

A

GO WAI KWAN

v.

AFZUL ZAINULLA SHAH &amp; OTHERS

B

[SUPREME COURT, 1976 (Mishra J.), 23rd January]

Appellate Jurisdiction

C

*Landlord and tenant—covenant not to part with possession without consent of lessor—lessee went abroad leaving premises in occupation of his lawful attorney—whether lessee could be deemed to have parted with legal possession without exclusive occupation being granted to his attorney—Property Law Act 1971 s. 114.*

D

Under a written agreement, the respondents let a shop to lessees. The agreement contained the usual covenant not to part with possession of the property without the consent of the lessors. The lessees left for China after one of them had given a power of attorney to the appellant who took over the running of the shop. The respondents issued a writ against the appellant seeking possession of the premises on the ground that he was occupying them unlawfully. The appellant maintained that he was looking after the business affairs of the lessees as their lawful attorney. One of the lessees returned to Fiji after an absence of 3 years just before the trial. He stated that he was still the owner of the business, still a Fijian citizen, and still in occupation of the premises. The magistrate, however, held that the arrangement was a subterfuge to avoid a breach of covenant, and made an order for possession.

E

*Held:* In all the circumstances of the case, the lessees did not part with legal possession of the premises; the appellant may have been in occupation of the shop, but it was not exclusive occupation as there was no evidence to show that he could exclude the lessees from the premises.

F

Cases referred to:

*Teasdale v. Walker* [1958] 1 W.L.R. 1076; [1958] 3 All E.R. 307.*Stening v. Abrahams* [1931] All E.R. 437.

G

*D. Whippy* for the appellant*P. Knight* for the respondents.

MISHRA J.: [23rd January 1976]—

H

This is an appeal from a judgment of the Magistrate's Court Suva giving the respondents (original plaintiffs) possession of certain shop premises at Nasinu which were then occupied by the appellant (original defendant) under a power of attorney from the lessees who had been for some time absent from Fiji.

The main facts of the case are not in dispute. Under a written agreement the plaintiffs had let the premises in question to Go Min and Ko Shou Cheun. Go Min

had gone away to China and at the relevant time Ko Shou Cheun was alone conducting the shop business. He also left for China in October 1971 giving a power of attorney to the appellant, a cousin of his, to manage his affairs generally during his absence. By a term of the tenancy agreement the lessees had covenanted not to transfer, assign or part with the possession of the said premises without the prior consent of the lessors. No consent was obtained from the lessors for the appellant to move into the shop premises and to look after the lessees' business. Upon learning that the appellant was in occupation of the premises the lessors refused to accept rent from him which was regularly posted to them by cheque. These cheques were signed by the appellant in his own name and were possibly drawn against his own account. The respondents, however, were aware of the power of attorney. They issued a writ against the appellant seeking possession of the premises on the ground that he was occupying them unlawfully. A B

The appellant denied that there had been any breach of the tenancy agreement and maintained that he was occupying the premises and looking after the business merely as a lawful attorney of Ko Shou Cheun. The power of attorney from Ko Shou Cheun to the appellant was produced at the trial and its validity is not challenged. C

While Ko Shou Cheun was away from Fiji the appellant filed income tax returns in his (Ko Shou Cheun's) name and presumably paid tax on his behalf. Just before the trial Ko Sheun arrived back in Fiji and gave evidence on behalf of the appellant. He maintained that the premises were still in his occupation and that he was the owner of the business which was still registered in his own name. He was a Fiji citizen and had been away from Fiji for nearly three years. In his judgment the learned magistrate said: D

"In the event I find that, even though the defendant may well have been a lawful attorney he was not and is not in lawful possession of the premises in question. The tenant had granted exclusive occupation to the defendant in the circumstances and on terms which indicate a subterfuge to avoid a breach of a covenant against sub-letting and parting with possession and this clearly amounted to parting with possession *Teasdale v. Walker* [1958] 1 W.L.R. 1076." E

The appellant's main ground of appeal is that the learned magistrate erred in holding that he was not in lawful possession of the premises.

