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IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO. 41 OF 1987

Between:

1. JAYANTI LAL
2. VALLABH BHAI & CO. LTD

Appellants

- and -

MORRIS HEDSTROM LIMITED

Respondent

Mr. H. K. Nagin for the Appellants
Mr. F. G. Keil for the Respondent

Date of Hearing: 12th May, 1988

Delivery of Judgment: 1st July, 1988

JUDGMENT OF THE COURT

The appellants appeal against the order of Mr. Justice Sheehan, made pursuant to the provisions of section 169 of the Land Transfer Act, that they vacate premises situate on land at Nausori owned by the Respondent.

The appellants argued four grounds of appeal as under:

"1. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellants were the proper defendants at the trial.

2. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellants were given valid notices to quit.

3. THAT the Learned Trial Judge erred in law and in fact in not holding that the only valid notice given was the notice dated 14th April, 1983 and this notice was subsequently waived.

4. THAT the Learned Trial Judge erred in law and in fact in not holding that the Appellants had shown cause why an Order for vacant possession should not be made".

The grounds on which the respondent sought possession of the premises were that both appellants were trespassers. They had been asked to vacate and had not done so.

The affidavit in support sworn by Mr. J. S. Singh, the respondent's Chief Property Manager, alleges the "defendant (sic) were "successors to Maganbhai who had occupied part of the plaintiffs property pursuant to a lease..." and in the same paragraph described them as trespassers. Annexed to the affidavit was the leasing agreement dated 20th January 1975 and some 20 letters which had passed between the said Maganbhai, the first appellant and the respondent. The annexures resulted in the grounds on which the respondent sought possession receiving little attention by the parties and by the learned Judge himself.

We will refer to this aspect of the section 169 application later in our judgment.

Under section 172 of the Land Transfer Act the appellants appeared on the date of the hearing of the summons to show cause why an order for possession should not be made against them.

Prior to that hearing the first appellant had sworn a lengthy affidavit on behalf of both appellants in reply to Mr. J. S. Singh's affidavit. They relied on that affidavit as showing cause why an order for possession should not be made against them.

The main ground on which the appellants resisted the order for possession appears in paragraph 5(ii) of

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Mr. Lal's affidavit where he states:-

> (ii) That part of the said premises is presently lawfully occupied by RAMIBEN (father's name Naran) of 17 Dunstan Street, Nausori in Fiji, Domestic Duties and myself as the Executors and Trustees of MAGANBHAI (father's name Jerambhai) late of Nausori in Fiji, Storekeeper, deceased".

Mr. Lal does not disclose what part of the premises were occupied by Ramiben and himself.

As regards the allegation that the appellants are trespassers, Mr.Lal does not mention this allegation. There is no denial or admission that he is a trespasser. Instead he traces the history of Maganbhai's occupation of the premises under the leasing agent. He makes a number of allegations that after the lease expired Maganbhai continued as a tenant holding over, that the respondent accepted rent after giving notice to quit, that notices were defective for a number of reasons which we need not consider.

None of those statements would be of any relevance if the appellants were trespassers in possession without any legal right to be there.

We gave Mr. Nagin an opportunity of considering whether he could rely on the arguments raised in the Court below and in this court to the respondent's contention that the appellants were trespassers. A limited liability company can be deemed to physically occupy premises through its managing director or manager. If the appellants were trespassers Mr. Lal could be in occupation in two capacities, in propria persona and on behalf of the Company.

We have briefly set out the nature of the respondent's action and the appellants' answer.

We now come to consider the first ground of appeal which we repeat for easy reference.

> "1. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellants were the proper defendants at the trial".

Mr. Nagin when arguing this ground referred to Maganbhai's tenancy agreement. It was for a term of 5 years from the 17th January, 1975. When the lease expired on 16 January 1980 Maganbhai continued in occupation of the premises. He died on 12 September 1983 testate and by his will appointed his wife and his son, the first appellant his joint executrix and executor.

The tenancy vested in Maganbhai's representatives on his death. Mr. Nagin is correct in stating that a valid notice to quit is required to terminate that tenancy if it still subsisted at the time the notice was given. Mr. Nagin further argued that eviction proceedings should have been brought against the executors. We do not propose to consider the facts and legal arguments regarding the tenancy and the termination thereof for reasons which will appear later.

