ROBERT KENNETH CARNOCHAN (*Plaintiff*) .... APPELLANT;

1955
*Mar. 24
*June 28

AND

MARGARET JEAN CARNOCHAN (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Claim for possession of matrimonial home—Discretion of trial judge—Jurisdiction of Supreme Court of Canada—The Married Women's Property Act, R.S.O. 1950, c. 223, s. 12—Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.

In an action by a husband to recover possession of the matrimonial home and damages for mesne profits, the Court directed trial of the following issues: (*a*) the right of the husband to an order for possession; (*b*) his right to payment for use and occupation by the wife; (*c*) the wife's right to alleged arrears under the provisions of a deed of separation. The trial judge held as to issue (*a*) that the husband was not entitled to the order but that so long as the wife continued in occupation she was to pay all taxes, maintain adequate insurance and make all necessary and reasonable repairs and assert no claim for alimony, and that their respective claims under issues (*b*) and (*c*) failed.

The Court of Appeal dismissed the husband's appeal as to the disposition of issues (*a*) and (*b*). There was no cross-appeal as to issue (*c*). The husband appealed and a motion was made to quash on the ground, *inter alia,* that the judgment from which the appeal was sought to be taken was made in the exercise of judicial discretion and that, by reason of the provisions of s. 44 of the *Supreme Court Act,* R.S.C. 1952, c. 259, no appeal lies to that Court. The motion and the appeal were heard together.

Held: 1. That issue (*a*) raised a question between husband and wife as to possession of property. No question of title arose and the trial judge's judgment was given in the exercise of the judicial discretion conferred upon him by s. 12 of the *Married Women's Property Act,* R.S.O. 1950, c. 223. It was not made in proceedings in the nature of a suit in equity and was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to that Court. *Minaker* v. *Minaker* [1949] S.C.R. 397 distinguished. *Lee* v. *Lee* [1952] 1 All E.R. 1299 at 1300, *Hutchinson* v. *Hutchinson* and *Stewart* v. *Stewart* [1947] 2 All E.R. 792 at 793 and 813 at 814 referred to.

2. That since s. 41 of the *Supreme Court Act* is expressly made subject to s. 44, leave to appeal could not be granted.

3. That that Court had jurisdiction to entertain the appeal so far as it related to issue (*b*) as the trial judge in dealing with it was not called upon to exercise the discretionary power conferred upon him by s. 12 of the *Married Women's Property Act* but to apply the law to ascertained facts. If the appellant's claim was regarded as one for

*PRESENT: Kerwin C.J. and Rand, Estey, Locke and Cartwright JJ.

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mesne profits, it could not be entertained. If treated as a claim in contract on an implied agreement to pay reasonable rent, the trial judge's finding on the facts, concurred in by the Court of Appeal, should not be disturbed. Appeal quashed as to issue (*a*) and dismissed as to issue (*b*).

Decision of the Court of Appeal for Ontario [1954] O.W.N. 548, affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of Schroeder J. (2) on the trial of an issue directed in proceedings under s. 12 of the *Married Women's Property Act,* R.S.O. 1950, c. 223.

A. J. J. Bourassa for the appellant.

H. P. Hill, Q.C. for the respondent.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The course of the litigation out of which this appeal arises is described as follows in the reasons of the learned trial judge (3):—

The Plaintiff husband originally sued his wife to recover possession of house known for municipal purposes as 53 Renfrew Avenue, in the City of Ottawa, together with damages for mesne profits and for other relief. When the action came into the hands of his present solicitors, they advised him, in view of the judgment of the Supreme Court of Canada in *Minaker* v. *Minaker* (4), that it was more than doubtful that such an action was maintainable, in that, being a proceeding for wrongful detention and possession of lands, which is the modern equivalent of the old action of ejectment, such an action sounded in tort and was barred by s. 7 of the *Married Women's Property Act,* R.S.O. 1950, c. 223. In conformity with the decision of the Supreme Court of Canada in that case, the plaintiff applied for an order for the trial of an issue pursuant to s. 12 of The Married Women's Property Act and on June 9, 1953, the Honourable Mr. Justice Chevrier made an order, in which it was provided that the following issues were to be determined:—

(*a*) The right of the plaintiff to an order for possession of premises known for municipal purposes as 53 Renfrew Avenue in the City of Ottawa in the County of Carleton.

(*b*) The right of the plaintiff to the sum of Nine Thousand Seven Hundred and Thirty-seven ($9,737) Dollars or any portion thereof for the use and occupation by the defendant of said premises 53 Renfrew Avenue from the 1st day of May, 1940, to the date of the trial of the issue.

(*c*) The right of the defendant to any alleged arrears of payments under the provisions of a deed of separation bearing date the 1st day of September, 1939, executed by the parties hereto.

Pleadings were delivered in accordance with Mr. Justice Chevrier's order and the defendant's claim for arrears under the deed of separation was made the subject of a counterclaim by her.

