

# ANDHRA PRADESH HIGH COURT

Metal Press Works

Vs.

G.M. Cotton Press Co

Letters Patent Appeal No. 57 of 1973

(Kondaiah and Raghuvir, JJ.)

05.02.1975

## JUDGMENT

### **Kondaiah, J.**

1. The defendant-appellant took on lease the suit premises along with machinery, plant etc., belonging to the plaintiff-respondent originally for a period of two years under a registered agreement dated May 27, 1937 with an option to continue as tenant for a further period of two years. The annual rent stipulated was Rs. 1150/- and the lease was for manufacturing and industrial purposes. Another registered lease agreement under Ex. A-2 dated June 20, 1941 was executed on a rent of Rs. 1,450/- per year for a period of two years commencing from 14-7-1941 with a similar option for the appellant to continue the tenancy. The appellant-lessee exercised the option to continue the tenancy and continued to be in possession of the property after the expiry of the stipulated period. The claim for enhancement of rent on the ground that the lessor provided extra accommodation and further amenities was resisted by the lessee who took the stand that no improvement was made or extra accommodation provided entitling the lessor to any enhancement of rent. Hence, disputes arose between the parties since 1963 resulting in the institution of S. C. Suit No. 340/63 on the file of the Subordinate Judge's Court, Guntur and O.S. No. 119/66 on the file of the District Munsif's Court, Guntur by the lessor for recovery of arrears of rent and other amounts said to be due and payable by the lessee, and O.S. No. 487/66 by the lessee for an injunction restraining the lessor from interfering with his possession. Thereupon, the lessor issued a registered notice Ex. A-1 dated 1-10-1966 calling upon the appellant-lessee to vacate the premises within 15 days time. No reply to Ex. A-1 was sent by the lessee. In the circumstances O.S. No. 107/67 on the file of the Additional District Munsif's Court, Guntur for recovery of possession of the suit premises with all the buildings, machinery plant etc. and subsequent rent or damages was instituted on 4-2-1967 by the lessor against the lessee. The original written statement contesting the suit claim on several grounds was filed by the lessee on November 15, 1967. The following issues were settled:

1. Whether the plaintiff is not entitled to possession of lease premises in view of the determination of the lease by the plaintiff-landlord ?
2. To what damages towards use and occupation of the suit property is the plaintiff

entitled ?

3. To what relief ?

The plaintiff-company examined its clerk, one Srirama Murthy as P. W. 1 and filed Ex. A-1, certified copy of registered notice issued by the plaintiff to the defendant, and Ex. A-2 dated 20-6-1941, registered lease bond in support of its claim. The defendant examined its factory manager, one Bhattacharji as D. W. 1 who speaks to the dilapidated condition of the factory building and filed Ex. B-1 dated 23-7-1968, inspection order issued by Inspector of Factories, Guntur. He deposes that the defendant issued a notice to the plaintiff for repairing the factory building and the plaintiff carried out some minor repairs thereafter and that the defendant effected several improvements like latrines, bath rooms and the extension of the main thatched shed with its own funds and it did not agree for any enhancement of rent as pleaded by the plaintiff. He filed Exhibits B-2 and B-3 registered notices. After completion of the recording of evidence the suit was posted for arguments to July 30, 1969. On July 29, 1969, an application for amendment of the written statement to the effect that Ex. A-1 notice dated 1-10-1966 is invalid and inoperative and is not in accordance with the provisions of Section 106 of the Transfer of Property Act, was filed by the defendant- lessee. The amendment of the written statement as prayed for was allowed on 30-7-1969 on payment of Rs. 30/- towards costs. After the amendment of the written statement, the plaintiff filed a rejoinder stating that the defendant was served with quit notice dated 1-10-1966 to which no reply was sent and hence, the defendant had waived the objection either as regards the notice to quit or with regard to defects, if any, in the notice and is therefore estopped from contending that the quit notice is invalid, inoperative and is not in accordance with the provisions of Section 106 of the Transfer of Property Act.

2. The trial Court, holding that the quit notice Exhibit A-1 dated 1-10-1966 is invalid and inoperative and does not satisfy the requirements of Section 106 of the T. P. Act and therefore, the plaintiff cannot seek to get back the possession as there was no proper notice terminating the tenancy, dismissed the suit.

3. On appeal preferred by the plaintiff, the learned District Judge, disagreeing with the trial Court, held that there was no need for the lessor to give any notice to quit in view of the specific condition in the original lease deed that the lessee shall give possession of all the schedule property to the lessor immediately after the expiry of the period of lease or on the termination of the lease and even if it was necessary, the defendant-lessee had waived its right as regards the notice to quit and therefore, the lessee could not raise any objection about the non-issue of any notice to quit as it was not raised in the original written statement. It was found that the notice Exhibit A-1 was not valid but however, in view of the fact that six months period had expired during the pendency of the suit, a decree for possession could be passed in the suit itself without driving the lessor to a fresh suit. In the result, the appeal was allowed setting aside the judgment and decree of the trial Court.

4. The defendant preferred S. A. No. 338/71 to this Court. The learned single Judge, Ramachandra Rao, J. reversed the finding of the first appellate Court that no notice to quit need be given in view of the specific condition in the original lease deed that the lessee should vacate the premises without any notice. Relying upon the decision of the Madras High Court in *Bapayya v. Venkatratnam*<sup>1</sup>, and the decisions of the Calcutta High Court in

*Trilokya Nath Roy v. Sarat Chandra*<sup>2</sup>, and *Dasarathi Kumar v. Saratchandra*<sup>3</sup>, and that of this Court in *R. Saraswati v. Pedaparaju*<sup>4</sup>,) in preference to the view taken by the Madras High Court in *G.M. Ali v. M. Rosary Ammal*<sup>5</sup>, he held that the defendant is a tenant holding over and that there being no agreement to the contrary, the term contained in the original lease deed dispensing with notice to quit cannot be imported into the tenancy created by holding over and that a notice to quit is necessary as required by Section 106 of the T. P. Act. However, it was found that a quit notice under Section 106 T. P. Act could be waived and the defendant, by its omission to give reply to the notice Ex A-1 prior to the suit and failure to raise the plea that the notice was defective in the original written statement, must be deemed to have waived its right to a proper and valid notice under Section 106 of the T. P. Act and therefore, the plaintiff cannot be denied the right of possession. In the result, the second appeal was dismissed but the learned Judge has granted leave. Hence this Letters Patent Appeal by the defendant-lessee.

5. Mr. N. Bapiraju, the learned counsel for the appellant, pressed upon us that his client has not waived the right to insist upon the issuance of a proper and valid notice as required by Section 106 of the T. P. Act and the onus is on the plaintiff to establish its right to evict the defendant-lessee on the ground that it has validly determined the tenancy and a defective notice will not terminate the tenancy unless it is accepted with defects by his client. He pleaded that the finding of the learned single Judge with regard to the need to give a valid quit notice in spite of the condition in the original lease that the lessee has to deliver possession vacating the premises without any notice, is correct.

6. Mr. T. Ramachandra Rao, the learned counsel for the respondent contended that no notice terminating the tenancy in terms of Section 106 of the T. P. Act need be issued by his client as the original lease deed itself provided that such notice is not necessary and even assuming that a notice to quit is necessary under the said section, the validity of a defective notice can be waived by the lessee and, in fact, it has been waived in this case by the defendant, and, therefore, there is no merit in this appeal.

7. Upon the respective contentions advanced on behalf of the parties, the following questions arise for decision:

1. Whether notice to quit under Section 106 of the Transfer of Property Act to a tenant holding over is or is not necessary when the original lease deed contains a term that the tenant will quit without notice after the expiry of the period fixed by the original lease?
2. Whether, on the facts and in the circumstances, the defendant-appellant can be deemed to have waived its right to question the validity of the plaintiff's notice Ext A-1 terminating the tenancy ?

8. We shall first take up question No. 1. The answer to the question depends upon the provisions of Sections 106, 111 (h), 113 and 116 of the Transfer of Property Act (hereinafter referred to as the Act) and their application to the facts of the case.

<sup>1</sup>(AIR 1953 Mad 884)

<sup>3</sup>(AIR 1934 Cal135)

<sup>5</sup>(1971-1 Mad LJ 156)

<sup>2</sup>(1905) ILR 32 Cal 123

<sup>4</sup>(1967) 1 Andh WR 301

9. Section 106 of the Act prescribes the duration of leases of immovable property depending upon the nature of the purpose for which the property is leased. Where immovable property is

leased for agricultural or manufacturing purposes, the lease shall be deemed to be one from year to year. Such lease can be terminated at the instance of either the lessor or lessee by issuing 6 months' notice expiring with the end of a year of tenancy. Where the lease of immovable property is for any purpose other than agricultural or manufacturing purpose, it will be one from month to month and is terminable by the issuance of 15 days notice expiring with the end of the month of tenancy by either of the parties. The aforesaid normal rule prescribing the duration of leases would be effective and applicable only when there is no contract or local law or usage to the contrary. In other words, the parties are at liberty to agree to any term other than the one indicated in this section and a contract between the parties or local law or usage would override the rule prescribed under this section for the duration of leases. The notice contemplated under this section must invariably be in writing and signed by or on behalf of the author of the notice. It can be sent by post, or be tendered or delivered personally to such party or to one of his family members or servants at his residence, or affixed to a conspicuous part of the property. Section 111 provides for the determination of leases of immovable property. A lease of immovable property is determined if the terms of any one or more of the clauses (a) to (h) thereof are satisfied. Under clause (h) of Section 111, a lease of immovable property must be held to have been determined on the expiration of the notice to determine the lease or to quit or of intention to quit the property leased, issued by either of the parties to the other.