The issue on the first ground is whether Mr. Lal's occupation, which he did not deny, was in his capacity as an executor of Maganbhai's Estate or whether he was there in his personal and/or representative capacity as managing director of the second appellant company and if it was the latter whether he was lawfully in occupation.

After his tenancy expired on 16th January, 1980, Maganbhai was able to persuade the respondent company to give him time to vacate. He was able to stave off action to evict him by promises to vacate which he did not honour and was still in occupation of the premises when he died on the 12th September, 1983.

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On the 28th September, 1983 Mr. Lal wrote to the respondent Company's Property Manager in the following terms:-

> " As I have not received a reply to my letter to you of 12th April, 1983 where I applied for an extension of my tenancy, I wish to again write and seek your kind consideration for the same. I also wish to inform you that my father who was Manager of Vallabhai and Company, Mr. Maganbhai Jairam had died on 12th September, 1983.
>
> I therefore would be grateful if you would amend your record to show that I, JAYANTI LAL be the Manager of the Company.
>
> I hope I have not inconvenienced you but I do trust that my request for extension and amendment of records would be accommodated.
>
> I thank you most sincerely."

It will be noted that Mr. Lal did not inform the Company that he and his mother were executors of his father's estate and request that that fact be recorded.

His request to amend the record to show he was manager would appear to be notification that he had taken over and was to be treated as the tenant. That view is strengthened by his request for an extension of what he termed "my tenancy".

The next letter on the record is dated 24 June 1986 and refers back to a letter the respondent wrote on 14 April 1983 addressed to Maganbhai, Trading as Vallabh Bhai & Company, terminating his tenancy. The letter of 24th June 1986 is in the following terms:-

> "TERMINATION OF TENANCY
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> We refer to previous correspondence in this matter resting with our letter of 14th April, 1983.

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We confirm that we require you to vacate and give possession of our property immediately and by no later than 31st July, 1986 as it is our intention to commence renovation of our old store premises by that date."

Mr. Lal on the 7th July, 1986 replied to this letter seeking further time to vacate. He signed that letter as Managing Director of the second appellant Company.

The letter of 24th June, 1983 was held by the learned Judge to be a valid notice to quit. He said in his judgment:-

" But more precisely even accepting the Defendant's contention that the tenancy continued after the formal notice to quit of the 14th April, 1983, because of the acceptance of rent to August of that year. Whatever the situation was between then and the 24th of June, 1986 when no rent was paid - offered or not; the letter of the 24th of June, 1986 is unequivocably a notice to quit and stipulates a month in which this is to be done. From that time onwards whatever the situation beforehand may have been, any tenancy monthly or otherwise was at an end".

The correspondence discloses that the second appellant was conducting business in the premises through Mr. Lal who purported to be the Managing Director. The company was incorporated to take over the family business of Vallabh Bhai & Co. Having requested the respondent company to change its records and the number of letters Mr. Lal wrote as Managing Director of the second appellant company. Mr. Lal cannot now be permitted to claim that he and his mother are and have always been in occupation in their representative capacity. His statement which is a self-serving one is not supported by any affidavit sworn by his mother.

The evidence is clear that Mr. Lal was in occupation of the premises either in propria persona or in that capacity and as managing director of the Company. That occupation was not with the approval of the respondent. The appellants have not established the first ground of appeal.

The next two grounds, which we repeat for easy reference can be considered together:-

> "2. THAT the Learned Trial Judge erred in law and in fact in holding that the Appellants were given valid notices to quit.
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> 3. THAT the Learned Trial Judge erred in law and in fact in not holding that the only valid notice given was the notice dated 14th April, 1983 and this notice was subsequently waived".

The appellant's objection to the form of notice rests on one word, the use of the word "immediately". They choose to ignore the words that immediately follow "and by no later than 3rd July 1986". On a proper consideration of the notice there can be no doubt that Mr. Lal understood that he did not have to vacate before the 31st July, 1986. This is borne out by his letter of 7th July, 1986 written as Managing Director of the second appellant Company seeking further time to vacate. He wrote again answering a letter from the Company dated 28th July, 1986 refusing extension of the time. His letter is dated 8th July 1986 which is clearly an error.

