

SUPREME COURT
HOUSING AUTHORITY

165

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v.

RAJ KUMAR (s/o PARAGA)

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[SUPREME COURT, (Williams, J.) 31st January 1979]

Appellate Jurisdiction

Tenancy—Housing Authority—Tenancy not freely assignable—assignee no right to remain.

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C. Gordon for Appellant

A. Patel and J. Punja for Respondent.

Appeal against a decision of a Magistrate rejecting a claim for possession by the Housing Authority (Authority) of Lot 34 part of Crown Lease No. 5037 against the defendant.

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Before the Magistrate the facts were presented by an agreed statement. The appellant was the owner of the premises. In his Statement of Defence the respondent claimed he was a “worker” within the definition of worker” in the Housing Ordinance Cap. 240 and therefore within the class entitled to occupy such accommodation. He alleged that Emosi, the appellant’s tenant had assigned his right and title to the respondent in 1974; the appellant was aware of the assignment and its failure to recognize the respondent as tenant was unlawful. He also pleaded laches and acquiescence by the appellant and further alleged the existence of a trust.

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The Magistrate purported to take judicial notice of an alleged “unofficial practice” among some Authority officers that “a tenant who moves to another area applies to assign his tenancy. He is advised to allow the proposed assignee to occupy as a caretaker whilst the application is being considered.” He found that the tenant and respondent were following this. The learned Magistrate considered that under clause (w) of the Authority’s Tenancy Agreement the tenant had acquired an equitable right to be regarded as a lessee purchaser which he was entitled to transfer to the respondent. He found for the respondent.

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The learned trial Judges noted the Authority had by correspondence advised the tenant he had assigned possession without permission and called upon him to rectify the breach. It also advised the respondent he was in illegal occupation and requested him to vacate.

The learned trial Judge held that it was clearly erroneous to take judicial notice of the practice by certain persons in the Authority. It was not notorious, and unknown to the Court and other Judges. No copy of the Authority “home purchase plan” was produced: accordingly Clause (w) (cited in the Reasons) could

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- A not be fully explained; or that under it the tenant had any equitable right to assign. The Court said that any option the tenant may have to become a lessee purchaser would be a purely personal option. It could be one requiring him to surrender his rights to the Authority or some person approved by it; or to give up possession.

- B The Court found, for reasons given, that the tenancy right was not freely assignable. If there was an option to assign, its exercise would require the giving of notice to the grantor. The tenant gave no such notice.

The Court expressed the opinion for reasons explained that the right to become a lessee purchaser was one intended to be personal to the tenant and was not freely assignable. Further permission to assign must be within the discretion of the Authority.

- C *Held:* The tenant Emosi had been clearly in breach of the tenancy agreement in purporting to assign and that he should have given one month's notice of his intention to quit.

- D If the Authority was guilty of any laches (not decided) the respondent had lost nothing thereby. The respondent had no right to possession having moved in without permission.

Appeal allowed.

Case referred to:

- E *Griffiths v. Peton* (1958) 1 Ch. 205.

WILLIAMS, J.:

Judgment

- F This appeal arises out of an action in a magistrate's court in which the Housing Authority, a statutory body created under the Housing Ordinance, Cap. 240, sought possession of a dwelling house on lot 34, Crown Lease No. 5037, from the defendant on the ground that he is a trespasser.

- G No oral evidence was adduced in the Court below and the parties' advocates presented submissions to the magistrate based on an agreed statement of facts.

The Housing Authority, the owner of Lot 34, part of Crown Lease No. 5037, alleges that the defendant is in unlawful occupation thereof and has refused to quit.

- H In his Statement of Defence the defendant alleges that he is a worker within the definition of the Ordinance and therefore within the class entitled to occupy such accommodation. He alleges that the plaintiff's tenant, Emosi Degei, assigned his

rights and title to the defendant in 1974; that the plaintiff was aware of the assignment and its failure to recognise the defendant as a tenant is unlawful. The defendant also pleads laches and acquiescence on the part of the plaintiff and alleged the existence of an implied trust but gave no particulars thereof.

