

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

SECOND APPEAL No.349 of 2013

JUDGMENT:

This second appeal is filed by the defendant, under Section 100 of CPC, assailing the decree and judgment dated 24.01.2013 in A.S.No.82 of 2008 on the file of the Court of Additional Chairman, Accidents Claims Tribunal-Cum-XX Additional Chief Judge, City Civil Court, Secunderabad, wherein and whereby the decree and judgment dated 03.04.2008 in O.S.No.145 of 2004 on the file of the Court of XIII Additional Senior Civil Judge (Fast Track Court), City Civil Court, Secunderabad, decreeing the suit filed by the plaintiff for eviction of the defendant, was confirmed.

2. For the sake of convenience, the parties will hereinafter be referred to as they were arrayed before the trial Court.

3. The facts leading to filing of the present appeal are briefly as follows: The plaintiff is the owner of the four storeyed building bearing No.2-3-168, situated at Nallagutta, Secunderabad. The ground floor is consisting of seven mulgis. The defendant is a proprietary concern. For the purpose of its go-down, the defendant took four mulgis out of seven mulgis situated in the ground floor on lease on a monthly rent of Rs.10,000/- with effect from 01.09.2000. There is no written rental agreement between the parties. The tenancy is month to month commencing from first of the month as per the English Calendar. As per the oral agreement, out of monthly rent of Rs.10,000/-, Rs.9,900/- has to be paid through cheque and Rs.100/- by way of cash. On 28.12.2003, the plaintiff got issued a notice to the defendant terminating the

tenancy and called upon him to deliver vacant possession of the suit schedule premises. The defendant issued reply notice dated 16.1.2004 enclosing a cheque of Rs.11,000/- contending that the said amount is towards rent for the month of December, 2003. Though the defendant claimed the tenancy as perpetual tenancy, there is no such agreement as claimed by him. Whatever the amount paid by the defendant towards the rent, after issuance of the notice, the plaintiff received the same under the protest and without prejudice to her right to seek eviction of the defendant from the suit schedule premises. As the defendant failed to handover the possession of the suit schedule property, in spite of the notice issued by the plaintiff on 28.12.2003, she is entitled to recover possession of the suit schedule premises besides future mesne profits at the rate of Rs.20,000/- per month from the date of filing of the suit.

4. The defendant filed written statement admitting jural relationship of landlord and tenant *inter alia* contending that the defendant executed original rental agreement on 05.9.2000 and the same is in possession of the plaintiff. The agreed rent was Rs.9,900/- per month but not Rs.10,000/-. The rent was enhanced to Rs.11,000/- from Rs.9,900/- with effect from 01.09.2003. The plaintiff through her agent, having received the rent upto September, 2003, demanded to enhance the rent at abnormal rate. The plaintiff, with a mala fide intention, avoided to come to defendant's shop to collect enhanced rent. The defendant sent enhanced rent of Rs.11,000/- from 01.10.2003 to 30.11.2003 vide letter dated 20.12.2003 along with cheque bearing No.130933,

dated 20.12.2003, for Rs.22,000/-. The plaintiff, having received enhanced rent, cannot say that she received rent under protest and without prejudice to her right to seek eviction. Notice dated 28.12.2003 was issued after receipt of enhanced rent of Rs.22,000/- for the months of October and November, 2003. Thus, the said notice is not valid under law. There were no arrears of the rent. The rights of the plaintiff under notice dated 28.12.2003 are waived as she has received rents thereafter. The so-called termination-notice dated 28.12.2003 is bad in law and is illegal. Thus, the question of handing over possession by the defendant does not arise. Hence, the plaintiff is not entitled for mesne profits at the rate of Rs.20,000/- from the defendant and the suit is liable to be dismissed.

5. Basing on the above pleadings, the Trial Court framed the following issues:

- (1) Whether the notice dated 28.12.2003 is a quit notice under Section 106 of Transfer of Property Act?
- (2) Whether the plaintiff is entitled for eviction or not?
- (3) Whether the plaintiff is entitled for the suit amount as prayed for?

