IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction
Civil Appeal No. 39 of 1984

Between : ALI HASSAN s/o Abdul Razak

Appellant

- and -

ROBIN-ANN RIEMENSCHNEIDER THOMS
AND R. BHINDI BROS.

Respondents

Mr. Ramesh Chandra for the Appellant
Mr. D.C. Maharaj for the Respondents

Date of Hearing : 16th July, 1984

Delivery of Judgment : 26th July, 1984

JUDGMENT OF THE COURT

Speight, V.P.

This is an appeal from a chambers order made by Kermode J. on the 5th June, 1984, when on a motion by the plaintiffs (now Respondents) he made an order, pursuant to section 169 of the Land Transfer Act (Cap 130) that the above named appellant give up possession of certain commercial land, namely a taxi stand, to the second named respondents.

The Respondents had commenced proceedings under the above section calling upon the applicant to show cause why possession should not be given.

The facts (previously challenged but now not disputed) were that the First Respondent had been the registered proprietor of a certain piece of land in Princes Street, Suva,

which had been let, as to part, to the appellant. In November 1983 the First Respondent sold the same to the Second Respondent, and on 28th November, 1983 her solicitors advised the appellant of this fact and said that henceforth rents should be paid to the Second Respondent.

On 24th January, 1984 the Second Respondent's solicitors gave a Notice to Quit to the appellant in the following terms :-

"

24 January, 1984

The Manager,
Ali Hassan Taxis,
Nina St.,
SUVA.

Dear Sir,

re : R.A. Riemenschneider Thoms
R. Bhindi Brothers Limited

On behalf of K. Bhindi Brothers Limited, the purchaser of the Nina Street property on which you currently have a taxi stand tenancy we hereby notify you that your tenancy is terminated as from 29th February, 1984. Please ensure that you have vacated the premises by that date.

Yours faithfully,
MUNRO, LEYS & CO.

The rent payable under the continuing tenancy was $175 monthly in advance.

As at the date of the Notice to Quit rent had not been paid to the new landlord, for the months of December 1983 and January 1984.

However, this was tendered to the Second Respondents solicitors on or about the 31st of January, and receipts were written, on the solicitors receipt forms for $175 for each month (the previous rental rate) and each was marked:-

"Without prejudice. Rent for December 1983 (January 1984)."

However, the receipts do not stand alone. They were apparently given or forwarded to the appellant's solicitors with a letter from Second Respondents' solicitors which read:-

" 17 February, 1984

Messrs Ramesh Chandra & Co.,
Solicitors,
41 Waimanu Road,
SUVA.

Dear Sirs,

re : K. Bhindi Bros. Ltd & Sanyo Cabs

We enclose our 'without prejudice' trust account receipt for rental paid by you on behalf of Sanyo Cabs.

These receipts are issued without prejudice to K. Bhindi Bros. Ltd's rights to increase the rentals payable by the tenants.

Yours faithfully,
MUNRO, LEYS & CO. "

We find the reference "without prejudice to Bhindi Brothers Ltd's rights to increase the rental payable by the tenants" perplexing.

Notice had been given terminating the tenancy at 29th February, 1984. It is not disputed by Mr. Chandra for the appellant that his client, the appellant was obliged to pay rent to the 29th February and no "without prejudice" endorsement was required at that date. (17th February). That point is concluded by the judgment of this Court in V.N. Rao v. Henry E. Sanday Civil Appeal 19/1977. It was said at page 2:-

" Any payment of rent which accrues due during the currency of a tenancy is merely the performance and acceptance of performance of an existing obligation.

> Such an act has no legal significance in relation to the continuance of the tenancy unless it is voidable under a right of forfeiture for breach of its terms. In that event such a payment may amount to a waiver of the right of forfeiture. No such question arises in respect of rent whilst the term continues and no right of forfeiture has arisen - the payment and acceptance of rent is a normal event happening according to the provisions of the tenancy during its agreed term. "

However, it is a prudent practice, often followed, to so mark receipts during a period when a notice is running to prevent such an argument being raised.

Under the Counter Inflation Act (Cap 73), the Respondents could not have increased the current rental without the approval of the Prices and Incomes Board, so the reference to the Respondents' "right to increase" was at the very least an overstatement.

Some light on this is however shed by an answering affidavit from the appellant. On 21st May, 1984 he deposed (para. 8) :

> " I deny the contents of paras. 10, 11, 12 and 13 of the (First Respondent's affidavit" - these paras. had primarily alleged that because of the notice to quit, the appellant had no right to remain after 29th February, 1984.

