PRUDENTIAL TRUST COMPANY LIMITED AND CANADIAN WILLISTON MINERALS LIMITED (*Defendants*) ..... APPELLANTS;

1959
*Nov. 9
Dec. 21

AND

TURE OLSON AND RUTH MARIE OLSON (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Non est factum—Mines and Minerals—Oil lease—Assignment of interest in lease—Allegation of fraud—Whether uncontradicted—Subsequent bona fide purchaser—False affidavit that land not homestead—Trading in security—Rule against Perpetuities—Trial judge's findings on credibility reversed by Court of Appeal—The Homesteads Act, R.S.S. 1940, c. 101—The Security Frauds Prevention Act, R.S.S. 1940, c. 287.

In 1949, the male plaintiff granted an oil lease to I Co. In 1951, he assigned and transferred to the defendant trust company and its *bona fide* assignee W Co. an undivided one-half interest in all mines and minerals, subject to the existing lease. The transfer was accompanied by an affidavit in which he falsely stated that the land was not his homestead. The plaintiffs sued to have the assignment and transfer set aside on the ground *inter alia,* of *non est factum.* They alleged that the defendants' agent F represented that the documents were only an option to lease. The trial judge dismissed the action and stated that he accepted F's evidence. The Court of Appeal reversed this judgment and held that the plaintiff's evidence was uncontradicted because F, in his evidence, could not recognize the male plaintiff and could not recall the particular transaction with him. The defendants appealed to this Court.

Held: The action should be dismissed.

A person can properly deny fraudulent representations attributed to him on a specific occasion, even though he may not remember the exact occasion or the person who alleges that such representations were made, if he is able, as was done in this case, to say that he followed the same pattern as in other cases and describes what that pattern was. After such a denial of fraud, it cannot properly be said that the allegations are uncontradicted. In fact they are contradicted. There were no sufficient reasons to warrant a reversal of the findings of fact made by the trial judge, based as they were on the credibility of the witnesses who had testified before him. On those findings of fact, the plaintiffs have failed to bring themselves within the principles of *Prudential Trust Co. v. Cugnet,* [1956] S.C.R. 914.

Even though the male plaintiff had falsely affirmed that the land was not his homestead, the *bona fide* purchaser for value was properly entitled to avail itself of the protection afforded by s. 7(3) of *The Homesteads Act.*

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

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APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Davis J. Appeal allowed.

E. D. Noonan, Q.C., and *A. W. Embury*, for the defendants, appellants.

D. G. McLeod, for the plaintiffs, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent Ture Olson is the registered owner of the east half of section 35, township 3, range 5, west of the second meridian, in the Province of Saskatchewan. The respondent Ruth Marie Olson is his wife. They resided on the south-east quarter of section 35, township 3, range 5, west of the second meridian, until October, 1946, when they purchased a house in Regina. They have lived in that city since that time.

On April 28, 1949, Olson entered into a petroleum and natural gas lease with Imperial Oil Limited of all petroleum, natural gas and related hydrocarbons, excepting coal and valuable stone, within, upon or under the half section for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the said lands. The lease provided that, if operations were not commenced for the drilling of a well within one year from its date, the lease would terminate, but that this drilling commitment could be deferred for a period of one year on the payment of the sum of $32 and that drilling operations could be further deferred from year to year by making like payments. There was no other drilling commitment except as to offset wells.

On March 26, 1951, Olson executed a document, entitled an assignment, in favour of the appellant Prudential Trust Company Limited (hereinafter referred to as "Prudential") in the same form as that which is set out in full in my reasons for judgment in the case of *Prudential Trust Company*

[1] (1959) 17 D.L.R. (2d) 341.

Limited v. Forseth (ante p. 210) which was argued immediately prior to the present appeal. On the reverse side of this document there appears the following form of affidavit:

HOMESTEAD AFFIDAVIT

CANADA
PROVINCE OF SASKATCHEWAN
TO WIT:

I, Ture Olson, also known as Ture I. Olson, of the Town of Hirsch, in the Province of Saskatchewan, Farmer, make oath and say:

1. THAT I am the Lessor named in the within Petroleum and Natural Gas Lease and I say:

THAT no part of the land described in the said lease is my homestead or has been my homestead at any time within the period of seven years immediately preceding the execution of the said lease:

—or—

GD. TIO ~~THAT I have no wife.~~

—or—

GD. TIO ~~THAT my wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.~~

SWORN before me at Hirsch, in the Province of Saskatchewan, this 26th day of March, A.D. 1951.