6. To substantiate the case, on behalf of the plaintiff, PW1 alone was examined and got marked Exs.A1 to A3. To dislodge the case of the plaintiff, DW1 alone was examined and no document was marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court came to a conclusion that Ex.A1-quit notice is valid one and binding on the defendant and

decreed the suit. Feeling aggrieved by the judgment and decree dated 03.04.2008 in O.S.No.145 of 2004, the defendant preferred A.S.No.82 of 2008 on the file of the Additional Chairman, Accidents Claims Tribunal-Cum-XX Additional Chief Judge, City Civil Court, Secunderabad. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, arrived at an independent conclusion that Ex.A1-quit notice is valid one; therefore, the defendant is not entitled to continue in suit schedule property, in view of termination of tenancy and dismissed the appeal, while concurring with the findings recorded by the trial Court. Hence, the defendant preferred the present second appeal.

8. Heard the learned counsel for the appellant-plaintiff, the learned counsel for the respondent-defendant and perused the material available on record.

9. The substantial questions of law raised by the learned counsel for the appellant-defendant are as follows:

- (1) Whether the Courts below have committed error in placing reliance on Ex.A1 without examining the plaintiff?
- (2) Whether the plaintiff waived her rights by accepting the rent after issuance of Ex.A1 notice?

10. Both the questions are interlinked with each other and hence, this Court is inclined to answer simultaneously, in order to avoid recapitulation of facts and evidence.

11. There is no dispute as to the jural relationship of landlord and tenant between the plaintiff and defendant with regard to suit schedule premises. It is not in dispute that prior to filing of the suit, the plaintiff got issued Ex.A1-legal notice dated 28.12.2003

directing the defendant to vacate the suit schedule property within fifteen days from the date of receipt of the said notice. The defendant got issued Ex.A2-reply notice. A perusal of Exs.A1 and A2 clearly reveals that the plaintiff is the owner of the suit schedule property and the defendant is the tenant of the suit schedule property. During the pendency of the suit, one Sri M.A.Gaffar filed General Power of Attorney-Ex.A3, seeking leave of the Court to depose the evidence on behalf of plaintiff.

12. The first and foremost contention of the learned Counsel for the appellant is that the GPA holder has not filed an application under Rules 32 and 33 of the Civil Rules of Practice, seeking permission of the Court to permit him to depose evidence on behalf of the plaintiff. A perusal of the record reveals that the defendant did not take any objection when the GPA holder came into the witness box and deposed evidence. Learned Counsel for the respondent strenuously submitted that seeking permission of the Court under Rules 32 and 33 by the GPA holder is not mandatory.

13. To substantiate the contention, learned counsel for the respondent-plaintiff has drawn the attention of this Court to the decision in **Natubhai Chotabhai Patel v. Smt.Patnam shakuntala**¹, wherein this Court held at para Nos.15, 16 and 17 as follows:

“15. A party generally represented by an Advocate. This provision enables an agent to represent the party. This provision has been introduced to discourage the parties to appoint the agents to represent them in the Courts than the legal practitioners. The wording "when a party appears by any agent other than an Advocate" used in Rule 32 clearly

