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IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 39 OF 1982

Between:

OM CHAND

APPELLANT

-and-

WING LEE LIMITED

RESPONDENT

K. Chauhan for the appellant.

J.G. Singh with B.K. Bali for  
the respondent.

Date of Hearing: 23rd November, 1982.

Delivery of Judgment: *Both November, 1982.*

JUDGMENT OF THE COURT

Spring, J.A.

This is an appeal from an Order of the Supreme Court of Fiji at Suva on the 22nd day of June, 1982, directing the appellant to give up vacant possession of the premises occupied by him as tenant of the respondent at Forster Street, Walu Bay, Suva. The facts may be briefly stated. The respondent issued a notice to quit dated the 23rd December, 1981, in the following terms :

" 23rd December, 1981.

Mr Om Chand  
Forster Street  
Walu Bay  
S U V A

Dear Sir

Re - Wing Lee Limited

We act for our abovenamed client which has instructed us to give you one calendar month's notice, as we hereby do, commencing on the 1st day of January, 1982 and ending on the 31st day of January, 1982 to quit and deliver vacant possession of the premises that you are occupying and which is situate at Forster Street, Walu Bay, Suva, on the grounds that you have failed to pay rent for the months of September, October, November and December, 1981 and also our client requires the said premises for its own use and occupation.

TAKE NOTICE that if you fail to vacate the said premises within the time herein specified, our instructions are to institute Court proceedings without any further notice or warning.

Yours truly  
Sherani & Co.

Per:  
(sgd) Hemandra Nagin".

Appellant disregarded the notice to quit; proceedings were issued out of the Supreme Court under the summary procedure provisions contained in section 169 of the Land Transfer Act 1971 seeking an order for possession.

On 17th February, 1982, respondent filed an affidavit in support of the summons giving the facts relied upon; although the affidavit included a statement

that the above notice to quit had been served on the appellant it did not specify the date of the alleged service, or prove it at first hand. It did, however, contain the following statement as to arrears of rent :

"THAT the defendant has failed to pay rent to the plaintiff for the months of September, October, November, December of 1981 and January and February of 1982."

No affidavit was ever furnished by the appellant.

Defendant first appeared in person and sought an adjournment so that he could consult his solicitor Mr. Chauhan. At a later Court hearing Mr. H.M. Patel appeared for Mr. Chauhan and informed the Court that he was in possession of Messrs. Chauhan & Co.'s Trust Account cheque for \$1260 for arrears of rent owing up till end of May 1982; no payment however was made either, to the Court or, to the respondent. On the 25th May, 1982, Mr. Bali, counsel for the respondent, advised that his instructor were to seek an order for possession and although Mr. Chauhan advised that he had a cheque available for rent arrears no payment was forthcoming. The hearing was resumed on 8th June, 1982, when Mr. Chauhan challenged the validity of the notice to quit upon the grounds that such notice was conditional upon the arrears of rent not being paid.

On 22nd June, 1982, the parties appeared, represented by counsel, and the learned judge after considering the matter made an order for possession and said:

" I have to assume that the tenancy was a monthly one which could be terminated by one month's written notice. Since the premises are commercial premises, the tenancy could be terminated by one month's written notice and no reasons need be given for terminating it. Section 89 of the Property Law Act provides for termination of tenancies and on the evidence before me the defendant's tenancy was duly and properly terminated.

There is no substance in Mr. Chauhan's submissions about the invalidity of the plaintiff's notice.

The defendant has not shown cause why an order should not be made against him.

It is ordered that the defendant vacate and deliver up possession of the said premises to the plaintiff company forthwith."

In his appeal to this Court the appellant relies on three grounds of appeal which are :

- "1. THAT the learned trial judge erred in law in misconstruing the proviso contained in section 172 of the Land Transfer Act, Cap. 131, for the dismissal of an action on tender of all arrears of rent and costs.
2. THAT the learned trial judge erred in law in not holding that the alleged notice to quit was void in law in that it was conditional upon fulfilment of payment of arrears of rent.
3. THAT the learned trial judge erred in law in holding that the tenancy was lawfully terminated when there was no evidence of proof of service of the notice to quit on the appellant/defendant, it being essential to the jurisdiction of the Court before the making of an Order for vacant possession."

Ground 3 was a point taken for the first time in this Court.

