J. J. GRAY (DEFENDANT) ..... APPELLANT;

AND

J. D. CAMERON, A. L. AINSWORTH, HENRY ARMSTRONG (PLAINTIFF) } RESPONDENTS.

1949
*Nov 16
1950
*Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Guarantee—Specific Performance—Covenant to relieve guarantors of bank loan within specified time—Whether, in absence of demand by bank on guarantors, court empowered to decree specific performance.

The appellant on July 25, 1945, entered into an agreement in writing with the respondents as follows: "For valuable consideration, which I hereby acknowledge to have received from you I hereby covenant to (sic) agree with you to guarantee, in your stead, the debt of Ontario Phosphate Industries Ltd. to the Royal Bank of Canada, twenty-five thousand dollars ($25,000) in amount and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt, and to relieve you from your guarantee within sixty days from date."

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Estey and Locke JJ.

1949

GRAY v. CAMERON ET AL

The respondents, no demand having been made by the bank, brought an action for specific performance of the agreement or, in the alternative, for damages. The action was dismissed. On appeal to the Court of Appeal for Ontario, that court while agreeing with the trial judge that so far as the document sued on gave the respondents a right of indemnity the action was premature, held that the covenant to relieve the respondents from their guarantee within sixty days was a binding agreement in no way contingent upon their first being indemnified, and granted an order for specific performance.

Held: (Affirming the judgment of the Court of Appeal for Ontario). Taschereau and Locke JJ. dissenting in part, that a right was conferred upon the respondents under the covenant to be relieved from their guarantee within the sixty days specified which was in no way contingent upon their first being indemnified under the terms of the guarantee. There was a binding agreement and the appellant was in breach of it. The agreement is more than "to guarantee in your stead" as it reads "to relieve you from your guarantee within 60 days from date". This covenant might be implemented in various ways, and the parties may well have had in mind that the appellant would desire to pay the debt guaranteed by the respondents, which would constitute performance of his obligation. Any award of damages would be too conjectural: *Adderley* v. *Dixon,* 1 S. & S., 607; and in any event would not be adequate.

The respondents have done all that was required of them and the appellant failed to establish that the provisions of the order were beyond the powers of the court and not proper under all the circumstances.

Taschereau and Locke JJ., while otherwise concurring with the majority of the Court, dissented as to the court's power to grant specific performance.

Per: Taschereau and Locke JJ., dissenting in part:—The judgment of the Court of Appeal can only be construed as a direction to the appellant to pay off the bank. So construed it conflicts with the principle that specific performance is not granted of a covenant to pay money to a third person, the covenantee being left to his remedy in damages. *Hall* v. *Hardy,* 3 P. Wms. 187; *Crampton* v. *Varna Ry. Co.,* 7 Ch. 562; *Atty.-Gen.* v. *MacDonald,* 6 Man. R. 545; *Lloyd* v. *Dimmack,* 7 Ch. D. 398; *Ascherson* v. *Tredegar,* 2 Ch. 401.

As to the alternative direction that in default of such payment security be given even if such direction could be supported, there is no warrant for it since the respondents, being apparently satisfied with the appellant's personal covenant, are entitled to nothing more. *Antrobus* v. *Davidson,* 3 Mer. 569; *Brough* v. *Oddy,* 1 Russ. & My. 55; *The King* v. *Malcott,* 9 Hare 592; *Hughes Hallett* v. *Indian Mammoth Gold Mines,* 22 Ch. D. 561.

For the judgment entered by the Court of Appeal an order should be substituted declaring the appellant bound to indemnify the respondents from liability under their guarantee but otherwise dismissing the claim, without prejudice to the rights of the respondents to bring such further action as they may be advised if there is default thereafter.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the judgment of Wilson J., dismissing the action of the plaintiffs respondents.

J. W. Pickup K.C. and *W. B. Williston* for the appellant.

Joseph Sedgewick K.C. for the respondent.

