IN THE SUPREME COURT OF SEYCHELLES

ANANDAN PILLAY **PLAINTIFF**

VERSUS

RAVICHANDRAN PILLAY **DEFENDANT**

Civil Side No 197 of 2003

Mr. P. Boulle for the Plaintiff

Mr. S. Rajasundaram for the Defendant

JUDGMENT

Perera J

By written agreement dated 10th November 1999, the plaintiff leased a shop premises to the defendant for a period of 2 years commencing 1st December 1999 on a monthly rental of Rs5000 for the first 6 months and Rs.6000 thereafter. However, the plaintiff avers that it was orally agreed between the parties that the duration of the lease would be from 1st February 2000 to 2nd February 2002. In an answer to a request for further and better particulars, the plaintiff stated that the delay in the commencement of the lease period was due to the Public Health officials requiring certain carpentry work to be effected before giving their approval to the Licensing Authority. The plaintiff also stated therein that the defendant left the premises on 8th June 2001. In paragraph 4 of the amended plaint dated 1st September 2003, the plaintiff admits that the defendant paid rent monthly, as agreed, from February 2000 to May 2001. In paragraph 5 thereof, the plaintiff avers that the defendant has failed to pay rent for the "last eight months of the lease, namely for the months of June 2001, July 2001, August 2001, September 2001, October 2001, November 2001, December 2001 and January 2002 amounting to a sum of Rs48,000. The claim for rent for the unexpired period of the lease is based on specific performance of the agreement.

Apart form this claim for rent, the plaintiff avers that in breach of Clause 4(c) of the lease agreement, when the defendant vacated the shop premises, there was damage which was not caused by "*fair wear and tear*" and that consequently, he had to purchase two "*perspex*" sheets costing Rs.4000 and spend Rs.3000 to clean the leased premises and make good the damage caused by the defendant. Further he avers that he spent R.3850 for the painting work, which the defendant was obliged to do under the lease agreement, but failed.

The defendant, in his answer avers that he vacated the premises on 8th May 2001 leaving no arrears of rent.

However in his testimony he stated that he vacated on 8th June 2001. He further avers that all payments were effected through his bank, and that as there was no existing lease since May 2001, there was no breach of any of the terms of the lease. He therefore denies the claim for arrears of rent, and also for any damage caused to the shop, as claimed.

The plaintiff, in his testimony stated that the lease commenced from February 2000 for a period of two years therefrom. The defendant had already paid the February, March and April 2000 rent in advance. This is evidenced by the bank deposit slip dated 20th February 1999 for Rs15,000 (D1). The plaintiff has admitted in paragraph 4 of the amended plaint that the defendant had paid rent up to May 2001. He stated that the defendant had paid a deposit of Rs.10,000 on 17th December 1998 (P2), and that amount was set off against the rent due for March and April 2001, pursuant to Clause 4(b) of the agreement. That Clause is as follows-

> "(b) That the lessee shall pay to the lessor at the execution of the present lease a sum of rupees ten thousand as a deposit *refundable only at the termination of the lease, less any amount that may then be due by the lessee."*

As regards the alleged damages, the plaintiff produced 22 photographs of the racks, shelves, a cupboard with a broken "*perspex"* sheet and dirty walls of the interior and exterior of the shop. He produced the invoice dated 5th July 2001 (P4) from one Michel Marengo, a maintenance Contractor quoting a sum of Rs.10,850, and a receipt of the same day from him for that amount (P5).

The plaintiff further testified that the defendant telephoned him on 7th June 2001 and informed him that he was vacating the premises the next day. He asked him to wait for him so that they could jointly inspect the premises, assess the condition" and to return the premises in the condition he took it. He went there around 4 p.m. on 8th June 2001 but found the shop wide open and empty. The defendant was in an adjoining shop. He refused to effect a joint inspection. The plaintiff stated that if he had agreed with the defendant to terminate the agreement, he would not have claimed for loss of rent for the unexpired period of the lease. In answer to a question by Counsel for the defendant as to whether the defendant had informed him one and a half months earlier before vacating, he answered "*yes*". However later he stated "*I do not recall. He could have called me but the issue is, he has no authority to cancel the lease, neither me, unless we agreed mutually".*

The shop was subsequently rented by the plaintiff in September 2001, for a monthly rental of Rs.5000 for the first year and Rs.5500 for the second year.

The defendant in his testimony stated that he had given the plaintiff prior notice of vacating the premises, and that on 8th June 2001 the plaintiff was handed over vacant possession. The plaintiff inspected the shop after the

keys were returned, and only made an observation that the windows were broken, but did not ask him to repair them nor ask him to paint the walls. He stated that even subsequently, the plaintiff did not either orally or in writing, request him to effect any repairs, until he was served with a copy of the plaint. However he offered to pay for a part of the broken "*perspex"* sheet.

Baskaran Pillay (Dw2) testified that one Paniselvan Pillay rented the plaintiff's shop at Pointe Conan in August/September 2001 for a monthly rental of Rs.5000. He was the shop Manager from September 2001 to February 2002. Subsequently he was succeeded by one Mr. Kumar. He stated that during the time he was Manager, the shop was in a good condition although the building was old.

