

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 17 of 1982

Between:

NAGAR BHAI KHEWAL BHAI PATEL Appellant
s/o Khewal Bhai Patel

and

MANIKAM REDDY Respondent
s/o Krishna Swamy Reddy

A. Ali for the Appellant
Respondent in Person

Date of Hearing: 19th July, 1982
Delivery of Judgment: 30th July 1982

JUDGMENT OF THE COURT

Gould V.P.,

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.

The appellant made the application under section 169 of the Land Transfer Act (Cap. 131 - Edn 1978) 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.

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.
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.
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 :
 - (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. "

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 in paragraph 4 and 8 he relies upon non-payment of rent.

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 -

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.

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:

When were flats built.

Mr. Chand:

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

Defendant:

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

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 raise 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. Edn 1978) 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.

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

The section has in our experience been productive of much litigation and some injustice in Fiji.

The learned Judge rejected the submission relying on a premise that where 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 as Criminal Appeal No. 70 of 1981. In the judgment of the Court it was said:

" 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."

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.

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.

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).

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.

The appeal is dismissed with costs (if any).



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Vice President



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Judge of Appeal



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Judge of Appeal