

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 29 of 1977

Between: KAPILA AND OTHERS Appellants

A n d: CHOU WAH Respondent

Date of Hearing : 22nd November, 1977  
Delivery of Judgment: 25th November, 1977

G.P. Shankar for the Appellant  
A.H. Rasheed for the Respondent

JUDGMENT OF THE COURT

This is an appeal against a judgment of the Supreme Court sitting at Lautoka dismissing a summons for possession of certain business premises situated in Ba. Appellants are the registered proprietors of the land upon which the said premises known as Shop No.1, have, together with a number of other shop premises, been erected. Respondent first went into possession under a written tenancy agreement for a term which expired on the 31st December, 1975. Under this agreement rent was payable at the rate of \$31 per calendar month.

In January, 1976 certain discussions took place between the parties, as a result of which respondent remained in possession at an increased rental of \$150 per month. Appellants claim that respondent had a monthly tenancy at a rental of \$150 per month and on the 19th January, 1977 gave respondent a notice to quit in the following terms:

"re: Kapilaben Patel, Ratilal Patel and Kantilal Patel as Executors, Ratilal Patel and Kantilal Patel - A.J.C. Patel Bros. Building, Ba.

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We are acting for the abovenamed who are your landlords in respect of Shop No.1 which you are occupying as a monthly tenant in our clients Building situated opposite the Ba Market.

For and on behalf of our clients we hereby give you one calendar month's notice to vacate and deliver up possession of said Shop No.1 to them on or before the 28th day of February, 1977. TAKE NOTICE that if you fail to comply with this notice we will issue a Supreme Court Summons against you for recovery of possession.

You are also advised that a sum of \$25.00 extra paid by you in the January rent will be credited towards your February rent and hence please pay that sum less in February. While you had agreed with our clients to increase your monthly rent from January 1977 by \$25.00 our clients have not given the requisite notice to the Prices and Incomes Board.

You are also warned that any rent you may pay after the date of this notice until actual possession is given to our clients will be accepted without prejudice to this notice and should in no way be treated as creating any form of tenancy."

Respondent did not comply with the notice and on the 9th May, 1977 appellants took proceedings in the Supreme Court at Lautoka under Section 169 of the Land Transfer Act, 1971 seeking an order for possession. Appellants filed two affidavits in support of the summons. Respondent filed two affidavits in opposition. The second affidavit set out the claim of respondent to a tenancy of the said premises. After dealing with the original tenancy of four years respondent deposed as follows:-

- "5. THAT the said RATILAL APABHAI PATEL and his son asked that the rent be increased from THIRTY ONE DOLLARS (\$31.00) per month to ONE HUNDRED FIFTY DOLLARS (\$150.00) per month.
6. THAT my son and I at first objected to this very substantial increase, however after a long discussion it was agreed by all of us present that I shall pay the sum of ONE HUNDRED FIFTY DOLLARS (\$150.00) per month and in consideration of my agreeing to the increased rental of ONE HUNDRED FIFTY DOLLARS (\$150.00) per month the plaintiffs will allow me to remain in occupancy of the said premises as long as I needed the same to operate a shop.
7. THAT it was also agreed that after a year if the landlords decided to increase the rent they will not increase it by more than ten (10) per cent, however it was clearly understood by all parties present that I was to enjoy the use and the benefit of the building premises which is the subject matter of this litigation as long as I needed the same. That the only question which was negotiable from time to time, was the re-assessment of rental."

In his first affidavit respondent claimed that an increased rental of \$175 per month had been agreed to in January, 1977. This claim was not repeated in his second affidavit, but respondent did in that affidavit state that he was prepared to pay \$150 per month as agreed. The position became clear that respondent claimed that he had a tenancy in terms of the above paragraphs, numbers 5, 6 and 7 and that he was prepared to continue the tenancy on that basis. Appellants denied that respondent had any such tenancy.

After perusing the affidavits and hearing counsel, the learned Judge made the following order:

"There appears to be some issue or issues which could arise on hearing evidence.

