

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 25.02.2011*  
*Judgment Delivered on: 03.03.2011*

+ **RSA No.224/2004 & CM No.13881/2004**

SH FATEH CHAND .....Appellant  
Through: Mr. Raman Duggal, Advocate

Versus

SH. PURSHOTTAM DASS & ANR. ....Respondents  
Through: Mr. M.M. Kalra, Advocate.

**CORAM:**  
**HON'BLE MS. JUSTICE INDERMEET KAUR**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

**INDERMEET KAUR, J.**

1 This second appeal has impugned the judgment and decree dated 19.07.2004 which had endorsed the finding of the trial Judge dated 05.03.2004 whereby the suit filed by the plaintiff Purshottam Dass seeking possession and ejectment of the defendant from the suit property i.e. property bearing Plot No. IX/1648, Gandhi Nagar, Multani Mohalla Road, Delhi measuring 180 square yards had been decreed in his favour.

2 The case of the plaintiff was that the aforementioned plot had been let out to the defendant; rent deed had been executed between the parties; the defendant had thereupon constructed a temporary structure i.e. a tin shed. Since it was an open piece of land, provision of Delhi Rent Control Act (hereinafter referred to as 'DRCA') were not applicable. In spite of legal notice terminating his

tenancy dated 24.11.1998 (Ex.PW-1/2), the defendant failed to vacate the suit property. Suit was accordingly filed.

3 The defendant had contested the suit. He had filed his written statement wherein a preliminary objection was that no tenancy had been created; service of legal notice had also been denied.

4 On the pleadings of the parties, the following four issues were framed:-

1. *Whether the plaintiff is entitled for a decree of ejectment as prayed for? OPD*
2. *Whether the suit is barred under Section 50 of DRC Act and if so, its consequence? OPP*
3. *Whether the suit has been undervalued for the purposes of court fees and jurisdiction? OPP.*
4. *Relief.*

5 The trial Judge was of the view that the suit was not barred under Section 50 of the DRCA as it was a vacant plot of land; legal notice dated 24.11.1998 had validly terminated the tenancy of the defendant; it was a month to month tenancy; postal receipt had been proved as Ex.PQ-1/12.

6 The trial Judge in para 12 had also noted as follows:-

*“During the course of arguments it was also argued on behalf of the defendant that the present rate of rent has been increased to ₹375/- which has been admitted by PW-1 in its cross-examination and defendant has become tenant by holding over as the plaintiff has already increased the rent even after the filling of the suit and the notice given by the plaintiff stands waived. It is argued on behalf of counsel for the plaintiff that no such plea has ever been taken by the defendant during the continuance of the suit and there is not even a single assertion in the pleading or in the cross-examination of on behalf of the defendant that the defendant has become tenant by holding over and at this stage the defendant cannot take stand in the absence of any pleading or*

*evidence. It is also argued on behalf of the plaintiff that notice given under Section 11 Clause his waived with the express or implied consent of the person to whom it is given by any act on part of the person giving it showing an intention and mere acceptance of rent does not mean that notice stand waived as if the tenant fail to vacate the premises despite notice the landlord is not left with no option but to receive the rent as user charges of the premises. The plaintiff has relied upon the various judgment including 1996 SCR V. (2) Bhawanji Lakhamshi & Ors. Vs. Himatlal Jamnadas Dani & Ors. wherein it was held that 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 on sufferance is English law and the later a tenant holding over a tenant at will, in view of the concluding words of S. 116 of the Transfer of Property Act a lease 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 sanction contemplates is that on one side there should be an offer to taking a new lease evidenced by the lesses of 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 express by acceptance of rent or otherwise. The basis of the section is thus a bilateral contract between the erstwhile landlord and the erstwhile tenant. If the tenant has the statutory right to remain in possession and if he pays the rent, that will not normally be referable to an offer for his continuing in possession which can be converted into a contract by acceptance thereof by the landlord (B-D; 897 G-H).*

*In the case of normal tenancy a landlord is entitled where he does not accept the rent after the notice to quit, to file a suit in ejectment and obtain a decree for possession, and so his acceptance of rent is an unequivocal act referable only to his desire to assent to the tenant continuing in possession. That is not so where a Rent Act exists; and if the tenant says that landlord accepted the rent not as statutory tenant but only as legal rent indicting his assent to the tenant's continuing in possession it is for the tenant to establish it (898 B-C).*

*Even in the present case the defendant has not shown any fact which reflects or proved that the plaintiff ever gave his consent to the defendant for allowing him to continues as a tenant. I have heard the arguments of both the parties, in my opinion, the burden of proving the tenancy by holding over was on the defendant and it was never the case of the defendant at any point of time during the whole suit and the stand taken by the defendant at the stage of arguments and at the time cross-examination of PWs not even single suggestion has been given to PWs that defendant has become tenant by holding over neither the defendant in its own evidence has stated that he has become tenant by holding over which clearly shows that there was no intention of the parties to*

*create a new tenancy after the determination of tenancy in question and the same continuing of the suit by the plaintiff against the defendant shows that the never waived the notice and took the defendant as a tenant by holding over. In my opinion, the plaintiff has successfully proved his case to the satisfaction of this Court and he is entitled for the decrees of possession. Hence I decide this issue in favour of the plaintiff and against the defendant.”*

7 The impugned judgment had reaffirmed the findings of the trial Judge. Before the first appellate court, the defendant had also moved an application under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as the ‘Code’) seeking permission of the Court to amend his written statement; by order of the same date, the application for amendment of written statement had been dismissed; appeal had also been dismissed.