Where a notice to quit the property leased is given by the landlord to the lessee, the lease of immovable property would be determined on the expiry of such notice. Similarly the lessee can also issue a notice of his intention to quit the property leased and on the expiry of such notice, the lease must be held to have been determined. Where the lease is for a fixed term, no notice is necessary to determine such tenancy. But, however, until a periodic tenancy is determined by the issuance and service on the tenant of a notice to quit under Section 106, the lessor cannot treat the lessee who continues to be in possession even after the expiry of the term of the lease, as a trespasser. Where a lessee continues in possession of the property even after the determination of the lease granted to him and the lessor thereupon accepts rents from him, the lease must be said to have been renewed, by virtue of the provisions of Section 116, from year to year or from month to month depending upon the purpose for which the property is leased. Such a lessee or tenant is considered to be a tenant holding over. However, it must be noted that the tenant's mere act of holding over after the expiry of the term of the lease does not invariably create some kind of tenancy. The lessee may be a tenant by sufferance or a tenant holding over or a tenant at will depending upon the facts and circumstances. A tenant who continues to be in possession even after the determination of the lease but without the consent of the landlord is called a tenant by sufferance under English Law but, however, a tenant who is in possession with the landlord's consent may be a tenant holding over or a tenant at will. The assent of the landlord for the continuance of the tenancy would, in our considered opinion, create a new tenancy. The term "renewed" used in Section 116 indicates the renewal of a tenancy from year to year or from month to month depending upon the purpose for which the property is leased as specified in Section 106. We have to look to Section 106 to ascertain the purpose for which the property is leased. Where the lease is for agricultural or manufacturing purposes, the renewal of the lease contemplated under Section 116 must be held to be from year to year. In other cases, it must be from month to month. The lease so renewed under Section 116 would be from year to year or from month to month, as the case may be, only in the absence of an agreement to the contrary. The expression "in the absence of an agreement to the contrary" used in Section 116 is referable to an agreement relating to the holding over. Where there is a specific and express agreement

between the parties, the terms of such agreement would determine the duration and the conditions of the renewed lease. Where there is no such express agreement setting the terms of the holding over, the renewed lease must be held to be either from year to year or from month to month according to the purpose for which the property is leased. We are, therefore, of the view that the expression "in the absence of an agreement to the contrary" is referable to the renewed leases contemplated or created under Section 116 of the T. P. Act. This expression cannot be construed to refer or to be applicable to the original agreement of lease or the terms thereof. A tenant holding over cannot be equated to a tenant under the original lease agreement. In the case of a tenant holding over, the relationship of landlord and tenant is created. Such relationship may be created even before payment of rent by the lessee to the lessor. It denotes a kind of bilateral contract by implication. The tenant or lessee's continuance in possession after the expiry of the lease must be construed to be an offer on his part to take a new lease and the acceptance of rent by the lessor has to be construed to be the consent on his part to the renewed lease. We may refer to the following passage in Mulla's Transfer of Property Act (Sixth Edition by Atul M. Setalvad) at page 770:

"What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee remaining in possession after the expiry of the lease, and on the other side there must be a definite consent to the continuance of possession by the lessor by the acceptance of rent or otherwise; there must be a bilateral contract by implication. The relationship of landlord and tenant may be created before payment of rent."

The learned author proceeded to state at page 772 thus:

"An agreement to the contrary is an agreement which settles the terms of the holding over. If there is such an express agreement, it will determine the duration and terms of the renewed lease."

On a close consideration of the provisions of Sections 106, 111 and 116 of the Act, we are of the firm view that the tenancy created by holding over is not the same old tenancy but a new one created by the operation of the provisions of Section 116 and such a tenancy would be governed by the terms of any agreement entered into between the parties for holding over and in the absence of such terms, the parties would be governed by the provisions of Section 106 for ascertaining the duration of the lease. On a plain reading of the provisions of Section 116, it cannot be said that the terms stipulated by the parties in the original agreement of lease relating to the dispensing with notice to quit and the tenant agreeing to deliver possession of property without notice, can be imported into the new tenancy created by holding over. But the parties may agree to dispense with notice to quit and determine the tenancy created by the tenant holding over either at the time of the execution of the original lease or at the time of the statutory lease. Where the parties have incorporated a specific term with regard to the duration of tenancy on holding over or the method and manner of notice to quit to determine such tenancy, such contract would govern the rights of the parties. Such agreement must have been clearly intended by the parties and the onus would be on the party who sets up such plea to establish the same. Where there is no specific agreement at the time of the holding over creating a renewed lease as

contemplated by Section 116, that the tenant would quit and deliver possession without any further notice, a valid notice to quit as required by Section 106 by the lessor is necessary for the purpose of determining such lease. Any agreement in the original lease to dispense with such notice to quit after the expiry of the lease will not come to the aid of the party who seeks to determine the renewed lease or tenancy created by holding over. In the absence of such a valid quit notice, the party cannot succeed to determine the lease.

10. We shall now turn to the decided cases cited before us. The earliest decision is that of a Full Bench of the Calcutta High Court in *Troilokyanath Roy v. Sarat Chandra Banerjee*<sup>6</sup>, The plaintiff in that case was a lessee for a term of three years of certain lands belonging to Bhookailash estate. After the expiry of three years, he was allowed to hold over for about nine years. Thereafter, 15 days quit notice as contemplated by Section 116 of the Act was given by the original lessor as the land was leased for purposes other than agricultural or manufacturing purposes. In the suit filed by the plaintiff-tenant against the sub-tenant for ejectment, rent and damages, the main defence set up by the sub-tenant was that the tenancy of the plaintiff was validly determined by the lessor by the issuance of the quit notice and hence, he was no longer entitled to eject him. In those circumstances the Calcutta High Court had to determine the question on what terms the plaintiff lessee held over. The learned Judge, Maclean, C. J. who spoke for the Court, ruled while considering the scope of Section 116, of the Act thus:

" "What does the language of that section mean? It does not appear to me to present any serious difficulty in construction. The material words are: "if a lessee remains in possession thereof after the determination of the lease . . . . and the lessor accepts rent from the lessee," which was the case here, "the lease is, in the absence of an agreement to the contrary" which must mean an agreement as to the terms of the holding over "renewed from year to year, or from month to month, according to the . . . . purpose for which the property is leased, as specified in Section 106." That takes us back to Section 106."

In view of the fact that the property was leased for purposes other than agricultural or manufacturing purposes, 15 days notice expiring with the end of the month of the tenancy Which was given by the lessor to the plaintiff- lessee was found to be sufficient to determine the lease which must be regarded as renewed "from month to month." In the circumstances, it was held that at the date of the institution of the suit, the plaintiff had no interest in the property as the 15 days notice given to the plaintiff by the superior landlord was sufficient in law. The decision in *Troilokya Nath Roy v. Sarat Chandra Banerjee*<sup>7</sup>, was followed by the Calcutta High Court in *Motilal Karnani v. Darjeeling Municipality*<sup>8</sup>, and *Gobinda Chandra Saha v. Dwarkanath Patita*<sup>9</sup>, In Motilal Karnani's case, (1913) 18 Ind Cas 844 (Cal), it was held that the lease renewed under Section 116 of the Act was "not in accordance

<sup>6</sup>(1905) ILR 32 Cal 123 at 127

<sup>8</sup>(1913) 18 Ind Cas 844

<sup>7</sup>(1905) ILR 32 Cal 123

<sup>9</sup>(1915) 26 Ind Cas 962

with the terms of the original grant but in accordance with the purpose for which the grant had been made."

11. The decision of a Division Bench of the Calcutta High Court in *Dasarathi Kumar v. Sarat Chandra*<sup>10</sup>, is on all fours with the case on hand. Therein, the defendant-tenant, who was holding over the property even after the expiry of the lease for manufacturing purposes, was sought to be ejected without issuing the requisite quit notice as contemplated by Section 106 of the Act. Though the trial court agreed with the plaintiff-lessor that no quit notice was necessary in view of the specific stipulation to dispense with such notice in the original lease, the District Judge, on appeal held that a valid quit notice was necessary and what had been given was sufficient notice and accordingly allowed the appeal and dismissed the suit. The contention of the plaintiff-appellant that the holding over must be taken to be on the same terms as the original lease which contained a clause to the effect that the defendant was to be ejected without service of new notice to quit and that term must be imported into the new tenancy created by the acceptance of rent by the landlord after the expiry of the term specified in the original lease and that the term relating to the liability of being ejected without notice must be held to be 'a contract to the contrary within the meaning of Sections 106 and 116 of the Act, was repelled by the learned Judges of the Division Bench holding that the point really was governed by the provisions of Section 116 of the Act. The learned Judges, after quoting section 116 of the Act observed thus:- -

"It is conceded that in this case the tenancy is for manufacturing purposes and therefore it is a tenancy from year to year. There can be no question that the words in the section "in the absence of an agreement to the contrary" must refer to an agreement as to the terms of holding over. This point was decided so far back as in the year 1904 by Sir Francis Maclean, C. J. Bodilly, J. and Mookerjee, J. in the case of *Troilokya Nath Roy v. Sarat Chandra*<sup>12</sup>, xx xx xx xx In our opinion as soon as the rent was accepted it was a new contract of the tenancy and that it was a contract of tenancy from year to year according to the purposes for which tenancy was taken. That being so we are of opinion that the District Judge, took a correct view of the case."

12. We may now notice the decisions of the Madras High Court wherein the view expressed by the Calcutta High Court in *Troilokyanath v. Sarat Chandra Banerjee*<sup>13</sup>, and *Dasarathi Kumar v. Sarat Chandra*<sup>14</sup>, was adopted.