¹ 2012 (4) ALD 553

indicates that the authorization is for all purposes including the filing of the pleadings, examination of the witnesses, marking of the documents and advancing of the arguments, which is generally expected to be performed by an Advocate who is a legal expert in the field. If an agent represents the party, he may not know the implications and complications of the issues involved in the matter, thereby it is likely to cause injustice to the party. If the party prepares to take the risk of authorizing an agent, it is an indication that the party is prepared to reap the consequences by appointing an agent. In order to make sure that the party authorized the agent to represent him in the matter, an affidavit is necessary. But in cases of authorizing an agent to sign the pleadings while authorizing a legal practitioner to appear on his behalf, it is sufficient if the court is satisfied that he was authorized to sign and in such a case, the filing of an affidavit is not mandatory, therefore, the defect can be cured at a later stage also by convincing the court that the agent was duly authorized by the respective party in that matter. But if an agent is authorized to undertake the signing of pleadings, adducing of evidence and advancing of arguments, the agent shall be permitted in writing and the party has to file an affidavit that he has duly authorized the agent to represent him instead of an Advocate. In case of a party executing a General Power of Attorney in favour of another person, the General Power of Attorney holder also cannot be permitted to represent the party in the suit for all purposes namely to sign the pleadings, to adduce evidence and to advance arguments unless an affidavit is filed by the party affirming that he has authorized his General Power of Attorney holder to represent his case for the above purposes. But for mere signing of the pleadings on behalf of the party duly represented by an Advocate, permission from the court is not necessary by way of filing an affidavit to that effect. It is sufficient if the court is satisfied that the agent or power of attorney holder is duly authorized to sign the pleadings, after perusal of such authorization, which was filed along with the pleadings.

16. In the light of the decisions rendered by this Court, it is made clear that Rule 32 is not mandatory.

17. In the light of the foregoing discussion, it is made clear that Rule 32 of the Civil Rules of Practice was introduced to discourage the parties to authorize their agents to represent their cases by way of signing the pleadings, adducing evidence and advancing arguments instead of authorizing a legal practitioner. If an agent or a General Power of Attorney holder is authorized to perform the above duties on behalf of the party, the obtaining of permission from the court by filing an affidavit by the party is necessary. **If the agent or GPA holder is authorized only to sign the pleadings or to give evidence as a witness, in such circumstances, Rule 32 is not mandatory.** The Rule was introduced to discourage the parties to authorize their agents and to engage the legal practitioners to represent their cases and in case of the agent or general power of attorney holder is authorized by the party to sign the pleadings or

to give evidence, **it is sufficient if the Court is satisfied on verification of such authorization that he is duly authorized by the party for those limited purposes.**

14. As per the principle enunciated in the case cited supra, Rule 32 is not mandatory, if the party to the proceedings authorises the GPA holder either to sign the pleadings or to give evidence especially when the Court satisfied to that effect. Moreover as observed earlier, the defendant has not taken any objection at the time of deposing evidence by PW1. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the defendant ought to have taken such an objection at the earliest point of time. Having failed to take such an objection at the earliest point of time, the defendant is not entitled to urge this point at the stage of second appeal.

15. The other contention of the learned Counsel for the appellant is that the Courts below ought not to have placed reliance on Ex.A1-quit notice as the plaintiff has not come into the witness box to prove contents of the same. To substantiate the contention, learned counsel for the appellant-defendant has drawn the attention of this Court to the following decisions:

(1) **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.**², wherein the Hon'ble apex Court held at paragraph Nos.14 and 15 as follows:

14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in

² (2005) 2 SCC 217

allowing the power-of-attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

15. Apart from what has been stated, this Court in the case of *Vidhyadhar v. Majikrao* observed at SCC pp.583-84, para 17 that:

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....

(2) **S.Kesari Hanuman Goud v. Anjum Jehan**³, wherein the

Hon’ble apex Court held at paragraph No.13 as under:

13. It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 CPC empower the holder of the power of attorney to “act” on behalf of the principal. The word “acts” employed therein is confined only to “acts” done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term “acts”, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any “acts” in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. (See: *Vidhyadhar v. Manikrao & Anr.*, AIR 1999 SC 1441; *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.*, (2005) 2 SCC 217; *M/S Shankar Finance and Investment v. State of A.P & Ors.*, AIR 2009 SC 422; and *Man Kaur v. Hartar Singh Sangha*, (2010) 10 SCC 512).

(3) This Court in **D.Vijayalakshmi v. T.K. Vijay Kumar**⁴

followed the principle enunciated in **Janki Vashdeo Bhojwani** and

S.Kesari Hanuman Goud cited supra.

³ 2013 Law Suit (SC) 314

⁴ 2012 (1) ALD 759

(4) **Mohd. Ayub Ismail v. Fouzia Mohiddin**⁵, wherein this

Court held at paragraph No.17 held as under:

17. In view of the above citations of the Apex Court, the decisions of different High Courts cited by the respondents/plaintiffs cannot be acceded to. Thus it is clear that PW.1, who is the GPA of plaintiffs can only speak of the acts done by him pursuant to the Ex.A.1 and nothing more. As per Ex.A.1, he was authorized to file the suit and do other acts which may generally include giving evidence. However, by that count alone, he cannot depose the factum of oral and written gifts said to be made in favour of the plaintiffs as those facts were within the knowledge of the plaintiffs but not him. Since he was authorized to file the suit and do all actions which includes filing of the documents and giving evidence, in my considered view, his evidence can be confined to the general aspects such as the plaintiffs appointing him as GPA and his filing suit on their behalf; the nature of the reliefs claimed and the nature of documents filed. Except that, he cannot give evidence in proof of the gift as stated earlier. Therefore, I consider it not necessary to dwell at length the evidence of PW.1 to decide the authenticity of oral and written gifts propounded by plaintiffs.”

16. As per the principle enunciated in the cases cited supra, the GPA holder is not entitled to depose the evidence in respect of the fact, which is within the exclusive knowledge of the principal. In the case referred supra, the Court held that in the suit for specific performance, the GPA Holder is not entitled to depose evidence with regard to readiness and willingness on the part of the plaintiff. Nature of the suit dealt in those cases is different to the nature of the suit on hand. This is a suit for eviction of the tenant from the suit schedule property. Therefore, the decisions relied upon by the learned Counsel for the appellant are no way helpful to him.

17. Another contention of learned counsel for the appellant is that it is a fit case to drawn adverse inference in view of the failure of the plaintiff to come into witness box and depose her case. The

⁵ 2017 (3) ALD 407

learned counsel for appellant has drawn the attention of this Court to the decision in **Vidhyadhar v. Manikrao**⁶, the Apex Court held at paragraph No.17 as follows:

17. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

18. As per the principle enunciated in the case cited supra, if a party to the suit intentionally abstains himself/herself to come into the witness box to prove his/her stand and offer himself/herself for cross examination by opposite party, the Court can draw an adverse inference. In the instant case, plaintiff got issued Ex.A1 notice directing the defendant to vacate the suit schedule premises. Thereafter, the defendant issued reply notice-Ex.A2. It is a settled principle of law that admitted facts need not be proved. The defendant has not denied issuance of Ex.A1 notice by the plaintiff. As stated earlier, defendant is not denying title of the plaintiff in respect of the suit schedule property. PW1 is none other than own brother of the plaintiff. As per the testimony of

⁶ (1999) 3 SCC 573

PW1, his sister let out the suit schedule property to the defendant. The testimony further reveals that the plaintiff got issued legal notice-ExA1. The defendant has not taken any objection before the trial court at the time of marking of Ex.A1-legal notice.

19. At this juncture, learned counsel for the respondent has drawn the attention of this Court to the following decisions:

(1) **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple**⁷, wherein the Hon'ble apex Court held at paragraph No.20 held as under:

20. The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission Vs. The State of Madras & Anr. AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt

⁷ 2003 (8) SCC 752

objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

As per the principle enunciated in the case 7th cited supra, at the time of marking a document by one of the party to the proceedings, the opposite party has to take objection, so as to challenge the validity of the document even at a later stage.

