RAM LOCHAN REGAN

v.

SATYA NAND VERMA

[COURT OF APPEAL, 1965 (Marsack V.P., Gould J.A., Knox-Mawer J.A.), 25th October, 25th November]

Civil Jurisdiction

Landlord and tenant—statutory tenancy supervening after monthly tenancy—right to distrain for rent—Fair Rents Ordinance (Cap. 39) s.14.

Landlord and tenant—notice to quit—requisites of—demand for possession compared—Crown Lands Ordinance (Cap. 138) s.15—Court of Appeal Ordinance (Cap. 3) s.14.

Landlord and tenant—distress for rent—stautory tenancy.

The respondent held a "protected lease" from the Crown, any dealing with which required the consent of the Director of Lands. On facts not in question in the Court of Appeal the Chief Justice in the Supreme Court found that, while the respondent and the appellant had in mind the granting of a sublease for eighteen months from the 1st September 1962 from the respondent to the appellant the Director of Lands actually consented to a monthly tenancy and this was the form of tenancy actually entered into between the parties. On the 26th June 1964 the respondent gave the appellant notice in the following terms :—

> "I have been instructed by my client S. N. Verma (your landlord) to write to you and inform you that vacant possession of the premises occupied by you of my client in Ono Street is required by him as the lease had expired on 28th February, 1964. Despite repeated requests you have not as yet vacated the premises.
>
> Please take notice that unless vacant possession is given on or before 31st July, 1964, my client will have no alternative but to resort to legal proceedings for an order for possession."

Distress having been levied at the instance of the respondent for rent from the 1st July 1964 to the 31st January 1965 the appellant brought action in the magistrate's court for damages for wrongful distress. On appeal to the Supreme Court the Chief Justice reserved the following questions of law for the opinion of the Court of Appeal :—

1. Was there a lawful tenancy subsisting between the respondent as landlord and the appellant as tenant, in respect of the period 1st July 1964 and 28th February 1965?
2. Alternatively, was the appellant liable for payment of rent in respect of that period, and accordingly subject to distress therefor, by virtue of the provisions of the Fair Rents Ordinance (Cap. 39)?

Held : 1. There was no reason to differ from the findings in the Supreme Court that there was a monthly tenancy subsisting between the respondent and the appellant.

A 2. (per Marsack V.P. and Gould J.A., Knox-Mawer dissenting) the notice of the 26th June 1964 was a valid and effectual notice to quit. *Doe d. Godsell v. Inglis* (1810) 3 Taunt. 54; 128 E.R. 22 distinguished.

3. At the expiry of the notice to quit the appellant became a statutory tenant of the premises by the operation of the Fair Rents Ordinance.

B 4. That under such statutory tenancy rent could be lawfully distrained for.

Cases referred to : *Permal Naiker v. Pachamuttu* (1958-59) 6 F.L.R. 144: *Carter v. S. U. Carburetter Co.* [1942] 2 K.B. 288; [1942] 2 All E.R. 228: *Remon v. City of London Real Property Co. Ltd.* [1921] 1 K.B. 49; 123 L.T. 619: *Alford v. Vickery* (1842) Car. & M. 280; 174 E.R. 507.

C Questions reserved for opinion of the Court of Appeal under section 14 of the Court of Appeal Ordinance.

K. C. Ramrakha for the appellant.

R. L. Munro and *C. Singh* for the respondent.

The following judgments were read [25th November 1965]—

D MARSACK V.P. : Two questions have been reserved for the opinion of the Court of Appeal under the provisions of section 14 of the Court of Appeal Ordinance (Cap. 3) in accordance with the judgment of this Court in *Permal Naiker v. Pachamuttu* (1958-59) 6 F.L.R. 144. They are questions of law based on findings of fact set out in the judgment of the learned Chief Justice in the Court below. These facts will be shortly summarised.

E It is clear that great difficulty was experienced in making findings of fact because of the manner in which the negotiations for a lease or tenancy from the respondent to the appellant were handled, and the lack of evidence as to exactly what was the dealing in land to which the Director of Lands gave his consent under section 15 of the Crown Lands Ordinance (Cap. 138).

F The facts which form the basis of the case stated may be shortly set out as follows. The respondent is the holder of Crown Lease No. 3205 over Lot 14 Section 12 Samabula North. This lease is what is known as a "protected lease" under the Crown Lands Ordinance, which provides that it shall not be lawful for the lessee under any such lease to deal in any way with the land without the written consent of the Director of Lands first had and obtained. After some G negotiation between the parties the respondent's solicitor wrote to the appellant setting out the terms under which it was proposed that the appellant should become the respondent's tenant or sub-lessee of the premises. The terms set out were that the rent was to be £40 per month payable in advance, tenancy was to commence on 1st September, 1962, a lease for 18 months was to be drawn up, and the H letting was to be subject to the consent of the Director of Lands for which application had already been made. By letter in reply dated 7th September, 1962, the appellant accepted the terms.

On the 8th September, 1962, the respondent wrote to the Director of Lands applying for consent to let his newly erected residence. Nothing is stated in that letter as to the terms of the proposed tenancy, nor does it indicate that a copy of the correspondence was enclosed for the information of the Director of Lands. None the less, on the 29th September the Director of Lands wrote acknowledging receipt of a letter of the 7th (not 8th) September, and granting permission to sublet the property concerned to the appellant, by name, at a monthly rental of £40. No information was given to the Court as to how the Director of Lands became aware of the identity of the proposed sub-lessee and of the amount of rent to be charged.

Until and including the month of February 1964, namely 18 months from the date at which the tenancy commenced, rent was tendered and accepted at the rate of £40 per month. The appellant remained in occupation thereafter, and it would appear that the appellant is still in possession. For the following three months the sum of £40 per month was tendered as rent and accepted by the respondent as "use and occupation fee". No payment was made by way of rent, or for use and occupation, for the period of 7 months from July 1964 to January 1965 both inclusive. Distress was then levied at the instance of the respondent for £280, representing 7 months at £40 per month. It is in respect of that distress that this action has been brought.

On the 26th June, 1964, notice was given by the respondent's solicitor to the appellant in the following terms:

> "I have been instructed by my client S. N. Verma (your landlord) to write to you and inform you that vacant possession of the premises occupied by you of my client in Ono Street is required by him as the lease had expired on 28th February, 1964. Despite repeated requests you have not as yet vacated the premises.
> Please take notice that unless vacant possession is given on or before 31st July, 1964, my cilent will have no alternative but to resort to legal proceedings for an order for possession."

On the 15th September, 1964, the respondent sued the appellant in the Magistrate's Court, with the consent of the Director of Lands, for possession on the ground that the term of 18 months which had been granted to the appellant had expired. These proceedings were later withdrawn.

On the 18th January, 1965, formal notice to quit was given to the appellant demanding possession on the 28th February, 1965, and claiming arrears of rent for the 7 months to which reference has already been made.

The learned Chief Justice held that the Director of Lands had not given his consent to an 18 months' sub-lease, and that the dealing which he approved must be taken to be a monthly tenancy. The learned Chief Justice further found that the parties must be taken to have accepted that the tenancy was a monthly one, and that this was supported by the fact that no agreement to lease was executed. As against this, however, there is the fact that the respondent in his letter of the 26th June, 1964, affirmed that the tenancy had been a "lease" expiring on the 28th February, 1964, namely 18 months after the day from which the tenancy was intended to commence.

The first question referred to this Court is in the following terms:

> "Was there a lawful tenancy subsisting between the respondent as landlord and the appellant as tenant, in respect of the period 1st July 1964 to 28th February 1965?"

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It was very strongly contended by counsel for the appellant that the whole agreement between the appellant and the respondent was illegal in that possession had been given and taken, and therefore the agreement substantially performed, before the consent of the Director of Lands had been given. He stresses the wording of section 15 of the Crown Lands Ordinance which provides that the consent must be *first* had and obtained, in default of which the transaction is illegal. If the absence of prior consent vitiates the transaction *ab initio*, then in counsel's contention the appellant at no time was the legal tenant of the respondent and at no time therefore was there a legal basis for the levying of distress. He further contends that when the appellant took possession, without the consent of the Director of Lands first had and obtained, the appellant became guilty of an offence under section 34 of the Crown Lands Ordinance and accordingly liable to the penalties therein specified. In counsel's submission the commission of an offence cannot be cured by an *ex post facto* granting of the necessary consent.

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This raises the inevitable rejoinder that the appellant is raising his own wrongdoing as a defence to an action which but for that wrongdoing would have been legally justified. That aspect of the matter was dealt with by the learned Chief Justice and is not the concern of this Court. All that we are required to decide is whether or not there was a lawful tenancy during the period of 7 months in issue.

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In my view the learned trial Judge was right in holding that upon the facts as found there was a monthly tenancy as from the date of the notification of the consent of the Director of Lands, whatever may have been the position with regard to the occupation of the premises by the appellant with the approval of the respondent before that date. I do not think that we are called upon to decide what was the position of the appellant in possession between the 10th and 29th September, 1962. The original agreement in writing between the parties, which was made subject to the consent of the Director of Lands, was for a lease for the term of 18 months. No consent was granted to that proposal, and it appears clear that entry into possession thereunder as from the 10th September was wrongful under the Crown Lands Ordinance. But as from the time of notification of the consent of the Director to a "sub-letting" by the respondent to the appellant at a rental of £40 per month, then it must be taken that, as the learned Chief Justice has found, from that date onwards the appellant became the lawful tenant of the respondent. It is common ground that rent at the rate of £40 per month was paid regularly. As was pointed out by counsel for the respondent, payment of rent is an acknowledgment of tenancy, and is conclusive in the absence of other evidence: *Woodfall on Landlord and Tenant*, 26th Edn., p.16, para. 28. The whole conduct of the parties, and not only the tender and acceptance of rent, is consistent only with the existence of a tenancy. The term of that tenancy was unspecified, but there was a

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finding by the learned Chief Justice that the tenancy was a monthly one; and I can find no reason for not accepting that finding for the purpose of these proceedings.

The question for determination then is this: Was that lawful tenancy still in existence during the crucial period in respect of which distress was levied, or had it in any way been terminated before that period commenced?

It has not been contended that the tenancy had been terminated in any way other than by notice to quit given by the respondent. The only such notice which is material in these proceedings is that already quoted, which is dated 26th June, 1964. The learned Chief Justice held, citing *Doe d. Godsell v. Inglis* (1810) 3 Taunt. 54, that this was not a valid notice to quit but a mere request for possession.

With the greatest respect, I am not satisfied that Godsell's case is strictly in point. The learned Chief Justice holds that the letter in question —

> "impliedly negatived any form of periodic tenancy, with respect to which only, in the absence of agreement or statutory provision, is a notice to quit appropriate."

In Godsell's case Mansfield L.C.J. said:

> "This writing is not in the least like a notice to quit but is a mere demand for possession, the defendant's term having then sometime since expired. The lessor of the plaintiff need not have given any notice at all; but the circumstance of his having given a notice will not hurt him."

The basis of that judgment was that the term admittedly granted by lessor to lessee had expired and no notice to quit was necessary. All that could be given was a demand for possession; and accordingly the landlord who had given the notice obtained an order for possession. In the present case the tenancy acquired by the appellant was held to be not a lease for the original term of 18 months, but a monthly tenancy, to terminate which a notice to quit would be required. Godsell's case to my mind has little application to this form of tenancy.

In my view the fact that the notice in question states, as the reason for demanding possession, that the lease had expired, does not in itself invalidate the notice if all requirements of a valid notice to quit are present. As is stated in *Foa on Landlord and Tenant*, 7th Edn., p.598, para. 964:

> "No particular form is requisite for a notice to quit ... The notice must —
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> 1. be addressed to the right person,
> 2. properly describe the premises to which it relates,
> 3. be plain and unequivocal and
> 4. expire at the proper time."

There is no doubt that the notice under review is addressed to the right person, and properly describes the premises. It has not been contended that it does not expire at the proper time. Can it be said that it is not plain and unequivocal? It can hardly, I think, be said that the appellant was left in any doubt as to what the respondent

required. He required the appellant to vacate the premises by the 31st July; and failing his doing so legal proceedings would be taken for possession. The cases cited in the argument before us, and referred to in Foa (op. cit.) at pp. 600-1, in which notices were held to be bad for uncertainty, all appear to concern notices which were conditional or vague as to their intent. There is admittedly an inaccuracy in the notice of 24th June, 1964. It refers to the expiry of a term of 18 months when in fact what subsisted between the parties was a monthly tenancy. But that inaccuracy does not go to the root of the notice itself. It refers only to the reason for the action of the respondent in giving a notice to quit. It does not in any way affect the terms of the notice itself, which are definite and capable of no misunderstanding: the landlord required the tenant to vacate the premises by the 31st July or face legal proceedings for possession.

Consequently the notice was, in my judgment, effective to bring to an end on the 31st July, 1964, the monthly tenancy which existed up till that date.

That being so it becomes necessary to answer the second question, namely:

> "Alternatively, was the appellant liable for payment of rent in respect of that period, and accordingly subject to distress therefor, by virtue of the provisions of the Fair Rents Ordinance (Cap. 39)?"

The relevant section of the Fair Rents Ordinance is section 14, which provides that no judgment or order for the recovery of possession of any dwelling-house or for the ejectment of a lessee therefrom shall be made except on certain grounds, including failure by the lessee to pay the rent or carry out the conditions of the tenancy. The first matter for determination then is whether what is known as a "statutory tenancy" has arisen. It is the contention of counsel for the respondent that the Fair Rents Ordinance does not create a class of statutory tenants as is the case in the United Kingdom. "Statutory tenant" is thus defined in *Megarry on the Rent Acts*, 6th Edn., p.142:

> "A statutory tenancy arises when a tenant under a lease or other contractual tenancy of premises within the Acts holds over, i.e. remains in possession after the expiration of the contractual tenancy."

The relationship between a tenant whose contractual tenancy is at an end but who has the protection of a statute such as the Fair Rents Ordinance, a statute providing that a tenant of premises to which the Act applies may not be evicted while he continues to pay the appropriate rent, is discussed by Lord Greene, M.R. in *Carter v. S. U. Carburetter Co.* [1942] 2 K.B. 288 (C.A.) at 291:

> "The effect of those sections is to prohibit a landlord from exercising the right to recover possession against a tenant who is prepared to go on paying the standard rent. In other words, that particular part of the Act deals with the case where the tenant has ceased to have a contractual tenancy, and the effect of the section is to give him what has been conveniently called a statutory tenancy which continues so long as he continues to pay the rent. The phrase 'statutory tenancy', although convenient, must not be allowed to mislead. In truth and in fact, a

> tenant who takes the benefit of the Act after his lease has come to an end is not a tenant at all in the sense that he has an estate. He has, as has been held, a merely personal right of occupation . . . ."

That seems to me to be precisely the position here. The contractual tenancy, which was the monthly tenancy at £40 per month agreed upon between the respondent and the appellant, expired by reason of a notice to quit given by the landlord on the 31st July, 1964. By reason of section 14 of the Fair Rents Ordinance (Cap. 39) the appellant was protected from eviction while he continued to pay the rent and perform the other terms and conditions of his tenancy. The learned Chief Justice has proceeded on the basis that the premises in question were subject to the provisions of this Ordinance which must, for the purposes of this case, be taken to apply. I cannot find such differences between the provisions of the Rent Acts (Imperial) and the Fiji Ordinance as to make it clear that in the former case a tenant in the circumstances described becomes a "statutory tenant" and in the latter case he does not; nor did counsel engaged in the case refer the Court to any such provisions. In *Remon v. City of London Real Property Co. Ltd.* [1921] 1 K.B. 49 at 54, Bankes L.J. says:

> "It is however clear that in all the Rent Restrictions Acts the expression 'tenant' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, someone whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him."

Later at p.58 Scrutton, L.J., says:

> "Unless 'tenant' includes a former tenant by agreement holding over against the will of the landlord, and 'letting' includes the landlord's relations to such a tenant, the whole object of the Acts is defeated."

There is some suggestion that in this case the appellant could more properly be described as a "tenant on sufferance" than a "statutory tenant". I do not think that is so. Scrutton L.J., deals with this aspect of the question in Remon's case at p.58:

> ". . . . tenants by sufferance seem to have been confined to persons who held over without the assent or dissent of their landlords, and not to have included persons who held over wrongfully in spite of the active objection of their landlords."

In 23 *Hals.* 3rd Ed. 509 para. 1158 a statutory tenant* is defined as:

> "One who enters on land by a lawful title, and after his title has ended continues in possession without statutory authority and without obtaining the consent of the person then entitled."

Here the tenant has remained in possession under statutory authority.

Applying these principles as well as I am able. I concluded that as from the 31st July, 1964, the appellant became a "statutory tenant" of the respondent in respect of the premises concerned. Moreover,

* This reference is no doubt intended to be to a tenant at sufferance to which the definition referred to in Halsbury in fact relates. — Ed.

this is consistent with the appellant's own view of his position, as in the statement of defence to the respondent's action for possession, given on 19th October, 1964, the appellant:

> "says he is a tenant within the provisions of the Fair Rents Ordinance and is a protected tenant thereby."

There then remains the final question as to whether the right of distress for rent in arrear exists against a statutory tenant. In *Woodfall* (op. cit.) at p.323, para. 774, it is pointed out that though what is known as a statutory tenancy is not, properly speaking, a species of tenancy, but only a personal right in the tenant not to have an order of possession made against him unless certain specified conditions are fulfilled, nevertheless a statutory tenant has the benefit of and is subject to most of the terms of the contracted tenancy. There is abundant authority for the proposition that there is no right of distress unless the relationship of landlord and tenant is established; that where a tenant holds over on sufferance only, a distress cannot lawfully be made but the remedy is by an action for use and occupation: *Alford v. Vickery* (1842) Car. & M. 280. But as I have said, in my view this is not a tenancy on sufferance. The relationship of landlord and tenant was established by the conduct of the parties and the payment of rent; and when the contractual relationship was brought to an end by the notice to quit, the appellant was still bound by the original conditions in so far as they were applicable to what is called a statutory tenancy, including in particular the liability to pay rent at the appropriate rate.

The appellant remained in occupation of the premises and was liable to pay rent — not, as was suggested, mesne profits — in respect of that occupation. The respondent's legal position was that of landlord; and even if the status acquired by the appellant was that of quasi-tenant only, I can find no authority compelling me to hold that the landlord's right to levy distress for rent in arrear was lost when the contractual tenancy became a statutory tenancy.

Accordingly, in my opinion, there is no restriction on the exercise by the landlord of what I conceive to be his legal right to levy distress for rent in arrear.

That being so, I am of opinion that the answers to the questions submitted to this Court should be as follows:

1. There was a contractual tenancy between the respondent as landlord and the appellant as tenant, which was terminated by notice to quit expiring on the 31st July, 1964.
2. From the 1st August, 1964, the appellant became a statutory tenant by reason of the provisions of the Fair Rents Ordinance (Cap. 39) and was liable to pay rent under such statutory tenancy at the agreed rate of £40 per month; and the respondent was legally entitled thereunder to levy distress for rent in arrear.

On the matter of costs I would order that the appellant pay the respondent's costs in respect of the argument before this Court, and I would fix these costs at 25 guineas, plus disbursements if any.

GOULD J.A.: I agree, and wish to add only a few words to what has been said by the learned Vice President. The first question

reserved for the opinion of this Court (and it must be remembered that only questions of law can be so reserved) involves consideration of two matters. The first is whether there was any basis for the inference drawn by the learned Chief Justice that a monthly tenancy followed the consent given by the Director of Lands. In his judgment the learned Chief Justice gave cogent reasons (which I will not repeat) and I am unable to say as a matter of law that there was no basis for his findings. The later attitude of the parties as shown in correspondence may well have had its origin in an idea that though they were forced by the consent to proceed on a monthly basis it was an arrangement intended to endure only until the arrival of the end of the time originally contemplated.

The second matter is whether the finding that the letter of the 26th June, 1964, did not constitute a valid notice to quit should be supported. I have found this a matter of some difficulty. I agree fully with the learned Chief Justice that the letter, on the face of it, is a demand for possession. It fulfils the requirements of a demand which must be given in the case of a tenancy at will before suit can be brought. But the question is whether that prevents it from operating also as a notice to quit if it is in appropriate terms. I attach no great importance to the absence of such words as "quit and deliver up" — there is an unequivocal demand for possession at a date which would be appropriate in the case of a monthly tenancy. The weakness is that the notice does not specify that it is designed to terminate a monthly tenancy but in the circumstances can the plaintiff have been in any doubt? If in his mind there had ever been a term of eighteen months that term had elapsed, and he had continued to tender rent on a monthly basis. I think the natural way for the plaintiff to construe the notice would be — "It demands possession and in case in the circumstances a monthly tenancy has arisen or may be claimed to have arisen by either party the notice has been made appropriate to that situation". The paradox is that it is the tenant (plaintiff) who now relies on the notice as valid and the landlord (defendant) on whose behalf it was given, who asserts the contrary; I doubt if he should be heard to do so. I have found the question difficult but, with considerable hesitation, I agree that the letter should be regarded as a valid notice to quit; the period of notice is appropriate to the tenancy which, as it has now been held, existed; the plaintiff did not have to decide difficult questions of law or fact to ascertain the intention of the letter, which was plain enough.

On the second question referred to this Court I am in agreement with what has been said by the learned Vice President. On the basis that the premises in question fall within the scope of the Fair Rents Ordinance (Cap. 39) (and I think that for the purpose of the case stated this Court cannot go behind the assumption to that effect made by the learned Chief Justice) I am satisfied that a statutory tenancy arose. A term of that tenancy was the continued payment of the rent, and I do not consider that the payment became something less than rent by the operation of the Ordinance. Rent arises out of the land and carries with it at common law the right to distrain and in my opinion that position was not altered by the Ordinance.

For these reasons and those given by the learned Vice President I agree with the answers to the questions of law and the order for

costs which have been proposed by him. Finally, I am impelled to comment that these proceedings throughout have provided a notable illustration of the danger of going to trial upon incomplete and ill-considered "agreed facts"; there is much to be said in this type of case for the normal procedure of pleadings and evidence.

KNOX-MAWER J.A.: I have enjoyed the advantage of reading the judgments of my learned brothers Marsack V/P and Gould J/A. I agree that it certainly cannot be held in law that there was no basis for the finding of the learned Chief Justice that a lawful monthly tenancy subsisted between the parties. Where my learned brothers have differed from the learned Chief Justice is in holding that the letter, dated 26th June, 1964, effectively terminated this monthly tenancy. For my part I am not finally persuaded that the finding of the learned Chief Justice on this point should be reversed. The learned Vice President has expressed his conclusions on this issue with his customary clarity. With respect, it seems to me that the contrary argument could be put something like this. Say a tenant was seeking the protection of the Court contending that this letter did not constitute an effective notice to quit. "I never had a lease which expired on 28th February, 1964", the tenant would argue, "my tenancy is a periodic one — a monthly tenancy. How can this demand for possession wrongly addressed to me as one holding over after the expiry of a non-existent lease, terminate a contract of letting to which, not only does the letter fail to refer, but which is unknown to the landlord or, if known, denied by him?" Argued thus, I feel that the Court would uphold the tenant's contention, and agree that this letter, as framed, could not be said to be an unequivocal termination of such contract of letting as in fact existed.

I would therefore answer the first question reserved for the opinion of this Court in 'the affirmative', and declare that there was a lawful tenancy subsisting between the respondent as landlord and the appellant as tenant, in respect of the period 1st July, 1964 to 28th February, 1965.

Upon the second (alternative) question stated for the opinion of this Court, assuming that it were necessary to answer it, I would be in complete agreement with the views expressed thereon by my learned brothers in this Court and by the learned Chief Justice in the Court below.