FAUBERT AND WATTS (*Plaintiff*) .....APPELLANT; 1959 *Dec. 7, 8

AND

TEMAGAMI MINING CO. LIMITED (*Defendant*) ..... } RESPONDENT. 1960 Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Arbitration—Error of law upon face of award—Jurisdiction of arbitrators—Distinction where question of law arises in course of arbitration and where question of law specifically referred—Nature of order extending time to apply to set aside award—Leave required of Supreme Court of Canada—The Arbitration Act, R.S.O. 1950, c. 20, s. 30—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.

The contract between the plaintiff and the defendant, for the construction by the plaintiff of a mining access road, provided for arbitration. Disputes arose between the parties and the plaintiff commenced arbitration proceedings. The defendant's motion to set aside the arbitrators' award on the grounds that it was bad on its face and that the arbitrators had exceeded their jurisdiction, was dismissed after the time for bringing the motion had been extended pursuant to s. 30 of *The Arbitration Act*. The Court of Appeal set aside the award and dismissed the plaintiff's cross-appeal in which he had contended that the defendant had accepted a benefit under the award and was thereby precluded from applying to have it set aside. The plaintiff appealed to this Court.

Held: The appeal should be dismissed; but the order of the trial judge extending the time to make the motion to set aside the award should be restored.

The order of the Court of Appeal, affirming the order made by the trial judge to extend under s. 30 of the Act the time for applying to set aside the award was a discretionary order within s. 44 of the *Supreme Court Act*. No appeal lay from that order unless leave be given by this Court under s. 41, and under the circumstances of this case leave would not be given.

There was no acceptance by the defendant of any benefit under the award or acquiescence in it so as to preclude it from applying for an extension of time, or from applying to set aside the award itself.

There was error of law appearing upon the face of the award. The authorities make a clear distinction between a case where disputes are referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him for decision. In the first case, the Court can interfere if and when any error of law appears on the face of the award but in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. In the case at bar, the pleadings indicate that no specific question of law was submitted to the arbitrators.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside an arbitration award. Appeal dismissed.

F. P. Varcoe, Q.C., for the plaintiff, appellant.

J. J. Robinette, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by Faubert and Watts against the judgment of the Court of Appeal for Ontario[1] allowing with costs an appeal by Temagami Mining Co. Limited from an order of Landreville J., dismissing without costs Faubert and Watts' cross-appeal, setting aside the order appealed from and also an award of a Board of Arbitration, dated April 1, 1958. The costs of the application to Landreville J. were also directed to be paid by Faubert and Watts. The latter will be referred to as the Contractor and Temagami Mining Co. Limited as the Company.

On October 9, 1956, these parties entered into a written agreement (the construction contract) whereby the Contractor agreed to

(*a*) construct a mining access road (hereinafter called the "road"), as hereinafter provided, from a point on Highway No. 11 approximately four (4) miles south of the Village of Temagami, westerly a distance of approximately twelve (12) miles to Sulphide Point on Lake Temagami along the route indicated on the plan hereto annexed as Schedule "A", subject to slight variation therefrom to secure better grades; and

(*b*) provide all the materials and complete the road including all bridges and culverts as follows and as in this agreement provided:—

(i) the road will be built to the specifications prescribed for mining access roads which include a road bed of gravel twenty-eight feet (28') wide and at least one foot (1') thick over base, of a grade of not more than seven percent (7%) and curves of not more than ten degrees (10°);

(ii) construction will be of the standard which may be required by the District Engineer of the Department of Highways at North Bay;

(iii) construction to commence immediately and proceed continuously, subject to weather conditions, and to be completed to the satisfaction of the company's engineers, Geophysical Engineering & Surveys Limited.

[1] (1959), 17 D.L.R. (2d) 246.

The Company agreed to:—

(*a*) pay the Contractor in lawful money of Canada for the materials and services aforesaid at the rate of Ten Thousand Dollars ($10,000.00) per mile plus Two Dollars ($2) per cubic yard of necessary rock cut and One Dollar ($1) per lineal foot of necessary corduroy, exclusive of bridges and culverts for which payment will be made at cost of labour and materials plus ten percent (10%) and

(*b*) make payments on account thereof upon the certificate of the Engineers as set out.

