1954
*Dec. 13
1955
*Feb. 23

ROBERT STANLEY DILWORTH and FREDERICK CHARLES FREEMAN (*Plaintiffs*) ..... APPELLANTS;

AND

THE CORPORATION OF THE TOWN OF BALA and THE ROYAL BANK OF CANADA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal, lack of substance—Municipal Corporation—Ratepayer—Right of latter to appeal from judgment rendered against municipality where latter decides not to appeal therefrom.

The appellants as ratepayers brought action against the Town of Bala and the Royal Bank of Canada in which they sought a declaration that a contract entered into by the Town for the installation of a water and sewer system and for the borrowing of money from the Bank to finance the scheme be declared *ultra vires*. Subsequently separate actions were brought by the Bank and by the contractor to recover the money they respectively claimed due them. The three actions were not consolidated but were tried together and the Town in its defence denied allegations of improper purposes in the action taken, or that the scheme was fraudulent, discriminating and illegal as against the majority of the ratepayers and, as to the alleged illegality, submitted itself to the jurisdiction of the court; otherwise it adopted all the argument of the present appellants. The trial court dismissed the first action and gave judgment for the Bank and the contractor in the other two. From these judgments appeals were taken to the Court of Appeal, were argued together and were dismissed, the Town again supporting the present appellants. The Town did not appeal further and before this Court asked that the appeal taken from the first judgment be dismissed.

Held: The question of *ultra vires* was raised in the courts below where the Town supported the present appellants. The question having been decided against the Town and it having refused to appeal further, it would be improper to permit the appeal to continue.

Per Rand, Kellock and Cartwright JJ.: The right of a ratepayer to bring a municipal corporation into court as a means of asserting the illegality of corporate action arises from the delinquency of the corporation. If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. *Paterson* v. *Bowes*, 4 *Grant* 170 at 191 distinguished.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock and Cartwright JJ.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal from the judgment of Smily J. (2). At the opening of the appeal the Court *ex proprio motu* questioned the right at law of the appellants to appeal in view of the judgment of The Royal Bank of Canada against the Town. To permit counsel to consider the point and submit supplementary factums the hearing was adjourned to the January term. At that term on the conclusion of argument, Kerwin C.J., speaking for the Court, dismissed the appeal and stated reasons for judgment would be handed down later.

H. E. Manning, Q.C., David Mundell, Q.C. and *R. F. Reid* for the appellants.

J. J. Robinette, Q.C. and *W. G. C. Howland, Q.C.* for The Royal Bank of Canada.

G. H. Aiken, Q.C. for the Town of Bala.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal by the plaintiffs from a judgment of the Court of Appeal for Ontario affirming the judgment at the trial of Smily J. and dismissing the action. The appellants issued their writ on December 10, 1951, on behalf of themselves and all other ratepayers of the Town of Bala against the Town and the Royal Bank of Canada. In that action they sought a declaration that no sums of money were owing to any person in respect of any work done or materials supplied or services rendered in respect of a certain water and sewer system, and that no valid contracts existed binding the Town to proceed therewith; a declaration that certain resolutions were inoperative and ineffectual to give rise to any authority or obligation; a declaration that no money was owing to the Bank in respect of certain loans and credits advanced and made by the Bank to the Town; an injunction restraining the Town, its officers, servants and agents from paying any sum of money to any person in respect of any alleged work done, services rendered, or obligation incurred in connection

(1) [1953] O.R. 787; 4 D.L.R. 122.

(2) [1952] O.R. 703; 4 D.L.R. 281.

1955

DILWORTH *et al.* v. TOWN OF BALA *et al.*

Kerwin C.J.

with the said water and sewer system; an injunction restraining the Town from creating or issuing any debentures to pay for anything in connection with the system.

On April 16, 1952, the Royal Bank of Canada issued a writ against the Town of Bala to recover a sum of money advanced by the Bank in connection with the said system, together with interest. A third action was instituted against the Town by Malvern Construction Co. Ltd., to recover a sum of money due upon a contract in connection with the same work. These three actions were not consolidated but were tried at the same time. Judgment was given for the plaintiffs in the action by the Malvern Company and in the action by the Royal Bank. At the trial the then counsel for the Town in the present action and in the Royal Bank action adopted all the arguments of counsel for the present appellants. Appeals by the losers in the three actions were dismissed by the Court of Appeal for Ontario, before which Court the Town again supported the position of the appellants. The Municipal Council of the Town has not authorized any appeal from the Court of Appeal by the Town in any of the actions and it has instructed Counsel to ask that this appeal be dismissed.

