Supreme Court of Canada
Dingle v. World Newspaper Co. of Toronto, (1918) 57 S.C.R. 573

Date: 1918-12-12

Louis Dingle *(Plaintiff) Appellant;*

and

The World Newspaper Company of Toronto *(Defendants) Respondents.*

1918: December 12.

Present: Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Pleading—Libel—Action against newspaper company—Advantage of want of notice—Averment in plea—Denial—R.S.O. [1914], c. 71, ss. 8 (1) and 15 (1).

By sec. 15, sub-sec. 1, of the "Libel and Slander Act" (R.S.O. [1914], ch. 71), the defendant, in an action against a newspaper company, is not entitled to take advantage of the want of notice required by sec. 8 unless the name of the proprietor and publisher is stated at a specified place in the paper. In a case in which there was no proof that the name was so stated:—

Held, reversing the judgment of the Appellate Division (43 Ont. L.R. 218; 43 D.L.R. 463), that the failure of the plaintiff to allege non-compliance with the requirements of sec. 15 (1) in his reply to a plea setting up want of notice is not an admission of the fact of such compliance.

Held, also, that under the practice in Ontario, even if the defendant by his plea alleges such compliance, the same is not admitted by the absence of denial in the replication.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], affirming, by an equal division of opinion, the judgment at the trial by which the plaintiff's action was dismissed.

The plaintiff brought action for an alleged libel published in the Toronto *World,* having served the notice required by sec. 8, sub-sec. 1, of the "Libel and Slander Act" on the city editor of the paper. The defendant company, claiming that this was not service on the defendant as the section required

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[1] 43 Ont. L.R. 218; 43 D.L.R. 463.

pleaded want of notice to which plea issue was joined. The trial judge dismissed the action on this ground and his judgment was affirmed by the Appellate Division. An appeal was taken to the Supreme Court of Canada, and when it came on for hearing, the question was raised by the court of there being no proof on the record that the requirements of sec. 15, sub-sec. 1, had been complied with, and counsel for the respondents contended that it was admitted by the pleadings.

D.J. Coffey for the appellant.

Kenneth Mackenzie for the respondents.

The judgment of the court was delivered by

ANGLIN J,—The plaintiff appeals from the judgment of the Appellate Division of the Supreme Court of Ontario[2], affirming, on an equal division of opinion, the judgment of Middleton J. granting a motion by the defendant for the dismissal of this action on the ground of non-compliance by the plaintiff with sub-sec. 1 of sec. 8 of the "Libel and Slander Act" (R.S.O., ch. 71). The notice of the alleged libel complained of, addressed to "The Editor of the *World,"* was delivered to the city editor of that newspaper. Middleton J. held this insufficient, following *Burwell v. London Free Press Co.*[3], and *Benner v. Mail Printing Co.*[4]. By his appeal the plaintiff seeks to have these decisions overruled.

The defendant's motion was made under Ont. Con. Rule 222, upon admissions contained in the plaintiff's pleadings and examination for discovery disclosing the fact above stated.

Sec. 15, sub-sec. 1, of the "Libel and Slander Act" (R.S.O., ch. 71) provided that:

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[2] 43 Ont. L.R. 218; 43 D.L.R. 463.
[3] 27 O.R. 6.
[4] 24 Ont. L.R. 507.

> No defendant shall be entitled to the benefit of sections 8 and 14 of this Act unless the name of the proprietor and publisher and the address of publication are stated either at the head of the editorials or on the front page of the newspaper.

We had occasion recently to consider a corresponding, provision of the "Alberta Libel Act" in *Scown v. Herald Publishing Co.*[5] Nowhere in the material before the court does it appear that the defendant company complied with the requirements of sub-sec. 1 of sec. 15. The newspaper itself, the production of a copy of which is made *primâ facie* evidence by subsection 2, is not in the record.

To meet this difficulty, raised by the court itself, counsel for the defendant invoked paragraph 7 of his client's plea, which avers the plaintiff's neglect to give the notice prescribed by sub-sec. 1 of sec. 8, and his failure in his reply to set up the defendant's non-compliance with sub-sec. 1 of sec. 15. But assuming paragraph 7 of the statement of defence to be a good plea without an averment that the defendant had complied with sub-sec. 1 of sec. 15, the absence from the reply of an allegation of non-compliance therewith is not an admission that it had in fact been complied with. Even if the defendant had expressly averred compliance with sub-sec. 1 of sec. 15 in his statement of defence, the failure of the plaintiff in his reply to deny that allegation would not amount to an admission of its truth under the Ontario practice. Con. R. 144.

The appeal to this court is upon a case stated ("Supreme Court Act," section 73), on which it is our duty to give the judgment which the court whose decision is appealed against should have given (section 51). We cannot, whether for the purpose of upholding or for that of impeaching the judgment

[5] 56 Can. S.C.R. 305; 40 D.L.R. 373; [1918] 2 W.W.R. 118.

appealed from, supplement the appeal case by admitting evidence that should have been placed before the provincial courts. *Red Mountain Railway Co. v. Blue*[6].

On the ground, therefore, that compliance by it with sub-sec. 1 of sec. 15 of the "Libel and Slander Act" is a fact which cannot be presumed in the defendant's favour on a motion made under Con. R. 222 but must be established by it, and that the record contains no admission of that essential fact by the plaintiff such as that rule requires the appeal must be allowed and the judgment dismissing the action set aside.

It should be unnecessary to add that from the allowance of the plaintiff's appeal no inference may be drawn as to the opinion of the court in regard to the soundness of the two decisions followed by Mr. Justice Middleton.

Appeal allowed with costs.

Solicitor for the appellant: D.J. Coffey.

Solicitors for the respondents: McKenzie & Gordon.

[6] 39 Can. S.C.R. 390.