The judgment of the Chief Justice, Kerwin and Estey, JJ. was delivered by:

KERWIN J.: The defendant, Gray, appeals against a judgment of the Court of Appeal for Ontario reversing the judgment of Wilson J., at the trial, which had dismissed the action of the plaintiffs respondents, Cameron, Ainsworth and Armstrong. The action was brought for specific performance of an agreement dated July 25, 1945, or, in the alternative, for damages in the sum of $25,000 and accrued interest and for further and other relief. The agreement reads as follows:—

To
Messrs. J. D. Cameron, L. Ainsworth and Henry Armstrong

For valuable consideration, which I hereby acknowledge to have received from you I hereby covenant to (sic) agree with you to guarantee, in your stead, the debt of Ontario Phosphate Industries Limited to the Royal Bank of Canada, Twenty-five thousand dollars ($25,000) in amount and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt, and to relieve you from your guarantee within sixty days from date.

Dated at Toronto this 25th day of July, 1945.

The Court of Appeal agreed with the trial judge that so far as the document gave the respondents a right of indemnity, the action was premature since the damages against which indemnity was provided had not accrued. However, fixing upon the words "I hereby covenant * * * to relieve you from your guarantee within sixty days from date", the Court of Appeal decided that a right was thereby conferred upon the respondents which was in no way contingent upon their first being indemnified under the terms of the guarantee referred to. With that decision I am in complete agreement. The argument that there was no binding agreement is satisfactorily disposed of by Mr. Justice Roach and nothing, I think, may be usefully added to his reasons upon that point.

Having concluded that there was a binding agreement and that the appellant was in breach of it, the Court of

(1) Not yet reported.

1950

GRAY
v.
CAMERON
ET AL

Locke J.

Appeal made an order which has been vigorously attacked by counsel for the appellant as being unauthorized. It is pointed out in the reasons for judgment in the Court below that no case precisely in point has been found, and counsel have been unable to refer us to any. To a Court of Equity that is no insurmountable objection.

There is no doubt as to the rule that, generally speaking, performance will not be granted of a mere agreement to loan money or to pay money to a third party. Here, however, the agreement is more than "to guarantee in your stead" as it reads "to relieve you from your guarantee within 60 days from date". This covenant might be implemented in various ways, and the parties may well have had in mind that the appellant would desire to pay the debt guaranteed by the respondents, which would constitute performance of his obligation. It is an unusual contract and any award of damages to the respondents would be too conjectural: *Adderley* v. *Dixon* (1); and in any event would not be adequate. The terms of the order made by the Court of Appeal are lengthy but are necessarily so in view of the case and of the position in which the respondents find themselves as a result of the appellant's failure to fulfil his part of the bargain. The respondents have done all that was required of them and counsel for the appellant has been unable to satisfy me that the provisions of that order are beyond the powers of the Court and that they are not proper under all the circumstances. The ordering of the appellant to repay the respondents such sums as they have paid since the issue of the writ is merely a detail that a Court possessing equitable jurisdiction is entitled to cover in the working out of the rights and obligations of the parties.

The appeal should be dismissed with costs.

The judgment of Taschereau and Locke, JJ. was delivered by:

LOCKE J.:—By a guarantee in writing dated October 26, 1944, the respondents and one Ian Armour jointly and severally guaranteed payment to the Royal Bank of Canada of the liability which Ontario Phosphate Industries Limited had incurred or might incur to the bank up to the sum of

(1) (1824) 1 S. & S. 607.

$25,000 with interest from the date of demand for payment at the rate of five per centum per annum. It was alleged in the statement of claim that on October 28, 1944, the above mentioned company borrowed from the bank the sum of $25,000 upon a demand note endorsed by the plaintiffs and that the defendant, by an instrument dated July 25, 1945, had agreed with the respondents to guarantee that debt in their place and stead, to indemnify them against obligation upon their guarantee, and to relieve them of liability thereunder. It was not alleged that the bank had made any demand for payment or that the plaintiffs had paid anything on account of their liability as endorsers of the note. The relief claimed in the action was specific performance of the last mentioned agreement and, in the alternative, damages in the sum of $25,000 and accrued interest to the date of the trial. The statement of defence denied that there was any concluded agreement between the parties, denied that the plaintiffs had suffered any damage and alleged that they had not paid the bank and that the principal debtor was in existence and might pay the bank and contended that the claim was not properly the subject of a mandatory injunction.

