A

SHAMBU PRASAD

v.

B

GURNAM SINGH AND ANOTHER

[SUPREME COURT, 1967 (Mills-Owens C.J.), 12th December 1966, 8th, 27th February 1967]

Civil Jurisdiction

C *Landlord and tenant—power of re-entry—necessity for demand for rent—common law demand—whether power of re-entry can be conferred orally—Common Law Procedure Act 1860 (23 & 24 Vict., c.126) (Imperial).*

Landlord and tenant—damages—forcible entry—high-handed action—aggravated but not exemplary damages.

Unless a power of re-entry is expressly made exercisable whether or not the rent is lawfully demanded, its exercise must be preceded by a D common law demand for the rent, unless the requirements of the Common Law Procedure Acts are complied with.

Semble: An oral proviso for re-entry is not a legal possibility.

Where a landlord forcibly re-entered upon premises after delivery of an invalid notice to quit, the tenant was held entitled to aggravated, but not E punitive or exemplary damages, on the basis that the tenant had been done a grievous wrong by a high-handed action, but without intention by the landlord to act in contumelious disregard of the tenant's rights.

Case referred to: *Rookes v. Barnard* [1964] A.C.1129; [1964] 1 All E.R.367.

F Action for damages for forcible eviction of a tenant.

R. L. Regan for the plaintiff.

R. I. Kapadia for the defendants.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J. [27th February 1967]—

G The plaintiff was a monthly tenant of the defendants of a small shop where he carried on a tailoring business. He became ill and spent several months in hospital. As at February 1966 he was in arrear with his rent, which was £5 per month, to the extent of £65. The tenancy was an oral one.

On the 7th February 1966 the defendants' then solicitor, Mr. McNally, H wrote to the plaintiff in terms which, it is agreed, did not amount in law to a notice to quit, although undoubtedly it was intended as such and to expire on the 28th of that month. The plaintiff thus remained a tenant when early in March 1966 the defendants, accompanied by Mr. McNally forcibly entered and re-took possession of the premises, in the plaintiff's

absence at hospital. Mr McNally made what he said in evidence was a complete inventory of the plaintiff's goods then being in the premises, and the inventory was produced in evidence. The plaintiff was not notified or invited to attend, or given the opportunity of checking the inventory, when the premises were forcibly entered. The defendants took possession of the goods and have remained in possession of them ever since. During the hearing one of the defendants produced in evidence what he says are the goods seized at the shop, mainly consisting of a sewing-machine and bolts of cloth. Inevitably there is a conflict as to whether the goods produced are complete. Mr. McNally can only rely upon his inventory; he has no detailed recollection of what was at the premises. The plaintiff says there were two motors, an electric iron and a button-hole machine which were not included in the inventory, the motors and button-hole machine being in the nature of attachments for the sewing-machine. He also says there was more cloth, but he can give no detail. The 2nd defendant supports Mr. McNally in saying that the inventory was complete. The plaintiff values the goods which he says were at the shop at some £390. The goods produced in evidence are obviously not worth anything like that figure. The plaintiff is unable to give specific detail, in particular of the yardage of the various cloths or of their nature, whether cotton, terylene or other material. The defence say the goods produced have been kept throughout in safe custody, in a locked store at premises occupied by the defendants.

The plaintiff claims, first, damages for trespass arising out of his forcible eviction from the shop. Regarding this claim the 2nd defendant says there was an express, oral, agreement for vacation of the shop by the plaintiff in the event of his getting into arrear with his rent. I regard this as highly unlikely and do not accept that there was any such agreement. In any event such an agreement would not justify a forcible re-entry. Even if an oral proviso for re-entry is a legal possibility (and I do not think it is because a right of re-entry is a proprietary interest, not a mere matter of contract) there must be a demand for the rent, and, subject to what is said below, it must be a common law demand unless the power of re-entry is expressly made exercisable whether or not the rent is lawfully demanded. In the absence of such an express provision there must be a common law demand which means that the landlord must attend at the demised premises, on the precise day that the rent accrues due, from sunrise to sunset. Alternatively, the Common Law Procedure Acts must be complied with, that is to say it must be shown not only that a half-year's rent was in arrear but that there was insufficient distress, which has not been attempted in this case. All this is very clear law; I need cite no specific authority, except to refer generally to *Woodfall on Landlord and Tenant* (26th Edn.) Vol. 1 para. 2051. Clearly the plaintiff has a claim for damages in trespass for his forcible eviction.

As to the goods, the plaintiff claims in detinue for the return of the goods or their value. He is, as I understand, willing to receive the goods produced in Court; but, of course, he wants damages also for what he says are missing articles. The defence raise the technical issue that there was no demand for the return of the goods before action brought. Even at this late stage they are therefore holding the goods adversely to the plaintiff, the rightful owner. Mr. Kapadia refers to 38 *Halsbury's Laws of England* (3rd Edn.) at paras. 1283 and 1294. Para. 1283 states that "the gist of the action is the unlawful failure to deliver up the goods when demanded"; para. 1294 is somewhat different — it states that "the

gist of the action in detinue is wrongful detention, and in order to establish that it is usual to prove demand and refusal after reasonable time to comply with the demand". As it appears to me, a demand and refusal are merely evidence of a wrongful detention. In the present case evidence of wrongful detention is to be found in the defendants' solicitor's letter of the 3rd March 1966, and the circumstances as a whole, from which it is clear that the defendants were taking the stand that they would hold on to the goods until their claim for rent was settled.