Upon it coming on for argument, this Court *ex proprio motu* raised the question as to whether, in view of the judgment of the Royal Bank against the Town, the appeal was without substance and ought not to be permitted to proceed further. *Duhamel* v. *Coutu* (1). The hearing was adjourned to permit counsel to consider the matter and to submit supplementary factums. After a complete argument on the point, we announced that the appeal was dismissed with costs and that reasons would be given later.

It was first contended on behalf of the appellants that the plea of *ultra vires*, relied upon in this action, had not been raised by the Town in the action brought against it by the Royal Bank of Canada. Reading the pleadings in that action in the light of the evidence adduced at the joint trial and of the position taken at the trial and before the Court of Appeal by counsel for the Town, it is clear that, as to all branches thereof, that question had been before the courts below and was decided by them.

(1) [1954] S.C.R. 279.

Irrespective of any proceedings the appellants might or might not have been able to take in the Ontario Courts, it would be improper to permit this appeal to continue. In the two actions the Town aided the appellants, so that it cannot be said that they are prosecuting any claim the Town declined to put forward and support since it was only after two judgments against it that it refused to appeal. Furthermore, there appears to be no reason that the Bank could not enforce its judgment by appropriate action under the Ontario *Execution Act,* R.S.O. 1950, c. 120. Finally, s. 15 (*f*) of the *Ontario Judicature Act,* relied upon by the appellants, has no relevancy to the case before us.

The judgment of Rand, Kellock and Cartwright JJ. was delivered by:—

RAND J.:—This action was commenced in December, 1951. It was brought by the appellants as ratepayers of the Town of Bala against the corporation and the Royal Bank of Canada in respect of certain action taken by the corporation in the way of carrying out what purport to be mandatory orders of the Department of Health for Ontario to construct water and sewage works, in relation to which contracts had been entered into and moneys borrowed from the Bank to pay for the work as it proceeded. The relief claimed included a declaration that the steps taken, the contracts entered into and the borrowing from the Bank were *ultra vires* of the Town because of non-compliance with the provisions of the applicable statutes.

The defence of the Town, except as to allegations of improper purposes in the action taken, of representations made to an agent of the Health Department, and that the scheme was "fraudulent, discriminating and illegal" as against the majority of the ratepayers, either admitted what was set up in the statement of claim or supplied further particulars or corrections; and as to the alleged illegality submitted itself to the judgment of the court.

In April, 1952, the Bank brought what I shall call the second action against the Town for the recovery of advances amounting to $85,000 and interest. The claim sets forth in detail the preliminary steps and acts done and taken by the Department of Health and the Town as necessary to the authority of the Town to undertake the works and to

1955

DILWORTH *et al.* *v.* TOWN OF BALA *et al.*

Rand J.

borrow the money. In its defence the Town pleaded the invalidity of the orders of the Department, of the by-laws of the Town and of the contract of loan with the bank, raising in substance the allegations made in the action before us.

A third action was brought by the contractor for the pumping station and connecting works, Malvern Construction Co. Ltd., against the corporation which was contested and in which judgment was recovered for $10,500. The pleading are not before us, but I gathered from the argument that the position taken by the Town was the same as in the second action.

The issues in the three proceedings were tried together. The trial court dismissed the first and gave judgment for the plaintiffs in the other two. From these judgments appeals were taken which were argued together and dismissed by the Court of Appeal. Before both courts the Town supported the present appellants.

But the Town did not take steps to bring the judgments in the second and third actions to this Court, and when the argument opened the question of their effect on this appeal was raised. As counsel were not then prepared to argue that question, the hearing was adjourned. Subsequent argument was heard, and at the conclusion the appeal was dismissed *in limine*.

The right of a ratepayer to bring a municipal corporation into court as a means of asserting the illegality of corporate action affecting its property or civil rights, and indirectly the interests of ratepayers, is not challenged. It assumes that the organ of the corporation created to speak and act for all who are comprised within it is disregarding its duty: and the purpose and effect of the proceeding is to compel the execution of that duty. The right of the ratepayer arises from the delinquency of the corporation and its essence is of a coercive nature against the corporation and only mediately against third parties. If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. It is the primary right and duty of the corporation itself to repudiate *ultra vires* action and it is this right and duty which are brought before the Court for enforced

action. The right of the ratepayer is thus accessory to that of the corporation; the substantive matter remains in the relation between the corporation and the third person.

This is to be distinguished from a direct or personal right asserted when action is taken against a ratepayer and is resisted as being illegally founded within corporate action alone, not involving third persons. The ratepayer may, in such a case, raise questions of substance between himself and the corporation. A direct determination *in rem*, by means furnished by the statute, of illegality, such as the setting aside of a by-law, will bind all ratepayers. It is so far similar in this action: the appellants are acting on behalf of all the ratepayers; and a decision that the action challenged is *intra vires* would bind all as between themselves and the corporation as well as between the corporation and the third parties in the proceeding.