(1) [1954] O.W.N. 543; 4 D.L.R. 448.

(2) [1953] O.R. 887; [1954] 1 D.L.R. 87.

(3) [1953] O.R. 887.

(4) [1949] S.C.R. 397.

It would appear from the formal judgment of Schroeder J. that the action was not discontinued. That judgment opens with the paragraph:—

> This action coming on for trial on the 7th, 8th and 9th days of October, 1953, at the sittings holden at Ottawa for trial of actions with a jury in the presence of counsel for all parties and upon reading the pleadings, and the issues directed by the Honourable Mr. Justice Chevrier, and hearing the evidence adduced and what was alleged by counsel aforesaid this Court was pleased to direct this action to stand over for judgment, and the same coming on this day of judgment.

As to issue (*a*), the learned trial judge held that the appellant was not entitled to an order for possession of 53 Renfrew Avenue but ordered that so long as the respondent continues to occupy such premises she shall pay all taxes, keep the premises adequately insured, make all necessary and reasonable repairs at her own expense and assert no claim for alimony. As to issue (*b*) he held that the appellant's claim failed. As to issue (*c*) he held that the respondent's claim failed.

The appellant appealed to the Court of Appeal as to the disposition made of issues (*a*) and (*b*). There was no cross appeal as to issue (*c*). The appeal was dismissed (1) and the appellant now appeals to this Court.

The appellant and the respondent are husband and wife. They were married in May, 1918. They have one child, a daughter, who was born in February, 1933. In April, 1925, the appellant purchased the house and premises, No. 53 Renfrew Avenue, of which he claims possession. It is not questioned that he is the legal and beneficial owner of this property. The parties lived together at this house from 1925 until the summer of 1939. In July 1939, the respondent went to a summer cottage owned by her brother, taking the daughter with her, for the purpose of having a holiday. She did not return to the matrimonial home and has never since lived with the appellant. On September 1, 1939, the parties entered into a separation agreement.

In December, 1939, the appellant was committed to the Ontario Hospital in Brockville, and shortly thereafter the Public Trustee rented 53 Renfrew Avenue to a tenant, who remained in occupation for a period but apparently had vacated the premises by May 1, 1940. On that date the respondent took possession of the house and its contents

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and has lived in the house with her daughter ever since. At the date of the respondent's examination for discovery her mother was also living with her.

It appears from the record that the respondent went into the house without the permission of either the appellant or the Public Trustee, who was his statutory committee by virtue of s. 74 of the *Mental Hospitals Act* (R.S.O. 1950, c. 229), but that the Public Trustee did not object to her remaining in the house after it came to his notice that she had moved in. It appears that the appellant himself objected throughout to her having possession of the property.

Commencing in or about December, 1939, the Public Trustee paid the respondent $145 a month for about sixteen months and thereafter for about a year he paid her $50 a month. The payments then ceased and no further payments were made to the respondent either by the appellant or by the Public Trustee.

The appellant was finally discharged from the Ontario Hospital on July 4, 1951, and since that date has been in charge of his own affairs although as a matter of arrangement between him and the Public Trustee the latter is still looking after his assets for him.

On January 31, 1955, counsel for the respondent moved to quash this appeal on the ground, *inter alia,* that the judgment from which an appeal is sought to be taken was made in the exercise of judicial discretion and that, by reason of the provisions of s. 44 of the *Supreme Court Act,* no appeal lies to this Court. This motion was adjourned to the hearing of the appeal.

Section 12 (1) of the *Married Women's Property Act* R.S.O. 1950, c. 223, in pursuance of which the order of Chevrier J. was recited to be made, reads as follows:—

> In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body or society in whose books any stock, fund or shares of either party are standing may apply in a summary way to a judge of the Supreme Court or at the option of the applicant irrespectively of the value of the property in dispute, to the judge of the county or district court of the county or district in which either party resides, and the judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct the application to stand over from time to time, and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit.

In so far as the appeal relates to the judgment of the learned trial judge on issue (*a*) I am of opinion that this Court is without jurisdiction. The judgment of the learned trial judge on this issue was, I think, given in the exercise of judicial discretion. The question which he was called upon to decide falls clearly within the wording of s. 12 of the *Married Women's Property Act.* It is "a question between husband and wife as to the . . . possession of property" and the jurisdiction conferred by the section on the judge is to "make such order with respect to the property in dispute . . . as he thinks fit." No question of title arose. The case for the respondent was that notwithstanding the fact that the appellant was sole owner of the property the circumstances were such that the Court ought to refuse to make an order for possession. In the course of his reasons the learned trial judge said:—

> What is vested in the Court is a discretionary power which must be exercised judicially in the light of all the circumstances connected with the case. After giving all relevant matters the most earnest and anxious consideration, I am satisfied that it would be unjust to make an order for possession against the defendant wife.