"The General Conditions of the Contract" which were annexed to the agreement and were to be read into and form part thereof contained Art. XII the relevant parts of which provided:

In the case of any dispute between the Company, or the Engineers on its behalf, and the Contractor during the progress of the work, or afterwards, or after the determination or breach of the contract as to any matter arising thereunder, either party hereto shall be entitled to give to the other notice of such dispute and to demand arbitration thereof.

Such notice and demand being given, each party shall at once appoint an arbitrator and these shall jointly select the third. The decision of any two of three arbitrators shall be final and binding upon the parties who covenant that their disputes shall be so decided by arbitration alone and not by recourse to any court by way of action at Law. However, if within a reasonable time the two arbitrators appointed by the parties do not agree upon a third or a party who has been notified of a dispute fails to appoint an arbitrator, then a third arbitrator or an arbitrator to represent the party in default or both such arbitrators may, upon simple petition of the party not in default, be appointed by a Judge of the Supreme Court of the Province of Ontario.

The original construction agreement was amended by another between the same parties, dated June 4, 1957, clause (*a*) of which reads:

(*a*) Notwithstanding any other provision in the Construction Contract to the contrary, from and after the 4th day of June, 1957, the Company will pay the Contractor in lawful money of Canada, Three Dollars ($3) per cubic yard of necessary rock cut and Fifty-five Cents ($.55) per cubic yard for gravel fill hauled to and used for the construction of said road (exclusive of such material hauled for surfacing the mining access road to a uniform depth of one foot). Payment for said fill shall be based on pit measurements and the Contractor shall advise the Company, from time to time, of its intention to remove gravel fill from a pit which it shall designate and shall enable the employees or nominees of the Company to properly survey said pit both before and after any such gravel is removed therefrom by the Contractor. In the event the Contractor fails to enable the Company to perform any such survey or surveys, the Company shall be under no obligation to pay for gravel removed from the pit since the time a survey of

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the pit was last made by the Company. Notwithstanding any other provision to the contrary, the Company shall not pay the Contractor for hauling gravel fill which is used in the construction of any part of said road from 0 + 0 to 264 + 00 on the grid laid out.

Prior to the agreement of October 9, 1956, the Contractor had entered into one dated September 13, 1956, with Geophysical Engineering & Surveys, Ltd., for the clearing of all trees, brush and other vegetation and the removal of all merchantable timber, windfalls and other fallen timber, fallen branches and other surface litter, on a location corresponding to that of the mining access road referred to in the agreement of October 9, 1956. As appears from clause (*b*) (iii) of this last mentioned agreement set out above, Geophysical Engineering & Surveys, Ltd. were the Company's engineers.

Disputes having arisen between the Contractor and the Company the former commenced arbitration proceedings in pursuance of Art. XII of the General Conditions. The procedure before the Board of Arbitration and what it did will be referred to later but it is first necessary to dispose of two points upon which we did not require to hear counsel for the respondent. The award dated April 1, 1958, was, according to the Contractor's factum, published and delivered to the solicitors for each party on April 2, 1958. According to the same factum, on May 15, 1958, the solicitors for the Contractor served a notice of motion asking for leave to enforce the said award, and on May 16, 1958, they were served with a notice of motion on behalf of the Company asking for an order extending the time for bringing a motion to set aside the award and for an order setting it aside on the grounds therein set forth. On May 20, 1958, the Company's motion was adjourned by consent and it was that motion which was heard by Landreville J. on June 16 and 17, 1958. That learned judge extended the time for bringing the motion pursuant to s. 30 of *The Arbitration Act*, R.S.O. 1950, c. 20:

30. (1) Unless by leave of the Court or a Judge, an application to set aside an award, otherwise than by way of appeal, shall not be made after six weeks from the publication of the award.

(2) Such leave may be granted before or after the expiration of the six weeks.

This was one of the matters as to which the Contractor cross-appealed to the Court of Appeal without success.

Mr. Varcoe agreed that Laidlaw J.A., with whom the other members of the Court of Appeal concurred, was correct in stating that he accepted the statement of counsel for the Company that the latter had made a mistake as to the date of publication of the award and the circumstances under which it became necessary to ask for an extension of time to set aside the award, but that Laidlaw J.A. was mistaken in stating that counsel for the Contractor therefore confined the cross-appeal to the submission "that a person who has accepted a benefit under an award is thereby precluded from applying to have it set aside". He did indeed make this latter submission before this Court but also contended that the Court can exercise its judicial discretion to extend the time for moving to set aside an award only if it can be shown that the applicant held a *bona fide* intention to move while the right to do so existed, that there were special circumstances which prevented him from so doing and that justice requires that leave be given. So far as that point is concerned we are all of opinion that no matter what the effect of the authorities to which counsel referred may be, the order of the Court of Appeal, affirming in that respect the order of the judge of first instance, was a discretionary order within s. 44 of the *Supreme Court Act* and that, therefore, no appeal lay unless leave be given by this Court under s. 41 and that under the circumstances leave would not be given.

