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IN THE FIJI COURT OF APPEAL
Civil Appeal No. 23 of 1986

Between:

MUTHUSAMI Appellant
s/o Ram Swamy

and

NAUSORI TOWN COUNCIL Respondent

Mr. R. Patel for the Appellant
Mr. R. Chand for the Respondent

Date of Hearing: 1st July, 1986

Delivery of Judgment: 4-7-86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from an order of Rooney J. giving immediate vacant possession to the respondent of a market kiosk operated by the appellant under an agreement dated 1.12.83 which gave him a two year lease.

Among the conditions of the agreement were :-

"6. PROVIDED the Sub-Lessor does not then require the said premises for its own use the Sub-Lessor will upon the written notice of the Sub-Lessee made not less than 3 (three) calendar months prior to the expiration of the said term and

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PROVIDED that there shall not at the time of such request be any existing breach or non-observance of the terms conditions and covenants herein contained on the part of the Sub-Lessee a renewal of the said Lease for a further period of 2 (two) years from the expiration of the term hereby created at a rental to be mutually agreed upon or failing agreement to be determined by Arbitration according to the provisions of the Arbitration Ordinance and subject to the same covenants and conditions as are herein contained except for this option to renew clause.

7. It is hereby expressly agreed and declared between the Sub-Lessor and Sub-Lessee that the sum of \$2405-00 (TWO THOUSAND FOUR HUNDRED AND FIVE DOLLARS) presently due and owing being for arrears of rent under the previous tenancy shall be paid to the Sub-Lessor by way of regular monthly instalments of \$165.00 (ONE HUNDRED AND SIXTY FIVE DOLLARS) and the first of such payment shall be from the 1st day of September, 1983 and thereafterwards as the end of each and every month and in case of default of any such payment the whole balance amount then due and owing shall fall due for payment immediately.
8. It is hereby expressly agreed and declared between the Sub-Lessor and the Sub-Lessee and in case of default is made on any monthly instalment payment of \$165.00 (ONE HUNDRED AND SIXTY FIVE DOLLARS) the Sub-Lessor may re-enter upon the demised premises or any part thereof in the name of the whole and take possession of the demised premises and thereupon this Agreement shall determine but without prejudice to any rights or powers of the Sub-Lessor hereunder in respect of any rent or other moneys due to the Sub-Lessor. "

By a letter dated 9th August, 1985 the respondent advised the appellant that he was in breach of several conditions of the Agreement including conditions 7 and 8, that the rent in arrears must be paid in full by 15th August, 1985 and that the kiosk was to be put out to tender at the expiration of the lease. Tenders were invited by advertisement in the Fiji Times on 14th and 18th September 1985 and among those who put in tenders in response to the advertisement was the appellant himself. His was not successful and on 30th December, 1985 he instituted proceedings in the Supreme Court seeking a declaration that he was by virtue of clause 6 of the agreement, entitled to a new two-year lease of the kiosk. To this claim a defence was filed by the respondent.

On 20th February, 1986 the respondent took out a summons under section 169 of the Land Transfer Act to seek an order for possession. The appellant's counsel resisted the application on the grounds that proceedings relating to the kiosk were already pending before the Supreme Court and that the case involved a dispute which could only be resolved properly by evidence in open court.

The learned Judge decided, quite correctly in our view, that mere institution of proceedings by writ did not by itself shut out a claim under section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would make the granting of an order under section 169 procedure improper.

There was before the learned Judge evidence that the appellant had rarely paid his rent promptly but, the lease having expired, that was no longer a crucial matter.

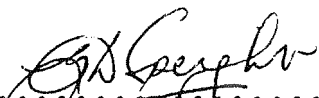
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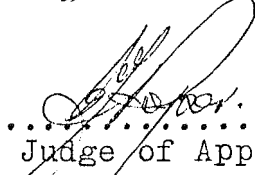
His right to a new lease depended entirely on the option granted to him under the agreement which had to be exercised by written notice before the end of August, 1985. Had he exercised it? If he had and the respondent was denying him his right under the option clause, there would certainly be a serious matter in dispute. But the appellant had first to show that he had done what he was required by the agreement to do. There was nothing before the learned Judge to show that. Instead, there was evidence to show that he was content to take his chance with others when the call for tenders came in September 1985.

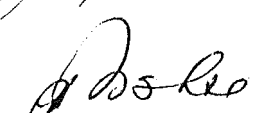
The learned Judge was, therefore, correct in holding that the appellant had failed to show cause why the order sought by the respondent should not be made.

The order made by the court below was for the appellant to give possession forthwith. He now asks, should his appeal fail, for time to remove his things, a request which has not been opposed by the respondent's counsel. We, therefore, vary the order and allow him 14 days from the date of this judgment to give vacant possession.

Apart from that, the appeal is dismissed with costs to be taxed in default of agreement.


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Vice President


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Judge of Appeal


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Judge of Appeal