

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 51 of 1979

Between:

1. DUKHI s/o Ram Lal
  2. PARMANAND s/o Dukhi
  3. ARUN KUMAR s/o Dukhi
- Appellants

and

1. MAGANBHAI  
s/o Prabhudas Patel
  2. RATILAL s/o Chhotabhai Patel
  3. RAMESH s/o Chhotabhai Patel
  4. MATILAL s/o Chhotabhai Patel
- Respondents

H.M. Patel for the Appellants  
B.C. Patel for the Respondents

Date of Hearing: 9th June, 1980  
Delivery of Judgment: 27/6/80

JUDGMENT OF THE COURT

Gould V.P.

This is an appeal against an order of the Supreme Court of Fiji at Lautoka that the appellants deliver up possession of shop No.1 and other premises occupied by them in the respondent's building on King's Road, Ba Town.

The respondents, on the 18th May, 1979, made their application for this order by summons under Section 169 of the Land Transfer Act, 1971, which enables

various categories of persons to call upon a person in possession to show cause why he should not give up possession. One such category, specified in paragraph (c) of the section, is a lessor against a tenant to whom a legal notice to quit has been given and has expired. Under Section 172 it is for the person summoned, if he appears, to show cause why he refuses to give up possession and if he proves to the satisfaction of the judge a right to possession, the summons will be dismissed or the judge may make any order and impose any terms he may think fit.

Affidavits were filed on both sides but we do not find it necessary to go in detail into the evidence. The respondents' case was that they were the owners of the premises and that the appellants had at first become their tenants by transfer from an earlier tenant for the residue of a ten-year term which expired on the 31st October, 1977. Thereafter it was alleged that the appellants remained on as monthly tenants at a somewhat increased rental until they were given notice to quit by a letter of the 28th September, 1978.

The appellants based their claim to a right to possession upon oral communications alleged to have been made to them by Ratilal s/c Chhotabhai Patel, one of the respondents. They alleged, variously and inconsistently, first that Ratilal had represented to them that the ten-year term, the residue of which they were in process of acquiring did not expire until 31st December, 1981, and subsequently that Ratilal had promised them a new tenancy from the expiry of the ten-year term on the 31st October, 1977, until 31st December, 1981. The first of these versions was put forward in a letter (set out in full later in this judgment) from the solicitors for the appellants dated the 30th October, 1978, which is only one day before the respondents had required them to give up the premises. The second version was contained in an affidavit by the appellant Dukhi dated the 12th June,

1979, and filed in the proceedings. Such inconsistency cannot but tell heavily against the appellant's veracity in the whole case.

The learned judge was not satisfied that a right to possession had been shown, nor that it was a case which required reference to the open court procedures. He noted the inconsistency we have mentioned, and was of opinion that even on their own case the appellants had not shown any such right, and they had not complied with a condition they claimed had been imposed. But the real purport of the learned judge's judgment is that he did not believe the appellants' case. He said :

" I cannot believe that if the defendant had got such consent even from one of the plaintiffs as he alleges that he would not have pressed as firmly as possible for some tangible proof or evidence of such consent. I can only presume that the plaintiffs did defendant's continuation in occupation as a monthly tenant, and the defendant took a calculated risk that he would be able to stay on long enough to make the venture worthwhile."

This basic opinion, from which we find no reason to differ, really disposes of the matter and renders it unnecessary for us to discuss a ground of appeal relating to agency, based upon what the respondent, Ratilal, is alleged to have said.

We would not have found it necessary to reserve this judgment were it not for two new grounds of appeal up in by leave of the court at the last minute. They are in fact only one, and read :-

- "4. That the learned trial Judge erred in law and in fact in presuming that the tenancy was terminated when there was no evidence of proof of service of the notice to quit in terminating

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the tenancy which was essential to the jurisdiction of the Court!

5. That the learned trial Judge was wrong in law in making the order for possession against the Appellants when the proof of service of the notice to quit was not clearly established by the Respondent and or should have dismissed the summons or adjourned the whole action for hearing in open Court."

It is conceded that this point was not raised in the court below, either in the affidavits or by counsel in argument. Counsel for the appellants, however, relied on two judgments of this court in which it was held that proof of the service of a notice to quit at a date when it would be effective to terminate the tenancy, is a matter which goes to the jurisdiction of the Supreme Court to make an order in reliance upon Section 169(c) of the Land Transfer Act, 1971. The cases are Vallabh Das Premji v. Vinod Lal and Others (F.C.A. Civil Appeal No.70/1974) and Abdul Aziz v. Mariben Brijlal Kapadia and another (F.C.A. No.53/1978). It is therefore necessary to ascertain what happened in the present case in relation to the notice to quit.

For this purpose it is to be taken as common ground that the monthly tenancy commenced on the 1st November, 1977. Paragraph 15 of the affidavit of the respondent, Maganbhai Prabhudas Patel, reads :

- "15. That on the Plaintiffs instructions their Solicitors Messrs Stuart, Reddy & Co. wrote to the defendants on 18th September 1978 terminating their monthly tenancy. A copy of that letter is annexed hereto marked 'C'."

