WILLARD M. GORDON and GEORGE H. BELL (*Defendants*) ..... APPELLANTS;

1966
*Mar. 14
Apr. 26

AND

ROBERT M. GABY (*Plaintiff*) ..... RESPONDENT;

AND

FEDERAL PACKAGING AND PARTITION COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Agreements entitling shareholders to purchase shares in proportion to existing holdings—Right claimed on basis of shares held including shares purchased and paid for but not yet registered.

A group of shareholders in a private company were in dispute concerning their rights to purchase shares from each other in the company. All of the shareholders were parties to agreements which provided that before any one shareholder could sell to an outsider, he must first offer his shares to the other shareholders, who were entitled to purchase proportionately to their existing holdings. M Co., the holder of 17,500 shares out of a total of 50,000 shares, offered to sell to the other shareholders all of its shares. The plaintiff, G, who was already the holder of 1,250 shares, accepted the offer. He paid the purchase price in full for the 17,500 shares and took delivery of a certificate endorsed by M Co. However, there was an interval of one month between the purchase of the shares and the registration of G as a shareholder in connection with his new acquisition. This delay was the result of the company's by-laws which required a resolution of the directors and a ten days' notice for the calling of a meeting.

In the meantime, two other shareholders, I and N, holding respectively 4,500 and 4,125 shares in the company, made an offer to the other shareholders to sell all their shares. Their offer was accepted by all the other shareholders, who were then only five in number. G, when he accepted, claimed the right to purchase proportionately to a holding of 18,750 shares. The other shareholders disputed G's right to count the 17,500 shares not yet registered in determining the proportion of the I-N shares that he was entitled to purchase.

In an action by G for a declaration, judgment was given in favour of the defendants. The trial judge decided that in the two agreements made among the shareholders the word "shareholders" meant "registered shareholders." On appeal, the Court of Appeal allowed the appeal, holding that G was a shareholder with reference to the 17,500 shares. From this decision the defendant shareholders appealed to this Court.

Held: The appeal should be dismissed.

Throughout the agreements the words used were "shareholders" and "shareholdings." There was nothing which required the construction that "shareholders" meant "registered shareholders" or that "shareholdings' meant "registered shareholdings". The trial judge's construction, if adopted, would mean that a block of 17,500 shares out of a total

* PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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issue of 50,000 shares would be disqualified for the count and that the advantage of pre-emption attached to these shares would be distributed among the four other shareholders. There was no logical or practical reason why such a result should follow.

The argument that G was disqualified because, in purchasing the 17,500 shares, he had a partner who had provided part of the funds on the understanding that he would be entitled to an undivided 72 per cent interest in the block and that G would be entitled to the remaining 28 per cent interest was rejected. G was bound as to the whole block by his shareholder agreements. He was trustee of the block to the extent of his associate's interest but always subject to the terms of these agreements.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Donnelly J. Appeal dismissed.

Allan Findlay, Q.C., for the defendants, appellants.

Douglas K. Laidlaw, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The dispute in this litigation is among a group of shareholders in Federal Packaging and Partition Company Limited, a private company, concerning their rights to purchase shares from each other in the company. All the shareholders were parties to agreements which provided that before any one shareholder could sell to an outsider, he must first offer his shares to the other shareholders, who were entitled to purchase proportionately to their existing holdings.

The facts are not in dispute. They are fully stated in the reasons delivered in the Court of Appeal[1]. The Court of Appeal held that a person who had purchased and paid for shares but had not yet secured registration as a shareholder on the books of the company was to be counted as a shareholder for the purpose of determining the proportionate rights to purchase when a further offer from other shareholders was made. The trial judge held to the contrary.

On May 14, 1962, Martin Paper Products Limited, the holder of 17,500 shares out of a total issue of 50,000 shares, offered to sell to the other shareholders all of its shares for $120,000, that is, at a price of $6.86 per share. The offer was to remain open for acceptance until the close of business on

[1] [1966] 1 O.R. 15, 52 D.L.R. (2d) 295.

May 23, 1962. On that date the plaintiff, Robert M. Gaby, who was already the holder of 1,250 shares, accepted the offer. No other shareholders accepted Martin's offer.

On May 25, 1962, Gaby paid the purchase price in full for the 17,500 shares and took delivery of a certificate endorsed by the Martin Company. On May 29, his solicitors sent to Federal Packaging a share certificate to have Gaby registered as the owner of the 17,500 shares. This certificate was received on May 30, 1962. The directors, pursuant to the by-laws of the company, had to call a meeting with ten days' notice for the approval of the transfer. The meeting was held on June 25, 1962. The transfer was approved and Gaby was entered on the books of the company as the holder of these 17,500 shares. There was, therefore, an interval of a month between the purchase of the shares and the registration of Gaby as a shareholder in connection with his new acquisition.