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The facts can be gleaned from the learned magistrate's judgment.

The Housing Authority let a house to Emosi Degei on 8/10/71 at a rent of \$23.00. Emosi Degei was transferred to Nadi and he wrote informing the Housing Authority on 29.4.74 that Mr Raj Kumar (defendant) now occupied the premises and had paid Emosi Degei what the latter had paid to the Housing Authority and asked that the title be transferred to the defendant.

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The Housing Authority did not reply.

On 30/4/74 Emosi Degei again wrote to the Housing Authority explaining that he was "temporarily transferred" to Nadi and that the defendant, would occupy as caretaker.

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On 28/6/76 the Housing Authority wrote to Emosi Degei complaining that he had assigned possession without the Housing Authority's permission and requesting him to remedy the breach.

Emosi Degei replied on 6/9/76 confirming that the defendant was still in occupation. On 8/9/76 the Housing Authority complained that no prior consent was obtained to sublet and asked him to give up the premises with vacant possession, and referred him to their letter of 28/6/76.

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The defendant wrote to the Housing Authority in April 1974 and in September 1976. In the letter he states that he has been paying the rent since April 1974 and considered himself eligible for a transfer to him of the tenancy. In April 1974 he had asked to be placed on the Housing Authority's waiting list. The Housing Authority replied to defendant's letter of September 1976 pointing out that he was in illegal occupation and requested him to vacate. It states that his name is on the waiting list and suggested that he re-new his application each year. This reply suggests that there is such a large demand for this kind of housing that waiting lists are checked annually.

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In his judgment the learned magistrate stated that it was evident that Emosi considered himself to be 'the owner' of the house (p. 19 of the typed record). He referred to clause (w) of the Housing Authority's tenancy agreement which states that after one year the tenant shall have a right to become a lessor/purchaser if he observes the conditions. He points out that Emosi had observed those conditions for 2½ years and concluded that Emosi had acquired an equitable right to be vested with legal ownership. The learned magistrate purported to take judicial notice of an unofficial practice among some Housing Authority officers that a tenant who moves to another area applies to assign his tenancy he is advised to allow the proposed assignee to occupy as a caretaker whilst the application is considered. He found that Emosi and the defendant were simply following what had become a common practice. He considered that under clause (w) Emosi had acquired an equitable right to be regarded as a lessee/purchaser which he was entitled to transfer to the defendant.

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For the forgoing and other reasons the learned magistrate rejected the Housing Authority's claim for possession and they appeal against that decision.

- The first ground of appeal is that the learned magistrate erred in purporting to
- A take judicial notice of certain practices by persons in the Housing Authority of permitting a tenant to let a prospective assignee of the tenancy to occupy as a caretaker until the application to assign was considered. It was clearly erroneous for the magistrate to hold that the practice should have been followed in the instant case. The practice is not notorious, it is unknown to me and other judges. The man in the street would scarcely say "Everyone is aware of that practice." No doubt the magistrate noticed it in the course of his work, but that alone does not entitle him to take
 - B judicial notice of it. His judgment reveals that it is not universal practice but is adopted by "some officials" of the Housing Authority. However, the error does not affect his decision that under clause "w" of the tenancy agreement Emosi held an equitable right to become a lessee/purchaser of the house.

Clause "w" reads as follows:

- C "If the tenancy shall continue for a period of one year and if the tenant shall throughout such period observe and perform the terms of these presents to the satisfaction of the owner the tenant shall become eligible to be a lessee purchaser of the premises under the owner's Home Purchase Plan."

