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IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
CIVIL APPEAL NO. 22 OF 1979

Between:

DIP NARAYAN s/o Cheddi — Appellant

- and -

RAJENDRA RAE s/o Basdeo — Respondent

Mr. H.K. Nagin for the Appellant
Mr. K. Chauhan for the Respondent.

J U D G M E N T

This is an appeal by an unsuccessful plaintiff from the decision of the Suva Magistrate's Court delivered on the 11th May, 1979 dismissing the plaintiff's claim against the defendant.

The plaintiff's claim was that on the 10th March, 1978 he was the lawful tenant of the defendant. On that day he alleged the defendant without prior notice broke into the plaintiff's flat and removed all the plaintiff's belongings. He alleged loss of chattels to the value of $1,429.12 and sought their return or their value and damages.

The defendant's case was that the plaintiff verbally notified him on 30th January, 1978 that he would be vacating the flat on 28th February, 1978. Although requested by the defendant to confirm the notice in writing the plaintiff did not do so. He did, however, during February, 1978 start removing his possessions and the

defendant says he finally vacated on the 28th February, 1978.

The appellant has three grounds of Appeal as under :-

> "(1) The verdict is unreasonable and cannot be supported having regard to the weight of the evidence adduced.
>
> (2) The learned trial Magistrate misdirected himself by not properly directing himself to the mode of payment of rent and the fact that the rent was continued to be paid in that manner.
>
> (3) The learned trial Magistrate erred in law that no notice in writing was required especially when there was a written tenancy agreement to the contrary and the deposit of $20.00 was not refunded to the Appellant."

All three grounds of appeal can conveniently be considered together.

The learned magistrate was presented with conflicting evidence. Very much in issue was whether the plaintiff had verbally notified the defendant he was vacating the flat on the 28th February, 1978.

It is clear from the magistrate's judgment that he fully considered the evidence. On the issue of credibility he was not impressed with the plaintiff and his witnesses and preferred the evidence of the defendant and his witnesses although not entirely impressed by the defendant.

The magistrate found as a fact that the plaintiff did give verbal notice to the defendant that he was vacating the premises and that he did vacate on the 28th February, 1978. He also found as a fact that the plaintiff had removed all his goods (i.e. his possessions) except a few items of a nature that tenants often leave behind when vacating.

This was a case where assessment of credibility was of vital importance. While Mr. Nagin for the appellant has drawn attention to apparent inconsistencies he has not satisfied me that the learned magistrate did not test the evidence by adequate scrutiny or take proper advantage of having seen and heard the witnesses.

The principles governing the position of an appellate Court where findings of fact by an inferior court are challenged are fully stated in the well known case of Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370. This Court must accept the material findings of fact by the learned magistrate.

Mr. Nagin however argued further that the verbal notice was in any event not a valid notice to quit. There was in existence an unsigned document headed "Particulars of Tenancy" relating to the premises let by the defendant to the plaintiff. Clause 2 thereof provided that the tenancy was terminable by either party giving to the other one month's notice in writing.

The magistrate found as a fact that the defendant had requested the plaintiff to confirm his verbal notice to vacate in writing and that the plaintiff had failed to do so.

The defendant was entitled to waive strict compliance with the agreed terms of the tenancy and accept the verbal notice to vacate. The plaintiff did in fact vacate the premises albeit he left a few items on the premises and the defendant was entitled to take possession of the flat. While the magistrate had little to say about the plaintiff continuing to pay rent after the defendant had taken possession he did refer to this fact in his judgment. I have no doubt he did consider this fact when considering the evidence that the plaintiff was seeking to sublet the premises although not entitled to do so.

There was evidence that supported the plaintiff's contention that he had not in fact vacated the premises. There was also evidence that indicated he had vacated and was seeking to instal a sub-tenant.

The magistrate properly considered and weighed this evidence. In view of his findings on the material facts dismissal of the plaintiff's claim was the inevitable result of such findings.

There is no merit in this appeal which is dismissed with costs to the Respondent.

(R.G. KERMODE)
JUDGE

SUVA,
9 May, 1980.