13. In *Gnanadesikam v. Antony*<sup>15</sup>, a Division Bench of the Madras High Court consisting of Sundaram Chetty and Pandrang Rao, JJ, had to consider the question "what really are the terms of the lease (Ex. E) as such, and what are outside the scope of the lease transaction and are simply collateral to it" and whether the term relating to collateral security was or was not a part of the lease transaction. Therein, the lessor sought to recover the arrears of rent due under the lease deed Ex. E executed by the lessee which was granted for a period of two years. There was a collateral agreement in the lease deed by way of mortgage whereunder the properties comprised in the lease deed were

<sup>11</sup> AIR 1934 Cal135 at 136

<sup>13</sup>(1905) ILR 32 Cal 123

<sup>15</sup> AIR 1934 Mad 458

<sup>12</sup>(1905) ILR 32 Cal 123

<sup>14</sup> AIR 1934 Cal 135

offered as security for the payment of rent due and payable under the lease. After the expiry of the lease period, the tenant held over. He continued to be in possession for more than 12 years before the date of the suit. In the circumstances, it was held that the defendant-lessee was a tenant holding over subsequent to the expiry of 2 years from the date of lease deed and a tenancy from year to year was created by operation of law and the claim of the plaintiff therein to recover the

arrears of rent for the entire period of 12 years on the ground that the charge created by the mortgage under Ex. E for payment of rent also held good for the entire amount of rent due as arrears, was rejected by the court following the decision of a Division Bench of the Madras High Court in *Kutti Umma v. Madhava Menon*<sup>16</sup>, and the decision of the Calcutta High Court in *Dasarathi Kumar v. Sarat Chandra*<sup>17</sup>, In *Kutti Umma v. Madhava Menon*<sup>18</sup>, a clause providing for payment of interest in case of default in payment of rent on the due date in a Verumpattam lease for one year executed by the mortgagor to the mortgagee was held to be "not a term of the lease as a lease which could be deemed to be imported into the terms on which the lessee was allowed to hold over." In that view, the claim for arrears of rent beyond three years before the institution of the suit was held to be barred by limitation. The learned Judge, Sundaram Chetty, J. speaking for the Court, observed thus (at page 460):

"In the present case, all that we can say is, that the mortgage created under Ex. E can only be enforced for the recovery of rent due for the term of two years. After the determination of that lease, when the tenancy from year to year was created, it is not possible to carry over this collateral security which is certainly no part of the lease transaction, so as to enable the plaintiff to claim the arrears of rent for the whole of the subsequent period, as if that mortgage was also created for the rent due subsequent to the transformation of the tenancy into one from year to year.

The test is not whether the particular clause in Ex. E is or is not repugnant to the terms of the lease. On the other hand, the true test is whether this clause can really be deemed to be any part of the terms which constituted the transaction of the lease itself. In a recent decision reported in *Dasarathi Kumar v. Sarat Chandra*<sup>19</sup> it was held that stipulation in the original lease that at the expiration of the term, the lessee should give up possession without notice, could not be imported into the new tenancy created by holding over and the acceptance of rent. The principle of that decision is in consonance with the view we have expressed. If the mortgage created under Ex. E is of no avail to the plaintiff for the recovery of rent due subsequent to the expiration of the term of two years, he can only recover the rent due for three years prior to date of suit according to ordinary law."

To the same effect is the unreported decision of Horwill J. in S. A. Nos. 2124 and 2125 of 1945 and C. R. P. Nos. 138 to 140 of 1946 (Mad) wherein, while considering the question as to whether the terms contained in the original lease whose term had expired could be imported into the renewed lease created under Section 116 of the Act when the tenant held over, the learned Judge observed thus:

"It is argued that a tenant holding over continues to hold the land under the same

<sup>16</sup>(1901) 11 Mad LJ 186

<sup>18</sup>(1901) 11 Mad LJ 186

<sup>17</sup>AIR 1934 Cal 135

<sup>19</sup>(AIR 1934 Cal 135)

term as in the original lease, and that therefore, for subsequent years, as well as for the year of the lease, no notice was necessary. This agreement, however, is not properly speaking a term of the lease and so does not dispense with necessity of giving notice if the tenant is allowed to hold over."

14. We may now turn to the decision of the Federal Court in *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*<sup>20</sup>, Therein, the appellant-plaintiff leased a residential premises in the city of Bombay to defendant No. 1 for a period of 5 years commencing from 1st September 1932 with an option of renewal for a further period of five years. The lessee exercised his option of renewal and the lease came to an end by efflux of time on 31st August, 1942. The lessee sub-let a portion of the premises to defendants 2 and 3. Defendants 2 and 3 did not vacate the premises occupied by them when the plaintiff-lessor demanded vacant possession of the building after the expiry of the lease. Subsequently, cheques were sent by defendants 2 and 3 to the plaintiff towards the rent payable by them. Though the lessor first refused the cheques, he subsequently accepted the same and put into his account. In those circumstances, one of the main points that arose for decision was whether defendants 2 and 3 were tenants holding over within the meaning of Section 116 of the Act and whether the tenancy created in their favor could be terminated only by proper notice to quit. It was held that the money paid by defendants 2 and 3 was received as rent by the plaintiff and consequently a monthly tenancy under the provisions of Section 116 of the Act did come into existence and the suit for ejectment must fail as long as the monthly tenancy so created was not determined as contemplated by law. While considering the scope and effect of the tenancy created by holding over under Section 116 of the Act., the learned Judge B.K. Mukherjea, J. who spoke for the majority, rules at page 127 thus:

"It is perfectly right that the tenancy which is created by the "holding over" of a lessee or under-lessee is new tenancy in law even though and of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. What Section 116 T. P. Act, contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessees or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise. It can scarcely be disputed that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

The learned Judge, Patanjali Sastri, J. (as he then was) who dissented from the majority on other questions, also agreed that a fresh tenancy results by the implied agreement of the parties in the case of a tenant holding over. As observed by the learned Judge (at page 131):-

"What creates the new relationship of landlord and tenant after the determination of the previous lease is not the acceptance of rent by itself but the "assent" of the lessor which may be proved by such acceptance or "otherwise", the assent of the lessee to the fresh arrangement being already there implicit in his continuing in

<sup>20</sup> AIR 1949 FC 124

possession or tendering of rent.

xx xx xx In my opinion, the principle underlying Section 116 is implied contract, and the test of renewal is the consensus between the lessor and the lessee or under-lessee holding over and not an option exercisable by the lessor alone."

15. The decision of the Federal Court in *Kai Khushroo v. Bai Jerbai*<sup>21</sup>, has been approved by the Supreme Court in *Bhawanji v. Himatlal*<sup>22</sup>, wherein what constitutes a tenancy by holding over by virtue of Section 116 of the Act has been considered. The learned Judge, Mathew, J., speaking for the Court, observed at page 821 thus:

"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 at sufferance in English law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee 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 section contemplated is that on one side there should be an offer of taking a new lease evidenced by the lessee or 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 expressed by acceptance of rent or otherwise." The learned Judge proceeded to observe at page 823 that.

"" . . . . . The basis of the section is 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 . . . the whole basis of Section 116 of the Transfer of Property Act is that in case of normal tenancy, 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 Rent Act exists . . . . . the animus of the tenant in tendering the rent is also material. If he tenders the rent as the rent payable under the statutory tenancy, the landlord cannot by accepting it as rent, create a tenancy by holding over. In such a case the parties would not be ad idem and there will be no consensus."

16. The decision of the Federal Court in *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*<sup>23</sup>, which has been approved by the Supreme Court in *Bhawanji v. Himatlal*<sup>24</sup>, did not rule that all the terms of the old lease would be imported into the new lease created by holding over of a lessee. It clearly indicates that many of the terms of the old lease might be continued in the new tenancy created under Section 116 of the Act. The term or clause relating to the giving up

<sup>21</sup> AIR 1949 FC 124

<sup>23</sup> AIR 1949 FC 124

<sup>22</sup> AIR 1972 SC 819

<sup>24</sup> AIR 1972 SC 819

of quit notice for the determination of the lease is not stated to be one that can be imported into the new lease. The English decisions taking the contrary view are not applicable to construe the

provisions of Sections 116 and 106 of the Act.

17. We shall now advert to the decision of the Madras High Court in *Kodali Bapayya v. Yadavalli Venkataratnam*<sup>25</sup>, That was a batch of Second Appeals arising out of suits instituted by the respondent-landlord for ejecting the appellants therein from the lands situated in a village called Yanikepadu. On the facts and in the circumstances, it was held that the grant comprised both the warams and the defendants-tenants did not succeed in establishing that they had occupancy rights in the lands in their possession and, therefore, the plaintiff was entitled to eject them. It was also found that the landlord had given valid and proper notice to quit under Section 106 of the Act to the defendants-tenants and, therefore, the plea of the tenants that the suit was not maintainable for want of valid notice was rejected. The lower appellate Court had held that the lease deeds executed by the defendants contained a provision that they would surrender possession without notice but, however, as they continued their possession even after the expiry of the period of lease, they must be deemed to hold over on the same terms and, therefore, no notice was necessary. The Division Bench consisting of eminent Judges, Rajamannar, C. J. and Venkata Rama Ayyar, J., though observed that the findings on the aforesaid two questions were sufficient to dispose of the appeals, however thought fit and proper to express their opinion on the question whether notice to quit as contemplated by Section 106 of the Act was or was not necessary in the case of a tenancy created by the tenant holding over in view of the specific clause requiring the lessees to surrender possession without notice after the expiry of the lease period as "certain points arising out of the judgment of the Court below have been fully argued before them". In the lease deeds executed by the tenants, Ex. P-6 series, there was a term that they should surrender possession at the end of the period without notice. The defendants-tenants continued in possession after the termination of the lease period but no notice terminating the lease was given to the tenants. In those circumstances the submission made on behalf of the appellants-tenants that Section 116 of the Act would apply only to terms such as rate of rent but not to stipulations about notice in relation to the termination of tenancy, was accepted by the learned Judges. In arriving at their conclusion the learned Judges relied upon the view taken by the Division Bench of the Calcutta High Court in *Dasarathi Kumar v. Sarat Chandra*<sup>26</sup>, and the earlier Division Bench of the Madras High Court in *Gnanadesikam v. Antony*<sup>27</sup>, and Horwill, J. of the Madras High Court in unreported decision in S. A. No. 2124/1945 (Mad) etc. (cited supra) and observed thus:

"There is thus ample authority in support of the position contended for by the appellants."