- No copy of the Housing Authority's "home purchase plan" was produced or referred to. There is not known what clause "w" means by a "lessee purchaser".
- D The expression "lessee purchaser" suggests some arrangement whereby the lessee becomes entitled to purchase the house from the Housing Authority. At the end of a year he does not automatically become a purchaser but becomes eligible to be a lessee/purchaser on conditions that are unknown to him at the time. It would seem that he has some kind of option which he can exercise but until he exercises it he will not become a lessee purchaser. The lessee/purchaser contract is bound to have stipulations protecting the Housing Authority's interests whilst the tenant is a lessee/purchaser and before he finally becomes an owner. Thus it could be a purely personal option requiring the tenant to surrender his rights to the Housing Authority on giving up possession before full payment; or it could require him to assign it to some person approved by the Housing Authority and on its waiting list; to pay an increased rent and so forth. If one or more of the stipulations was unsatisfactory to the tenant he could decide not to exercise the option.

- F Jenkins L. J. said in *Griffiths v. Felton*, (1958) 1. Ch. 205 at 225 that an option is "a chose in action the benefit of which can (if the terms of the contract are such as to show that it is not merely personal to the grantor) be assigned by the grantee to anyone he chooses, subject to any restriction imposed by the contract as to the persons in whose favour assignment is permissible."

- G I have been referred to numerous decisions on the assignability options to purchase which appeared in leases. In all those cases in which they were held to be assignable the terms of the option expressly made them assignable. Whether the law implies that they are assignable in the absence of a provision to that effect does not appear to have been definitely decided. However, assuming that the law implies that the right can be assigned unless assignment is excluded expressly or by implication, how does this affect Emosi's position? It appears to me that the right to become a
- H lessee/purchaser under clause (w) is intended to be personal to the tenant. Thus he only becomes eligible for consideration after he has been a tenant and paid his rent for 12 months. The option is not to purchase outright at a known price before the

expiry of a certain period. The Housing Authority's duty to be fair to those on its light could be defeated completely by treating the right as freely assignable and it would be contrary to the spirit and the provisions of the Ordinance. Thus a tenant under the Ordinance is a "worker" and therefore an assignment can only be made to a "worker". Under the Ordinance it is the duty of the Housing Authority and not of the tenant to ensure that the new occupant is a "worker". Accordingly I do not think it would be correct to imply that the right is freely assignable in the absence of any provision to the contrary in the tenancy agreement.

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Mr Punja argues that Emosi was entitled to regard himself as a purchaser. It is firmly established that one can only exercise an option by giving notice to the grantor that one intends to exercise it. Emosi gave no such notice and it would be difficult for him to give such notice without being aware of the price to be paid, its mode of payment and so forth. I think he would have had the right to be informed of them had he exercised it. Even if he accepted the terms of the lessee/purchaser agreement he may not by the term "lessee/purchaser?" I cannot guess at its meaning. It could withhold conveyance of title until the payment of a final instalment by way of rent and may contain prohibitive conditions as to attempts to assign.

With respect to the learned magistrate I am of the opinion that the tenant Emosi had acquired no assignable option under the agreement.

The learned magistrate ruled that Emosi was not in breach of clause (d) of the tenancy agreement which requires written consent of the Housing Authority before he can assign on the basis that clause (d) is ultra vires the Ordinance.

The clause (d) reads:—

"The tenant will not transfer or assign the tenancy or sublet or otherwise part with possession of the premises or any part thereof without the written consent of the owner first obtained which consent may be withheld in the absolute discretion of the owner."

A clause such as (d) must be inserted in all Housing Authority leases under the provisions of S.16 (3) which enacts that:—

"The Authority shall make it a term of every letting that the tenant shall not assign sublet or otherwise part with possession _____ except with the consent in writing of the Authority and shall not give such unless it is shown to its satisfaction that no payment other than a rent which is in its opinion reasonable _____ is received by the tenant in consideration of the assignment _____."