The copy of the letter exhibited reads :

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"Stuart, Reddy & Co.  
BARRISTERS AND SOLICITORS  
COMMISSIONERS FOR OATHS

P.O. Box 60  
Narara Parade,  
Lautoka.

JAI RAM REDDY

Telephone 60044

Notary Public

60089

BHOENDRA CHIMANBHAI PATEL

60098

VINOD KUMAR KALYAN

Lautoka, Fiji

28th September, 1978

Messrs. Dukhi & Sons (a firm),  
Storekeepers,  
Ba.

Dear Sirs,

re: Your Landlords - Maganbhai f/n  
Prabhudas Patel, Ratilal, Ramosh  
and Matilal all sons of Chhotabhai  
Patel

We are acting for your landlords abovenamed.

For and on behalf of our clients we hereby give you one calendar month's notice to vacate and deliver up possession of the Shop Premises with attached Toilet and Bathroom on the ground floor of our clients' building situate on Lot 3 Deposited Plan 2542 comprised in Certificate of Title 11175 on Kings Road, Ba Town which you have been occupying as a monthly tenant.

Take notice that unless you vacate and deliver up possession as requested on or before the 31st October 1978 we are instructed to issue Supreme Court proceedings against you for recovery of possession of the premises.

Please be advised that any rent you may pay to our clients after the date of this notice will be accepted without prejudice and should in no way be treated as creating any form of tenancy.

Yours faithfully,  
STUART, REDDY & CO.  
Per: Sgd.

By letter dated the 30th October, 1978, the appellants' solicitors replied as follows :

"SAHU KHAN & SAHU KHAN  
BARRISTERS & SOLICITORS  
COMMISSIONERS FOR OATHS

Telephone: Office 74040  
Residence 74215

NAZEEM CHAMBERS,  
P.O. Box 179,  
BA, FIJI.

A.H. SAHU KHAN LL.B.  
M.S. SAHU KHAN LL.M. Ph.D  
S.D. SAHU KHAN  
(Lincoln's Inn)

30th October, 1978.

Our Ref: 5/14

Your Ref: BCP/jp

Messrs Stuart Reddy and Company,  
Barristers and Solicitors,  
P.O. Box 60,  
LAUTOKA.

Dear Sirs,

re: Your Landlords - Maganbhai f/n  
Prabhudas Patel, Ratilal, Ramesh and  
Matilal all sons of Chhotabhai Patel

We have been instructed by Dukhi and Sons to refer to your letter dated 28th ultimo with instructions to reply.

Our client is absolutely amazed to learn of your clients stand. Your clients are well aware that when he and Ram Geer (the previous lessee of your client) were negotiating for the purchasing of the business, our client went to your client Rati Lal who assured our client that the condition under which Ram Geer was holding the shop in question was that the tenancy was until the 31st day of December, 1981. Our client made it very clear to your said client that it was on that basis that our client was purchasing the business.

Otherwise he would not have purchased the same. Now it seems your client made gross misrepresentations to our client.

Accordingly, our client giving your client notice that if they take steps to evict our client then our client will defend the same and also claim damages for misrepresentations. Your clients are estopped from bringing the actions.

Yours faithfully,

SAHU KHAN AND SAHU KHAN

Per:               Sgd.               "

In their reply dated the 19th January, 1979, Messrs Stuart, Reddy & Co. claimed that the monthly tenancy had been properly terminated by their letter of the 28th September, 1978, and the correspondence terminated at that point.

Clearly the appellants, in their solicitors' letter of the 30th October, 1978, were basing their claim to possession upon the alleged assurance by Rati Lal that the ten-year tenancy did not expire until 31st December, 1981. They made no challenge to the notice to quit as such and have never done so until the last moment in this appeal, when they alleged that "proof of service" was not established. Service was of course proved by admission in the correspondence. As to the actual date of service it is to be remembered that, since the passing of the Property Law Act, 1971, and in the absence of express agreement the matter of notice to quit is no longer governed by the common law. Section 89(2)(b) of that Act reads :

"89(2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly,



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monthly, yearly or for any other recurring periods may be terminated by either party giving to the other written notice as follows :

- (a) .....
- (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."

It has not been contested that the increased rental payable by the appellants after the 31st October, 1977, was payable calendar monthly and therefore the tenancy was determinable under the section just quoted by one calendar month's notice expiring at any time. The former common law requirement that the notice must expire at the end of a rental period no longer applies.

The letter from Stuart, Reddy & Company of the 28th September, 1978, containing the words - "we hereby give you one calendar month's notice to vacate and deliver up possession", complies with Section 89(2)(b); it terminated the tenancy one calendar month from the receipt by the appellants of the letter, or (for the section contains the words "at least") on the 31st October 1978, whichever was the later. As has been noticed, the proceedings for ejectment did not commence evidence the letter was received on some date between the 28th September, 1978 and the 30th October, 1978; prima facie it validly terminated the tenancy on a date which would be clear to the appellants and prior to the commencement of the litigation. No attempt has been made to establish or put forward any claim to uncertainty in relation to the notice.



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This ground of appeal therefore also fails  
and the appeal is dismissed with costs.

(Sgd.) T. Gould  
VICE PRESIDENT

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

(Sgd.) G.D. Speight  
JUDGE OF APPEAL