The decisions in *Kelu v. A. Mamad Kutti*<sup>28</sup>, *Moosa Kutty v. Kovilakath Thekke*<sup>29</sup>, and *Badal v. Ram Bharosa*<sup>30</sup> relied upon by the contesting respondents therein were distinguished on facts. This decision (*Kodali Bapayya v. Yadavalli Venkataratnam*) of the Division Bench of the Madras High Court on the present aspect cannot strictly be termed to be obiter. The question decided by the learned Judges was one of the points raised and determined by

<sup>25</sup> AIR 1953 Mad 884 at 887

<sup>27</sup> AIR 1934 Madras 458

<sup>29</sup> AIR 1928 Mad 687

<sup>26</sup> AIR 1934 Calcutta 135

<sup>28</sup> 1910 Mad WN 794

<sup>30</sup> AIR 1938 All 649

the Courts below. It cannot be said that the question did not arise out of the judgment of the Court below. If the matter had been taken up to the Supreme Court and in case the finding of the learned Judges relating to the validity of the notice was reversed, the finding on this question would have been necessary to dispose of the right of the parties in that case. Hence it cannot be said that the decision of the Division Bench of the Madras High Court on this aspect is only

obiter and it did not arise out of the judgments of the Courts below. We may add that a learned single Judge of this Court, in *Rayavarapu Saraswati v. Uppalapati Peda Paparaju*<sup>31</sup>, has followed the decision of the Madras High Court in *Kodali Bapayya v. Yadavalli Venkataratnam*<sup>32</sup>, Therein it was held that a stipulation in the original lease deed that the landlord, if so inclined, could take delivery of possession without a notice to quit at the expiration of the term would not be imported into the new tenancy created by holding over.

18. We shall now turn to the decisions relied upon by Mr. T. Ramachandra Rao, the learned counsel appearing for the respondent-lessor. The earliest case is that of a Division Bench of the Madras High Court in *Kelu v. A. Mamad Kutti*<sup>33</sup>, Therein, the plaintiff appellant leased certain vacant land for one year under Ex. A dated 15th October 1905 on a monthly rent of Rs. 10/-. The tenant agreed to pay rent at the rate of Rs. 15/- per mensem if he would fall into arrears. The lessee further agreed in Ex. A thus:

"It is specifically agreed that this Stalam would not be given to none else besides surrendering same to you in case I do not require it. It is agreed that if the improvements now existing, exist at the time of surrender, the then estimated value of those alone would be given and the same should be received."

Contrary to the agreement, the lessee had leased a portion of the land to defendants 2 and 3. The lessor issued a notice to quit under Ex. B dated 5th July 1906 to 1st defendant even before the expiry of the term of one year. As the lessee did not vacate the premises, the lessor instituted a suit on February 22, 1907 for eviction of the defendants 1 to 3 and for recovery of the possession of the land and for rent. The suit was decreed. On appeal, the District Judge found that the notice issued under Ex. B on July 5, 1906 was not proper and valid and therefore allowed the appeal. In the second appeal, the following order was passed:

"Seeing that in Exhibit A there is an express provision to surrender on demand we think there is a contract to the contrary within the meaning of Section 106 of the Transfer of Property Act. The plea of waiver raised for the respondents was not taken in either of the Courts below. We therefore reverse the decree of the District Judge and restore the Decree of the District Munsif with costs. . ." That was not a case of tenant holding over by virtue of the provisions of Section 116 of the Act. In fact, a notice to quit was issued even prior to the expiry of the one year lease period. There was no stipulation that the lessee would surrender possession without notice after the expiry of the term of the lease. The suit was instituted for ejection and for recovery of rent as the lessee, contrary to the agreement, had sub-leased a portion of the land to defendants 2 and 3. Hence this decision does not assist the respondent.

<sup>31</sup>(1967) 1 Andh WR 301

<sup>33</sup>1910 Mad WN 794

<sup>32</sup> AIR 1953 Mad 884

19. In *Moosa Kutty v. Kovilakath Thekke*<sup>34</sup>, at 688, there was an oral lease for a term and one of the terms was that the leased land should be surrendered whenever required by the lessor. Without issuing a notice to quit, the lessee was sought to be ejected in a suit instituted by the lessor. The question that fell for decision was whether notice to quit before the institution of the suit was necessary. The objection raised on behalf of the appellant-lessee that the cause of action

to eject him arose on the notice to quit before the date of suit, was repelled by the learned Judges thus:

"It cannot be said that in all cases the cause of action to sue in ejectment arise only when the tenant becomes a wrong-doer by reason of his staying on after notice to quit is given. If a tenant is a yearly tenant or a tenant-at-will, no doubt notice to quit could be necessary; but if according to the terms of the lease the tenant is not entitled to notice, it cannot be said that the cause of action does not arise till the period given in the notice to quit expires. S. S. T. P. Act enacts how and in what cases a lease of immovable property determines . . . . ."

In that case, the finding of the lower court was that one of the terms of the tenancy was that the Paramba and Kuzhilkur chamhyama should be surrendered when required. Hence, the learned Judges, held that no notice to quit was necessary in order to enable the plaintiff to maintain a suit for ejectment. That was not a case of a tenant holding over by virtue of Section 116 of the Act. It is only an authority for the proposition that where a tenancy was for a fixed period and it expired by efflux of time, there will be no need to give a notice to quit as contemplated by Section 106 of the Act. This case is not an authority for the proposition that in the case of a tenant holding over, stipulation as to notice in the original lease would be imported into the new tenancy created under Section 116 of the Act. We may add that the learned Judges who decided *Kodali Bapayya v. Yadavalli Venkataratnam*<sup>35</sup>, also were of the same view.

20. The decision of a single Judge of the Allahabad High Court in *Badal v. Ram Bharosa*<sup>36</sup>, is not directly on point. The question that fell for decision was as to when tenancy must be deemed to have commenced under Section 116 of the Act. In view of the fact that the original tenancy commenced on October 24, the tenancy created under Section 116 by the tenant holding over was held to have commenced on 24th October. Hence, that case is distinguishable.

21. The decision of a Division Bench of the Madras High Court in *Arunachala Naicker v. Ghulam Mahmood Saheb*<sup>37</sup>, is an authority for the proposition that the Court must construe the contract governing the question of quit notice in a reasonable way to ascertain what the parties (lessor and lessee) intended by way of notice and it must not attempt to read into the agreement some term that would have to be implied only if there were no agreement at all. Therein, a small plot of land was leased under lease deed Ex. P-1 dated August 4, 1917 for a period of 2 years on a rent of its. Rs. 2/- per month. One of the material terms of the lease was:

"Besides this, if you after the expiry of the said stipulated period send me a notice giving one month's time I shall vacate the said land and deliver to you possession

<sup>34</sup> AIR 1928 Mad 687

<sup>36</sup> AIR 1938 All 649

<sup>35</sup> AIR 1953 Mad 884

<sup>37</sup> AIR 1951 Mad 408

thereof". The lessee continued in possession even after the expiry of the term of the lease. He extended the area of cultivation. After the death of the lessor in 1932, the legal representatives of the lessor demanded increased rent. The lessee agreed for enhancement of rent to Rs. 36/- per annum, and later to Rs. 48/- and eventually, as time went on, to Rs. 100/- at the time of the suit. Notices were sent in July 1937 to the lessee to

quit the land but the lessee was unwilling to vacate the same. The lessee resisted the suit filed in the year 1945 for ejectment, on the ground that he was entitled to 6 months notice as the land was leased for agricultural purposes, and the period of notice should expire with the year of the tenancy. The suit was decreed. The appeal by the lessee before a learned single Judge of the High Court was not successful. In the Letters Patent Appeal, the same points were canvassed before the Division Bench. Horwill, J., speaking for the Court observed. (at pages 408 and 409) thus:-

"It seems to us that when there is a contract governing the question of notice, we must read that contract in a reasonable way to ascertain what the parties intended by way of notice and not to try to read into the contract some term that would have to be implied only if there were no contract. It seems to us reasonable to conclude from the passage set out in the opening para that not merely did the parties intend that the period of notice should be one month, but also that the one month's notice should be given at any time."

On a consideration of the pleadings and the correspondence, the scope and meaning of the term of the original lease pertaining to the quit notice was interpreted by the learned Judges as amounting to an agreement to deliver possession of the land to the lessor after one month's notice by the lessor. This decision is not, in our considered opinion, an authority for the general proposition that a term of the original lease relating to the notice to quit would be imported to the new lease created under Section 116 of the Act, but, on the construction of that particular clause or term with the aid of the pleadings and the correspondence between the parties, the learned Judges came to the conclusion that the parties intended that the legal relationship should be governed by the terms of the original contract. This may be noticed from the following passage in the judgment:

"There is a great deal to be said for the appellant's contention that fresh contracts were entered into from time to time . . . . . The pleadings and the correspondence between the parties lead to the conclusion that the only discussion entered into between the parties from time to time was with regard to the amount of rent to be paid and that otherwise they intended that the legal relationship should be governed by the terms of the original contract. xxx xxx x If, except, as to rent, the parties intended to be governed by the original contract, then it would follow that only one month's notice was necessary and that the lessor could give that month's notice at any time he chose."