The second point in the cross-appeal by the Contractor which was decided adversely to it by the Court of Appeal is as to the alleged approbation of the award. As to that we agree with Laidlaw J.A., speaking for the Court of Appeal, that while certain saleable timber left on the site of the work after the termination of the construction contract was found by the Board to be the property of the Company and while the Company transferred its right in the timber to one Roy Pacey in return for his clearing it from the right of way, there was a separate contract between the Contractor and the engineers for the clearing of the right of way. Any question as to the ownership of this timber arose under this separate contract and was in no way connected

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with or dependent upon the terms of the construction contract, and there was no acceptance by the Company of any benefit under the award or acquiescence in it so as to preclude it from applying for an extension of time, or from applying to set aside the award itself.

The members of the Board of Arbitration were duly chosen; what might be called pleadings were then delivered,—"points of claim" by the Contractor, "points of defence and counter-claim" by the Company and "points of reply and defence to counter-claim" by the Contractor. In view of the award made by the Board it is important to note that after referring to the construction contract of October 9, 1956, para. 7 of the claim alleged that at the request of one Davidson, for and on behalf of the Company, the Contractor agreed to construct a road substantially different from that contemplated by the contract, the benefit of which had been accepted by the Company, and that "It was an implied term of the said agreement that the Defendant Company would pay to the Plaintiffs a reasonable remuneration on a *quantum meruit* basis for the construction of the said road. The said term is to be implied from the said request and the said acceptance by the Defendant Company. The Plaintiffs say that a reasonable remuneration for the construction of the said road would be the cost of construction incurred by the Plaintiffs plus ten per cent profit". These allegations were denied by para. 8 of the defence including a specific denial that there were implied terms of any agreement between the parties. Denial was also made that the Company had accepted as substantially complete the work done by the Contractor under the original construction contract and the Company maintained that the amending agreement of June 4, 1957, was entered into at the request of the Contractor for its financial benefit. Claims were also advanced by the Contractor as set out in the reasons of Laidlaw J.A. for damages under various heads.

The Board made this finding:—"We further find that the only means to settle the deeply involved dispute is to pay the Contractor the cost of the work, plus a percentage for profit", and then awarded the contractor the cost of the work plus ten per cent. "applied to the total cost of the

work after deducting therefrom the amount of equipment rentals". The Board also found that the contract was wrongfully terminated by the Company and therefore in addition to the cost of the work, plus ten per cent., awarded the Contractor $10,100 "as liquidated damages".

I find it unnecessary to refer to any of the other findings of the Board of Arbitration. It appears to me to be quite clear that there is error of law appearing upon the face of the award. The Board did not proceed to arbitrate the matters that were in dispute under the construction contracts but imposed their own view of what should be done and gave what they considered was a proper sum on a *quantum meruit* basis and furthermore allowed a large sum by way of "liquidated damages". The authorities are all mentioned in the 16th ed. of Russell on Arbitration but reference might be made particularly to the judgment of the House of Lords in *Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*[1]. Lord Russell with the concurrence of Lord Buckmaster and Lord Tomlin, at p. 607, points out that the authorities make a clear distinction between a case where disputes are referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him for decision. In the first, the Court can interfere if and when any error of law appears on the face of the award but in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. Lord Warrington of Clyffe and Lord Wright came to a like conclusion for similar reasons. I read the relevant parts of the pleadings as indicating that no specific question of law was submitted by the parties to the Board and therefore I do not investigate the problem that would arise if this were not so as did LeBel J.A. with the concurrence of McGillivray J.A.

The appeal should be dismissed with costs. The formal judgment of the Court of Appeal set aside the order of Landreville J., but, as the latter extended the time within which the motion to set aside the award might be made, it

[1] [1933] A.C. 592.

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would appear to be preferable if the affirmance of that part of the order of the judge of first instance were made clear in the judgment of this Court to be issued.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Varcoe, Duncan & Associates, Toronto.

Solicitors for the defendant, respondent: Lang, Michener & Cranston, Toronto.