By the agreement of July 25, 1945, the appellant agreed with the respondents to guarantee in their stead the debt of the company to the bank "and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt and to relieve you from your guarantee within sixty days from date." The evidence did not prove that any demand for payment of either principal or interest had been made by the bank upon the respondents prior to the commencement of the action, nor had they paid anything to the bank. The evidence of the bank manager disclosed that, at least in so far as he was concerned, the guarantee of Gray had never been considered as a substitute for the guarantee of the respondents and of Cameron and that the only way the guarantors would have been relieved was by payment in full of the note. Some payments on account of interest had been made by each of the guarantors but this was some months after the commencement of the action. The learned trial judge, considering that it was impossible to order the bank to accept the appellant's

1950

GRAY
v.
CAMERON
ET AL

Locke J.

guarantee in lieu of that of the respondents, held that the agreement was impossible of performance and, in so far as the claim was for indemnity he considered it to be premature. As to damages, he found that there was no evidence and dismissed the action without prejudice to whatever claim the respondents might thereafter see fit to advance "in regard to what they alleged to be the agreement between the parties." In the Court of Appeal Mr. Justice Roach, delivering the judgment of the Court, found that there was a binding agreement between the parties obligating the present appellant to discharge the obligations referred to in the agreement of July 25, 1945, and, while holding the claim in so far as it was one for indemnity to be premature, decreed specific performance of that part of the agreement whereby the appellant had undertaken to relieve the respondents from their guarantee within sixty days from its date. The formal judgment of the Court declared that the document sued upon was binding on the appellant, directed that he pay to each of the respondents the amount which they had paid respectively to the Royal Bank and required the appellant within thirty days:

to cause the appellants (the present respondents) to be relieved from their guarantee to the bank and in default thereof ordering that the respondent shall either

(*a*) pay into Court in this action an amount equal to the balance unpaid to the bank, or

(*b*) deposit with the Accountant of the Supreme Court securities in such form and in such amounts as shall be adequate for the protection of the appellants against all liability under their guarantee to the bank;

If the parties cannot agree on the amount unpaid to the bank or if they cannot agree on the form or the adequacy of any securities proffered by the respondent pursuant to this judgment, then there shall be a reference to the Master to ascertain the amount or determine the form and adequacy of the securities as the case may be.

If at any time, or from time to time while the liability of the appellants on their guarantee remains undischarged, the bank shall demand payment from them of any sum or sums on account thereof, they shall be entitled to move before the Master, on notice to the respondent, for payment out to them from the money in Court of an amount equal to the amount demanded by the bank or for delivery to them of securities having then a value in the open market equal in amount to the amount demanded by the bank, and the same shall be used by the appellants in satisfying such demand of the bank.

If the liability of the appellants on their guarantee shall have been discharged wholly or in part otherwise than by payment by the

appellants, leave is reserved to the respondent to move before the Master, on notice to the appellants, for payment out to him of an appropriate part or the whole of the money then on deposit with the Accountant or for re-delivery to him of an appropriate part of the securities which shall have been deposited by him in lieu of money.

1949

GRAY v. CAMERON ET AL

Locke J.

I agree with the conclusion of the judgment of the Court of Appeal that the agreement of July 25, 1945, became and remains binding upon the appellant. The point to be determined is, in my opinion, whether or not specific performance may be granted of such an agreement.

The judgment of the Court of Appeal, as will be noted, requires the appellant to cause the respondents to be relieved from their guarantee to the bank and this, of necessity, would involve either arranging with the bank to accept the obligation of the appellant in lieu of that of the respondents, or to pay the promissory note. If the first is the meaning ascribed to the language of the undertaking, the claim was obviously not one which could be the subject of an action for a specific performance since this would involve requiring the appellant to make an arrangement with the bank, and that institution was not a party to the action and might refuse to make any such arrangement. A court of equity will not make a decree which cannot be enforced. If the proper construction was that the appellant thereby obligated himself to pay off the debt owing by the company to the bank, it was a covenant by the appellant to pay money to a third person, an obligation in respect of which (with certain exceptions to be hereafter noted) specific performance is not granted, the obligee being left to his remedy at law. Before considering this aspect of the matter, it is to be noted that in so far as the claim advanced in the pleadings may be construed as a claim for indemnity, it was clearly premature since no demand was alleged to have been made, nor was any proven to have been made by the bank upon the respondents prior to the institution of the action and they had paid nothing to the bank prior to that time. The claim, it should be further noted, was not for a declaration that the appellant was liable to indemnify the respondents, nor were the proceedings in the nature of an action *quia timet*.