(2) **L.S.Sadashivaiah v. C.Saraswathi**⁸, wherein this Court observed at paragraph No.9 as follows:

15. Therefore, the contention that the evidence on record cannot be taken into consideration to declare the title of the plaintiff has no substance. The suit is one for declaration of title and for possession. In a suit for declaration of title, the plaintiff has to establish his title. Title cannot be established by his personal knowledge. It has to be established by producing documents under which he is claiming title, most of the time under a registered document. In so far as documents are concerned Section 61 of the Evidence Act mandates that the contents of documents may be proved either by primary or secondary evidence. Primary evidence means the documentary evidence produced for inspection of the Court. Therefore, when a particular fact is to be established by production of documentary evidence there is no scope for leading oral evidence and there is no scope for personal knowledge. What is to be produced is the primary evidence, i.e., document itself. The said evidence can be adduced by the party or by his Power of Attorney Holder. Production of the document, marking of the document is a physical act which does not need any personal knowledge. Even proof of the document is by examining the persons who are well versed with the document or by examining the attesting witnesses or the executant of the document. Again the personal knowledge of the plaintiff has no role to play. In those circumstances, it is open to the plaintiff to examine the

⁸ W.P.No.45788 of 2012 & batch, dated 15.3.2013

Power of Attorney Holder, produce the documents through the Power of Attorney Holder, mark the same and examine witnesses to prove the said document if it is denied. Therefore, the contention that the evidence of a Power of Attorney Holder cannot prove the case of the plaintiff in all cases is not correct and that is not the law laid down by the Supreme Court in the aforesaid judgement. In the instant case, the registered sale deed is produced and the same is proved by examining the executant of the said document and it is one the basis of the said evidence the suit is decreed, which cannot be found fault with.

20. As per the principle enunciated in the case cited supra, the GPA holder is entitled to depose evidence in respect of the documents in view of section 61 of Indian Evidence Act, 1872. In the instant case, the defendant himself admitted issuance of legal notice-ExA1.

21. The facts of the case on hand are almost identical to the facts of the cases 7 and 8 cited supra. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases 7 and 8 cited supra, I am unable to accede to the contention of the learned Counsel for the appellant that the Courts below committed grave error while accepting Ex.A1-notice.

22. It is not disputed that originally the defendant paid rent at the rate of Rs.10,000/- per month up to September, 2003. In the month of December, 2003 the defendant sent a cheque of Rs.22,000/- covering rent for the months of October and November, 2003. The plaintiff has encashed the rent amount. The plaintiff got issued legal notice after accepting the rent. In order to appreciate the contention of the learned Counsel for appellant-defendant, it is not out of place to extract hereunder relevant portion of ExA1- legal notice.

“The cheque sent by you is being accepted without prejudice to my right to seek your eviction. I do not intend

to allow you to continue to occupy the property as my tenant. I am giving you 15 days notice to vacate the property. You are requested to hand over vacant possession of the property 15 days after receipt of this letter. If you fail to hand over possession, I will be forced to take steps for recovery of possession through court of law.”

23. A perusal of the above clearly demonstrates that the plaintiff accepted rent under protest and without prejudice to her rights. Had it been case of the defendant that the plaintiff had accepted rent without any prejudice, there may be some legal force in the submissions made by the learned Counsel for the appellant. Acceptance of rent without prejudice to the rights of the landlord would not amount to waiver or not is the crucial question be addressed by this Court.

24. The learned counsel for the respondent-plaintiff submitted that mere acceptance of the rent would not amount to waiver. He has drawn attention of this Court to the decision in **Sarup Singh Gupta v. S.Jagdish Singh**⁹, wherein the Hon’ble apex Court held at para Nos.6 and 8 held as under:

6. Learned Senior Counsel also relied upon a decision of a learned Single Judge of the Calcutta High Court, reported in AIR 1926 (Calcutta) 763, wherein It was held that where rent is accepted after the notice to quit, whether before or after the suit has been filed, the landlord thereby shows an intention to treat the lease as subsisting and, therefore, where rent deposited with the Rent Controller under the Calcutta Rent Act is withdrawn even after the ejectment suit is filed, the notice to quit is waived. In our view, the principle laid down in the aforesaid judgment of the High Court is too widely stated, and cannot be said to be an accurate statement of law. A mere perusal of Section 113 leaves no room for doubt that in a given case, a notice given under Section 111, Clause (h), may be treated as having been waived, but the necessary condition is that there must be some act on the part of the person giving the notice evincing an intention to treat the lease as subsisting. Of course, the express or implied consent of the person to whom such

⁹ (2006) 4 SCC 205

notice is given must also be established. **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.