The learned magistrate upheld the defence contention that S.16(3) does not give the Housing Authority an absolute discretion to refuse permission to assign and that clause (d) is ultra vires in purporting to vest an absolute discretion in the Housing Authority. In that connection I note that S.16(3) does not say that the Housing Authority must permit assignments if they are satisfied that no payment other than rent which is reasonable is received in consideration of the assignment. The statute requires the Housing Authority to ensure that the tenant is not profiteering out of a proposed assignment. There must also be other reasons which would justify refusal of an assignment. Being a statutory body created to provide housing for "workers" they have to be satisfied that the assignee is a "worker" as defined by the statute. There is a waiting list and an assignment which was not examined and approved

- A could enable a "worker" to obtain a house without even approaching the Housing Authority, or without being on the waiting list, or to obtain one by "jumping the queue", or enable an assignment to a person who is not a worker contrary to the Ordinance. And unrestricted right to assign could result in gross unfairness to persons who may have waited several years for a house. The permission to assign must, in my view, be within the discretion of the Authority. Use of the term "absolute discretion" in clause (d) does not enlarge the unqualified word "discretion" used in section 16(3). A discretion exercised by any statutory body such as the Housing Authority must always be fair and just and its behaviour in such matters can be controlled by the Courts.

With respect to the learned magistrate I take the view that clause (d) is not ultra vires the provisions of S.16(3). Nor is there any merit in the respondent's argument before me that the subsection does not entitle the Housing Authority to require written permission "prior" to an assignment. Since certain statutory conditions have to be complied with which necessitate investigation and inquiry by the Housing Authority before an assignment can be sanctioned, it follows that consent being based on the outcome of such investigations must precede an assignment to the person whose qualifications have had to be verified.

In my opinion Emosi was clearly in breach of clause (c) in purporting to assign the premises without the permission of the Housing Authority.

- D Mr Punja has argued that consent should not be unreasonably withheld. I have indicated that the Housing Authority must act fairly and justly. No step has been taken by the defendant to compel the Housing Authority to give its permission on the ground that it was unreasonably withheld. In fact if consent were to be given it would have to be retrospective because Emosi gave up possession 4 years ago. If it was not convenient for him to live in the house when he was transferred it was open to him to quit. It was not incumbent upon him to assign the lease because he wished to give up possession.

- F In the magistrate's court the defendant argued that the Housing Authority was guilty of laches and that the defendant should be allowed to remain in possession. It was April 1974 when Emosi stated that he had put in defendant in possession and requested that this be retrospectively consented to. On 7/10/75 the house was inspected by a Housing Authority inspector. Housing Authority appears to move pondering slowly because it was not until 25/6/76 that instructions were signed for action to be taken and notice was served on Emosi in September 1976 to remedy the breach. In other words he was given the opportunity of resuming possession and of then asking for permission to assign. At that stage he was being treated as a tenant. Nothing had been done in the preceding two years which could have caused him to alter his position to his detriment by reason of any laches. He had lost nothing. He had not lost any opportunity to make a substantial profit out of an assignment because the Ordinance forbids an assignor to receive other than a reasonable rent. Similar reasoning applies to the defendant. Due to the Housing Authority's delay in acting against Emosi he had not lost anything; in fact he had benefitted to the extent of 2 years occupancy to which he was not entitled.

- H It would appear that in obtaining occupation the defendant had jumped the waiting from a position at the very end. I say this because in the agreed correspondence there is a letter dated 29/4/74 from the Housing Authority informing the

defendant that his declaration of earnings dated 1/4/74 was noted and he was then being placed on the waiting list. This was just about the time that the defendant took possession. Why did the defendant ask to put on the waiting list if he genuinely believed that Emosi had the right to transfer the lease? The defendant waited for over 2 years before writing to the Housing Authority to inform them that he was in occupation. During the whole of that period the defendant was under no illusion as to his status because he was paying the rent in the name of Emosi.

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The defendant has no right to be in possession. He moved in without the consent of the Housing Authority. There will be judgment for the Plaintiff who will have the costs of the appeal which I fix at \$90.00 and the costs in the court below.

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The respondent will give up possession to the Housing Authority.

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Appeal allowed. Order for possession against the Respondent.