

A

## NAGAR BHAI KHEWAL BHAI PATEL

v.

## MANIKAM REDDY

B

(COURT OF APPEAL—Gould V. P., Spring, J. A., Speight, J. A.)

Civil Jurisdiction

Date of Hearing: 19 July 1982  
Date of Judgment: 30 July 1982

C *Landlord & Tenant—summary ejectment—unsuitable procedure in the circumstances—Lessee to plead full facts.*

A. B. Ali for Appellant  
*Respondent in person*

D Appeal from a decision of the Supreme Court at Lautoka dismissing an application under Land Transfer Act (Cap. 131) s.169, by the appellant for possession of a flat, being part of the premises situated on Native Lease No. 12010 on land known as Lot 7 Wailulu Subdivision at Narewa Nadi.

E The appellant's affidavit had included that by a verbal tenancy agreement, he had let to the respondent a flat erected on the land; that respondent failed to pay the rent; that appellant by letter called attention to rental being in arrears for 3 months and respondent still had not paid the rent for August 1981; that since there had been no consent by Native Land Trust Board for the letting, the tenancy was illegal and void, therefore respondents' tenancy was illegal.

F After an adjournment, allowed to pay arrears of rent, the court dismissed the application upon the basis that appellant having built flats pursuant to permission, leave to lease was implied i.e. the occupancy was not illegal. At the appeal appellant contended the learned judge at first instance had no power to adjourn to allow arrears to be paid.

G On the argument as to illegality the court referred to *Subramani v. Prices and Income Board* which had considered such a situation. The Court said the learned judge's ruling had not finally been accepted; every case might well depend on its own circumstances.

*Held:* The lower court had complete authority to allow the adjournment to pay rent.

H

As to the second point what permissions or authority the lessee (appellant) had actually obtained or from whom was not known: or what if any, correspondence passed between the Native Land Trust Board on what was apparently a breach of

## NAGAR BHAI KHEWAL v. MANIKAM REDDY

the lease was also unknown. These matters apparently being within the knowledge of the appellant, yet he rested on a bare allegation as his proof. A

The summary procedure under S. 169 was not suitable for this case. Appellant having called on the respondent tenant to show cause, the respondent showed he was a tenant; whereupon the appellant who had granted the tenancy sought to show it was illegal, taking advantage of his own wrong. B

The onus was upon the appellant to establish his case, plead the matters he relied on and be subject to e.g. discovery and interrogatories. The respondent was entitled to have the benefit of a full investigation.

There was insufficient material to decide the question of illegality.

Order of the Supreme Court upheld, but as to illegality on different grounds. C

Appeal dismissed.

Cases referred to:

*Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd.* (Civil Appeal 39/1972) D  
*Vallabh Das Premil v. Vinod Lal and Others* (Civil Appeal No. 70/1924)—  
*Subramani v. Prices and Incomes Board* (28 FLR)

GOULD. Vice President E

## Judgment of the Court

This is an appeal from a judgment of the Supreme Court at Lautoka dismissing an application by the appellant for possession of a flat, being part of the premises situated on Native Lease No. 12010 on land known as Lot 7 Weilulu Subdivision at Narewa. Nadi. F

The appellant made the application under section 169 of the Land Transfer Act (Cap. 131) a summary procedure under which persons specified in the section may summon any person in possession of land to appear before a Judge in Chambers to show cause why he should not give up possession. Such persons include the last registered proprietor of the land, and a lessor whose tenant is in arrear with the rent for a certain period. The appellant sought to rely upon both capacities. G

Paragraphs 3—8 of the appellant's affidavit in support of the application, read:

3. That by virtue of a verbal tenancy agreement I had let out to the respondent from the month of September 1977 1 flat erected on the said land at a monthly rental of \$100-00 per month. H
4. That the respondent has failed to pay the rent on several occasions.
5. That I caused a letter dated 18th day of August 1981 to be written to the respondent pointing out that the respondent has failed to pay the rent for 3 months.

- A 6. *That* the respondent still has not paid the rent for August 1981.  
 7. *That* there was no consent of Native Land Trust Board for the letting of said premises to the respondent and hence the said tenancy is illegal null and void and that therefore the respondent's tenancy is illegal.  
 8. *That* I pray for an Order for Vacant Possession in respect of the said land and dwelling house occupied by the respondent upon the ground stated in this Affidavit, namely:

- B (i) That the respondent's tenancy is illegal, null and void, under section 12 of the Native Land Trust Ordinance.  
 (ii) That the respondent has failed to pay the rent for the months of August 1981.  
 (iii) That the respondent has no right, title or interest to occupy the said premises as his tenancy is illegal."

C It is to be noted that under paragraph 7 the tenancy which the appellant claims by paragraph 3 to have granted to the respondent is asserted to be illegal. Nevertheless is paragraph 4 and 8 he relies upon nonpayment of rent.

D The respondent appeared in person and the proceedings were brief and (to say the least) informal. The most convenient way to convey the nature of the proceedings is to set out the Judge's notes as contained in the appeal record. On the 13th November, 1981, they read:

Mr V. Chand, Counsel for the Applicant  
 Respondent—In Person

*Respondent—*

E I am up to date with rent. I have the receipts. I paid my solicitors, Anand & Tappoo.

I asked plaintiff to do the repairs—to tiling in kitchen and bathroom. Electric wires naked in passage—painting, screening—mosquito rotten, timber bathroom rotten—3 months ago.