8. In the instant case, as we have noticed earlier, two notices to quit were given on 10th February, 1979 and 17th March, 1979. The suit was filed on June 2, 1979. The tenant offered and the landlord accepted the rent for the months of April, May and thereafter. The question is whether this by itself constitutes an act on the part of the landlord showing an intention to treat the lease as subsisting. In our view, mere acceptance of rent did not by itself constitute an act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted 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. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. It cannot, therefore, be said that **mere acceptance of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended.** In the instant case, we find no other fact or circumstance to support the plea of waiver. On the contrary the filing of and prosecution of the eviction proceeding by the landlord suggests otherwise.”

25. As per the principle enunciated in the said decision, mere accepting rent after issuance of termination notice would not amount to waiver. In the instant case, quit notice-Ex.A1 was issued after receiving the rent by the plaintiff. Having regard to the facts and circumstances of the case and also the principle enunciated by the apex Court in the cases cited supra, I am unable to accede to the contention of the learned Counsel for

the appellant that acceptance of the rent by the plaintiff for the months of October and November, 2003 would amount to waiver.

26. The learned counsel for the appellant submitted both the Courts misconstrued Ex.A1 quit notice that itself constitute a substantial question of law. To substantiate the same, he has relied upon paragraph No.25 of the decision of the Hon'ble apex Court in **Hero Vinoth (Minor) v. Seshmmal**¹⁰, which reads as follows:

24. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. **Construction of a document involving the application of any principle of law, is also a question of law.** Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

27. Ex.A1 quit notice was issued under Section 106 of T.P. Act. The Court has to consider whether the recitals made in Ex.A1 are in consonance with the provisions of Section 106 of T.P. Act or not.

¹⁰ (2006) 5 SCC 545

A perusal of Ex.A1 clearly reveals that the plaintiff strictly adhered to the procedure as contemplated under Section 106 of T.P. Act by granting fifteen days' time to the defendant to vacate the suit schedule premises. A perusal of Ex.A1 further reveals the intention of the plaintiff to terminate the tenancy. There is no ambiguity in Ex.A1 quit notice. The Courts below properly construed the recitals of Ex.A1 quit notice and concurrently held that Ex.A1 quit notice is a valid one. The findings recorded by the Courts below are based on evidence much less legally admissible evidence.

28. In the light of the above discussion, I am of the considered view that the Courts below have properly construed the recitals of Ex.A1 quit notice in touchstone with the provisions of Section 106 of T.P. Act.

29. Having regard to the facts and circumstances of the case and also the principle enunciated in the case last cited supra, I am of the considered view that there is no question of law much less substantial question of law involved in this second appeal.

30. At this stage, learned counsel for the appellant submitted that four months' time may be granted to the appellant-defendant to vacate the suit schedule premises. Learned counsel for the respondent-plaintiff submitted that two months' time is quite reasonable to vacate the suit schedule premises by the defendant if at all this Court is inclined to grant time to vacate the suit schedule premises.

31. Taking into consideration the facts and circumstances of the case, this Court is of the considered view that granting of three months' time is just and reasonable to vacate the suit schedule premises by the appellant-defendant. Therefore, the appellant-defendant is hereby directed to vacate the suit schedule premises within a period of three months from today, failing which the respondent-plaintiff shall take delivery of the possession, in accordance with law.

32. In the result, the second appeal is dismissed at the admission stage. As a sequel, miscellaneous petitions, if any pending, shall stand closed.

Dated: 12th December, 2017
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T.SUNIL CHOWDARY, J

