor gives the second notice recognising the lessee as such that illustration (b) would come into play. It is the legal character of the person to whom the second notice is given which is of significane. If the notice purports to be given to a trespasser, or a person in wrongful occupation, or one holding over after the due termination of the lease, then it is not a notice as a lessee and consequently illustration (b) would not be attracted.

(8) Added to the above, is the settled rule of construction that it is the provisions of the section themselves which partake of the dominant character whilst the illustrations to a section are elaborations of the principle laid down therein. There is no manner of doubt that the illustrations appended to a section by the legislature itself are a very valuable guide to the interpretation thereof. Nevertheless an illustration cannot run counter to or be repugnant to the section itself. Indeed there is high authority for holding that in an extreme and special case, an illustration may be rejected on the ground of its absolute repugnancy to the section itself. No such repugnancy arises in the present case but it is obvious that according to the

rule of harmonious construction, illustration (b) must be read in the light of the language of the section itself and, if necessary, be controlled thereby. This view finds full support from the following observations of Barman, J. in *Bhagabat Patnaik and others* v. *Madhusudhan Panda and others* (2) :—

> '(The phrase (showing an intention to treat the lease as subsisting' in section 113 is clear to indicate that to amount to waiver there must be evidence of such intention. The parent provision of section 113 containing the said phrase requires that there must be evidence showing an intention to treat the lease as subsisting. The illustrations must be read subject to this parent provision in the section itself. Thus viewed illustration (b) on which the plaintiffs rely is subject to the governing provision of the section itself, namely that there must be evidence 'showing an intention to treat the lease as subsisting.' ".

A reference is also made hereafter to the authoritative observations of their Lordships of the Supreme Court in this context.

(9) Before adverting to the authorities bearing directly on the point what first deserves notice in *Navitlal's case* (1) (supra) is that Kania, J., in categorical terms observed as follows:—

> "It was contended that section 113, Transfer of Property Act, made the Indian Law different from the English law. In my opinion, there is no substance in that contention".

And again—

> "It was contended that section 116 made a difference in the Indian law. That argument, in my opinion, is unsound."

There is then the authoritative pronouncement in *Harihar Banerji and others* v. *Ramshahi Roy and others* (3), holding that the principles governing the construction of a notice to quit laid down by English cases are equally applicable to cases arising in India. It is evident, therefore, that English authorities on the point are relevant and of considerable assistance. Indeed in *Navitlal's case* (1), their

(2) A.I.R. 1965 Orissa 11.
(3) A.I.R. 1918 P.C. 102.

Lordships placed reliance on a number of English cases. On the present issue, the ratio in *Loewenthal* v. *Vanhoute and another* (4), is directly applicable. The express point raised in that case also was that by giving of a second notice by the solicitors of the landlord, the earlier notice to quit stood waived. Repelling this contention Denning, J., observed as follows:—

> "In this case, the tenancy was determined on September 21, 1946, the notice to quit having been given, a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice. Applying that test in the present case, it is plain that there was no agreement, express or implied or to be inferred for any new tenancy. The tenancy expired on September 21. On September 23, the tenants offered rent. It was refused. That showed plainly that the landlord was not going to create a new tenancy, and the mere fact that a solicitor, in order to get possession, gave another notice to quit, is not, in my judgment, any reason for inferring any agreement for a new tenancy."

The abovesaid observations are on all fours with the present case and this judgment was expressly relied upon by the Division Bench of this Court in *Basheshar Nath* v. *Delhi Improvement Trust* (5), in holding that merely because a second notice was given the first notice cannot be deemed to have been waived. However, it must in fairness to the appellant be noticed that this judgment does not expressly mention section 113 of the Transfer of Property Act though the allusion in the judgment is apparently to the said provision. Also there is an observation in the case on facts that the second notice was not really a notice to quit but a reply to a request of the lessee, for the grant of one year's grace which was refused.

(10) Though their Lordships had left the matter open in *Tayabali Jaferbhai Tankiwala* v. *Messrs Ashan and Co. and others* (6), nevertheless the tenor of observations therein tends to lend massive support

(4) (1947) A.E.L.R. 116=1947—1 K.B. 342.
(5) A.I.R. 1953 Pb. 243.
(6) A.I.R. 1971 S.C. 102.

to the contention on behalf of the respondent and there appears to be a tacit approval of the reasoning in *Loewenthal's case* (4), (supra). After referring expressly to illustration (b) to section 113, it was observed as follows :—

> "If only the language of the illustration were to be considered as soon as the second notice was given, the first notice would stand waived. Counsel for the appellant has relied on the observation of Denning, J. (as he then was) in *Lowenthal* v. *Vanhoute* (4), that where a tenancy is determined by a notice to quit, it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect and further that a subsequent notice to quit is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first."

The observations of Bachawat, J., in *Muralidhar Kulthia* v. *Sm. Tara Dye* (7), repelling a similar if not identical argument, as is being raised on behalf of the appellant, are in these terms:—

> "The notice to quit by the end of October, 1944 was served on the defendant on the 4th October, 1944. I have no doubt that this notice is a valid notice to quit. It is contended by the defendant that the notice to quit has been waived by service of the notice dated 2nd November, 1944 whereby the plaintiff demanded possession. In my judgment, this contention is unsound. Under section 113, Transfer of Property Act, there can be waiver of notice to quit with the express or implied consent of the tenant by any act on the part of the landlord showing an intention to treat the lease as subsisting. The letter, dated 2nd November, 1944 does not show any intention to treat the lease as subsisting. It is a demand for possession. It is not a notice to quit in term of section 106, Transfer of Property Act. It does not show that the defendant could remain rightfully in possession after the expiry of October, 1944."