(Sgd) Ture I. Olson

(Sgd) George Van Dutchak
A Commissioner for Oaths in and for the Province of Saskatchewan.
My commission expires December 31, 1955.

The letters "GD" and "TIO", which appear on the left-hand side of this affidavit, are the initials of George Van Dutchak and of Olson.

On the same date Olson executed a transfer to Prudential of an undivided one-half interest in all the mines and minerals within, upon or under his lands, reserving all coal. On this transfer form appears a form of affidavit, signed by Olson, stating that no part of the land described in the transfer was his homestead or had been his homestead within the period of seven years immediately preceding the execution of the said transfer.

The documents in question were taken by Prudential as a bare trustee for Amigo Petroleums Limited. The rights of the latter company were twice transferred and are held by the appellant Canadian Williston Minerals Limited (here-

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inafter referred to as "Williston"), which is admittedly a *bona fide* purchaser for value of any rights of Prudential under these documents.

Prudential filed a caveat on April 6, 1951, in respect of the transfer of one-half the mines and minerals and the option to acquire a lease on the termination of the existing lease to Imperial Oil Limited.

At the time of the transaction on March 26, 1951, there was no indication of oil discoveries anywhere in the area of these lands. At the time of the trial, in November, 1956, two wells had been drilled on Olson's land. Oil had been discovered in the Steelman Field in which Olson's lands are situate before this action was commenced on July 7, 1955.

The execution of the documents in question was obtained in Regina by one Fesser, an agent of Amigo Petroleums Limited. There is a direct conflict of evidence as between Fesser and Olson as to what occurred on that occasion, they being the only persons who testified as to their conversation. Olson's version of this discussion is that Fesser stated to him that he, Fesser, was representing Prudential and that he wished an option to lease, if Imperial Oil Limited dropped their lease, and would pay Olson $40 for such option. The lease for which the option was given was supposed to be the same as the lease to Imperial Oil Limited, only providing for twenty-five cents an acre delay rental instead of ten cents. Nothing else was said. Olson says that he did not feel like signing it at that time and that he wished to obtain advice from his friends. Fesser left and took the documents with him. Olson consulted with his brother-in-law about the matter. On the next evening, Fesser returned and the discussion was the same as on the previous occasion. Olson says he understood that the document was an option for a lease, if Imperial Oil Limited dropped its lease. He said he did not read the document.

Fesser's evidence is that he worked on and off for four or five months in 1951, making similar deals; that he interviewed about one hundred farmers in all and was successful in obtaining agreements in about a couple of dozen cases. He did not remember Olson or the particular transaction, but he followed a similar pattern in all cases. He would

introduce himself, explain that he was representing Prudential and was interested in acquiring one-half the mineral rights. If the existing lease expired or was dropped, Prudential would have the option of leasing, in which case the delay rental would be tweny-five cents an acre.

Olson signed the assignment and the transfer at his house in Regina and signed the affidavits, under *The Homesteads Act,* which appeared on each of these documents. He denied that these affidavits were sworn or that Van Dutchak, the Commissioner for Oaths whose signature appears on each of these affidavits, was present. He was later paid $40 as consideration for his execution of the documents. He says that in September, 1951, he received a copy of the assignment, which he then read for the first time and realized that he had granted something more than an option.

After hearing the evidence, the learned trial judge stated in his judgment that he did not believe Olson's story that Fesser had misrepresented the transaction to him. He said that there could be no doubt that when Olson signed the documents he was fully aware of their contents and did so willingly. He stated that neither of the respondents was a satisfactory witness and that where their evidence conflicted with Fesser's he accepted the latter. Judgment was given in favour of the appellants.

This judgment was reversed by the Court of Appeal[1], which accepted Olson's evidence. From that decision the present appeal is brought.

In my reasons for judgment in the *Forseth* case[2] I cited authorities regarding the proper position to be taken by an appellate Court in relation to findings of fact by a trial judge based upon the credibility of witnesses. It is unnecessary to repeat them here. In the present case the judgment of the Court of Appeal is based upon the conclusion that the respondents' evidence was uncontradicted because Fesser, in his evidence, had stated that he did not recognize Olson and did not have any recollection of the particular transaction with him. I do not think that such a conclusion must follow because of that evidence, since Fesser went on to say that he had followed the same pattern in his dealings with Olson as that which he followed in his interviews with other

[1] (1959) 17 D.L.R. (2d) 341. [2] [1960] S.C.R. 210.

