

KANJI JOGIA AND OTHERS

v.

BHAGWANDAS HARGOVIND AND OTHERS

[SUPREME COURT, 1966 (Hammett P.J.) 25th November, 2nd December]

Civil Jurisdiction

Landlord and tenant—notice to quit—provision in agreement for notice by “the lessors”—notice given by only two of three lessors—ineffective.

Landlord and tenant—application for possession by lessors under the Land (Transfer and Registration) Ordinance—omission to include description of land in summons under section 187 remedied by reference to description in affidavit in support—Land (Transfer and Registration) Ordinance (Cap. 136) s.187.

Practice and procedure—time—summons for appearance “not earlier than sixteen days after the service of the summons”—construction of requirement as to time—Land (Transfer and Registration) Ordinance (Cap. 136) s.187.

Interpretation—Ordinance—provision as to time limited by summons for appearance—construction—Land (Transfer and Registration) Ordinance (Cap. 136) s.187.

In an agreement to lease shop premises it was provided that in certain circumstances the lessors could give the lessees three months’ notice to quit. A notice to quit given by only two of the three lessors was ineffective to determine the lease.

The requirement of section 187 of the Land (Transfer and Registration) Ordinance that a summons for possession shall contain a description of the land, is sufficiently complied with if, though the description is omitted from the summons, there is reference in the latter to the description in the affidavit in support thereof.

The words “not earlier than sixteen days after the service of the summons”, in section 187 of the Ordinance, are to be construed as meaning, “not less than sixteen clear days after the service of the summons.”

Cases referred to: *Re Viola’s Indenture of Lease, Humphrey v. Stenbury* [1909] 1 Ch. 244; 100 L.T. 33; *Re Railway Sleepers Supply Company* (1885) 29 Ch. D. 204; 1 T.L.R. 399.

Summons in chambers in the Supreme Court for possession of land. Reported by direction. The facts are set out in the order of Hammett P.J.

N. S. Arjun for the applicant.

T. Madhoji for the respondent.

HAMMETT P.J. : [2nd December, 1966]—

A This is an application by the Plaintiffs under the provisions of the Land (Transfer and Registration) Ordinance calling upon the Defendants to show cause why they should not give up possession to the Plaintiffs of the premises "described in the affidavit of Kanji Jogia duly sworn and filed herein". The Defendants in their affidavit in opposition and at the hearing have relied on three grounds why this application should not be granted.

The facts are not in dispute and are briefly as follows :—

B The Plaintiffs are the registered proprietors of the land comprised in Certificate of Title No. 8954 situated in Cumming Street, Suva. By an agreement dated 7th April, 1965, the Plaintiffs agreed to lease to the Defendants the premises known as Shop No. 1, being part of the said land and the building thereon for a term of five years from the 1st April, 1965.

C Clause 4(b) of the said agreement reads as follows :—

"And it is hereby mutually agreed and declared by and between the parties hereto as follows :—

D (b) In the event of the present tenancy taken from Messrs. Morris Hedstrom Limited by the two lessors herein namely KANJI RATANJI JOGIA and RATANJI DEO KARAN JOGIA in respect to the shop premises now occupied by them at Thomson Street, Suva, not being renewed or extended by the said Morris Hedstrom Limited or in the event of the said Morris Hedstrom Limited giving to the said K. R. Jogia and the said R. D. Jogia notice to quit in respect to the said shop premises occupied by them then in such event or events the term hereby created shall be deemed to be determined and cancelled PROVIDED HOWEVER the Lessors shall give to the Lessees at least three (3) calendar months' notice prior to such determination and upon the expiration of such notice the Lessees shall peacefully and quietly deliver up vacant possession of the said premises hereby demised to them."

F By Notice to Quit dated the 30th June, 1966, Morris Hedstrom Limited demanded possession of the shop premises referred to in Clause 4(b), from Kanji Jogia and Ratanji Deo Karan Jogia not later than the 31st July, 1966. On the 4th July the Solicitors for Kanji Jogia served on the Defendants, notice on behalf of the first and second Plaintiffs purporting to terminate the agreement dated 7th April, 1965, as from the 31st October, 1966, in the following terms :—

H "On the instructions of our clients Kanji Jogia and Ratanji Jogia, we hereby give you notice that the lease which you hold from them and Nichhabhai dated the 7th April, 1965, will be determined on the 31st October, 1966. This notice is given in accordance with Clause 4(b) of the said Lease, as our clients have been given notice by Morris Hedstrom Limited to vacate their premises at Thomson Street, Suva, not later than the 31st July, 1966."

There appear to be some unexplained differences in the names and capacities of certain of the parties in this case. For example, the name of the first Plaintiff in the summons is stated to be "Kanji Jogia" and the affidavit in support of the application was made by "Kanji Jogia" who states that he is one of the registered proprietors of the land, whereas in the agreement for lease made with the Defendants the first lessor is referred to as "Kanji Ratanji Jogia". Similarly, the second Plaintiff is stated in the summons to be "Ratanji Jogia" but the second lessor in the lease is stated to be "Ratanji Deo Karan Jogia". Again, the agreement dated 7th April, 1965, is stated in the affidavit of "Kanji Jogia" to have been granted by "Kanji Jogia", "Ratanji Jogia" and "Nichhabhai" to the Defendants whereas in the affidavit of "Kanji Jogia" in support of the application it is stated that there are only two lessors, namely "Kanji Ratanji Jogia" and "Ratanji Deo Karan Jogia". Further, in the Notice to Quit dated 4th July, 1966, addressed by the Solicitors of "Kanji Jogia" to the Defendants it is stated that "Kanji Jogia" and "Ratanji Jogia" and "Nichhabhai" are the lessors but that the Notice is given upon the instructions of "Kanji Jogia" and "Ratanji Jogia".