It must be assumed that it was not intended by the judgment of the Court of Appeal to direct the appellant to make arrangements with one not a party to the action

1949

GRAY
v.
CAMERON
ET AL

Locke J.

to accept his guarantee in lieu of the respondents. Since the only possible alternative is to pay off the bank, the judgment must, in my opinion, be interpreted as an order directing the appellant to do so. In 31 Hals. (2nd Ed.) at 329, it is said that:—

> The remedy (of specific performance) is special and extraordinary in its character, and the Court has a discretion to grant it, or to leave the parties to their rights at law. The discretion of a Court exercising equitable jurisdiction is, however, not an arbitrary or capricious discretion; it is a discretion to be exercised on fixed principles in accordance with the previous authorities. It is not simply a question of what the individual judge thinks is fair or reasonable; the exercise of his discretion must be judicial.

which, in my opinion, accurately expresses the law. The ground of the jurisdiction is the inadequacy of the remedy at law and, where damages will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere. As long ago as 1733 in *Hall* v. *Hardy* (1), in a note to the decision of Sir Joseph Jekyll, M.R., where upon the special facts specific performance of an award was decreed, it is said:

> These decrees may not have been usual, because awards are commonly to pay money; in which cases a bill in equity to compel a performance is improper.

This statement of the law has been applied to contracts to pay money and consistently followed: *Crampton* v. *Varna Co.* (2), Lord Hatherley, L.C. at 567; *Attorney-General* v. *MacDonald* (3), Taylor C.J., at 375 and Killam J. at 378; *Belgo-Canadian Real Estate Co.* v. *Allan* (4), Fullerton J.A. at 560; 31 Hals. (2nd Ed.) 408. Specific performance is not granted of an agreement to loan money (*South African Territories* v. *Wallington* (5)); the remedy is in damages (*General Securities* v. *Don Ingram, Ltd.* (6)). There is, however, an exception in the case of the claims of sureties who may upon payment of the guaranteed debt being demanded of them obtain a decree of specific performance directing the principal debtor to pay it, and the jurisdiction is also exercised in certain circumstances as between co-sureties. The leading cases illustrating the application of the principle in proceedings such as these

(1) (1733) 3 P. Wms. 187; 24 E.R. 1023.
(2) (1872) 7 Ch. 562.
(3) (1890) 6 Man. R. 372.
(4) (1924) 34 Man. R. 545.
(5) [1898] A.C. 309.
(6) [1940] S.C.R. 670.

are *Ranelaugh* v. *Hayes* (1), *Lloyd* v. *Dimmack* (2); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3); *Ascherson* v. *Tredegar* (4). These cases were brought against the principal debtor by sureties but in *Wooldridge* v. *Norris* (5), a surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father who had died having by will devised certain properties specifically upon trust to pay the debt, and it was held that the surety, though he had not actually paid anything, was entitled to maintain a bill *quia timet* against the executors for administration, payment of the debt and of an indemnity. Sir G. M. Giffard, V.C. found that the plaintiff was entitled to file the bill on the principle that a court of equity will prevent injury in proper cases before any actual injury has been suffered, by proceedings *quia timet,* in analogy to proceedings at common law where in some cases a writ may be maintained before any molestation or distress. In *Wolmershausen* v. *Gullick* (6), at 525, Wright J. refers to this decision as proceeding on the particular terms of the covenant. Wooldridge's case is, in some respects, similar to the present where the appellant has agreed to relieve the respondents from their liability within a fixed period and might conceivably justify an action *quia timet* if there had been any circumstances present and alleged in the pleadings justifying the intervention of the court to prevent loss; but there is neither one nor the other here.

