

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
JODHPUR**

S.B. Civil Second Appeal No. 136/2024

Lrs Of Prahlad Rai

----Appellant

Versus

Mahesh Chandra

----Respondent

For Appellant(s)	:	Mr. MM Dhera
For Respondent(s)	:	Mr. Shreyansh Mardia

HON'BLE MR. JUSTICE MANOJ KUMAR GARG

Order

Order Reserved on : 23/09/2024

Date of pronouncement: 26/09/2024

Heard on the stay application.

Counsel for the appellants submits that the plaintiff issued first eviction notice on 09.03.2005 (Ex-1) to the tenant terminating his tenancy, but no eviction suit was filed on the basis of the first notice. Thereafter, the plaintiff issued second eviction notice dated 12.04.2006 (Ex-4) to the tenant and subsequently filed eviction suit on 20.11.2008 wherein the plaintiff mentioned the cause of action based upon the second notice dated 12.04.2006 (Ex-4). Counsel submits that the trial court did not frame any issue in this regard. Subsequently, the appellants filed an application under Order 41 Rule 25 CPC before the learned lower appellate court, which was dismissed on 21.11.2020 with the observations that the issue No.2 already framed covered the issue of validity of second notice dated 12.04.2006 (Ex-4), hence, new issue was not necessary. Counsel submits that the eviction

decree passed by the trial court as affirmed by the lower appellate court on the basis of the first notice dated 09.03.2005 (Ex-1) is nullity in law being contrary to mandatory provisions of Section 113 of TP Act. It is further argued that the plaintiff landlord had accepted the due rent of seventeen months as demanded by the him in the notice and thus, admitted the defendant to be a subsisting tenant. To buttress his contentions, counsel has relied upon the judgments of the Hon'ble Supreme Court in the cases of **Tayabali Jaferbhai Tankiwala Vs. M/s Ahsan & Co. & Ors. [AIR 1997 SC 102]**, **Yusufji Sulemanji Khatri Vs. Mahamadbhai Amirbhai Malek [1998 0 Supreme (Guj) 374]** and **Prem Lal Vs. Jadav Chand & Anr. [AIR 1979 RAJASTHAN 44]**. Counsel has also relied upon the illustration (a) & (b) of Section 113 of the TP Act and prayed that the eviction decree passed in favour of the respondent-plaintiff may be stayed.

Per contra, counsel for the respondent No.1 submits that according to Section 113 of the TP Act, the words "showing an intention to treat the lease as subsisting" are very much relevant. In this regard, he relied upon the judgment of Delhi High Court in the case of **Raj Krishen Jain Vs. Hoshair Singh [AIR 1971 DELHI 213]** and on the judgment of the Hon'ble Supreme Court in the case of **Sarup Singh Gupta Vs. S. Jagdish Singh & Ors. [AIR 2006 SC 1734]**. Counsel submits that the second notice was in continuation of the first notice, so the trial court has rightly framed the issue in this regard. Thus, the prayer for stay made by the counsel for the appellants may not be accepted.

Heard learned counsel for the parties and perused the material available on record.

It will be apt to refer to provisions of Section 113 of Transfer of Tenancy Act which reads as under :

“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.”

The rights and responsibilities of landlords and tenants with regard to lease agreements and eviction procedures are determined in large part by this section. According to Section 113 of TP Act, the landlord may treat the lease as though it were still in effect by acting in a way that waives the notice requirement under Section 111(h). Tenant permission to waive this agreement may be given expressly or subtly. It must be evident from the landlord's acts that they intend to keep. With regard to eviction notices in particular, Section 113 of the TPA has a significant impact on the landlord-tenant relationship. The key takeaway is that the landlord's intentions and actions must be considered in the context of

the whole lease agreement and the particulars of each case in order for the waiver of a notice to quit to be granted.

A perusal of Section 113 of the Act shows that 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 notice is given must also be established. However 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 the opinion of this Court, whether the second notice dated 12.04.2006 was in continuation of the first notice dated 09.03.2005 or not is a question of fact. This Court is not currently addressing the merits of the notices but is deferring the factual determination to the final appeal stage.

So far as the argument of counsel for the appellant with regard to acceptance of arrears of rent is concerned, mere acceptance of rent by the landlord does not indicate that the landlord intended to treat the lease as subsisting unless there be any other evidence to prove or establish that the landlord so intended.

In the aforesaid facts and circumstances, this Court finds no prima facie case to stay the effect and operation of eviction decree passed by the trial court as well as appellate court.



[CSA-136/2024]

Hence, the stay application is dismissed.

(MANOJ KUMAR GARG),J

129-MS/-