The grounds upon which this application is opposed are as follows :—

Firstly, that the summons issued by the Plaintiff is bad in law. It is submitted that it does not comply with the requirements of Section 187 of the Land (Transfer and Registration) Ordinance in that it does not contain a description of the land as is required by that Section.

Secondly, that the Notice to Quit dated 4th July, 1966, is invalid and ineffective because it was given on behalf of Kanji Jogia and Ratanji Jogia alone and not on behalf of Kanji Jogia, Ratanji Jogia and Nichhabhai the "lessors" as is required by Clause 4(b) of the agreement dated 7th April, 1965.

And *thirdly*, that the summons is bad in law in that it required the Defendants to appear on a day earlier than sixteen days after the service of the summons contrary to the express requirements of Section 187 of the Ordinance.

I will first deal with the first ground of objection.

The provisions of Section 187 of the Land (Transfer and Registration) Ordinance read as follows :—

"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons. The summons shall be served in the same manner as a writ of ejectment."

It is true that the summons in this case does not itself expressly describe the land concerned. It does, however, refer to it as that "described in the affidavit of Kanji Jogia duly sworn and filed herein". In that affidavit the land is sufficiently described. There is no provision in the Ordinance for a summons under Section 186 to be supported by an affidavit although this is the invariable practice.

A I do, therefore, read the summons and the affidavit in support together, as a whole. In the particular circumstances of this case I am satisfied that there has been sufficient compliance with the procedural requirement of Section 187 in respect of the description of the land concerned. There are, therefore, in my opinion, no merits in the first ground of objection.

B The second ground of objection raises the question whether it is open to two of three owners, who are tenants in common, to give an effective notice of termination of the agreement to lease dated 7th April, 1965. The first Plaintiff, has sworn in paragraph 2 of his affidavit that the agreement to lease was given by the three Plaintiffs and this allegation is admitted in paragraph 3 of the Defendants' affidavit in opposition. Notwithstanding the apparent conflict in the wording of Clause 4(b) of the agreement which is set out in paragraph 3 of the first Plaintiff's affidavit, which seems to suggest that there were only two lessors, I must deal with this application on the basis of the facts alleged by the Plaintiffs (and admitted by the Defendants) that there were in fact three lessors. The notice of termination dated 4th July, 1966, clearly states that the Solicitors concerned gave this notice on the instructions of the first and second Plaintiffs alone. There is no evidence that they had any authority or that the first and second Plaintiffs had any authority to give any notice of termination on behalf of the third lessor.

E In *In re Viola's Indenture of Lease, Humphrey v. Stenbury* [1909] 1 Ch. 244, the lease contained a proviso that if "the Lessees" should be desirous of terminating the lease at the end of the first three years of the term and of such desire should give to the lessor six months' previous notice in writing, then at the end of such three years the term thereby granted should cease. Warrington J. held that the terms of the proviso were express and that both lessees must be desirous and express their desire to determine the lease and that a notice therefore by one of them could not be notice by both to determine the lease.

F In the present case Clause 4(b) expressly provides that "the lessors" shall give notice of determination. There were three lessors and the notice of determination was given on behalf of only two of them. In my view, therefore, no effective notice to determine the term created by the agreement to lease dated 7th April, 1965, has been given.

G On this ground alone I am of the opinion that the application must fail but since it has been raised I feel I should also deal with the third ground of objection.

H The third ground raises the question of the construction of the term "not earlier than sixteen days after the service of the summons" in Section 187 of the Land (Transfer and Registration) Ordinance. The summons in this case was issued on the 9th day of November, 1966; by the summons the Defendants were called upon to appear on the 25th November, 1966. It is not in dispute that from the

wording of Section 187 the date of issue of the summons, namely the 9th November, 1966, must be excluded and that the first day of the sixteen days allowed was the 10th November, 1966. The 25th November, 1966, was therefore the sixteenth day. It is the contention of the Defendants that the expression "not earlier than sixteen days" is the same as "not less than sixteen days" and that the sixteenth day, i.e., the 25th November should therefore be excluded. On this basis the earliest day on which the Defendants should have been summoned to appear was the 26th day of November 1966. In other words, the Defendants contended that in computation of the sixteen days referred to in the section, the date of the service of the summons and the date of the hearing of the summons should both be excluded. I have studied the several authorities quoted on the issue of whether the sixteenth day should be included or excluded in the computation of time.

This matter was dealt with by Chitty J. in considerable detail in *In re Railway Sleepers Supply Company*, (1885) 29 Ch. D. 204. He there referred to Lord Tenterden's test which had been cited with approval by Lord Wensleydale in two later cases. This was to reduce the time to one day and I propose to apply the same test.

Supposing the Ordinance had said in Section 187 that the summons should be to appear at the court on a day not earlier than one day after the service of the summons: the summons was served on the 9th November 1966 which was the date of issue, and the hearing could not properly be held on the 10th November for one day must intervene. Therefore, the 11th November would have been the earliest day. Adding fifteen more days to make up the sixteen, the earliest date of appearance at court given in the summons should therefore have been the 26th November.

On this basis it is clear that in computing the period "not earlier than sixteen days after the service of the summons" it is necessary to exclude both the date of service and the date of hearing. This expression means "not less than sixteen clear days after the service of the summons". As was said by Chitty J. in *In re Railway Sleepers Supply Company* "where there must be an interval of not less than fourteen days, that means fourteen clear days".

I uphold the contention of the Defendants that the summons in this case was returnable on a day earlier than sixteen days after the service of the summons and this contravened the express provisions of Section 187.

The Defendants have shown cause why they are entitled to refuse to give up possession of this land; I do therefore dismiss the summons with costs.

Summons dismissed.