Ms. Linda Baccus (Dw3) testified that the plaintiff's shop adjoined her house. She knew the defendant and his wife well. She helped them to pack the goods on the 8th of June 2001 when they vacated. She saw the defendant locking the shop before he left. The plaintiff was not present at that time.

As regards the condition of the shop at the time the defendant vacated, the witness stated that everything was in order except for the front counter where a piece of "*formica"* was broken. One day when she was in the shop a person brought a crate and accidentally damaged the "*formica*" of the shelf. The defendant later covered the cracks with "*sellotape".* It is not in dispute that the "*formica"* she was referring, was the "*perspex"* sheet which the plaintiff avers was damaged.

Kasi Pillay (Dw4) is the owner of the shop adjoining the shop of the plaintiff at Pointe Conan. He stated that the defendant who was renting that shop vacated in June 2001. About two months later, one Naidoo operated the shop under the business name, *"Valli Store".*

In this case, the plaintiff claims rent from June 2001 to January 2002 amounting to Rs.48,000. He had admitted that the defendant vacated the premises on 8th June 2001, and that all rent up to May 2001 was paid by the defendant. The plaintiff's claim for the balance period of the lease is based on the contract. Where the lease is in writing for a fixed period, it shall, as of right, come to an end at the expiry thereof without the necessity of notice. (*Article 1737 of the Civil Code).*

It is a settled principle that a synallagmatic, or bilateral contract, cannot be terminated unilaterally unless there is a specific clause to that effect in it or both parties had agreed to terminate it. In the present agreement there is no clause giving either party the right to terminate the lease.

In the case of ***Camille v. Bonte 3 SCAR (Vol I) 84***, the lessee was a merchant within the meaning of Article 1 of the Commercial Code, although the lessor was not. That lease was considered as a commercial contract and a commercial transaction as the lease of the shop premises was solely for the purpose of trading. In the present case, the leased premises consisted of two floors, "*the basement as living and the road level ground floor to be used as Commercial shop premises"* (Clause 1). For purposes of the Control of Rent and Tenancy Agreements Act (Cap47) the General Commercial nature of the lease is not affected. Article 109-3 of the Commercial Code provides as follows-

> "When a breach of a Commercial Contract occurs,, the party innocent of the breach *shall be entitled to treat the contract as discharged by operation of law".*

Sauzier JA, applying this Article in the case of *Camille (Supra)* stated-

> "In the face of such a clear expression of legal principle, *it would not be open to the Court to consider a lease as discharged when the case before it is a claim for rent under a lease which is still in force. Moreover the wording of Article 109-3 of the Commercial Code makes it clear that the option to treat the contract as discharged rests with the innocent party. The Court would be going against such provision if it were, ex officio, to treat the contract as rescinded by operation of law through a breach of the guilty party".*

Under Article 109-3 of the Commercial Code, the owner could treat the lease as discharged. Sauzier JA, citing French Jurisprudence stated that "whether the owner has treated the lease as discharged may be inferred form his behaviour. In that case he held that the lessor had done nothing from which it could be inferred that she treated the lease as discharged or cancelled. That lease was from 17th October 1983 to 17th October 1984, but the lessee vacated in January 1984. The plaint was filed on 8th Mach 1984 within the lease period, claiming rent from February 1984 to mid-October 1984, a period of 8½ months. The lessor, left the keys of the shop in the possession of Counsel for the Defendant. Hence the lessor did not treat the lease as discharged, nor re-let the premises during the unexpired period. The lessor was therefore awarded the full sum..

In the present case, the lessor (plaintiff) behaved differently. The defendant vacated on 8th June 2001 when the lease was to expire only on 2nd February 2002. The lessor rented the premises to another person in September 2001. The plaint was filed only on *17th July 2003,* 1 year and 5 months after the lease had expired and nearly 2 years after the defendant had vacated. His behaviour was therefore indicative of a cancellation of the lease, however much he claimed that it was not so. Hence, he cannot seek to enforce the lease and claim the full sum due as rent for the unexpired period of the lease. The decision in the *Camille* case *(supra)* must therefore be distinguished.

In the present case, in the absence of any provision in the lease for its termination by

notice by the lessee, the lessee was at fault when he vacated the premises without the agreement of the lessor. Hence Clause 4(h) of the lease, which was agreed upon by both parties would apply. This clause is as follows-

> "Should the lessee fail to pay two consecutive month's rent and/or fails to comply with any of the terms and conditions of the present lease, the present lease shall become *ipso facto null and void and the lessor shall be entitled to recover immediate re-possession of the premises leased, without having to take any legal step to that effect, without prejudice to any right of action which the lessor may have against the lessee".*

This Clause is consistent with the provisions of Article 1760 of the Civil Code. The claim of the plaintiff in the circumstances of this case would be limited to the rent during the *period reasonably necessary* for him to re-let the premises, and damages, if any, as claimed. The Hon. B. Wright, Chief Justice of Seychelles in 1908, in his translation of the French Civil Code into English, cites Laurent Vol. XXXV Section 379 at Page 3320 foot note(o) under Article 1760 and states that the period envisaged in Article 1760 is very vague and that the Judge has to decide how long it continues. It is further stated "*the lessor has to do his best to let. In practice the Courts have generally assumed that it is to be the time required for a notice to quit, but it is always a question of fact in each case".*