The affidavit then went on to say (still in para. 8) :

> " ...the director of K. Bhindi Bros. Ltd. wanted an increase in rental which amount was not acceptable to me."

We will return shortly to the possible meanings to be attached to this claim.

But to complete the narrative - on 1st March, 1984 someone (and it may have been the appellant) - paid into the Second Respondent's solicitors' office a further $175. and a receipt was issued again marked "without prejudice - rent for March 1984".

The same day the Respondent's solicitors wrote to appellant's solicitors as follows:-

" 1st March, 1984

Messrs Ramesh Chandra & Co.,
Solicitors,
SUVA.

Dear Sirs,

re : Sanyo Cabs

Further to our telephone discussion we discovered that our accounts clerk accepted in error your cheque this morning for $175 on behalf of Sanyo Cabs for March rent when it was tendered at the counter.

Your client was well aware that his tenancy was terminated as at 29th February 1984 and accordingly your cheque is returned. Please return the receipt. Our instructions from K. Bhindi Bros. Limited are not to accept any rental for the month of March. Please instruct your client to hand over the keys for the premises to Mr. Bhindi.

Yours faithfully,
MUNRO, LEYS & CO. "

Now we trust we do the appellant's case no disservice when we say that in the Supreme Court attention seems to have been concentrated upon the legal effect, if any, of this apparent receipt of March rent, and its affect on the Notice to Quit.

The learned Judge held, and in our view correctly, that receipt of rental, accepted in mistake, does not create a new tenancy, or waive the termination of the old tenancy unless

that is shown to have been the intention of the parties. There is abundant authority for this proposition.

The common law position is so stated in Halsbury (4th Edition) Vol. 27 Para. 199 - with many supporting authorities, including, just to take one example, a passage from the judgment of Lord Goddard, C.J. in Clarke v. Grant (1950) 1KB 104 at 105 :

> " Therefore, when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. A new tenancy must be created. That has been the law ever since it was laid down by the Court of King's Bench, presided over by Lord Mansfield, in Doe d. Cheny v. Batten (1). I need not read the judgments in extenso, but Lord Mansfield said (2) : "the question therefore is, quo animo the rent was received, and what the real intention of both parties was". "

The position is even clearer in Fiji where the matter is given statutory authority in section 100(2) of the Property Law Act :-

> "100.-(2) After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy. "

In Rao v. Sanday (supra) this Court held that the words "rent accepted" referred to rent payable in respect of a period after the expiry of the Notice to Quit.

The 1st March receipt was so marked as without prejudice and the learned trial Judge relied on that case when giving judgment for the Second Respondent.

Now in this Court Mr. Chandra has stressed a different aspect of the facts, giving rise, so he submits, to a conclusion that by the letter of 17th February (supra) the landlord had abandoned the termination notice and had evidenced an intention to "revive" the previous tenancy. In so doing he relies on the wording of that letter, and not on the receipt of 1st March. Mr. Chandra claims that this argument was ventilated at trial. Mr. Maharaj does not so concede. As the point only emerged clearly after submissions on appeal had commenced, there has been no opportunity to confirm this, but it is so distinctly separate an argument from that based on the March receipt that it is surprising that the learned trial Judge did not refer to it in his judgment.

However that may be, in our opinion it cannot avail the appellant. The crucial test in these cases of further dealings between landlord and tenant, after notice to quit is :

> " Has any fresh agreement been reached by the parties?"

Mr. Chandra submits that the letter of 17th February shows that the Respondent had abandoned his wish to evict the appellant, was confirming him in his existing tenancy and was proposing to attempt to increase the rent. The affidavit of the appellant however does not bear that out. On the contrary it suggests that he had refused to pay the increased rent the landlord was asking. From common experience of such negotiations the most likely explanation is that the landlord may well have been minded to give a new tenancy if a new rental was paid but the tenant declined.

Mr. Chandra's hypothesis, that the landlord had changed his mind, and was continuing the tenancy with the hope of getting an increased rent, is incompatible with the view conveyed in the letter of 1st March. The more likely explanation of the letter of 17th February, and of paragraph 8 of the

appellant's affidavit (already recited) is that negotiations for a renewal, given an increase in rent, had collapsed, so that the notice to quit remained valid and enforceable in the way that the Judge held. In any event the onus of proving that the parties had agreed on a new tenancy, or on the continuation or restoration of the old one, was on the appellant - just as in the case of the tenant who contends for the evidential value of rent received.

That onus has not been discharged. In our view the Judge was right, and for the reasons he gave. The appeal is dismissed with costs.

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Vice-President

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Judge of Appeal

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Judge of Appeal