22. We shall now advert to the decision of the Supreme Court in *Manujendra Dutt v. P. P. Roy Chowdhury*<sup>38</sup>, Therein, the appellant took certain land under a registered lease dated December, 4, 1934 from the Bhowanipure Wards Estate for a fixed term of 10 years at a monthly rent of Rs. 47-0-3 ps. The tenant had option to renew provided he offered the maximum rent which others might offer on the expiry of the said term. Clause 7 of the

<sup>38</sup>(1967) 1 Andh WR 61

lease deed required the lessee to restore to the lessors the land demised, on the termination or determination of the lease, after removing the structures with drains, privies, watertaps, etc., leaving the land in the same state as it was at the time of the lease. It also required the lessee to sell the same to the lessors if they so desired. Clause 7 further provided as follows:-

"Provided always and it is hereby agreed and declared that if it be required that the lessee should vacate the said premises at the end of the said term of 10 years the lessee will be served with a 6 months' notice ending with the expiry of the said term and it is further agreed that if the lessee is permitted to hold over the land after the expiry of the said term of 10 years the lessee will be allowed a six months' notice to quit and vacate the said premises."

Before the expiry of the term of the lease, the lessee expressed his desire to exercise his option of renewal. But, however, the parties could not agree with regard to the enhanced rate of rent payable thereafter. The demand made by the lessor to vacate the premises was not acceded to by the lessee. The lessor thereupon instituted a suit before the Sub-Court, Alipore for ejectment and for mesne profits on the ground that the lessee was a trespasser after the expiry of the lease period. The suit was resisted on the ground that the lessee had lawfully exercised his option of renewal, that the lessor had accepted the rent as agreed under the said lease even after the expiry of the term and therefore he was a tenant holding over and that he was also entitled to the protection of Calcutta Thika Tenancy Act, 1949 which came into force and hence, the suit was not maintainable. In view of the provisions of the Calcutta Thika Tenancy Act, the Thika Controller was competent to decide the dispute under Section 29. The suit was transferred to the Fourth Court of the Munsif at Alipore who was the Thika Controller under that Act. But, however, Section 29 was subsequently deleted. Therefore, the question arose whether the Thika Controller, after the deletion of Section 29, had jurisdiction to decide the suit. The Thika Controller finally passed an order evicting the tenant. On an application under Article 227 of the Constitution of India, the High Court agreed with the decision of the Thika Controller. In the appeal before the Supreme Court, it was held that the Thika Controller, in spite of the deletion of Section 29, had still the jurisdiction to proceed with the suit transferred to him. On the question regarding the requirement of six months' notice as provided for in the lease deed, the Supreme Court held that the appellant-tenant was entitled to six months' notice as required by the proviso to clause 7 of the lease deed and as no such notice was issued by the plaintiff-lessor, the suit for eviction could not succeed. The learned Judge, Shelat, J., who spoke for the Court, ruled (at p. 65) (of Andh WR) thus:-

"It is well settled that statutory tenancy normally arises when a tenant under a lease holds over, that is he remains in possession after the expiry or determination of the contractual tenancy. A statutory tenancy therefore comes into existence when a contractual tenant retains possession after the contract has been determined. The right to hold over, that is, the right of irremovability, thus is a right which comes into existence after the expiration of the lease and until the lease is terminated or expires by efflux of time the tenant need not seek protection under the Rent Act. For, he is protected by his lease in breach of which he cannot be evicted."

The learned Judges held that notice under Section 106 of the Act was essential to bring to an end the relationship of landlord and tenant and unless such relationship was validly terminated by a valid notice under Section 106 of the Act, the tenant could not be evicted. The contention of the landlord that the Calcutta Thika Tenancy Act conferred additional rights on him was repelled. But on the contrary, it was held that that Act like other Rent Acts had imposed further restrictions

on the right of the landlord to evict his tenant under the general law or under the contract of lease. The contention of the respondents' counsel that since the period of lease expired, the lessee, in the absence of any such renewal, was bound to hand over vacant possession to the respondents as provided by clause 7 of the lease deed, and that the appellant was a trespasser and therefore there was no question of any notice required to be given to him, was repelled by the Supreme Court holding that such construction would be contrary to the express language of the proviso to clause 7 of the lease. The Supreme Court while considering clause 7 of the lease deed, observed at page 66 (of Andh WR) thus:-

". . . . . clause 7 requires that on the determination of the lease by efflux of time or earlier termination the lessee has to hand over vacant possession of the land in its original position after removing the structures constructed thereon by him. If the structures are not so removed the lessee has to sell them to the lessor at a valuation to be fixed by the lessor's Engineer. What would happen in a case where the tenant is not informed and does not know whether his lease which is for a fixed term would be extended by a renewal or otherwise? If there is no provision for an option to renew and the landlord does not extend the term, he had, of course, to vacate on the expiry of the term. But where the lease provides for an option and the tenant exercises the option it is but fair and equitable that he must know in good time whether the lessor agrees to the renewal or not. It is to provide against contingency where the lessee would have to quit without a fair opportunity to dispose of the structures he has put up that the proviso was added in clause 7 of the lease and that proviso lays down the condition of six months' notice ending with the expiry of the term clearly to enable the lessee to remove the structures, if need be, if the lease was not renewed or extended. The object of inserting such a condition being clear as aforesaid it would not be right to construe clause 7 and its proviso in the manner suggested by the respondents."

23. This decision is distinguishable on facts. The proviso to clause 7 of the lease deed itself provided that six months' notice should be given if the tenant held over after the expiry of the period of 10 years lease. Hence, there was admittedly a contract to the contrary even with regard to the tenancy created under Section 116 of the Act by the tenant holding over.

24. We shall now consider the decision of the Madras High Court in *G.M. Ali v. M. Rosari Ammal*<sup>39</sup>, which supports the plea advanced by the respondent. In that case, the petitioner took on lease under a tenancy agreement Ex. P-1 dated November 24, 1954, premises No. 100, Broadway, Madras on rent and was let into possession thereof. It was agreed that the tenancy should be in accordance with the English calendar month and the premises should be used only for the own use of the lessee and it should not be sub-let or assigned. Clause 6 of the agreement reads thus:- -

<sup>39</sup>(1971) 1 Mad LJ 156

"The lessee agrees to take on lease the premises for a period of one year commencing from Ist December 1954 and is terminable on a month's notice on either side on the expiry of this lease."

25. Even after the period of the tenancy, the lessee was holding over as a month to month tenant for several years. A notice to quit was issued on July 8, 1965 terminating the tenancy with the end of July, 1965. Though 15 days' notice as contemplated by Section 106 of the Act was issued terminating the tenancy with the end of July 1965, the lessee claimed that he was entitled to one month's notice as required by clause 6 of the agreement which was pleaded to be an agreement contrary to the provisions of Section 106 of the Act. The learned Judge, relying upon the decisions in *Kelu v. A. Mamad Kutti*<sup>40</sup> *Moosa Kutty v. Kovilakath Thekke*<sup>41</sup>, *Arunachala Naicker v. Ghulam Mahmood Saheb*<sup>42</sup>, *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*<sup>43</sup>, and *Manujendra Dutt v. P. P. Roy Choudhury*, (1967) 1 Andh WR 61 (cited supra) held that clause 6 of the agreement would be imported into the tenancy created under Section 116 of the Act by the tenant holding over and, therefore, there was an agreement to terminate the tenancy on one month's notice contrary to 15 days' notice as contemplated by Section 106 of the Act and allowed the claim of the lessee. He also relied upon two English decisions in *Digby v. Atkinson*<sup>44</sup>, and *Hyatt v. Griffiths*<sup>46</sup> to hold that the terms of the original lease were imported into the fresh tenancy created by law under Section 116 of the Act unless there was evidence to the contrary. The decision of the Division Bench of the Madras High Court in *Kodali Bapayya v. Yadavalli Venkataratnam*<sup>45</sup>, on this aspect was not followed as it was considered to be obiter. With great respect to the learned Judge, Ramaprasada Rao, J. we are unable to persuade ourselves to accept his view. The decisions of the English Courts are not material and relevant for the purpose of construing statutory provisions of Sections 106 and 116 of the Act. As observed by Meehan, C. J. in *Troylikya Nath Roy v. Sarat Chandra Banerjee*<sup>47</sup>, it is "immaterial to consider what the English law may be on the subject. We have to consider what the law in India, is. That law has been codified and is to be found in Section 116 of the Transfer of Property Act." The passage at page 762 from Mulla's Transfer of Property Act (Fifth- Edition) which was relied upon by the learned Judge, only relates to English Law. It reads:

"If there is no agreement fixing the terms of the new lease the implied tenancy is in English law subject to such of the terms of the old lease as are applicable to a yearly or monthly tenancy."

The learned Judge's view that there was no new contract of tenancy created under Section 116 of the Act was contrary to the decision of the Federal Court in *Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden*<sup>48</sup>, which was been approved by the Supreme Court in *Bhawanji v. Himatlal*<sup>49</sup>, The learned Judge was also not correct in thinking that the matter is now settled beyond controversy by the Supreme Court in *Manujendra Dutt v. P. P. Roy Chowdhury*<sup>50</sup>, We have already referred to that decision of the Supreme Court where the result of the case depended upon the construction of the proviso to clause 7 of the original lease deed which specifically provided a stipulation relating to

<sup>40</sup>1910 Mad WN 794

<sup>42</sup> AIR 1951 Mad 408

<sup>44</sup>(1815) 4 Camp. 275, 278

<sup>41</sup> AIR 1928 Madras 687

<sup>43</sup> AIR 1949 FC 124

<sup>45</sup> AIR 1953 Mad 884

<sup>46</sup>(1851) 17 QB 505

<sup>48</sup> AIR 1949 FC 124

<sup>50</sup>(1967) 1 Andh WR 61 = (AIR 196 SC 419)

<sup>47</sup>(1905) ILR 32 Cal 123

<sup>49</sup> AIR 1972 SC 819

quit notice applicable to the tenancy created under Section 116 of the Act by the tenant holding over. We are, therefore, of the view that the decision of the learned single Judge of the Madras High Court in *G.M. Ali v. M. Rosary Ammal*<sup>51</sup> is not correct.