The judgments recovered in the second and third actions have merged the causes of action arising out of the contracts made under the impugned procedure and they conclude the question as between the corporation and the claimants. The contractual right of the Royal Bank so adjudicated is that challenged in this appeal and a successful issue of this appeal would mean that the claim now transmuted into judgment never, in law, existed. A declaration to that effect would be futile because it could not nullify the efficacy of the judgment. It cannot now be made because the cause of action upon which it rests no longer in fact exists. If, in some manner so far not made clear, a declaratory judgment could be the basis for a perpetual stay of proceedings in the second action, it would be equivalent to a compulsory appeal; but counsel conceded that the bona fide decision of the corporation not to appeal could not, at least in the absence of extraordinary circumstances not present here, be overridden. The Legislature has confided in the Council the authority and responsibility to make such decisions and there is no power in the courts to interfere with them when made or to transfer authority from the council to the courts through the intermediation of individuals. The appeal assumes the challenged matter in its broadest sense to be still subject to determination, but that is not now the case; it has become definitively determined and there is no existing subject-matter upon which

1955

DILWORTH *et al.* v. TOWN OF BALA *et al.*

Rand J.

the judgment of the court can operate: what was matter of fact is now of record. Viewed from another angle, the appeal raises only an academic question which, in the event of dismissal, would but confirm the existing judgment, and of allowance, would create a nugatory conflict.

Mr. Manning conceded that if he was unsuccessful in showing that the issue of *ultra vires* had not been litigated, he was left with only a distinction between the right of the corporation and that of the ratepayer in relation to the substantial matter in controversy. He could furnish us with no authority in support of this distinction except certain language used by Spragge V.C. in *Paterson* v. *Bowes* (1). In that case money was alleged to have been illegally appropriated by the mayor of Toronto and the council had refused to act. The bill was brought against both the City and the mayor. A demurrer was pleaded on two grounds, that only the Attorney General could bring such a suit, and that the plaintiffs, suing on behalf of themselves and all other inhabitants (including ratepayers) of the City, showed no sufficient interest to maintain the bill. After citing the cases of *Cohen* v. *Wilkinson* (2) and *Carlisle* v. *The South Eastern Railway Company* (3), the Vice-Chancellor proceeded:—

> The corporation in such case would sue in respect of a right common to every individual rate-payer; and if the corporation may sue but will not, I think that individual rate-payers may. The refusal of the governing body to assert the right cannot, I think, extinguish the right of the rate-payers who dissent from them, or prevent their asserting it, when, as in this case, they sustain a pecuniary loss by the act complained of.

Notwithstanding the fact that the right is spoken of as arising from the wrongful refusal of the governing body to act, it is argued that this means a right running from each ratepayer directly against the third person, a primary right not affected by a judgment on the same originating matter against the corporation. The Vice-Chancellor, immediately before that paragraph, was considering whether the plaintiffs had shown sufficient interest to bring the action which he found by reason of the fact that,

> by the misapplication complained of in the bill all the rate-payers were injured, as more money must necessarily be collected from them than would otherwise have been required of them.

(1) (1853) 4 Gr. 170 at 191. (2) 1 McN. & G. 481; 41 E.R. 1351.
(3) 1 McN. & G. 689; 41 E.R. 1432.

But the bill prayed that the mayor be ordered to pay back the money to the City. It was undisputed that the right to claim the money was in the City and it was only because the funds were under a quasi-trust that equity would interpose its action at the instance of quasi-beneficiaries of a public administration. The equitable right to sue was to bring the corporation into court and to compel the payment to it by the mayor, to enforce the legal right of the City against the mayor which improperly the corporation had itself refused to do.

The remaining question is as to a general claim to restrain the Town from acting upon contracts, purporting to be made under the authority questioned, with third persons not parties to this or any other action. This is consequential relief based on primary grounds that have been rejected in the two private actions by the Court of Appeal. Since the council has unimpeachably decided to accept those judgments, it would be acting within its competence in concluding the matters outstanding necessary to the completion of the works. The allowance of the appeal would produce only the same futile conflict as in the other instances. The right of a rate-payer is not absolute; it depends upon the equity of his position vis-à-vis the corporation and the existing state of things. The basis of the appellants' intervention has thus disappeared, and with it their interest in this appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Manning, Mortimer, Mundell & Reid.*

Solicitor for the respondent Town: *G. H. Aiken.*

Solicitors for the respondent Bank: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*