BOBAT v KAPINDULA (1974) ZR 235 (SC)
SUPREME COURT (CIVIC JURISDICTION)
DOYLE CJ, BARON DCJ AND GARDNER JS
10th OCTOBER 1974
SCZ Judgment No. 27 of 1974.

Flynote

Landlord and tenant - Valid agreement for lease - Essentials.

Landlord and tenant - Lease or oral tenancy - Alleged agreement not sufficiently certain for the court to order specific performance - Invalidity.

Headnote

The appellant appealed from a decision of the High Court dismissing his claim against the respondent for possession of a house and mesne profits. It was common cause that the respondent was at all material times in occupation of the house, the issue being whether or not such occupation was, alleged by the respondent, by virtue of an oral tenancy agreement. The respondent pleaded that the parties agreed that the respondent could occupy the premises for the purpose of selling Chibuku beer and that he would carry out repairs and redecorations to the dilapidated building, obtain a licence to sell Chibuku, and pay a rent of between K20 and K25 per month.

The trial judge had found that there was an agreement but did not state what its terms were and this was one of the grounds of appeal. Another ground of appeal was that the trial judge erred in finding that there was an agreement when the evidence clearly showed that there was no complete agreement.

Held:

(i) It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement.

(ii) There is no valid agreement for a lease or oral tenancy agreement unless the alleged agreement is sufficiently certain for the court to order specific performance.

Case cited:

(1) *Harvey v Pratt* (1965) 2 All ER 786.

J Dare, QC, instructed by M. S. Ngulube, Lisulo and Company, for the appellant.

S S Zulu, Chaane, Zulu and Company, for the respondent.

BARON DCJ

Judgment

Baron DCJ: This is an appeal from a decision of the High Court dismissing the appellant's (the plaintiff's) claim against the respondent (the defendant) for possession of a house and mesne profits. It is common cause that the defendant was at all material times in occupation of the house, the issue being whether or not such occupation was, as alleged by the defendant, by virtue of an oral tenancy agreement. Paragraph 2 of the defence pleads that on the 11th December, 1970, the parties agreed that the defendant could occupy the premises for the purpose of selling Chibuku beer and that he would carry out repairs and redecorations to the dilapidated building, obtain a licence to sell Chibuku, and pay rent of between K20 and K25 per month.

The learned judge found that there was an agreement but did not state what were its terms, and this is one of the grounds of appeal; another is that the learned judge erred in finding that there was an agreement when the evidence clearly showed that there was no completed agreement. It is convenient to deal with these grounds together.

In *Harvey v Pratt* [1], Lord Denning M.R said:

"It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term and the rent, but also the date of its commencement."

The emphasis in that dictum on the date of commencement was because that was the issue in the case, but the other essentials are of course of equal importance. There can be no

valid agreement for a lease or oral tenancy agreement unless the alleged agreement is sufficiently certain for a court to be able to order specific performance.

In the present case there are three areas of uncertainty: the rent, the length of the term and the date of its commencement. Indeed even the identity of the intending tenant is unclear; the defendant named in the action is the brother of the man who alleges to have entered into an agreement with the plaintiff and to have repaired the house, who obtained the licence, who carried on the business and who gave evidence in the case; all this was, he said, done as his brother's agent, and since the action was brought against the brother the plaintiff must be regarded as having accepted this position. For the sake of simplicity I propose to continue to refer to the agent as the defendant; the actual defendant, who was seriously injured in the Mufulira mine disaster, took no part whatever in the matter.

The defendant, who is a police officer, said in evidence that on the 11th December, 1970, he, accompanied by another police officer, went to see the plaintiff at his house and asked to rent a house in Kalingalinga, owned by the plaintiff, in order to carry on for the benefit of his disabled brother a Chibuku beer business; he said the plaintiff agreed to grant him a tenancy on condition that he repaired the house, and that the plaintiff could not say what the rent would be until the house had been rebuilt and licence obtained. He said he spent between K4,000 and K5,000 on repairs

and redecorations, that he then obtained a licence and that he took it to the plaintiff on the 3rd February, 1971. At this point his evidence is confused in the extreme; the record reads:

"Mr Bobat condemned sale of Chibuku on these particular premises if we did not sell minerals as well. I was told that I was going to pay a sum of money not over K25. . . Mr Bobat said I was to leave the house within 13 days' time. He promised to give me money to go and find another house at some other place. I was promised between K4,000 to K5,000 I was not given this money but the place was shown to me."

If the reference to the rent of not more than K25 was to something that was said at that meeting on the 3rd February, it is clear that in fact no agreement was reached, since the defendant himself says he was told to vacate the house, within thirteen days; if, on the other hand, the defendant was referring to something alleged to have been said in December, this is in direct conflict with his own evidence that "there was no arrangement regarding rent for the premises", and that of his companion, who said that the plaintiff agreed to let the house to the defendant if the defendant repaired it, but that nothing specific was agreed between them. On this point alone the defendant must in my judgment fail. He pleads that the oral agreement of which he asks the court to order specific performance was made on the 11th December, 1970, but it is clear that at best, from his point of view, there was on that day no more than an agreement to agree, which is worthless.

I make no comment on the defendant's allegation that he spent a large sum of money on repairs and redecorations. Assuming in his favour that he did so and that he can prove it, he may or may not have a remedy; but if he has a remedy it is certainly not the one he has sought to establish by way of a defence in this action.

As to mesne profits, Mr Dare on behalf of the plaintiff submits that there is sufficient evidence on record to enable us to decide this issue. He refers to the defendant's own evidence as to rent as being an indication of the value of the premises. This is the only evidence of such value, and since Mr Dare indicates that the plaintiff will be content to rely on it I would use the lower figure of K20. In the result, I would allow the appeal and order that the defendant deliver up possession of the house to the plaintiff and pay mesne profits at the rate of K20 per month from the 3rd February, 1971, to the date of possession. The defendant will pay the plaintiff's costs both here and in the court below.

Appeal allowed with costs