In my opinion, the judgment in this case, construing it as I do as a direction to the appellant to pay a sum of money to the Royal Bank, not being in a proceeding between surety and principal debtor or between co-sureties or in proceedings taken *quia timet,* conflicts with the long established principle that specific performance is not granted of a contract to pay money to a third person. As to the alternative direction that, in default of such payment, security is to be given either by paying money into or depositing securities in court, there is, in my opinion, no warrant, even if the judgment directing the payment could be supported. The respondents in entering into the agreement with the appellant did not require from him any

(1) (1683) 1 Vern. 189.
(2) (1877) 7 Ch. D. 398.
(3) (1882) 22 Ch. D. 561.
(4) [1909] 2 Ch. 401.
(5) (1868) 6 Eg. 410.
(6) [1893] 2 Ch. 514.

1950

GRAY
v.
CAMERON
ET AL

Locke J.

security that he would discharge his obligation. They were apparently satisfied with his personal covenant and I am unable to preceive upon what ground a court is justified in directing that he give security for its performance. In *Antrobus* v. *Davidson* (1), the colonel of a regiment had taken a bond of indemnity from his agents with another as surety in respect of all charges to which he might become liable by their default: the agent having afterwards become bankrupt and the government having given notice to the representatives of the colonel (who had died) of a demand upon his estate by virtue of an unliquidated account, a bill by such representatives against the representatives of the surety to pay the balance due to the government and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet,* was dismissed. The colonel had accepted the covenant of the surety and Grant, M.R. said in part:—

> What is here asked is to have a new security and one of a totally different sort from that which Davidson (the surety) consented to give, —a security by deposit of money instead of a security by personal obligation.

In *Brough* v. *Oddy* (2), where the defendant had entered into an agreement to pay a stipulated amount annually by quarterly payments in the event that they were not paid by the principal obligor, the plaintiff claimed payment of amounts due and security for the payment of amounts thereafter to fall due. Sir John Leach, M.R., after referring to the terms of the engagement, said that he was not aware of any case in which, where the contract created only a personal obligation, the Court had ordered a party to give a security on property for its due performance. In *The King* v. *Malcott* (3), a lessor claimed the administration of the estate of his lessee and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease, thus in effect asking for a decree of specific performance against the estate and the giving of security to ensure it. Sir G. J. Turner, V.C., dismissing the claim, said:—

> Why should the lessor have any such right as he claims in this case? How can it be the result of the relation between landlord and tenant? The landlord has not bargained with his tenant that the tenant's assets,

(1) (1817) 3 Mer. 569.
(2) (1829) 1 Russ. & My. 55.
(3) (1852) 9 Hare 592.

or any fund whatever, should be impounded for the purpose of securing his rent or the due performance of his covenants. He looks to the personal security of the lessee or to the rights which he has expressly reserved to himself over the subject of the demise; and farther than that he cannot proceed at law. Why should a Court of Equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a court of law?

In *Hughes Hallett* v. *Indian Mammoth Gold Mines supra,* where a claim was made upon a contract of indemnity and security in respect of payments which might become due in the future, Fry, J. referring to *Brough* v. *Oddy, supra* said:—

If the plaintiff was minded to accept the personal contract of Cookesley for indemnity, he must be content with that and I cannot possibly give him any better indemnity.

The respondents were apparently satisfied with the personal covenant of the appellant and are entitled, in my opinion, to nothing more.

It was shown that after the commencement of the action the respondents had paid to the Royal Bank certain sums for interest upon the note and judgment was given against the appellant for the amounts so paid. As to this, no such claim was advanced by the statement of claim and as the rights of the respondents must be determined as of the date of the commencement of the action this portion of the judgment cannot, in my opinion, be supported.

While the statement of claim did not ask a declaration that the appellant was bound by the agreement of July 25, 1945, that issue has been fully argued upon what, I am satisfied, is all of the available evidence and, in the interests of all parties, should not be further litigated. For the judgment entered by the Court of Appeal I would substitute an order declaring the appellant to be bound to indemnify the respondents from liability under their guarantee but otherwise dismissing the claim, without prejudice to the right of the respondents to bring such further action or actions as they may be advised if there is default hereafter. If there is such default, the respondents will have their remedy in damages.

1950

GRAY
v.
CAMERON
ET AL

Locke J.

The appellant should have his costs of this appeal and I think, since the respondents did not by their pleadings claim the only relief to which they are entitled, there should be no costs of the proceedings other than in this Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for the respondents: *Joseph Sedgwick.*