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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 39 of 1980

Between:

BA MEAT COMPANY

Appellant

and

KHAIRUL NISHA & OTHERS

Respondents

Vijay Chand for the Appellant
H.C. Sharma for the Respondents

Date of Hearing: 11th March, 1981

Delivery of Judgment: April, 1981

JUDGMENT OF THE COURT

Marsack J.A.

This is an appeal against the judgment of the Supreme Court sitting at Lautoka delivered on the 16th May, 1980 ordering that the appellant give up possession to the respondents of certain premises occupied by the appellant in Ba.

The premises in question, which are occupied as a butcher shop, were originally leased to the appellant for a term of three years from 1.10.72 at a rental of \$120 per month. The original lessor died on 1.12.73; and probate was granted to the respondents as executors on the 23rd May, 1977. After termination of the lease appellant remained in possession at the same rental of \$120 per month.

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On 29th January, 1980 respondents served on the appellant a notice to quit on or before 1st March, 1980. The appellant did not comply with the notice but has remained in possession up to the present time.

The learned Trial Judge determined the case on affidavit evidence, holding that, in the absence of express agreement, the fixing of the rent on a monthly basis created a monthly tenancy.

The grounds of appeal argued before us were under two main headings :

- (a) that the learned Judge erred in holding that the appellant was not an annual tenant but a monthly tenant;
- (b) that the learned Judge erred in not ordering a formal trial with oral evidence because of conflict in the affidavits filed.

Under (a) the appellant relies on a statement in an affidavit of Ahmad Khan, one of the partners in the appellant company, to the effect that deceased had agreed with him that the company could occupy the premises after the expiration of the lease as an annual tenant. The learned Trial Judge held that this alleged agreement was void for uncertainty. As to that, the evidence in our opinion is totally insufficient to set up a binding contract creating an annual tenancy for an indefinite term.

The learned Trial Judge goes on to hold, on the authority of a number of decisions cited in his judgment, that the agreed fact that the rental is expressed as \$120 per month, establishes that the tenancy in question must be a monthly tenancy. In this respect we agree with the learned Judge; and the notice

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given was therefore effective in terminating the tenancy.

As to (b), nothing in the argument presented to us has satisfied us that the learned Judge would have been in a better position to find the facts if he had insisted on the production of oral evidence. Such evidence could not, for example, have gone any further to establish the setting up of a yearly tenancy, the only basis for which was the alleged conversation with the deceased before his death.

Accordingly we can find no merit in this appeal which is dismissed. Appellant will pay respondents' costs to be fixed by the Registrar if not agreed upon.

Jack Kowalski

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Judge of Appeal

J. Henry

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Judge of Appeal

R. J. S. Jones

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Judge of Appeal