As to the claim in respect of the goods therefore the plaintiff is entitled to the return of the goods produced in Court. In the particular circumstances of the case there appears to be no strict necessity to make the usual order in a detinue action, namely for the return of the goods or £X their value, but for the sake of form the judgment will follow the usual course and for this purpose I will put the value of the goods in Court at £100. The plaintiff does not suggest that the goods produced have deteriorated. A judgment for the return of those goods, now in the custody of the Court, would therefore, at least pro tanto, be in satisfaction of the plaintiff's claim in respect of the goods which were in the premises at the time of the defendants' entry. The question then is whether the plaintiff has established a claim to the other goods he says were there, namely the two motors, the electric iron, the button-hole machine, and some further quantity of cloth. The plaintiff impressed me as a witness who was not out to inflate his claim; he certainly made little effort in his evidence to establish the value of the missing cloth or its exact yardage, nature or quality. I think that he did have the motors, electric iron and button-hole machine in the shop when he personally was in occupation. The 2nd defendant and Mr. McNally say that these articles were not there when they entered the premises, and that there was no other cloth there, and this is supported by the inventory made by Mr. McNally. I find it difficult to disbelieve them. It is to be observed that the inventory shews the sewing-machine item as written in a diffierent ink or pen, as if it had been added afterwards, but I do not regard that as of any particular significance. The articles could, of course, have gone missing while the plaintiff was in hospital when a young person looked after the shop for the plaintiff. They are articles such as a tailor would normally be expected to have. But I think I must give particular weight to the contents of the inventory, and I therefore, with some hesitation, hold that the plaintiff has not discharged the onus of proving that these articles were removed by the defendants. With regard to his claim that there were other items of cloth, he gives no detail or value whatsoever and in my view does not make out his case in this respect either. He could not have been a worse witness in his own interest, being quite unable to give precise evidence. For the foregoing reasons therefore the judgment for the return of the goods produced in Court will be in satisfaction of the plaintiff's claim in respect of the detention of his goods.

Turning to his claim for damages for eviction, this is in law a claim in trespass arising from the invasion by the defendants of his right to exclusive possession of the shop by virtue of his tenancy. There can be no such claim as is pleaded for 'unlawful termination of the tenancy'; either the tenancy still subsists or the parties have by agreement terminated it or estopped themselves from denying its termination. They accept, in these proceedings, that it was terminated and I do not concern myself with that any further. The question is what are the damages to which the plaintiff is entitled for the trespass. His evidence that he

was making £45 a month or so in his tailoring business was uncontradicted and I see no reason to disbelieve that it was around that figure. It is clear that the defendants, for their part, were acting on the advice of their solicitor. The plaintiff admittedly was some 13 months in arrear with his rent and the defendants were not only deprived of their rent but left in a complete state of uncertainty whether or when he would recover. It would however been perfectly feasible to invite him to surrender the tenancy and to attend at the premises if only to check his goods. The defendants, it must be said, had been patient to the extent of giving him time to recover his health and to take up occupation again. No doubt also they finally came to think, and were advised, that some drastic action must be taken. Nevertheless their action was an arbitrary invasion of the plaintiff's rights, and no matter how small the premises or the rent he was paying he is entitled to something more than nominal damages. He was done a grievous wrong by a high-handed action, but I acquit the defendants of any actual intention to act in contumelious disregard of his rights. I therefore do not think that it is a case for punitive damages against the defendants. Assuming that the tenancy was a calendar monthly tenancy, which I think is agreed, the earliest point of time at which the tenancy could lawfully have been determined by notice to quit, when the ineffectual notice of the 7th February was given, would have been the end of April 1966. That would have given the plaintiff a little less than two months in the premises, in which period he might have been able to secure other premises.

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He is entitled to a substantial sum by way of damages in respect of his eviction; to aggravated damages, but not to exemplary or punitive damages (*vide Rookes v. Barnard* [1964] 1 All E.R.367). I fix the amount at £100.

The plaintiff is also entitled to consequential damages arising from the detention of his goods and loss of use of the premises. Making the best estimate as I can of his loss in these respects I fix the damages under this head at £50.

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Accordingly I give judgment for the plintiff for the return of the goods in Court (or £100 their value) and for the sum of £150 by way of damages. The defendants are entitled to judgment on the counterclaim for the agreed sum of £65 arrears of rent. These sums are to be set-off against each other and accordingly the money judgment will be for the balance of £85 in favour of the plaintiff. As to costs, the counterclaim was admitted throughout and formed no part of the contest at the hearing; nevertheless the defendants had to raise it in the pleadings. I give judgment for the plaintiff for the general costs of the action but the defendants are to have judgment for such costs as are exclusively referable to the counterclaim up to and including the Reply; the two sets of costs to be set-off against one another and the balance to be paid by the defendants to the plaintiff.

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Judgment for the plaintiff.