26. From the foregoing discussions, the following results emerge: Section 106 of the Transfer of

Property Act provides for the duration of leases of immovable property and the quit notice depending upon the purpose for which the property was leased. If the property was leased for agricultural or manufacturing purposes, the lease must be deemed to be one from year to year terminable by six months' notice expiring with the end of the year of tenancy. In other cases the lease shall be deemed to be one from month to month terminable by 15 days' notice expiring with the end of a month of the tenancy. The aforesaid duration of lease and the length of quit notice would govern the rights of the parties by virtue of the statute, only in the absence of a contract or local law or usage to the contrary. The parties would be entitled to agree to any other duration with regard to the lease and any other length of quit notice. In the case of a contract to the contrary, the provisions of Section 106 of the Act do not come into play and the parties will be governed by the terms of the contract.

27. Mere holding over by the lessee after the termination of the lease period does not create a tenancy of any kind. Under the Common Law, he may be a tenant on sufferance. But, however, where a tenant remains in possession of the immovable property leased, even after the expiry of the term of the lease and the lessor accepts the rent from him or otherwise assents to his continuing in possession, he would become, by virtue of the provisions of Section 116 of the Act, a tenant holding over. The tenancy created by the tenant holding over is a new tenancy. It is a statutory tenancy which entitles the tenant to retain his possession after the expiry or determination of the contractual tenancy. The right to hold over, is a right to irremovability and comes into existence after the expiration of lease and continues till such lease is terminated or determined. The tenancy by holding over is not a tenancy which comes into existence on the volition of one of the parties. In order to bring or create a new tenancy into existence, there must be a bilateral act. The principle underlying Section 116 is implied contract and the test of renewal is the consensus between the lessor and the lessee but not an option exercisable by either of the parties. It is the assent of the landlord for the tenant's continuing in possession, but not the acceptance of rent by itself, after the expiry of the term of lease that is the foundation for the new tenancy. The assent of the landlord is based on the acceptance of rent as such. The acceptance of rent as such by the landlord is considered to be a clear recognition of the tenancy right asserted by the lessee who offers the rent. But the mere tender of rent by the tenant without its acceptance on the part of the landlord would not, in any way, create the statutory tenancy by holding over. That apart, the animus of the tenant in tendering the rent also is material. Where the tenant tendered the rent as payable under the Rent Acts like Bombay Rent Act, Calcutta Thika Tenancy Act, etc., which create statutory tenancy, the acceptance of rent in such circumstances by the landlord does not create a tenancy by holding over, as the landlord has no other option but to accept the same because he cannot evict the tenant even after the expiration of the lease period as his right to remain in possession is created by virtue of the Rent Act.

28. The expression "agreement to the contrary" used in Section 116 is referable to the

<sup>51</sup>(1971) 1 Mad LJ 156

terms of the tenancy created by the tenant holding over but not to terms of the original lease. In the absence of any such agreement to the contrary, the statutory tenancy created under Section 116 has to be invariably determined in accordance with the provisions of Section 106. The parties are at liberty to agree with regard to the terms of the statutory tenancy such as the duration of the lease, the nature and character of the lease and the length of quit notice. Such agreement may be entered into between the parties either at the time of the original lease or at the time when the new tenancy by holding over is created. It may be oral or in writing. Where there is a specific

stipulation in the original lease that a quit notice of a particular nature must be issued to determine the new lease created under Section 116 of the Act by the tenant holding over, such stipulation would be an "agreement to the contrary" within the meaning of Section 116 of the Act and would govern the rights of the parties relating to the issuance of notice determining the statutory tenancy. The real difficulty arises when there is no such specific stipulation in the original lease. In the new statutory tenancy created by the tenant holding over, some or many of the terms of the original lease such as quantum of rent, mode of its payment, access to the leased property, rights of the parties to the new additions, if made, etc. might be continued by implication when there is no agreement to the contrary. But, however, all the terms of the original lease cannot be considered to be the terms of the tenancy by holding over. The true test is whether a particular term or stipulation can really be deemed to be one of the terms or stipulations which constituted the transaction of the new lease created under Section 116. The onus to prove that a particular term of, or stipulation in, the old lease formed part of the terms of or stipulation, of the new lease, is on the party who sets up such plea. Where the original lease deed is silent with regard to the issuance of quit notice to determine the new tenancy, the intention of the parties which can be gathered from the correspondence between and the conduct of the parties, would be material. The term regarding collateral security and a stipulation to quit without notice as required by Section 106 of the Act, which are found in the original lease, would not be imported into the statutory new lease, created under Section 116 of the Act.

29. We may now briefly refer to the material terms of the original lease deed Ex. A-2. Though the lease was only for a period of two years from 14-7-41 on payment of a rent of Rs. 1450/- per year payable in 4 equal instalments, it specifically reserves a right to the lessee to renew the same for a further period of two years on the same terms. Ex A-2 contains the following term or clause pertaining to the tenancy and delivery of possession.

"The lessee shall stop all work and the working at a factory, the premises, machinery, plants, fixtures, tools, etc. more fully described in the schedule hereunder written, immediately after the expiry of the period described or on the termination of the lease as herein provided after, and without requiring any notice from the lessor company, the lessee shall then give possession of all the scheduled property to the lessor in complete and good working order . . . . . "

The lessee, therefore, was bound to deliver possession of all the scheduled property to the lessor in complete and good working order immediately after the expiry of the period of lease or on the termination of the lease. The two years period of lease expired on 14-7-1943 but the lessee exercised his right to renew the lease for a further period of two years. The lessee had to give possession of the scheduled property to the lessor in complete and working order immediately after 14-7-1945 if there was no statutory tenancy created by the tenant holding over under Section 116 of the Act. Admittedly, the lessee continued to work the factory for a number of years thereafter on payment of rent to the lessor who accepted the same without any reservation. Hence, the lessee is undoubtedly a tenancy by holding over on the application of the provisions of Section 116 of the Act. There is admittedly no agreement entered into between the parties at the time of the creation of the tenancy under Section 116 of the Act with regard to the termination of the new lease. The aforesaid clause or stipulation requiring the lessee to hand over possession of the property without requiring any notice from the lessor company to quit would apply only to the original lease period which ended with 14-7-1943 and to the renewed period of

lease, which ended with 14-7-19-45 On a careful reading of the language of the stipulation relating to the suit notice, we are of the considered view that there is no stipulation applicable to the termination of the new lease created by the tenant holding over. The aforesaid term relating to the determination of the tenancy in the original lease deed cannot not be imported into the statutory tenancy created under Section 116 of the Act unless it was intended by the parties. There is no evidence to establish that the parties have specifically agreed to have this stipulation or clause or term applicable to the termination of the statutory tenancy. That apart, the fact that the lessor company had issued a registered notice to quit as evidence by Ex. A-1 indicates that there was no agreement to the contrary for the determination of the statutory tenancy except in accordance with the provisions of Section 116 read with Section 106 of the Act. The lessor company was conscious of the fact that the statutory tenancy created by the tenant holding over can only be terminated by the issuance of a notice and that was the reason for the issuance of Ex. A-1. We may add that Ex. A-1 reveals that 6 months' time was originally granted to the lessee for vacating the premises but subsequently, the words '6 months' were scored out and the words '15 days' written with pen. Irrespective of the fact whether it was 6 months or 15 days, no notice to quit need be given if what the lessor company now sought to contend were really agreed upon or intended between the parties.

30. The other contingency for the attraction of the clause dispensing with quit notice is the "termination of the lease" as herein provided after. The lessee was given an option in the subsequent clause to terminate the lease at any time before the expiry of the period of lease by issuing a written notice to the lessor company in case of acts of God or State or if the scheduled property becomes incapable of being used as a factory for the manufacture of tins etc., and give possession of the property to the lessor company without any notice. Hence, the lessee had to give possession of the leased property to the lessor immediately after the termination of the lease period without requiring any notice from the lessor company to quit. Where the lease has been terminated or determined either as agreed upon or in accordance with law, the lessee, no doubt, had to give possession of all the scheduled property to the lessor in complete and good working order without requiring any further notice to quit from the lessor company.

31. In the present case, the statutory lease has not been determined in accordance with law. It can be terminated or determined only by the issuance of a 6 months' notice to quit by the lessor company as required by Section 106 of the Act. The stipulation in the original lease relating to quit notice is also not absolute. It provides for payment of certain damages if the lessee fails to deliver possession of the premises on the expiration of the period of lease. The intendment of the parties as can be seen from a reasonable and fair construction of the several terms of the original lease deed and the purpose for which the property was leased and the conduct of the parties, was not to deliver possession of the property within 15 days after notice, but the lessee requires really some reasonable time to satisfy the terms of the contract so as to deliver possession of the scheduled property to the lessor company in complete and good working order. Judged from any angle, we find that the plaintiff-lessor cannot successfully eject the defendant-lessee herein without determining the tenancy created under Section 116 of the Act by issuing a 6 months' quit notice as contemplated by Section 106 of the Act in view of the admitted fact that the property was leased to the appellant for a manufacturing purpose. For all the reasons stated, our answer to question No. 1 is in the affirmative and in favor of the appellant.

32. We shall now turn to the second question whether the appellant-lessee has waived its right to question the validity of the quit notice Ex. A-1 terminating the tenancy. Before examining the

facts of the case, it is necessary to briefly refer to the concept and content of 'waiver'. As observed by the Supreme Court in *Associated Hotels of India v. Ranjit Singh*<sup>52</sup>,

"A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights."

