THE S. MORGAN SMITH COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE SISSIBOO PULP AND PAPER COMPANY (DEFENDANTS)..... } RESPONDENTS.

1904
*May 16, 17.
*June 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mechanics' lien—Machinery furnished—R. S. N. S. (1900) *c.* 171 *ss.* 6 *and* 8—*Contract price.*

Under the Mechanics' Lien Act of Nova Scotia R. S. N. S. (1900) ch. 171 a lien for machinery for a mill does not attach until it is delivered and if the contractor for building the mill has then been fully paid there is nothing upon which the lien can operate as by sec. 6 of the Act the owner cannot be liable for a sum greater than that due to the contractor.

B., holder of more than half the stock of a pulp company for which he had paid by cheque, and also a director, offered to sell to the company land, build a mill and furnish working capital on receipt of all the bond issue and cash on hand. The offer was accepted and all the stock, issued as fully paid up was deposited with a trust company and the cash, his own cheque and the price of five shares, given to B. The stock was sold and, from the proceeds, the land was paid for, the working capital promised given to the company and the balance paid to B. from time to time, as the mill was constructed. The machinery was supplied by an American company but when it was delivered all the money had been paid out as above.

Held, affirming the judgment appealed from (36 N. S. Rep. 348) that as all the money had been paid before delivery the company was not liable under the Mechanics' Lien Act to pay for the machinery.

Held also, that sec. 8 of the Act which requires the owner to retain 15 per cent of the contract price until the work is completed did not apply as no price for building the mill was specified but the price was associated with other considerations from which it could not be separated.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904

S. MORGAN SMITH CO. v. SISSIBOO PULP AND PAPER CO.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the plaintiffs.

The respondent company was incorporated on the 11th March, 1898, by chapter 135 of the Nova Scotia Acts of that year, for the purpose of manufacturing pulp wood, with a capital of $550,000, divided into 5,500 shares of $100 each, with power to issue bonds not to exceed in the whole the amount of the issued stock of the company. The first meeting of the provisional directors of the company was held on the 28th September, 1898. At this time the stock list consisted of Mr. Burrill's subscription for 2,745 shares, and four additional shares which had been subscribed by other persons; one share was later on subscribed for by one of the appellants, who became a director of the respondent company. These shares were subsequently paid in full, amounting to $500. Nothing beyond this was ever paid by any one. Burrill deposited with the company his cheque for $68,625 as a payment in respect of the shares for which he had subscribed, but the cheque was never paid, nor intended to be paid, and was deposited, as Burrill says, to make the company's position legal. The company was prohibited, by section 16 of its charter, from commencing operations until half the capital stock had been subscribed and 25 per cent of such subscriptions paid up. At the first meeting of the provisional directors, held on the 28th September, 1898, Burrill, who was a director of the respondent company, made a proposition to sell the company certain lands and properties, to build and equip a pulp mill, and to pay to the company $55,000 as working capital, in consideration of receiving the company's whole bond issue, amounting to $250,000, the balance

(1) 36 N. S. Rep. 348.

of the company's stock, viz., 5,495 shares (including the stock for which he had subscribed), to be issued as fully paid, and the money in the treasury of the company, $69,125, being his own cheque and the $500 paid for the five shares already mentioned. This offer the provisional directors accepted, on the 29th September, 1898. At the time Burrill did not own the lands and property which be offered to sell to the respondent company; he merely held options entitling him to purchase the same.

Nothing further was done until the 17th of September, 1899, when a meeting of the shareholders of the company was held at Montreal, at which the agreement between Burrill and the provisional directors was ratified, bonds to the extent of $250,000 and the balance of the stock was delivered to the National Trust Company, and Burrill was paid the money in the treasury of the company, amounting to $69,125, consisting of his own cheque for $68,625 and the $500 which had been paid for five shares. The bonds were sold, and realized $237,000, and, 2,500 shares were also sold for 15 per cent of their face value. In all from the sale of bonds and stock $274,000 was realized, less some commission paid to brokers.

The property was conveyed to the company by deed dated the 7th October, 1899. The property was paid for out of the moneys realized from the sale of the bonds and stock, and the respondent company was paid the $55,000 as working capital. The pulp mill had still to be built and equipped with the best modern and improved machinery, according to Burrill's contract with the company. After payment by the Trust Company for the property conveyed to the respondent company, and after providing the working capital of $55,000, there still remained with the Trust Company, in December, 1899, a balance of $72,113.47. This

1904

S. MORGAN SMITH CO. v. SISSIBOO PULP AND PAPER CO.

money was paid out to Burrill from time to time as the construction of the mill progressed, on the certificate of Faulkner, who had been appointed inspector of the work by the respondent company, the first payment being one of $10,000 made on the 31st December, 1898.

On the 11th May, 1900, Burrill made a contract with the appellants for the supply of the machinery for the mill. On the 23rd of November, 1899, the Trust Company made its last payment to Burrill, thereby exhausting the $72,113.47. The mill was not then finished, as Faulkner, the inspector, knew.

On the 23rd of November, 1900, the plaintiffs shipped the machinery, which reached Weymouth on the 25th December, 1900. The plaintiffs began to instal the machinery on the 14th January, 1901, and finished installation on the 28th February, 1901. The respondents received from the plaintiffs notice of the completion of the contract on the 11th March, 1901. The plaintiffs filed a lien on the 28th March, 1901 and began this action on the 23th May, 1901.

The action was tried before Mr. Justice Meagher who held that plaintiffs were entitled to a lien for $18,000 the price of the machinery with interest. This the full court reversed and dismissed the action.

Pelton K.C. and *R. V. Sinclair* for the appellants.

H. A. Lovett and *F. H. Bell* for the respondents.

The judgment of the court was delivered by:

NESBITT J.—The facts are very fully stated in the judgment of Mr. Justice Graham in the court below.

The case may be disposed of upon one short ground, namely, that section 8 of the Mechanics' Lien Act is not applicable to such a transaction.

Assuming, but without deciding, that, in a case of this kind, a lien could be acquired as against the

1904

S. MORGAN SMITH CO. v. SISSIBOO PULP AND PAPER CO.

Nesbitt J.

defendant company for materials, etc., supplied to Burrill, yet, by section 6 of the Act, R. S. N. S, 1900, ch. 171,

except as in this chapter is otherwise provided, a lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

The plaintiffs acquired no lien by their contract with Burrill. No lien could attach until the machinery was actually furnished or the work done. Long before that the full consideration had been paid. The only ground upon which the plaintiffs can hope to maintain a lien as against the defendant company would be that section 8 of the Act applies, and we think that that section does not by its terms apply to a case where there was no price specified or capable of being ascertained for the erection of the building, but the contract price of the building was blended with considerations for other matters from which it could not be separated. And we adopt the reasoning of the cases in Massachusetts referred to in the judgment below, to which may be added *Ellenwood* v. *Burgess* (1); *Angier* v. *Bay State Distilling Company* (2).

We think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Sandford H. Pelton.*

Solicitor for the respondents: *W. H. Covert.*

(1) 144 Mass. 534-541.

(2) 178 Mass. 163.