1955

*Mar. 15
*Apr. 6

LOUIS H. MARCOTTE (*Plaintiff*) ..... APPELLANT;

AND

LA SOCIÉTÉ COOPERATIVE AGRICOLE DE STE. ROSALIE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Mandamus—Contract between member and Agricultural Co-operative Society—Member expelled from Society for breach of contract—No allegation in pleadings that member was not heard or summoned before expulsion—Whether court can act proprio motu—Co-operative Agricultural Association Act, R.S.Q. 1941, c. 120, ss. 13, 14.

*PRESENT: Taschereau, Kellock, Estey, Fauteux and Abbott JJ.

(1) 110 C.C.C. 338.

The appellant was a shareholder member of the respondent agricultural co-operative, which was organized under the *Co-operative Agricultural Association Act,* R.S.Q. 1941, c. 120. In common with other members, he had entered into a contract with the respondent, providing that each member should purchase from the respondent all his required feed, seed grain and chemical fertilizer, that if a member committed a breach of his contract, the respondent might claim stipulated damages and the board of directors was authorized to strike off such member from the list of members.

For breach of contract by the appellant, the directors passed a resolution declaring him to be no longer a member. He applied for a mandamus to have the resolution declared illegal, null and void, alleging that he had fulfilled all the terms of the contract and that the respondent had acted unjustly, arbitrarily and illegally.

The trial judge and the majority in the Court of Appeal dismissed his application. The dissenting judgments in the Court of Appeal held that the directors should have heard the appellant before adopting the resolution and that, whether pleaded or not, the court itself was entitled to raise the doctrine of *audi alteram partem.*

Held: The appeal should be dismissed.

1. The trial judge was not required nor entitled to act *proprio motu* on the doctrine of *audi alteram partem,* which had not been pleaded by the appellant before the trial judgment was rendered. Assuming that the directors were acting in a quasi-judicial capacity, the failure to hear or summon the appellant before adopting the resolution was a question of fact which should have been expressly pleaded if the appellant wished to rely upon it in his action.

2. On a true interpretation of the obligations of the appellant, there was ample evidence to show that the decision of the directors was not unjust, arbitrary and illegal.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Barclay and McDougall JJ.A. dissenting, the judgment of the trial court which had dismissed the writ of mandamus.

P. Pothier, Q.C. for the appellant.

V. Pager, Q.C. and *E. Tousignant* for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—The respondent is a co-operative agricultural association organized under the provisions of the *Co-operative Agricultural Associations Act,* R.S.Q. 1941, c. 120. Appellant was a member of the said Association and the holder of ten shares of the value of $10 each.

In common with other producer shareholders, appellant had entered into a contract with the association for a period of five years from February 1, 1944, and this contract was

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renewed for a further period of five years, terminating on the 1st February, 1954. The said contract, authorized by s. 13 of the Act, provided, among other things, that each member should purchase from the Association all feed, seed grain and chemical fertilizer which he might require. The contract further provided that if a member committed a breach of his obligations under the contract, the Association might claim and recover from such member, as stipulated damages, a sum equivalent to thirty percent of the value of all such merchandise purchased elsewhere. In the event of a breach, aside from any claim which the Association might make for damages, under the terms of the said contract, and in virtue of s. 14 of the Act, the board of directors was authorized, if deemed expedient, to strike off such shareholder member from the list of members and convert his ordinary shares into preferred shares.

On October 18, 1950, on the ground that appellant had neglected and refused to carry out his obligation to purchase from the association his requirements of feed, seed grain and fertilizer, the Directors of the Association passed a resolution in the terms of which they declared the appellant no longer a member, converted his ordinary shares into preferred shares and authorized the immediate repayment of the said shares. No attempt appears to have been made to assert any claim for stipulated damages.

On October 20, 1950, respondent wrote appellant advising him of the terms of the said resolution and forwarded a cheque for $100, the par value of his shares, which appellant refused to accept.

On October 28, 1950, appellant applied for the issue of a writ of mandamus. In his petition he alleged that during the whole period of the original contract and its renewal, he had fulfilled all the terms of the said contract, had carried out all his obligations as a producer shareholder, both under the law and the by-laws of the said Association, that he had been illegally struck off the list of members, and that the action thus taken by respondent, relying upon an alleged breach of contract by appellant, was unjust, arbitrary and illegal. With his petition for the writ he tendered and deposited the cheque in the amount of $100 above referred to and in his conclusions asked that the resolution adopted by the Directors of the Respondent Association on

October 18, 1950, be declared illegal, null and void; that it be declared that he had been illegally removed from the list of members, and that the respondent be ordered to restore him as a producer member of the Association.

The learned trial judge and a majority of the Court of Appeal (1) held that it was clearly established on the evidence that the appellant had committed a breach of his obligations under his contract with the Association, that in consequence, the Directors were justified in adopting the resolution removing him from the list of producer members, converting his shares into preferred shares and repaying the said shares.

Mr. Justice Barclay, with whom Mr. Justice McDougall concurred, without passing upon the question as to whether or not appellant had committed a breach of his contract, was of the opinion that before the Board of Directors could validly adopt a resolution removing him as a member, appellant was entitled to be heard. Since in his view the appellant had been removed *ex parte* without being given any chance to be heard, and applying the well known principle *audi alteram partem,* the learned judge held that the resolution of the Board was illegal, null and void. He also held that whether pleaded or not, the Court itself was entitled to raise this issue.

I shall deal first with the merit of the argument based on the doctrine of *audi alteram partem.*

The appellant did not complain in his pleadings or at any time before judgment was rendered in the Court of first instance, that he had not been heard or at least duly summoned by the Board of Directors before action was taken to remove him as a member. The question appears to have been raised for the first time before the Court of Appeal. It is true that at the trial there was evidence which might have supported a complaint that appellant had not been heard or at least summoned before the Board. Had this question been pleaded, however, respondent might have been able to adduce evidence indicating that appellant had either been heard or was unwilling to appear. I should add that the mere existence of a contract between the parties would not constitute an answer to a complaint by appellant

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that he had not been given a hearing by the Board before it acted: *Lapointe* v. *L'Association de Bienfaisance de la Police de Montreal* (1).

With the greatest respect for the learned judges of the Court below who expressed a contrary view, I do not share their opinion that in the case at bar the trial Court was required or entitled to act *proprio motu*.

Assuming that the Board of Directors of the Association was acting in a quasi-judicial capacity, the failure to hear or to summon the appellant before adopting the resolution in question was in my opinion a question of fact which should have been expressly pleaded if appellant wished to rely upon it in his action. On this branch of the appeal, therefore, the appellant cannot succeed.

As to the merits of the action, on a true interpretation of the obligations of appellant, there was ample evidence, as found by the two Courts below, to show that the decision of the Board of Directors was not unjust, arbitrary and illegal as contended by the appellant.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Philippe Pothier.*

Solicitor for the respondent: *Eugene Tousignant.*