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persons who had executed similar documents, which pattern he described. The point is that Fesser was accused by Olson of fraud in misrepresenting the nature of the documents which Olson was to sign. This Fesser denied. It seems to me that a person can properly deny fraudulent representations attributed to him on a specific occasion, even though he may not remember the exact occasion or the person who alleges that such representations were made, if he is able to say that he followed the same pattern as in other cases and describes what that pattern was. Having made such a denial of fraud, I do not think that it can properly be said that the allegations were uncontradicted. The fact is that they were contradicted, the denial of fraud by Fesser was believed and the allegations of fraud made by Olson were not believed by the learned trial judge.

With respect, I do not think that the reasons stated in the judgment of the Court of Appeal were sufficient to warrant a reversal of the findings of fact made by the learned trial judge, based as they were on the credibility of the witnesses who had testified before him. Accepting those findings of fact, the respondents have failed to bring themselves within the principles enunciated in *Prudential Trust Company v. Cugnet*[1].

The respondents then contended that at least in respect of the south-east quarter the transaction was void for non-compliance with the provisions of *The Homesteads Act*. This contention is based upon the ground that, contrary to what appears in Olson's affidavits, the south-east quarter had been his homestead within the period of seven years immediately preceding the execution of the documents. The respondents had purchased their house in Regina to which they moved in October, 1946. The documents were executed on March 26, 1951. The south-east quarter was, therefore, at that time, still the homestead of the respondents, as defined in the statute then applicable, that is, s. 2 of R.S.S. 1940, c. 101, as amended.

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

However, it seems to me that Williston, as a *bona fide* purchaser for value, is entitled to rely upon the provisions of subs. (3) of s. 7 of that Act. Subsections (1) and (3) of s. 7 provide as follows:

> 7. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage, which does not comply with the provisions of sections 4 and 5, shall be accompanied by an affidavit of the maker (form C) stating either that the land described in such instrument is not his homestead and has not been his homestead at any time or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.
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> * * *
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> (3) No transferee, mortgagee, lessee or other person acquiring an interest under such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit hereby required to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as provided in section 11, R.S.S. 1940, c. 101, s. 7.

Sections 4 and 5, referred to in subs. (1) of s. 7, relate to a declaration by the wife of a registered owner of a homestead that she has executed an instrument for the purpose of relinquishing her rights in the homestead and to the certificate by a qualified officer that she has been separately examined and understood her rights. No such declaration or certificate was made in the present case.

Turning to the terms of subs. (3) of s. 7, it appears to me that Williston acquired an interest under instruments purporting to be completed in accordance with the Act and, in so far as it is concerned, the same would, therefore, be valid and binding. Section 11, referred to in subs. (3), has no application because there is no evidence that Williston had any knowledge that the lands involved included Olson's homestead. In fact there is no evidence that Fesser had any such knowledge.

It is true that the affidavit of Olson on the assignment form states that he is "the Lessor named in the within Petroleum and Natural Gas Lease" and that the document in question was not a lease. However, it seems to me that the essential part of the affidavit is that which is specifically required by the terms of subs. (1) of s. 7, that is that it must state "either that the land described in such instrument is not his homestead and has not been his homestead

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at any time within the period of seven years immediately preceding the execution of the instrument, or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage". This is specifically stated in the affidavits which Olson signed and, having been so stated, it is my view that, for the reasons stated in the *Forseth* case[1], Williston is properly entitled to avail itself of the protection afforded by subs. (3) of that same section.

In my view, therefore, the contention of the respondents based on *The Homesteads Act* fails.

Additional points were argued by the respondents, contending that the assignment did not involve a transfer to Prudential of one-half of any royalties payable under the Imperial Oil Limited lease; that the whole transaction was void by reason of the provisions of *The Security Frauds Prevention Act* and that, in any event, the provisions of the assignment relating to the option to lease were void as being contrary to the rule against perpetuities. Each of these points was fully discussed in my reasons for judgment in the *Forseth* case[1] and the same reasons are equally applicable in the present case.

I am, therefore, of the opinion that the appeal should be allowed with costs payable by the respondents both here and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.

Solicitors for the plaintiffs, respondents: Pedersen, Norman & McLeod, Regina.

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[1] [1960] S.C.R. 210.