In the meantime, on May 23, 1962, two other shareholders, W. Imrie and O. G. Nash, holding respectively 4,500 and 4,125 shares in the company, made an offer to the other shareholders to sell all their shares at $3.50 per share. This price was well below the price at which the Martin Company had offered its shares. The Imrie-Nash offers were to be accepted before twelve o'clock noon on May 29, 1962. The Martin Company had already sold its shares and Imrie and Nash were engaged in selling their shares. Their offer was accepted by all the other shareholders, who were then only five in number. Gaby, when he accepted, claimed the right to purchase proportionately to a holding of 18,750 shares. This was made up of 1,250 shares which he had held for some time and which were registered in his name, and the 17,500 shares which he had just acquired from the Martin Company but had not yet been able to register and was not able to register until June 25, 1962. The other shareholders disputed Gaby's right to count the 17,500 shares not yet registered in determining the proportion of the Imrie-Nash shares that he was entitled to purchase. This is the whole dispute.

The other shareholders say that according to the agreements that they made the only shares that could be counted were those registered on the books of the company. Gaby says that he was a shareholder with reference to the

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17,500 shares because he was entitled to registration, having bought and paid for the shares, and that the delay was merely the result of the company's by-laws which required a resolution of the directors and a ten days' notice for the calling of the meeting.

The learned trial judge decided that in the two agreements made among the shareholders the word "shareholders" meant only "registered shareholders." The Court of Appeal held that Gaby was a shareholder with reference to the 17,500 shares. I agree with this construction. Throughout the agreements the words used are "shareholders" and "shareholdings." I can see nothing which requires the construction that "shareholders" means "registered shareholders" or that "shareholdings" means "registered shareholdings." If the trial judge's construction is adopted, it means that a block of 17,500 shares out of a total issue of 50,000 shares is disqualified for the count and that the advantage of pre-emption attached to these shares is distributed among the four other shareholders. There is no logical or practical reason why such a result should follow. It was the merest accident that the Imrie-Nash offer followed so closely on the Martin Company offer at a time when the Martin Company shares which had been validly sold had not been registered in the name of the new owner. Gaby was the owner in equity of these shares and as soon as it was possible he became the registered owner. It requires a very highly technical construction of the agreement to deprive him of his rights of pre-emption along with the other four remaining shareholders. The Martin Company had parted with these shares. It could not accept the Imrie-Nash offer even though it remained the registered shareholder. Imrie and Nash were out of the competition. This left only five shareholders, including Gaby. If the 17,500 shares are not to be counted in Gaby's hands, there is a big bonus to the other four shareholders.

When the parties were unable to agree upon proportionate participation in the Imrie-Nash offer, the solicitors acting for these two shareholders directed the transfer in accordance with Gaby's contention. I think that they were right in so doing and that the Court of Appeal judgment was right in affirming these directions.

In argument before us, much was made of the practical difficulties which would arise among the shareholders if the

construction of "registered shareholders" was rejected. These practical difficulties do not exist with a company of this size.

The difficulties of the company were also emphasized if the construction of "registered shareholders" was rejected. Again, I see no difficulty. The company in sending out notices and paying dividends must be governed by the share register. But matters of this kind are not in issue here.

Finally, the appellants urged that Gaby, in purchasing the 17,500 shares, had a partner who had provided part of the funds on the understanding that he would be entitled to an undivided 72 per cent interest in the block and that Gaby would be entitled to the remaining 28 per cent interest. This means no more than this, that Gaby would become the registered owner of the whole block. He would be trustee for his associate as to 72 per cent of the shares in the block. I cannot see that this disqualifies Gaby. The company, when Gaby became registered, could only recognize him as the shareholder. If Gaby wished to sell the block at any time he could only do so on the terms of first offering the shares to the other shareholders pursuant to the agreements to which he was a party. There is no question of the associate becoming a registered shareholder. Gaby is bound as to the whole block by his shareholder agreements. He is trustee of the block to the extent of his associate's interest but always subject to the terms of these agreements.

I agree with the reasons of the Court of Appeal and I would dismiss the appeal with costs payable by the appellants.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Tilley, Carson, Findlay and Wedd, Toronto.

Solicitors for the plaintiff, respondent: McCarthy and McCarthy, Toronto.

Solicitors for the defendant, respondent: Kilmer, Rumball, Gordon, Davis and Smith, Toronto.