8 This is a second appeal court. On behalf of the appellant, it has been urged that a substantial question of law has arisen as the appellate Court had erred in dismissing the application of the appellant under Order 6 Rule 17 of the Code on the ground that the provisions of Order 6 Rule 17 of the Code stood amended w.e.f. 2002 and this amendment would be applicable even to proceedings filed prior in time thereto. Learned counsel for the appellant has placed reliance upon a judgment reported in 157 (2009) DLT 267 Purchasing Management International & Anr Vs. Rajat Pandhi & Anr to support his submission that this amended provision (of Order 6 Rule 17 of the Code) and the proviso contained therein would not be applicable to suits filed prior to the said amendment. This legal proposition had not been disputed by learned counsel for the respondent. Admittedly, in this case, the suit had been prior to this amendment i.e. prior to 2002. It is thus clear that the dismissal of application under Order 6 Rule 17 of the Code on this ground

was an illegality. The second ground for dismissal of the application under Order 6 Rule 17 of the Code was on the ground of delay and laches. Reliance has been placed upon (2007) 6 SCC 167 Andhra Bank Vs. ABN Amro Bank N.V. & others. It is submitted that delay by itself should not be a ground for refusal of a prayer for amendment. In this judgment, the Apex Court had allowed the amendment in the written statement; admittedly the trial was in progress at that time.

9 In the present case the trial had culminated and only before the first appellate court, the amendment application had been filed. That apart, it would be necessary to advert to the provisions of Order 6 Rule 17 of the Code. They read as under:-

***"17. Amendment of pleadings.-**The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*

*Provides that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial"*

This provision necessarily stipulates that permission may be granted to either party to amend his pleadings on such terms as may be just and for the purposes of determining the real controversy between the parties. The terms must be just and the amendment is permissible if it is necessary to determine the real controversy between the parties. This is the crux of the provision.

10 By way of the amendment in the written statement what the defendant had sought to incorporate is that the notice dated

24.11.1998 stood waived in view of the fact that during the pendency of the trial, the initial rent which was ₹357/- per month stood enhanced and this enhanced amount was admittedly paid and received by the defendant; the plaintiff had thus waived this notice in view of the provisions of Section 113 of the Transfer of Property Act, (hereinafter referred to as the 'TPA'), the defendant could not have been ejected. Learned counsel for the appellant has placed reliance upon a judgment of the Apex Court reported in (2000) 7 SCC 232 Bhuneshwar Prasad & Anr. Vs. United Commercial Bank & others to support his submission that where the enhanced rent has been tendered and accepted, it amounted to a waiver of a notice. Emphasis has also been laid upon the illustrations appended to Section 113 of the TPA.

11 Trial Judge in para 12 (as aforenoted) has already dealt with this argument which the defendant seek to incorporate by way of an amendment. The plea of waiver of notice had been advanced as an argument before the trial Judge and had been dealt with as aforenoted. It had been rejected. This was a legal plea; it was not the case of the defendant that he wishes to adduce any other documentary evidence in support of this plea. The first appellate court had also dealt with this plea of waiver of notice in para 13 and 14 of the impugned judgment. They read as follows:-

*"13. Now, as regards the waiver of the notice in view of the acceptance of an enhanced rent is concerned, the arguments of counsel for the appellant are devoid of merits. In this regard the judgment Bhuvneshwar Prasad Vs. United Commercial Bank's case (supra) relied on by counsel for the appellant is of no help. The judgment was delivered by two Hon'ble Judges of the Hon'ble Supreme Court. As against this judgment was have Gappu Lal's case (Supra), Calcutta Credit corporation Case (Supra) and Savita Dey's case (Supra) of the Hon'ble Supreme Court. All these judgments had been delivered by the benches*