(7) A.I.R. 1953 Cal. 349.

Similar view has been expresed by Barman, J. in the authority already referred to *Bhagabat Patnaik's case* (2), which is in the following terms:—

> "The law is now well settled that where a tenancy is determined by a notice to quit, it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect. A subsequent notice to quit, is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first. The mere facts that the tenant continues in possession and a suit is not instituted are insufficient. The relevant passage in Woodfall on Landlord and Tenant (26th Edition) at page 1004 is also in the same line as stated thus :
>
> 'Generally speaking, giving a second notice to quit does not amount to a waiver of a notice previously given unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first.' "

The only authority, on which some reliance was placed on behalf of the appellant by Mr. Malook Singh, learned counsel for the appellant, is the Single Bench judgment in *Mohanlal* v. *Vijai Narain and another* (8). Reliance was placed on the following brief observation of Modi, J., who after quoting illustration (b) to section 113 says—

> "There is no doubt that the giving of a second notice to quit is a waiver to the first notice so far as the person giving notice is concerned. The only question which, then arises is as to the consent express or implied of the person to whom the notice is given."

That case, however, is first distinguishable on facts. In that, the learned Judge came to the finding that the first notice was bad in law and, therefore, no issue of the waiver thereof arose. Further on a close reading of the authority, I find myself unable to hold that the brief observation abovequoted, on which reliance is placed by the learned counsel, is indeed the ratio of the said case. In view of the

(8) A.I.R. 1961 Raj. 136.

clear finding that the first notice was bad in law and consequently no issue of waiver arose, these observations would appear to be *obiter*. Further these brief observations cannot be construed to mean as laying down that the mere giving of a second notice without more would necessarily amount to waiver of the first notice. No reasons have been stated nor any authority has been cited in this judgment for the observations abovesaid. However, if this judgment is construed as laying down any such inflexible proposition, then, with great respect, the view taken seems to run counter to the weight of the authority and I would, therefore, regretfully dissent from the same.

(11) Summing up, therefore, on the construction of the language of section 113, on principle as well as on authority, the answer to the legal question posed at the very beginning of this judgment must be returned in the negative.

(12) Once the legal issue abovesaid is resolved in favour of the respondent, the matter in this case is essentially simple. It is well settled that the intention to treat the lease as subsisting is, in the ultimate analysis, a question of fact to be inferred from the totality of circumstances in each case. In the present case, far from there being any such intention to treat the lease as subsisting, everything in fact points to the contrary. It first deserves notice that there is no other circumstances apart from the giving of subsequent notices Exhibits P. 2 and P. 3, from which any inference in favour of the tenant could possibly be taken. Now a reference to the contents of these two notices would show that the landlord categorically took the position that the lease stood determined with effect from December 31, 1967, which was the date mentioned in the first notice Exhibit P. 1. Exhibit P. 2 subsequently was a demand for possession within a week coupled with the claim that the tenant would be liable to pay a sum of Rs. 100 per month over and above the pre-existing charge of Rs. 92 for the use and occupation of the said house. The clear inference therefrom is that the landlord stood by his position that the tenancy had been determined and thereafter a heavily enhanced amount would be claimed as damages for use and occupation.

(13) In this context what followed is of equal significance. The defendant-tenant then sent a Money Order for Rs. 184 in January, 1968, purporting to be the rent for the month of December, 1967 and

January, 1968. This was refused by the plaintiff landlord. Another attempt was made by the defendant tenant, who sent a Money Order for Rs. 633.40 P. as rent for the period of December, 1967, to June, 1968, which was also refused. Similarly the tenor of Exhibit P. 3 is even more firm and categorical on the point of the previous determination of the tenancy. Expressly therein it is mentioned that the landlord had refused to accept the rent tendered by the tenant by Money Orders basically on the ground that the tenancy stood terminated and the claim was to be for damages for use and occupation thereof. The offer of the rent through Money Orders was characterised in the notice both as misconceived and as a clever device on the part of the tenant. In terms the landlord stated that he stood by the first and second notices served by him on the defendant and that if the defendant did not vacate forthwith, the same would be entirely at his risk as to the costs and consequences thereof. It is evident, therefore, that the landlord was relentless in his resolve to stick to the determination of the tenancy made by his first notice, Exhibit P. 1.

(14) An argument half-heartedly pressed by Mr. Malook Singh, learned counsel for the appellant, was that the use of the word 'rent' along with damages for use and occupation by the landlord in Exhibits P. 2 and P. 3 may be taken as suggestive of the continuation of the tenanacy. I am wholly unable to agree. There is no magic in the use of the word 'rent' when the clearest intention of the landlord was to claim compensation for the wrongful use and occupation of the property after the determination of the tenancy. When the landlord was claiming as much as a sum of Rs. 192 only for use and occupation instead of the earlier agreed rent of Rs. 92, it was evident that he was not visualising the continuation of the tenancy. What in fact was being claimed was damages for wrongful use and occupation. It must, therefore, be held that on the facts of the present case there was no intention on the part of the landlord to treat the tenancy as subsisting. The same, therefore, must be held to have been determined validly on December 31, 1967.

(15) Consequently the judgment and decree of the first appellate Court must be affirmed and this appeal be dismissed with costs.

K. S. K.

7429 ILR—Govt. Press, Chd.