There may well be cases falling within s. 12 of the *Married Women's Property Act* in which an appeal lies to this Court. If, for example, the sole question raised were whether property of which the husband was the legal owner was owned beneficially by him or was held by him as trustee for the wife or as trustee for himself and the wife jointly, while this would be "a question between husband and wife as to the title to . . . property" the judge would not, in my opinion, have a discretion to decide such question otherwise than in accordance with the applicable rules of law and equity. It was a question of that nature which was dealt with in *Minaker* v. *Minaker* (1), in which no question of jurisdiction appears to have been raised. In that case it appears to have been assumed that the giving of possession would follow as of course if it were determined that the husband was the sole beneficial, as well as legal, owner of the property. It does not appear that the wife sought to have the Court exercise a discretion to permit her to retain possession of the property if her claim to be the sole or joint owner thereof were rejected.

(1) [1949] S.C.R. 397.

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In *Lee* v. *Lee* (1), Somervell L.J., as he then was, in discussing the English counterpart of s. 12, says at page 1300:—

I am inclined to agree with counsel to this extent—and this is clearly what Sir Boyd Merriman P., had in mind in *Kelner* v. *Kelner* (2), on which counsel for the husband relied—that, if the question is one of title only, it has, of course, to be decided according to law.

The judgments in this case and that of Denning J., as he then was, in *Hutchinson* v. *Hutchinson* (3), shew that in England the Court has a discretion to order that a wife be allowed to remain in possession of a home of which the husband is the sole owner. In the last mentioned case at page 793 Denning J. says:—

The discretion remains with me, and I am quite satisfied that it would be unjust to turn the wife and the son out of their home.

In *Stewart* v. *Stewart* (4), which was also a claim for possession of a house, Tucker L.J. said at page 814:—

It must always be a question for the exercise of the discretion of the judge on all the facts before him whether in a particular case he thinks it proper to make the order for possession which he clearly has jurisdiction to do.

I conclude that the judgment of Schroeder J. in the case at bar was "a judgment or order made in the exercise of judicial discretion."

It is next necessary to inquire whether it was made "in proceedings in the nature of a suit or proceeding in equity". In my opinion it was not. The judgments of Kellock J.A., as he then was, and of Laidlaw J.A. in *H.* v. *H.* (5) set out the history of the jurisdiction of the Supreme Court of Ontario to grant alimony and shew that it was formerly exercised in the Court of Chancery; but in the case at bar the learned trial judge was not, I think, exercising the jurisdiction formerly exercised by that Court or one which he would have possessed, apart from statute, in a proceeding in equity, but rather a statutory jurisdiction conferred upon him by s. 12 calling upon him in the circumstances of this case, in the exercise of his discretion to make such order as he saw fit. That in making such order the learned judge was called upon to exercise his discretion judicially goes without saying and was fully recognized by him.

(1) [1952] 1 All E.R. 1299.
(2) [1939] 3 All E.R. 957.
(3) [1947] 2 All E.R. 792.
(4) [1947] 2 All E.R. 813.
(5) [1944] O.R. 438; 4 D.L.R. 173.

For these reasons I am of opinion that the judgment of the learned trial judge in regard to issue (*a*) was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to this Court.

In the result we can not entertain the appeal as to issue (*a*), nor could we grant leave to appeal, since s. 41 of the *Supreme Court Act* is expressly made subject to s. 44. Under these circumstances it is undesirable that I should express any opinion as to the merits of the decision in regard to this issue.

In my view the Court has jurisdiction to entertain the appeal in so far as it relates to the judgment on issue (*b*). It is not necessary to decide whether a claim for the payment of money of the sort made in this issue comes within the terms of s. 12 (1) because, although it came before the learned trial judge pursuant to the order made under s. 12 of the *Married Women's Property Act* it also came before him in the action. In dealing with it the learned judge was not called upon to exercise the discretionary power conferred upon him by the section but to apply the law to the ascertained facts.

As to the merits of issue (*b*), for the reasons given by the learned trial judge I agree with his conclusion that the appellant's claim if regarded as one for mesne profits cannot be maintained. If, on the other hand, it is treated as a claim in contract on an implied agreement by the respondent to pay a reasonable rent, the finding of the learned trial judge that on the facts no contract to pay rent could be implied is supported by the evidence, has been concurred in by the Court of Appeal and should not be disturbed. In my opinion the appeal as to this issue fails.

For the above reasons I would quash the appeal as to issue (*a*), and dismiss the appeal as to issue (*b*). The respondent is entitled to her costs in this Court.

Appeal quashed as to issue (*a*) *and dismissed as to issue* (*b*). *Respondent entitled to costs in this court.*

Solicitors for the appellant: *Ewart, Kelley, Burke-Robertson, Urie & Butler.*

Solicitors for the respondent: *Hill, Hill & Hall.*