



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 315 OF 1992

Shankar Ambadas Parswar
(Deceased through LRs)

.. Appellant

versus

M/s Ganesh Saw Mills

.. Respondent

Mr. C. V. Dharurkar, Advocate for the appellant.

Mr. S. S. Manale, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.

DATE : 30th JANUARY, 2025.

PER COURT :

1. This Court by order dated 14.10.2024, framed following substantial question of law :-

Whether the finding on the point of waiver amounts to resjudicata by the Appellate Court is justified ?

2. Learned counsel for both sides were heard on this point as well as on other issues involved in this appeal. Learned counsel for Respondent has drawn attention of the Court to the findings of fact recorded by the First Appellate Court in this regard. It would be relevant to take note of the said findings which are reproduced as under :-

“37. Though Not of much importance, let it be on record that the Respondent firm filed on record a certified copy of Regular Civil Suit No. 27 of 1991 filed by the Appellant against the Respondent firm. The Appellant’s counsel put his endorsement on Exhibit 26 to the effect that he had no objection to allow production of certified plaint copy. This plaint copy shows that on 28th March 1988 a fresh notice is issued to the Respondent firm by the Appellant, terminating the former’s tenancy and a suit being Regular Civil Suit No. 27 of 1991 is filed for decree for ejectment on the basis of this notice dated 28th March 1988. Shri Jain, the learned Counsel for the Respondent firm submitted that this fresh suit on the basis of fresh notice of the year 1988 goes to show that the earlier notice i.e. the suit notice of the present matter is waived by the Respondent because after expiry of first notice, the Respondent firm remained in possession of the suit premises and during pendency of that dispute, a second notice to quit was given by the Appellant and therefore, in view of illustration (b) of Section 113 of the Transfer of Property Act, a notice given under Section 111, Cl(h) can be held to be waived by the Act on the part of the Appellant. This can not be considered to be the ground for holding the earlier notice bad in law because there is no pleading to that effect and perhaps the finding on the point of ‘waiver’ may amount as *res-*

judicata in the subsequent suit. Therefore, this point is left open and not considered by me in this appeal.

3. Relying upon above observations, it is the contention of learned counsel for the Respondent that when admittedly first notice of termination of tenancy has been issued by landlord/Plaintiff, in view of provisions of Section 113 of Transfer of Property Act, once subsequent notice is issued and a suit is filed for recovery of possession on the basis of such notice, the same amounts to waiver of the earlier notice. According to him, resultantly the notice first in time, so also any proceeding initiated thereupon would not survive.

4. Learned counsel for appellant/original plaintiff resisted the said contention and sought interference in the impugned judgment and decree.

5. It would be relevant to take note of Section 113 of Transfer of Property Act which reads thus :-

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.

Illustrations

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit 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.

6. As recorded by the First Appellate Court admittedly a fresh notice of termination of lease has been issued by plaintiff to the defendant under Clause (h) of Section 111 of Transfer of Property Act and Regular Civil Suit No. 27/1991 is filed on the basis of the same. This admitted fact clearly indicates that the present case is covered by Section 113. This provision clearly indicates about express or implied consent by person to whom it is given, by any act on the part of the person giving it show intention of treat the lease as subsisting. Illustration (b) shows that A, the lessor gives B, the lessee, notice to quit 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.

7. Here in this case, there are findings recorded by the Trial Court confirmed by the First Appellate Court about continuation of lease of the defendant and possession over suit property. In the light of these findings, when admittedly notice is issued of termination of the said lease again, the first notice which was a cause of action for filing of the suit, stood waived. Consequently, suit filed against Defendant being Regular Civil Suit No. 184/1976 would not survive. As cause of action for filing suit in question, does not survive, all proceedings must fail. In view of the above, nothing survives in the appeal.

8. In view of the aforestated subsequent relevant events occurred in the instant case, no findings are required to be recorded on the merit of the case. Resultantly appeal stands dismissed.

9. All pending applications stand disposed of.

(R. M. JOSHI)
Judge