At the hearing of this appeal, Mr. Chauhan conceded that appellant was still in possession of the premises and that no rent had either been paid by appellant or received by the respondent since the commencement of proceedings.

Section 169 of the Land Transfer Act provides :

"169. The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant :-

- (a) the last registered proprietor of the land;
- (b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;
- (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."

The word "month" stated in section 169(b) means calendar month (see section 2 Interpretation Act (Cap.7)).

Section 172 of the Land Transfer Act provides :

"172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons."

In support of his grounds of appeal Mr. Chauhan addressed various submissions to this Court. It was clear that at the date when the order for possession was made in the Supreme Court on 22nd June, 1982, at least six months rent was owing by appellant. Section 169(b) of the Land Transfer Act provides (inter alia) that where the tenant is in arrears for one month and whether or not any previous demand has been made for the rent he may be summoned before a judge in chambers to show cause why he should not give up possession to the landlord. To bring section 169(b) of the Land Transfer Act into operation there is no necessity for a landlord to give a formal notice to quit determining the tenancy; nor as we have said is any previous demand for arrears of rent required.

Mr. Bali acknowledged that respondent had not received the arrears of rent outstanding and deposed to in the respondent's affidavit. Further it was common ground that prior to the hearing of the summons in the Supreme Court no payment or tender of the arrears of rent due, together with costs incurred by respondent had been made which would have activated the proviso to section 172 of the Land Transfer Act (supra) and ensured the dismissal of the summons.

The learned judge in his judgment dealing with the arrears of rent said :

"In the instant case there was no payment or tender of rent due so that the defendant cannot call in aid the proviso to section 172 of the Act."

Mr. Chauhan in arguing grounds 1 and 2 of his appeal claimed that the notice to quit was conditional and bad in law as it would only take effect if the arrears of rent were not paid; he referred to and discussed at length section 169(b) of the Land Transfer Act (supra).

It is clear that if the lessor sought an order for possession of premises based upon section 169(b) it was necessary for him to prove that the tenant was in arrears for one month with the payment of his rent, whether or not any previous demand had been made therefor. Then if the tenant failed before the hearing of the summons to pay or tender all rent due and all costs incurred by the lessor and was unable to show any other cause why he should not vacate the premises, an order for possession could be made under the summary procedures of the Act without the necessity of any notice to quit being given.

In the course of his argument Mr. Chauhan acknowledged that the tenancy (as found by the Supreme Court) was a monthly tenancy. He conceded that at the date of the order for possession made by the Supreme Court no payment or tender of the arrears or rent (which were not less than six months) had been paid or tendered in accordance with the provisions of the proviso to section 172. Irrespective of the question as to the validity of the notice to quit it is manifestly clear that at the date that the order for possession was made the appellant was more than one month

in arrears with his rent and, further, he was unable to call in aid the second proviso to section 172 of the Land Transfer Act (supra). This matter was brought forcibly to the notice of this Court by Mr. Chouhan's argument and in our view we are bound to take cognizance thereof. Admittedly, the point was not taken on this appeal by the respondent who, had he done so, would have required the support of a respondent's notice.

The matter of the non payment of rent by the appellant was clearly shown by the respondent's affidavit and in our view necessarily arose at the hearing before the Supreme Court; the point was certainly canvassed at length in the lower court.

We are satisfied therefore, that as a matter of common sense, the order for possession should be allowed to stand although admittedly on different grounds.

We are fortified in this view as we have been told from the Bar, that the appellant is still in possession of the premises, and, that no rent is being paid. The point was brought to our notice by counsel for appellant and we consider that technical rules of procedure should not be permitted to interfere with the justice of the matter.

In Mauray v. Durley Chine (Investments) Limited [1953] 2 Q.B. 433 Jenkins L.J. at p. 448 in discussing the Rent Acts made a statement which is apposite; he said :

"In other words, the Act, which was designed to prevent the exploitation of tenants by landlords, may in such cases be made an engine for the exploitation of landlords by tenants."



Accordingly, for the reasons we have given, it is unnecessary for us to deal with the other grounds of appeal as we are convinced that the order for possession should be upheld.

The appeal is dismissed accordingly and the order made in the Supreme Court remains extant. Appellant is to pay respondent's costs, to be fixed by the Chief Registrar, if not agreed.

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Vice President

*Chackarsack*

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Judge of Appeal

*[Handwritten signature]*

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Judge of Appeal