*of 3 Judges each. In Gappu Lal's case (Supra) it was held that a mere increase or deduction of rent does not necessarily imply the surrender of the existing lease and creation of new tenancy. In Savita Dey's case (Supra) the rent had been increased from ₹ 475/- per month to ₹ 505/- per month from 1969. The tenancy had been created on 06.07.1964. The Hon'ble Supreme Court held that mere increase in rent is not sufficient to draw an inference that there was a new contract. In Vijay Shree Commercial Pvt. Ltd. Vs. Tika Jigjit Singh's case (Supra) it was held that by a Hon'ble Mr. Justice R.C. Lahoti (as the Hon'ble Chief Justice of India had been at that time) that the illustrations under Section 113 of the TPA Act can neither control nor can expand the enactment. It was further held that in order to constitute the waiver of notice, there must be consent-expressed or implied-of the person to whom the notice is given and there must be an act on the part of person subsequent to the date of termination of tenancy, does amount to waiver. Similar view was taken in Bhawanji Laxmi & Ors. Vs. Himmat Lal's case (Supra).*

14. *In the present case, initially, the appellant did not accept the service of the notice dated 24.11.1998, This is evident from para 8 of the WS (page 9). At the time of filing of the WS the plea of the appellant was 'that the plaintiffs (respondents) appear to be applying some fraud and no such notice had ever been server'. The appellant had initially admitted his signatures on the AD Card Ex. PW-1/1 vide which the notice dated 24.11.98 (Ex. PW-2/1) had been served on him. However, when the appellant appeared as DW-1 and written statement shown the AD Card Ex. PW-1/1 (during the cross-examination), he denied his signatures on it. However, he hastened to add that his signatures appeared at point A. The signatures at point A were in fact the signatures put by this witness at the time of admissions/denial of this document. Admittedly, the appellant had not given the reply to the notice. He is primarily banking upon the acceptance of the increased rent from 01.08.2001 to 31.12.2001 @ ₹393/- vide Ex. DX-1. The suit was filed on 09.03.1999. In my view the mere acceptance of the increased rent does not ipso-facto establish the waiver of the notice dated 24.11.1998 by the respondents. The appellant was required to take a specific plea that dated 24.11.1998 was received by him and that it stood waived because of that notice dated 24.11.1998 was received by him and that it stood waived because of the acceptance of the increased rent. Savita Dey's judgment (Supra), Bhawanji Laxmi & Ors. (Supra), Vijayshree Commercial Pvt. Ltd. (Supra) and Gappu Lal's case (Supra) relied on by counsel for the respondents can be pressed into service. "*

12 In this view of the matter, even assuming that the order dated 19.07.2007 dismissing the application of the defendant under Order 6 Rule 17 of the Code was dismissed on an erroneous legal proposition, yet on merit there was no reason whatsoever in

favour of the defendant to allow him to amend his written statement. Beside the fact that the parties would be relegated to a trial afresh, it would serve no purpose whatsoever. The contentions sought to be raised by way of amendment have already been dealt with by both the courts below & as aforementioned. The order dismissing the amendment application thus suffers from no infirmity. No substantial question of law has arisen on this count.

13 The only substantial question of law in fact urged before this Court is that the amendment application could not have been disallowed for the aforementioned reasons. Plea of waiver had been discarded by both the two fact finding courts.

14 Section 113 of the TPA reads as follows:-

***"113. 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."*

15 Waiver of notice to quit does not like waiver of forfeiture depends upon election of one party but upon the consent of both. This discretion is manifested in the Section by the words 'with the express or implied consent of the person to whom the notice is given'. To constitute waiver under Section 113 mere tender and acceptance of rent are not sufficient. These two actions should show the intention on the part of the landlord to treat the lease as subsisting. Where there is an acceptance by the landlord of any sum tendered by the tenant as rent, the Court is obliged to look into such an acceptance in the light of such a lease under Section 113 as to where this acceptance has shown the intention on the

part of the landlord to treat the lease as subsisting. It is a question of fact in each case.

16 In (2006) 4 SCC 205 Sarup Singh Gupta Vs. Jagdish Singh & Others, the provisions of Section 111 (h) and Section 113 of the TPA had been expounded.

*‘The question as to whether the person giving the notice has by his act shown an intention to treat the lease as subsisting is essentially a question of fact. In reaching a conclusion on this aspect of the matter, the Court must consider all relevant facts and circumstances and the mere fact that rent has been tendered and accepted, cannot be determinative.*

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*Mere acceptance of rent did not by itself constitute an act of the nature envisaged by Section 113, TPA showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file suit for eviction, and even while prosecuting the suit accepted the rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent he intended to waive the notice to quit and to treat the lease as subsisting.”*

17 The notice Ex.PW-1/1 dated 24.11.1998 had in fact initially been denied by the defendant; however at the time of admission/denial, he had admitted his signatures on the A.D. card. In the instant case, there is nothing on record either oral or documentary to show that the plaintiff had permitted the defendant to continue as a tenant or with the acceptance of enhanced rent had waived this notice given by the plaintiff to the defendant terminating his tenancy.

18 This Court is even otherwise not a third fact finding court. Fact findings have already been delved into by the two courts below. The substantial questions of law have been formulated at page 6 of the body of the appeal. No such substantial question of law has arisen.

19 Appeal as also pending application are dismissed in limine.

INDERMEET KAUR, J.

MARCH 03, 2011

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