There is no estoppel by waiver. Waiver is distinct and different from estoppel, waiver is contractual whereas estoppel is governed by Section 115 of the Evidence Act. Estoppel is not a cause of action whereas waiver may constitute a cause of action. Waiver is an agreement to release or not to assert a right whereas estoppel is a rule of evidence which comes into operation if a statement as to the existence of a fact has been made by a party or his authorized agent to another party or some one on his behalf, with the object or intention, that the other party should act upon the faith of the statement and the other party does act upon the faith of the statement. Where an agent with authority to make an agreement on behalf of his principal agrees to waive, his principal's right, the principal will be bound. The distinction between estoppel and waiver had been succinctly drawn by the Judicial Committee in *Dawson Bank Ltd. v. N. M. K. K. (Japan Cotton Trading Co)*<sup>53</sup>.) As ruled by Lord Russell of Killowen, speaking for the Privy Council.

"The question of estoppel is governed by Section 115, Evidence Act. . . . Estoppel is not cause of action. It may . . . assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorized agent of his by the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal agrees to waive his principal's rights then (subject to any

<sup>52</sup> AIR 1968 SC 933 AT 937

<sup>53</sup> AIR 1935 PC 79 at 82

other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver."

33. As pointed out earlier, a lease of immovable property determines under Section 111 (h) of the Act either on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, issued by the lessor to the lessee or vice versa. Section 113 provides for waiver of notice to quit as required by clause (h) of Section 111. The requisite notice contemplated by Section 111 (b) may be waived. But the waiver of notice to quit depends upon the consent of both the contracting parties. It is not open to one of the parties to choose or elect to waive the notice to quit. This is manifested by the use of the expression "with the express or implied consent of the person to whom it is given" found in Section 113. The consent of the party

to waive the issuance of notice to quit may be express or implied. The implied consent can be gathered by any act of the party showing an intention to treat the lease as subsisting. Where the lessor who had issued to the lessee a notice to quit the property leased, subsequently accepts the rent tendered by the lessee it must be held that the notice to quit has been waived. Hence, waiver of notice to quit is not a unilateral act depending upon the choice or election of one of the parties but it is a bilateral agreement of both the parties.

34. The foundation for the plea of waiver raised by the respondent-plaintiff is the failure or omission on the part of the defendant-lessee to reply to the quit notice Ex. A-1 dated 1-10-1966 giving 15 days' time to vacate the premises and his raising the plea for the first time by way of amendment of the written statement on 29-7-1969 by which time the trial was over and the case was posted for arguments. Admittedly there is no waiver in express terms. The waiver is claimed to be an implied one on the facts referred to above.

35. In view of our answer to question No. 1 the plaintiff-respondent cannot successfully eject the defendant-lessee unless it establishes that it has issued a valid quit notice giving six months' time as contemplated by Section 106 of the Act, or that the defendant has waived its right for the issuance of such quit notice. The onus of proving that the defendant has waived its right to a valid quit notice is on the a plaintiff who asserts the same. The validity or legality of quit notice is not a mere technical plea. The respondent, on appraisal of the material on record, has to establish that there was a valid quit notice.

Waiver being a conscious factor, it must be established that the appellant, being fully conscious of its right to waive has voluntarily given it up. The failure or omission on the part of the lessee to reply to the defective quit notice Ex. A-1 is not, in our considered opinion, a valid ground to constitute or infer waiver on the part of the lessee. The lessee can as well ignore a defective or invalid notice. He is not estopped from pleading in court after the filing of the suit that no proper and valid notice was given. He is not of only not estopped from raising such a plea but he is also under no duty to the plaintiff to point out this error. A party-defendant might, due to negligence or inadvertence, have failed to raise the plea of the defective notice at an earlier stage, but his negligence or omission in that regard cannot give rise to an estoppel unless there is statutory duty of care and obligation on him to send reply to the notice: See *Vellayan v. Madras Province*<sup>54</sup>, Even otherwise, the omission on the part of the lessee to reply to the notice Ex. A-1 cannot form a basis for inferring waiver.

<sup>54</sup> AIR 1947 PC 197

36. The next ground urged is that this objection was taken at a very late stage i. e., at the time of the arguments. The submission of Mr. Ramachandra Rao that the defendant must be deemed to have waived its right to question the validity of the quit notice by its failure to raise the same in the original written statement, cannot be acceded to. The validity or legality of a quit notice is a question of law and, therefore it can be raised even at a late stage if no further determination or investigation of facts is required. It is well settled that a new plea of law can be raised for the first time at a late stage if no investigation of facts is needed. The preliminary objection taken by the respondents before the Supreme Court in *Badri Prasad v. Nagaramal*<sup>55</sup>, that the Cloth Association at Badhar was not a legal association, was overruled as the question was found to be a pure question of law and it did not require the investigation of any facts and 20 persons formed the association in contravention of Section 4 (2) of the Rewa State Companies Act 1935. It is apt in this context to refer to the decision of the Privy Council in *Surajmull Nagoremull v. Triton Insurance Co. Ltd*<sup>56</sup>. wherein an omission to mention Section 7 (1) of the Indian Stamp Act (II of

1899) in the judgments under appeal was sought to be raised as a bar. Lord Sumner said:-

"The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claims. No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset." See also *Shiba Prasad Singh v. Sirish Chandra Nandi*<sup>57</sup>, The decision of the Supreme Court in *J.C. Chatterjee v. S.K. Tandon*<sup>58</sup>, is an authority for the proposition that in spite of the failure to deny the plaintiff allegations as to termination of tenancy by a valid notice in a suit for ejectment of a tenant and the absence of any issue demanded thereon by the defendant the point as to termination of tenancy can be raised in second appeal and decided by the High Court without remanding the case as it is essentially one of law. The decision provides a complete answer for the objection raised by the plaintiff on this aspect.

37. The decision of the Supreme Court in *Gauri Shankar v. Hindustan Trust Ltd*<sup>59</sup>, relied upon by the respondent is distinguishable on facts. Therein, a suit for eviction was filed by the owner in the year 1959 and no plea was taken by the defendant-lessee that a valid notice to terminate contractual tenancy had not been served and therefore the application for eviction was not maintainable. The plea relating to the absence of valid notice terminating the contractual tenancy which was raised after 8 years, was permitted by amending the written statement. In those circumstances, it was held by the Supreme Court that by not raising that plea for nearly 8 years, a great deal of prejudice was caused to the appellant. This may be noticed from the following passage in the judgment at page 2095:

"In our judgment the course the litigation between the parties had taken and the manner in which the plea was sought to be raised by an amendment after eight years of the institution of the eviction petition and further the abandonment of any contention based on that plea before the Rent Control Tribunal were more than

<sup>55</sup> AIR 1959 SC 559

<sup>57</sup> AIR 1949 PC 297

<sup>59</sup> AIR 1972 SC 209

<sup>56</sup> AIR 1925 PC 83

<sup>58</sup> AIR 1972 SC 2526 at 2527

sufficient to persuade the court that any argument based on the absence of a valid notice should not have been allowed." That case does not in any way assist the respondent herein, as there is no such long delay in raising the plea in the case on hand.

38. It is fairly well-settled that a defective or invalid quit notice will not terminate the tenancy-be it contractual or statutory-unless it is accepted with defects by the party to whom it was issued. In *Mangilal v. Sugan Chand*<sup>60</sup>, it was held that the provisions of Section 4 of the Madhya Pradesh Accommodation Control Act, 1955 are in addition to those of the Transfer of Property Act and the notice to quit as contemplated by Section 106 of the Act "is essential for bringing to an end the relationship of landlord and tenant" and "unless the relationship is validly terminated the landlord does not get the right to obtain possession of the premises by evicting the tenant" and "Section 106 of the Transfer of Property Act does not provide for the satisfaction of any additional requirements." It is the service of the notice in the manner prescribed by Section 111

(h) read with Section 106 of the Act that determinates the tenancy. In other words, the tenancy stands determined on the expiration of the period of tenancy if the requisite notice is duly issued and served on the other party. As ruled by the Supreme Court in *Calcutta Credit Corporation v. Happy Homes Ltd*<sup>61</sup>.

"Even if the party served with the notice does not assent thereto, the notice takes effect. If the notice is defective it does not operate to terminate the tenancy by force of the statute. But a tenancy is founded in contract, and it is always open to the parties thereto to agree that the tenancy shall be determined otherwise than by notice served in manner provided by Section 106 of the Transfer of Property Act, or by a notice of a duration shorter than the period provided by the Act. If the parties so agree, the tenancy will come to an end."

This decision is an authority for the proposition that a notice given as required by Section 106 of the Act operates to terminate the tenancy irrespective of the assent of the party served with such notice and it is open to him to plead that the tenancy does not stand determined if a defective notice has been served on him. But, however, after the acceptance of the defective notice, the party serving such notice cannot contend that the notice served by him was defective and therefore the tenancy was not determined as the tenancy would come to an end when it was properly served. The party who has served a defective quit notice on the other party is precluded or estopped from contending that the tenancy was not determined on account of the defect in the quit notice issued by him. The scope of Section 113 of the Act also is indicated in this decision. The learned Judge, Shah J. (as he then was), who spoke for the court, observed thus:

"Clearly Section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent-express or implied therefor..... Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be

<sup>60</sup> AIR 1965 SC 101

<sup>61</sup> AIR 1968 SC 471 at 474

treated as subsisting."