As regards the third ground Mr. Nagin towards the end of his argument raised a point he had not raised in the court below namely that there was no proof of service of the notice to quit. It is not clear what notice he was referring to. If it was the notice of 14th April 1983 then his argument would defeat ground 3 on which he relies.

If it referred to the notice of 24th June 1986 then we must consider the authority he quoted namely Abdul Aziz v. Manibhai Brijlal Kapadia and Anor. F.C.A. Civil Appeal No. 53 of 1978.

In that case this court held that failure to prove service of a notice to quit in proceedings under section 169 of the Land Transfer Act was fatal to the proceedings before the Supreme Court.

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That case, however, can be distinguished from the instant case in that the appellant in that case sought leave to argue an additional ground of appeal as follows:-

> "That the learned trial Judge erred in law in holding that the tenancy was terminated when there was no evidence of proof of service of the notice to quit which was essential to the jurisdiction of the Court".

The respondents in that case raised no objection. Mr. Nagin did not seek leave of this court to add a similar additional ground.

Notwithstanding this state of affairs examination of the correspondence annexed to Mr. Singh's affidavit indicates that the letter of the 24th July 1986 was received by Mr. Lal.

Section 129(1) of the Property Law Act provides as follows:-

> "129. - (1) In cases other than those to which the provisions of section 128 applies any notice required or authorized by this Act to be served on any person may be served on him by delivering the same to him personally or by posting it by registered letter addressed to that person -
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> (a) in the case of a company incorporated or registered under the provisions of the Companies Act in the manner in which notices are required to be served on Companies under the provisions of that Act; or
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> (b) in any other case at his last known place of abode or business in Fiji, and a notice so posted shall be deemed to have been served at the time when the registered letter would be delivered in the ordinary course of post."

The copy of the letter in the record indicates the letter was registered. In the normal course of post the letter would have been received by Messrs Vallabh Bhai

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& Company of which firm Mr. Lal was manager within 2 or 3 days and certainly before the end of June 1986.

We are satisfied that there was prima facie evidence of service by registered post on Mr. Lal of a proper notice to quit and deliver up possession of the premises.

The second and third grounds fail.

The fourth and last ground is to the effect that the appellants had shown cause and furthermore it was not a case for use of the summary procedure.

Mr. Nagin quoted as authority an appeal of this court DINESH JAMNADAS & ANOR. v. HONSON F.C.A. Civil Appeal No. 22 of 1985.

In that case there was a conflict of evidence and this court reached the conclusion that it was not an appropriate case to be dealt with under section 169 of the Land Transfer Act.

That is not the situation in the instant case. There is an abundance of written material and no need to resolve any conflict in open court.

The fourth ground fails.

There is only one further matter to consider. Mr. Nagin did not refer to the fact, which we brought to his notice, that the grounds on which the respondent sought possession of the premises were that the appellants were trespassers. Mr. Singh's affidavit referred to "the defendant" (sic) as "successors to Maganbhai" but his subsequent statements in his affidavit makes it clear that by the time the respondent took action they believed the appellants had no legal right to be on their property and were therefor trespassers.

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We can appreciate Mr. Keil's dilemma. Over the years since the tenancy expired the respondent lost sight of earlier correspondence. They sent one letter to Maganbhai long after he had died which was answered by Mr. Lal who did not remind the company that his father was dead.

Mr. Nagin admitted that the Company could terminate the tenancy at any time by one month's notice. The actions of Mr. Lal, who followed in his father's footsteps indicates a failure to appreciate and respond to the generous indulgence of the respondent company which enabled him and his father to remain on the premises for over 8 years the last 5 years without payment of any rent. They repeatedly asked for extension of time implying that if time was granted they would vacate. We have no doubt that if Mr. Keil had to give another notice he would be met with further technical defenses. If notices were now given to Mr. Lal and his mother as Executors to vacate Mr. Lal would no doubt then argue that his company was the tenant and delay eviction.

The appellants in our view failed to establish that they were lawfully in possession of the premises when summonsed to show cause.

The appeal is dismissed with costs to the respondent.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal