A

MANASA SOGANIVALU

v.

DAYA RAM

B

[SUPREME COURT, 1975 (Mishra J.) 31st July]

Appellate Jurisdiction

Landlord and tenant —premises protected by Fair Rents Ordinance—whether tenant forfeited protection of Act if he called no evidence at trial—Fair Rents Ordinance (Cap. 241) ss.19(1), 19(2), 19(5).

C

The tenant, when sued for vacant possession of his flat by the landlord on the grounds of arrears of rent, made certain submissions regarding the landlord's title and the notice to quit, but gave no evidence himself. The magistrate, thereupon made an order for possession forthwith, paying no attention to the fact that the flat was protected by the Fair Rents Ordinance.

D

Held : Even though the tenant called no evidence, he did not forfeit his right to the protection of the Fair Rents Ordinance, and the magistrate should have considered this aspect. This would have allowed the magistrate to decide whether an order conditional on the tenant paying the arrears would have been more reasonable than an absolute order for possession.

As there had been delay in hearing the appeal resulting in further arrears of rent, the order for possession would remain in force, but its execution suspended subject to the payment of the arrears of rent.

E

Cases referred to :

Mohammed Rasul v. Jeet Singh & Hazara Singh 10 F.L.R. 16.
Yates v. Morris [1951] 1 K.B. 77 ; [1950] 2 All E.R. 577.
Payne v. Cooper [1957] 3 All E.R. 335 ; [1958] 1 Q.B. 174.

Appeal against the decision of the Magistrate's Court granting the respondent an order for possession, judgment for arrears of rent and mesne profits.

F

H. M. Patel for the appellant.
D. N. Sahay for the respondent.

MISHRA J. : [31st July 1975]—

This is an appeal from a decision of the Magistrate's Courts Suva giving the plaintiff judgment for arrears of rent, mesne profits and order for possession. Both counsel agree that the issues raised in this appeal are identical with those raised in *Daya Ram s/o Sheo Raj v. Semi Tamanivalu* Civil Appeal No. 20 of 1974 and that this judgment will be equally applicable to that appeal. Both the appeals were, therefore, dealt with together.

G

It is not disputed that the defendant has been the plaintiff's tenant since October 1966 occupying Flat No. 26C at 26 Totoya Street, Samabula paying rent on a monthly basis. He has not at any time denied the landlord's title to the property. The provisions of the Fair Rents Ordinance apply to this flat. The particulars of claim briefly state the amount owing in rent and the estimated cost of repairs to a few louvres in the flat. They also allege breaches of an agreement under which the flat is let. The defendant filed a brief defence denying these allegations and claiming protection under the Fair Rents Ordinance. Formal pleadings were neither requested nor ordered.

H

At the trial the plaintiff gave evidence that two months' rent was owing when he first served a written demand on the defendant. Several notices were sent later without much response. He also alleged that six persons were occupying the small flat instead of two as required by the agreement. A copy of this agreement was exhibited (Ex. 2). He agreed in cross-examination that the property in question was on Crown land and that he had not obtained the Director of Land's consent to institute these proceedings. A rent book was given to the defendant and the plaintiff gave regular receipts to the defendant as and when rents were paid.

At the end of the plaintiff's case the defendant submitted no case to answer and elected to call no evidence. In his submission counsel for the defendant submitted that the plaintiff had not proved his title to the land and that the notice served on the defendant did not constitute a proper notice to quit. He also made a brief reference to the Fair Rents Ordinance. The case was then adjourned for a few days and on 19th September 1974 the learned Magistrate gave his ruling. He said, " On a consideration of the evidence I find that there is a case to answer. " Thereafter the following appears on the record :

Sahay : Defendant elected to stand on his submission therefore I ask for order.

Patel : Would Court please note that this matter will be taken on appeal.

Court : Order for possession forthwith and mesne profits and damages as claimed. "

No reasons are given for the ruling or for the order.

Learned counsel for the appellant submits, in one of his grounds of appeal, that the respondent's claim should have been dismissed because he did not produce any evidence to show that he had obtained the Director of Land's consent required under section 13 of the Crown Lands Ordinance. This argument, however, did not form part of his submission of no case to answer at the trial and the only evidence before the learned Magistrate as to the nature of the building indicated that it was on " Crown land ". No lease was produced. The Crown Lands Ordinance had not been pleaded. The appellant would appear to have created a great deal of difficulty for himself by electing not to call evidence. As a result there was no evidence before the learned Magistrate to show that the lease in qustion, if there was such a lease, was a protected lease under section 13 of the Crown Lands Ordinance, or that it was the " lease " that was being dealt with by the Court, or that the necessary consent had not been obtained at any stage of the proceedings until the Court's judgment was delivered (*Mohammed Rasul v. Jeet Singh and Hazara Singh* 10 F.L.R. 16). That ground, therefore, cannot help him at this stage.

Counsel for the appellant also submitted that the letter dated 8th May 1974 (Ex. 3) addressed to the appellant was not a proper notice to quit under the agreement signed between the parties (Ex. 2) which required the rent to be paid on a monthly basis. The appellant's tenancy, however, was one to which the Fair Rents Ordinance applied and a notice, however correct, would not have helped the respondent in recovering possession of the premises unless the provisions of section 19 (1) of the Ordinance were satisfied. The letter in question does not, in fact, require the appellant to vacate the premises. What it does is to give him notice that failure to pay arrears of rent forthwith would result in proceedings being taken for his eviction.

The relevant part of section 19 (1) of the Fair Rents Ordinance provides:

" 19 (1) No judgment or order for the recovery of possession of any dwellinghouse to which this Ordinance applies or for the ejection of a lessee therefrom shall be made, and no such judgment or order made before the coming into force of this Ordinance shall be enforced, unless—

(*a*) the lessee has failed to pay the rent or to perform the other terms and conditions of the lease;

(*b*) the lessee has failed to take reasonable care of the premises or has committed waste;

(*c*) ....."

The evidence given on behalf of the respondent showed that the appellant was seriously in arrear with his rent and that his payments in the past had been irregular. This evidence remained uncontradicted. There was also uncontradicted evidence of some minor damage to the windows in the flat occupied by the appellant. This would certainly give the respondent the right to seek possession of the flat and the learned Magistrate was correct in holding, on the respondent's evidence, that there was a case for the appellant to answer. But from his very brief ruling, and the subsequent order that he made, it seems that he accepted Mr Sahay's submission that, in view of the appellant's election to submit no case to answer, the respondent was automatically entitled to an order for possession and all the other reliefs sought by him. There was, however, enough in the respondent's own evidence to show that the appellant's tenancy was protected by the Fair Rents Ordinance and the appellant had, in his defence, offered to pay the arrears of rent. Section 19 (5) of the Fair Rents Ordinance states:

" (5) The Court shall take cognisance of the protection afforded to a lessee by the operation of this section whether such protection is pleaded or not."

Does a lessee who relies entirely on certain technical defences, and elects to call no evidence, forfeit his right to the protection afforded by section 19 of the Ordinance? The learned Magistrate does not seem at all to have adverted to this issue which clearly arose from the way the proceedings went. There is nothing in his judgment, or the rest of the record, to show that he did. In *Yates v. Morris* ([1951] 1 K.B. 77 at 80) Evershed M.R. said:

" When there is a rent controlled house, and a statutory tenant is the occupant, the Court cannot order possession at the suit of the landlord save in certain circumstances. First, it must be shown that some one of the events enumerated in the Act of 1933 has occured which gives the Court jurisdiction to make an order at all, and, second, the Court must come to the conclusion that it is reasonable to make the particular order for possession. There is, therefore, a difference in emphasis."

This principle is equally applicable under the Fair Rents Ordinance. The appellant in this case was a protected tenant and, if he was prepared to pay all the rent then in arrear, was it reasonable to make an absolute order for possession? Should not the Court at least have given consideration to the desirability or otherwise of making a conditional order under section 19 (2) of the Fair Rents Ordinance? (See *Payne v. Cooper* [1957] 3 All E.R. 335). There is nothing in the learned Magistrate's judgment to suggest that any such consideration had crossed his mind before he made the absolute order.

In my view, while the appellant may have created unnecessary difficulties for himself by electing not to call evidence, he did not thereby deprive himself of the protection provided by the Fair Rents Ordinance. If the learned

Magistrate had considered this aspect of the case and given reasons why such protection should not be accorded to the appellant his judgment could not have been impugned. He, however, did not do so. I will, therefore, allow the appeal to the extent of converting the absolute order made by the learned Magistrate into a conditional order under section 19 (2) of the Ordinance.

The matter, however, has become further complicated by the delay in hearing this appeal. The appellant has been in possession all this time and the amount now owing to the respondent is much greater than at the time of the trial. It will be inequitable to give the appellant relief under the Fair Rents Ordinance without requiring him to pay the total sum now owing. The order for possession will, therefore, remain in force but its execution will be suspended until 21st August 1975 subject to the condition that the appellant pays into Court before that date the amount claimed by the writ together with mesne profits calculated at the rate of $29 per month from the date of the writ to 1st August 1975 when the August rent would have normally become payable. Any money already paid into Court by the appellant will be taken into account for the purpose of such calculation. If this condition is complied with by 21st August 1975 the order for possession will be discharged. If not the respondent will be entitled to have the order executed and, in that case, there will also be a judgment in favour of the respondent for the amount claimed by the writ plus mesne profits calculated from the date of the writ at the rate of $29 per month until the date of the delivery up of possession. Though there was no specified claim in the writ for mesne profits the learned Magistrate, in my view, was correct in including them in his judgment, in a summary action of this nature. Such an order will obviate a multiplicity of proceedings.

The case will be remitted to the Magistrate's Court with directions as above. The appellant will pay the costs of this appeal as well as the costs of the Court below.

Appeal allowed to extent of converting absolute order for possession into a conditional order.