We may add that mere delay on the part of the appellant-defendant in raising the plea relating to the validity of the quit notice Ex. A-1 does not *ipso facto* give rise to the plea of waiver but there must have been prejudice caused to the plaintiffs by such delay in order that the defendant can be deemed to have waived his right to a notice. See *Wasant Shripat Deshpande v. G.M. Khandekar*<sup>62</sup>, and *Hirachand Himatlal v. Kashinath Thakurji*<sup>63</sup>,

In the present case, there is no evidence on record to show that the defendant knew fully that he was giving up his right to raise this plea by his omission to plead in the original written statement. In fact, the principal contention raised before the trial Court by the defendant-tenant was "whether the notice Ex. A-1 dated 1-10-1966 is valid and operative and whether it satisfied the requirements of Section 106 of the Act?" (See para 8 of the trial Court's judgment). That

apart, unless prejudice has been caused to the plaintiff by the omission of the defendant in not raising this plea in the original written statement and by raising the same by way of amendment at the time of arguments, the respondent cannot be permitted to raise successfully the plea of waiver. On the facts, we are of the firm view that no prejudice has been caused to the plaintiff by the belated amendment of the written statement permitting the defendant to raise the question relating to the validity of the quit notice. When asked by the Court, the learned counsel Mr. Ramachandra Rao was unable to show any prejudice that has been caused to the respondent-plaintiff by this belated plea and he only requested this Court to remand the case to the lower court on this account. We do not find any merit in this submission, as there is no justification for remanding the case. As pointed out earlier the inordinate delay of 8 years on the part of the defendant lessee in raising the plea of waiver and protracted proceedings between the parties since several years which are found in the case of *Gauri Shankar v. Hindustan Trust Ltd*<sup>64</sup>. are not found in the case on hand for us to hold that the plaintiff herein has been prejudiced. The plaintiff herein could have issued a valid notice giving 6 months' time to the defendant-lessee and obtained possession of the suit premises thereafter. But instead, the plaintiff took 1 year, 7 months and 9 days for obtaining the appellate decree subsequent to the dismissal of the suit on the ground that the notice was defective. For these reasons, we hold that no prejudice to the plaintiff can be inferred in this case and therefore, the mere delay in raising the plea of want of a valid quit notice would not warrant inference of waiver.

39. We find one more substantial ground to reject the plea of waiver raised by the respondent. As pointed out earlier, the amendment for the written statement was allowed on June 30, 1969 on payment of Rs. 30/- as costs to the respondent-plaintiff. The order of the trial court permitting the amendment of the written statement was, therefore, a conditional one. That order was allowed to become final as no revision was preferred. Nor has any objection been raised by the respondents before the 1st appellate Court in this regard. The 1st appellate Court which allowed the appeal preferred by the plaintiff did not give any specific finding in his favor that the amendment was belated and it should not have been allowed. The conditional order passed by the trial court granting the

<sup>62</sup> AIR 1949 Nag 25 at 28

<sup>64</sup> AIR 1972 SC 2091

<sup>63</sup> AIR 1942 Bom 339 at 340

amendment of the written statement must be regarded as an entire whole giving a benefit in one respect to the plaintiff and in another respect to the defendant. To put it differently, the benefit of costs to the plaintiff would not have been granted but for the corresponding benefit of amending the written statement as at a late stage to the defendant. The acceptance of costs in a conditional order would bar or prevent such party from questioning the jurisdiction or validity of the order granting amendment. In the circumstances, it must be held that the respondent-plaintiff was satisfied with the conditional order and, therefore, it must be deemed to have accepted the same and it is not open to it to challenge the same in this court. We, therefore, hold that the awarding of costs to the plaintiff is, in fact and substance, a part of the entire order and the plaintiff who accepted a part of the same relating to award of costs is barred from attacking the rest of the order pertaining to the amendment of the original written statement which is against him.

40. This view of ours gains support from decided cases. The earliest authority on this aspect is the decision of Queen's Bench Division in *King v. Simmonds*<sup>65</sup> Therein, it was held that where a party accepts costs awarded under an order of Court, he cannot subsequently object to the

validity or justification of that order as, but for such conditional order, no costs were payable at that time. See also *Tinkler v. Hilder*<sup>66</sup>, In *Prayag Dossjee v. Venkata Perumal*<sup>67</sup>, Pandalai J. observed:

". . . . . in every particular case it must be ascertained whether the costs or other benefit accepted by a party is in fact and substance a part of the entire order of which after accepting the part favorable to him, a party puts it beyond his power to attack the rest. . . . . It is sufficient if by their nature or intention the Court regarded them as an entire whole, giving a benefit in one respect to one party and in another to his opponent, in other words such, that the benefit to one would not have been granted but for the corresponding benefit, granted to the other . . . . . I am of opinion that the Judge would not have granted the costs unless he allowed the amendment and therefore the order comes within the rule."

The objection that the advocate has no right to receive the costs awarded by the court without the authority of the party and his act would not bind the party was repelled by saying that:

"The advocate in the ordinary course of his employment has undoubted authority to receive costs paid by the other side. The fact if it is a fact, that the advocate did not realize the consequence of his acceptance of the money, cannot prevent the legal consequences which courts draw from such an act."

The aforesaid ruling would answer the objection of Mr. Ramachandra Rao that there is no evidence to show that his client has accepted the costs deposited in the lower Court and the acceptance of costs by the counsel without specific authorization from the party in that regard would not bind the party. We entirely agree with the learned Judge, Pandalai, J. that the party who accepts either directly or through his counsel the costs awarded in a

<sup>65</sup>(1845) 7 QB 289

<sup>67</sup> AIR 1933 Mad 410 at 411

<sup>66</sup>(1849) 4 Ex. 187

conditional order, is precluded or barred from attacking the validity of the portion of the order with which he is aggrieved. The principle of approbate and reprobate would apply. The decision of a Division Bench of the Patna High Court in *Ramcharan v. Custodian, Evacuee Property*<sup>67</sup>, is also to the same effect. Therein amendments to the written statements were allowed by the trial court some years after the original written statements were filed and the plaintiff withdrew the costs that were awarded as a condition precedent for the amendments. It was ruled that "the plaintiffs cannot now raise any objection against the amendments as they accepted the cost allowed by the Court in that respect." In support of their view, their Lordships of the Patna High Court relied on the decision of the same High Court in *M. Kapura Kuer v. Narain Singh*<sup>68</sup>, wherein it was held that the party having accepted the amount of costs awarded to her as a condition precedent to the restoration of an application under Order 9 Rule 13 Civil Procedure Code was estopped from challenging the validity or propriety of that order. The amount of costs awarded is not material. It is the awarding of costs which were accepted or deemed to have been accepted by the party to whom they were awarded that is material when once the conditional order was allowed to become final or the costs awarded have been accepted by the party to whom they have been awarded or by his counsel, it must be deemed that the order allowing the

amendment was accepted to be within the jurisdiction of the Court.

41. We may add that the respondent cannot succeed unless it is established that the defendant was fully conscious from the beginning of the fact that a valid quit notice as contemplated by Section 106 of the Act was necessary in spite of the stipulation in the original agreement with regard to the dispensation of such notice. From the facts of the case, it admits of no doubt that the law on the subject is not settled. The defendant might have been under a wrong impression that no such notice was needed. In any event we are inclined to agree with Mr. N. Bapiraju that the defendant and its counsel might, in all probability, have thought it doubtful whether such notice was necessary. However, on a close reading of the facts and circumstances, we are of opinion that there was no intentional or conscious omission on the part of the defendant to raise the point to the validity of the quit notice in the original written statement or to reply to Ex. A-1.

42. We shall now turn to the decision relied upon by Mr. Ramachandra Rao in support of his plea that the defendant has waived the requirement of a valid notice under Section 106 of the Act. The decisions in *Komaraswami v. Venkataramana Rao*<sup>69</sup>, and *State v. Muniyappa*<sup>70</sup>, relied upon by him are distinguishable on facts. In Komaraswami's case, the question that fell for consideration was whether an Election Commissioner appointed to enquire into an election petition to set aside an election to a District Municipality, has jurisdiction to amend the petition by adding another ground after the time for presenting the election petition has elapsed. The learned Judge, Rajagopalan J. took the view that the Election Commissioner is not competent to order the amendment. On appeal, the Bench agreed with the learned Judge and dismissed the writ appeal holding that it was not necessary to add altogether a new ground attacking the validity of the election. The objection raised by the appellant's counsel that the respondents were precluded from disputing the correctness of the order of amendment on the ground that costs ordered by the Election Commissioner had been withdrawn, was rejected on the ground that it was not a conditional order as in the case of

<sup>67</sup> AIR 1964 Pat 275 at 277

<sup>69</sup> AIR 1956 Mad 105

<sup>68</sup> AIR 1949 Pat 491

<sup>70</sup> AIR 1956 Mad 679

*Prayag Dossjee v. Venkata Perumal*<sup>71</sup>, Even in the present case, the respondent could have preferred a revision against the order of the trial court amending the written statement if it so desired. The decision of Bahseer Ahmed Sayyad, J. in *State v. Muniyappa*<sup>72</sup>, is distinguishable on facts. Therein, the correctness of the very order of amendment was questioned in a revision petition. Hence, there is no merit in this submission of the respondent.

43. For all the reasons stated, we are unable to agree with the learned Single Judge, that prejudice has been caused on account of the delay in raising the plea in the written statement and, in the circumstances the appellant must be deemed to have waived its rights to take this plea and we set aside that finding. Question No. 2 is answered in the negative and in favor of the appellant.

44. This brings us to examine whether the defective notice can be considered to have become valid by efflux of time. We are unable to agree with the respondent that as 6 months' time contemplated by Section 106 of the Act had elapsed several years ago and the defendant had sufficient opportunity to find alternative accommodation and vacate the suit premises the appellant may be ordered to vacate the premises in this appeal itself without driving the respondent to a fresh suit for that purpose. The defendant-lessee has a statutory right to have a valid and proper six months' notice. Unless and until such notice is served on it terminating the

tenancy created under Section 116 of the Act, the relationship of landlord and tenant continues and thereby the tenant is entitled to remain in possession until the statutory tenancy is determined in accordance with law.

45. In the result, the appeal is allowed with costs throughout.

Appeal allowed.

<sup>71</sup> AIR 1933 Mad 410

<sup>72</sup> AIR 1956 Mad 679