They then asked me to vacate. I said I would if given time. I will vacate.

F I do not owe rent. There is \$100.00 for October, I have it with me.

*Mr V. Chand:*

Rent for August outstanding.  
 Unlawful.

*Court:*

G When were flats built.

*Mr Chand:*

After 1968. This is a flat. There is a shop attached which plaintiff occupies.

*Defendant:*

H There are 3 flats, one shop. Three separate tenants to flats.

## NAGAR BHAI KHEWAL v. MANIKAM REDDY

*Judgment:*

Apparently plaintiff was given permission to build flats and a shop for purpose of letting them. In that case permission to let must be implied—see A. 54/81 Adesh Kumar v. Nanku & Others (13/11/81). No information to contrary in plaintiff's affidavit.

Defendant is prepared to pay the rent so he says.

*Order:*

This application is adjourned to 27.11.81 to enable defendant to pay the arrears."

On the 27th November, 1981, there is:

"Mr C. Gordon for Mr Chand, Counsel for the Applicant.

*Mr C. Gordon:*

Arrears have been paid. Nevertheless possession is sought on ground that respondent is a trespasser.

*Court:*

As I have indicated there is authority, albeit my own, that where permission to build flats is given, permission to lease them must be implied—Kumar v. Nanku and Ors. A. 54/81 (delivered on 13th November, 1981). Application dismissed."

The question of rent may be shortly disposed of. Clearly the arrears had been paid and accepted by the 27th November, 1981, when Mr Gordon so indicated. Mr Gordon at that time impliedly abandoned any right based on arrears of rent, and confined himself to the ground that the respondent was a trespasser. Despite this Mr Ali has sought to rise the matter again on appeal, claiming that the learned Judge had no power to adjourn to enable the payment to be made. Where the interests of justice require it a Court has ample power to adjourn proceedings and under section 105(2) of the Property Law Act (Cap. 130) it has wide power to relieve against forfeiture in a lessor's action. There is no merit in this point.

The claim that the respondent was a trespasser is a different matter. It is based on the single paragraph in the appellant's affidavit that there was no consent of the Native Land Trust Board to the letting of the premises—the consequence, it is argued, is that section 12 of the Native Land Trust Act (Cap. 134) has been broken, and the letting was illegal.

Section 12 reads:

"12(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September, 1948, to mortgage such lease.

- A (2) For the purposes of this section 'lease' includes a sublease and 'lessee' includes a sublessee."

The learned Judge rejected the submission relying on a promise that whose permission to build flats is given permission to lease them must be implied. He relied upon the case of *Kumar v. Nanku*. A 54/81 but this reference is obviously an error. The intention must have been to refer to No. 44 of 1981 *Subramani v. Prices and Incomes Board*, which does deal with that topic. However, that case came to this Court on appeal (28 FLR). In the judgment of the Court it was said:

- B  
C "In the Supreme Court it was held that, in view of the general surrounding circumstances and the use to which the land was put and the nature of the buildings, that it should be inferred the successive sublessees had complied with legal requirements and that it was lawful for the sublessees (including appellant) to let the flats from time to time without the consent of the Board. We do not favour this approach and will not pursue it."

- D It would appear therefore, that the point relied upon in the learned Judge's ruling has not been finally determined and in our opinion every case may well depend upon its own particular facts and circumstances. Virtually none of the relevant facts and circumstances were put before the Supreme Court in the present case, and the learned Judge relied upon assumptions when he said: "Apparently plaintiff was given permission to build flats and a shop for the purpose of letting them". There is no evidence about that.

- E Under Clause 9 of the Native Lease the lessee is required to build a residential building. Subsequent clauses restrict the number of buildings to one dwelling and restrict the use of the land accordingly. What permits, permissions or authority the lessee actually obtained for his three flats and one shop, and from whom, is unknown. What, if any, correspondence took place with the Native Land Trust Board concerning what is on the face of it a deliberate breach of the terms of the lease is also unknown.

- F These are matters peculiarly within the knowledge of the appellant. Yet he asks the Court to accept a bare allegation in one paragraph of an affidavit, that no consent was given. We consider the summary procedure under section 169 quite unsuitable for such a matter. The respondent, having been called upon to show cause why he should not give up possession, did so by showing that he was a tenant of the premises. The appellant then seeks to plead that the tenancy which he himself granted was illegal, null and void. He seeks to take advantage of his own wrong. In such a situation the onus is upon him to establish his case, plead the facts he relies upon and be subject to such matters as discovery and interrogatories. The respondent is obviously entitled to the benefit of a full investigation of facts and law, for which, in the particular circumstances, we find the summary procedure inappropriate. There are earlier cases in which this Court has reached a similar conclusion; they were referred to in *Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd.* (Civil Appeal 39/1972—unreported) quoted in *Vallabh Das Premji v. Vinod Lal and Others* (Civil Appeal No. 70/1974—unreported).

## NAGAR BHAI KHEWAL v. MANIKAM REDDY

We uphold the order of the Supreme Court that the application be dismissed, but (so far as the legality issue goes) on different grounds. We find that there was insufficient material on the record to enable the Court to decide the question of illegality and that the summary procedure was inappropriate for the purpose. It is not a matter for Chambers but for open Court proceedings, and by virtue of the first proviso to section 172 of the Land Transfer Act, the appellant is not precluded by the dismissal of the summons from instituting such proceedings if he so desires.

A

B

The appeal is dismissed with costs (if any).

*Appeal dismissed.*