In the case of ***Hoareau v. Smith 1979 S.L.R. 23,*** the plaintiff leased his house to the defendant for a period of 2 at a monthly rental of Rs.2300. After giving oral notice of termination of the tenancy, the defendant vacated the house at the end of one year. The lessor claimed the rent for the unexpired portion of the lease. The lessor, after carrying out repairs, re-let the premises after 2 years months at a rental of Rs.500 per month, more than the rent received from the defendant. On the facts of that case, the Court found that the termination was due to the fault of the defendant. Hence on the basis of the provisions of Article 1760 of the Civil Code, it was held that the defendant was liable to pay for "*the period reasonably necessary for re-letting the premises".* In this respect, the Court referred to Jurisprudence Generale Dalloz Codes Annotes Article 1760 Notes 4, 5, 6, 9, 17 and 18 which stated that the Tenant is liable to pay the rent when he is at fault, but not for all the time the house is empty, but only for the period it normally takes a landlord to find a new Tenant. It was held that "*this period is to be decided by local practice, but is normally the same as the relevant period of notice. When the landlord re-lets immediately, he is not entitled to any indemnity, but the Tenant would be liable to make good for loss incurred by the landlord where the rent is less than the old rent*". In that case the Court determined that the lessor had lost two months rent, but awarded only one month's rent on the basis that the notice required in that agreement was one month.

However in the case of ***Revera v. Dinan 1984 S.L.R. 113*** where the lease was for a period of 5 years, the Court held that the payment of six months rent was reasonable in the circumstances of the case, but as the lessor had during that period rented the premises and received Rs10,000 for two nights, which was only Rs2000 less than what she would have received as rent from the defendant, and also as she could have rented the premises within that period, the plaintiff was not awarded any damages under Article 1760 for loss of rent, as she had suffered no loss

through the defendant's fault.

In the present case, the plaintiff re-let the premises from September 2001 on a monthly rental of Rs5000, Rs1000 less than what he would have received had the defendant continued his tenancy. As stated by the defendant, the plaintiff made no claim for the unexpired period of the lease, nor for any damage caused to the shop premises until this case was instituted on 17th July 2003. Although the defendant vacated on 8th June 2001, an invoice was obtained for repairs on 5th July 2001. It is reasonable to accept that he could not have re-let the premises without repairing. There is no evidence as to when the shop was ready for re-letting. In these circumstances it reasonable that the plaintiff be awarded three months rent, namely for June, July and August 2001 totaling Rs.18,000, consequent to the breach of the agreement by the defendant.

As regards the claim for damages, the plaintiff will be entitled to damages not caused by *"fair wear and tear",* as provided in Clause (c) of the Agreement. The invoice dated 5th July 2001 (P4) from Maintenance Contractor Michel Marengo contains three items-

1.	*To complete and clean the premises*	*-*	*R. 3000*
2.	*New carpets, painting labour and material*	*-*	*R. 3800*
3.	*Two sheets perspex, each Rs2000*	*-*	*R. 4000*
			R10,850

The liability of the defendant for damage under Clause (c) of the agreement is limited to-

(1) *Damage not caused by fair wear and tear*

Damage caused by lessee or his family's negligent or carelessness

Under item (1), the only damage not caused by fair wear and tear is the damage to the perspex sheet as shown in photograph (3)(i) and (3T). The plaintiff in paragraph 8 of the amended plaint claims Rs4000 for two sheets. In his testimony he stated that the actual damage to the sheet was about the size of the clock in the Court room, which is about 18 inch square. He however stated that as sheets of the size were not available, a complete sheet of the size of 4 ft x 12 feet had to be purchased. The defendant should be liable only to the extent of the damage caused. In the absence of proof of the actual cost of a *"perspex sheet*," a sum of Rs.500 is a reasonable amount to be awarded. As regards items (2), there is no evidence that any damage was caused by the negligence or carelessness of the lessee or his family. The photographs show that the carpet, the shelves and the walls had undergone *"fair wear and tear"* in ordinary usage. Hence on the basis of the agreement, no claim can be maintained by the plaintiff in respect of these items. However Clause (c) provides that "*during the last three* months of the term of the agreement and *whenever necessary* ……. The lessee shall paint with suitable colours to be approved by the lessor". Hence although the defendant vacated the premises prematurely, he was obliged to comply with that Clause. There is again no evidence of actual cost of the painting, except in item (2) of the invoice which states that a sum of Rs.3800

was quoted. The Contractor was not called by the plaintiff to substantiate his quotations, and hence the defence was deprived of an opportunity to cross examine him and see the receipts, as he has quoted for materials as well. In these circumstances a sum of Rs1000 would be adequate.

Accordingly, judgment is entered in favour of the plaintiff in a total sum of Rs.19,500 together with interest and costs taxed on the Magistrates' Court scale of fees and costs.

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A.R. PERERA

JUDGE

Dated this 16th day of June 2005