In view of the facts of this case, which are not disputed, the only question that needs to be answered is: Did Ko Shou Cheun under the circumstances of this case part with the legal possession of the premises? As Farwell J. said in *Stening v. Abrahams* ([1931] All E.R. 437 at 438): F

"I must entirely disclaim any attempt to define the meaning of parting with possession generally. It must always be a question of fact, and the construction of the particular agreement in each case, and it cannot be determined by looking at the document alone. G

But, in my view, a lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part.....Retention of a key may be a negative indication, and the authorities show that nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to parting with possession." H

- In this case there was no agreement between the appellant and Ko Shou Cheun.
- A** The document in question is a power of attorney. It is not for a fixed term. It is revocable at will. Can such a document oust the donor of the power from the legal possession of the premises in question? Unless there is some strong evidence to show that contrary is the case the legal possession of the premises must, in my view, remain in the donor who can recover possession at will. The learned magistrate seems to have come to the view that the circumstances of this case indicated a subterfuge to avoid a breach of the covenant relating to parting with possession in support of which inference he relied on *Teasdale v. Walker* ([1958] 3 All E.R. 307). In that case, however,
- B** there was an enforceable agreement between the legal tenant and the occupier which gave the occupier exclusive use of the premises so long as he continued to pay £ 750 per annum to the legal tenant. There was a valuable consideration for the agreement which could not be revoked at will. No evidence has been led in the present case to show that the appellant could retain the possession of the premises
- C** against Ko Shou Cheun's will. There is no evidence of any agreement which he could enforce against Ko Shou Cheun. The power of attorney itself is in the form of a deed completely unsupported by consideration. The parallel therefore between a power of attorney revocable at the donor's will and a legally enforceable agreement between the legal tenant and the occupier can be misleading. It is true that the appellant signed the rent cheques in his own name but this he is empowered to do under section 114 of the Property Law Act, 1971.

- D** Owners of small family businesses conducted on rented premises must occasionally leave the country for varying periods and it would be odd indeed if the continuance of such a business during the owner's absence depended on the consent of the landlord. It would be odder still if the selection of the owner's attorney were to depend on such consent. In my view the covenant in a tenancy agreement relating to parting with possession cannot be so construed as to require such consent.
- E**

In the present case the learned magistrate found that "the tenant had granted exclusive occupation to the defendant in the circumstances". The evidence, however, does not support such a finding. "Exclusive occupation" in such a case must exclude the grantor himself—there is no evidence to show that the appellant could exclude Ko Shou Cheun from the premises.

- F** A power of attorney of this kind can no doubt be some times used as a subterfuge to cover some other agreement such as that of a sale, or an irrevocable transfer of control for a specified period. In such a case a court will not confine itself to the power of attorney but look at the whole of the evidence. Evidence, however, there must be before it will accept the existence of such an agreement. No such evidence has been produced by the respondents in this case, except to say that the rent cheques to them came from the appellant and not from Ko Shou Cheun. The appellant
- G** and Ko Shou Cheun both say that the business still belongs to the latter and that the appellant has returned its control to him. He himself intends to start a tea room business. There is no suggestion in the evidence of any agreement, behind the power of attorney, which could oust Ko Shou Cheun from the legal possession of the premises.
- H** The appeal is, therefore, allowed and the order of possession made by the court below set aside. The tenancy agreement remains in force and the respondents are entitled to receive all the rents due to them under it.

The appellant also alleged in one of the grounds of appeal that no cause of action lay against him personally as he was not a party to the alleged agreement. In view of the decision I have already arrived at, there is no need for me to advert to that ground. **A**

The appellant will have the costs of this appeal as well as those of the court below which will be taxed in default of agreement.

*Appeal allowed and judgment set aside.*

**B**