I consider that this is a matter which will be more properly resolved by a trial and evidence.

The summons for possession is dismissed. I make no order as to costs in the circumstances."

It is against that order that this present appeal is brought.

The record does not disclose what issues would arise which required a trial proper, and which could not be adequately dealt with in the present proceedings. The essential terms (omitting for the moment the question of the need for a written memorandum) of an agreement to lease are:

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- (1) The identification of the lessor or lessee;
- (2) the premises to be leased;
- (3) the commencement and duration of the term; and
- (4) the rent or other consideration to be paid.

If the matters just mentioned are ascertained to be offered and accepted, this is sufficient. As long as the necessary terms indicated above have not been agreed to or an additional term has been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract: Halsbury Laws of England 3rd Edition Vol. 23 page 440 para 1039. To constitute a tenancy for a term therefore, it is essential that the term can be fixed with certainty and that the rent payable can also be similarly ascertained. The expression "as long as needed" is too uncertain to fix the term of tenancy. Moreover, the rent for the first year was fixed at \$150 per month, but thereafter the rent was a matter of negotiation from time to time with a limitation in not very clear terms, of an increase or increases not to exceed 10 per cent. This condition of the alleged tenancy is also too uncertain as to future rents to constitute a binding contract. This provision may be sufficient to be treated as a term for one year, that is up till the 31st December, 1976, but thereafter the rent is uncertain and a matter for negotiation; Adams v. Cairns (1901) 85 L.T.10; and therefore no concluded contract has been made which might include a later period.

For these reasons we are of the opinion that the respondent, on his own evidence has failed to prove that he has a tenancy for a term which can be fixed with certainty beyond one year, or that the rent for the duration of the occupancy claimed is certain. The question then is whether the occupancy which respondent has can be terminated by the notice given on the 19th of January, 1977.

Section 89(2)(b) of the Property Law Act, 1971 provides as follows:-

"89. In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows:-

(2)(b) where the rent is payable for any recurring period of less than one year, notice for at least a period equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not."

In our opinion, on the evidence of respondent, the tenancy which he has set up is one of no fixed duration for the reason that neither the term nor the rent for the whole period is fixed with certainty. It has therefore been properly terminated by one month's notice which complied with the provisions of section 89(2)(b).

No argument has been addressed to this Court on the question of the validity of the notice if section 89(2)(b) applied. Counsel for respondent conceded that a tenancy such

as that claimed is required to be in writing. This appears to be so, but in view of the findings already made, it is unnecessary to consider either the arguments of counsel for appellants on this question or the concession made by counsel for respondent. Part performance will not help respondent because the terms of his alleged contract are before the Court and are insufficient. The question which was raised in the Court below and adverted to in this Court, namely, whether or not the increase in rent was lawful in view of legislation controlling increases of rent, is not relevant to the present proceedings. The acceptance of \$25 on account of rent for February, 1977 during the period of notice does not invalidate the notice: *Clarke v. Grant* (1950) 1 K.B.104. However, as earlier stated, no objection has been taken in respect of the notice if in fact a tenancy was terminable on one month's notice. We have held that it was.

Accordingly we are of opinion that since respondent has failed, on his own evidence (if accepted), to prove a tenancy that has not been legally terminated by the notice, there is no issue which requires to be determined by a more formal hearing. The matter can thus properly and conveniently be dealt with on the present proceedings. The right of appellants to an order of possession has been established and there should be an order accordingly.

The appeal is therefore allowed. The respondent is ordered to give up possession of the premises in issue on or before the

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31st December, 1977. The respondent must pay the appellant's costs of this appeal to be taxed if not agreed upon.

(Sgd.) T. Gould  
VICE PRESIDENT

(Sgd.) C.C. Marsack  
JUDGE OF APPEAL

(Sgd.) T. Henry  
JUDGE OF APPEAL

Suva,

25th November, 1977.