THE ROYAL BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

J. L SKENE AND J. S. CHRISTIE (PLAINTIFFS) ..... RESPONDENTS.

1919
*Oct. 14, 15.
*Oct. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Judgment—Setting aside—Common error of parties.

In a former action between the appellant and the respondents, the trial judge pronounced an oral judgment finding in favour of the appellant upon certain contested items and in favour of the respondents upon certain other contested items and fixed the rate per foot upon which the sum for which judgment was to be finally given in favour of the appellant was to be calculated; and a reference to the registrar was directed to work out this judgment and express the result in figures. The solicitors then agreed to substitute a report by architects for this reference. It had been expressly stated that it was the respondent's intention to appeal from the judgment. The order, drawn up by agreement and initialled by the solicitors for both parties, apparently deprived the respondents of that right. Subsequently, the respondents appealed but the appeal was dismissed on the ground that it was a judgment by consent. The respondents then took a direct action to set aside the judgment.

Held, that there had been common error in the expression of the intentions of the parties and the judgment was properly set aside. *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, followed.

Per Davies C.J. and Duff, Brodeur and Mignault JJ.—The appellant, having succeeded in his contention that the judgment was drawn in a form which made it unappealable, cannot now be allowed to say, as against the respondents, that this was not in law the construction of the order.

Judgment of the Court of Appeal ([1919] 3 W.W.R. 740), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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the trial judge, Morrison J., (1), and maintaining the respondents', plaintiffs', action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *Sir Charles Tupper K.C.* for the appellant.

W. N. Tilley K.C. for the respondent was not called upon.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff.

IDINGTON J.—The judgment in the original action by appellant against respondents, on the main issue therein, clearly was pronounced by the learned trial judge against the will of the respondents.

And their avowed intention to appeal therefrom appears in the answer by their solicitors, to the suggestion of appellant's solicitors, that they should mutually try to avoid the expense of a reference to determine the amount of the allowances to be made the respondents, within the terms of the opinion judgment given by the learned trial judge. That renders it difficult for me to understand how appellant could in good faith take the objection made to hearing an appeal from the formal judgment issued as the result of the adjustments reached to avert a reference.

The appellant's solicitors expressly recognized in their reply to said answer the right and intention to appeal.

The adjustment of the matters to be the subject of a reference was all that either party contemplated giving assent to.

(1) [1919] 1 W.W.R. 390.

The initialling of the consents was evidently only intended to shew an adjustment had been made of the said matters and need for a reference.

As I read the memo thus initialled it was all done on the "basis of the judgment" pronounced by the learned trial judge. And as I understand the facts appellant's counsel unfairly refused to let the Court of Appeal get seized of these facts when the motion for appeal was heard, and thus have the ambiguous document illuminated by what the letters clearly shew the parties intended.

Hence there was a failure of that court to recognize the right of appeal and I imagine a failure of justice.

As the learned trial judge herein well expressed his view of the situation thus created:—

> It would be a reproach upon our juridical system if it were impossible to put the parties to this action in a position whereby the judgment of the trial judge could be worked out ultimately according to its true intent and meaning.

I, therefore, entirely agree with the judgment appealed from.

It may be that if called upon to consider the judgment in appeal against said judgment I should not agree with the result arrived at.

The mere question of practice or procedure relative to the proper method of rectifying what seems to be a grave wrong, is one that according to the settled jurisprudence of this court we must not interfere with unless a result has been reached that violates natural justice.

The bringing of an action instead of proceeding by way of motion may have resulted in greater expense to be borne by appellant.

Of this the appellant has no right to complain for its course of conduct in refusing to accede to the

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request for a stay of proceedings, when the appeal was being heard, in order to enable the respondents to move and rectify the form of judgment which raised the doubt and difficulty, is the cause of resorting to a more costly mode of procedure.

I think this appeal should be dismissed with costs.

DUFF J.—There is no dispute as to the agreement between Mr. McMullen and Mr. Bull respecting the judgment which was to be entered in the action. The trial judge at the conclusion of the trial had pronounced an oral judgment in which he found in favour of the bank upon certain contested items and in favour of Skene and Christie upon certain other contested items for which credit was claimed in the defence and fixed the rate per foot upon which the sum for which judgment was to be finally given in favour of the bank was to be calculated; and a reference to the registrar was directed to work out this judgment and express the result in figures. After some correspondence the solicitors agreed that the two architects who had been examined as witnesses for the respective parties before the trial judge should be requested to make the necessary measurements and calculations and to report to the solicitors, it being understood that, if they reached an agreement, the result of the investigation in figures should be adopted and that they should be incorporated in the judgment as if they had been arrived at by the learned trial judge himself. It was not only understood but expressly stated that it was Mr. McMullen's intention to appeal from the adjudication of the learned trial judge, that is to say, from the principle of the judgment. The findings, of course, in so far as they rested upon the report of the architects or upon the calculations of the

solicitors themselves were the necessary result of the adjudications of the trial judge and must stand or fall with these adjudications.

I cannot accept the contention that on these points there was not a concluded agreement. The correspondence read together with a document which finally became the judgment but which was not a judgment until it had been approved of by the trial judge affords a complete demonstration not only of the general terms but of the particulars of the agreement between the solicitors. Moreover, there is no dispute upon it. Mr. Bull's evidence is explicit and the effect of the documents and the oral evidence is that both Mr. McMullen and Mr. Bull believed that both of them were giving their assent to certain findings which, taken with the adjudications of the trial judge, should together constitute a judgment; a judgment which, save as regards these agreed findings, was the judgment of the trial judge based upon his own decision. The truth is that as regards these consent findings the solicitors intended that they should be in precisely the same position as findings upon admissions made in the course of the trial.

The trial judge, in giving judgment, I repeat, was acting in the ordinary course of jurisdiction, not at all *extra muros*; indeed there was nothing irregular in what was done and a judgment beyond all question could have been drawn in a form which would have excluded any possible suggestion that the judgment itself was a consent judgment or that on any ground the adjudications of the trial judge were not to be open to the appeal to which everybody intended that they should be subject.

I express no opinion upon the point whether or not the form of the judgment presented is strictly

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an obstacle in the way of an appeal. The counsel for the bank took the objection that the judgment was drawn in a form which made it unappealable. I am not sure that I quite understand the precise nature of the objection but I gather from the evidence of Mr. McMullen that the view taken by the majority of the Court of Appeal on the occasion was that one paragraph in the judgment shewed that the adjudication was an adjudication by consent, not an adjudication resting upon judicial decision; and that consequently the parties were, as no doubt they would be if such were the case, precluded from impeaching the adjudication by way of appeal. I repeat, that I express no opinion as to this view, but counsel for the bank having contended for this construction and having succeeded in his contention and having got the appeal dismissed as a result of his successful contention, the bank cannot now be allowed to say as against the respondents, that this was not in law the construction of the order. I refer to a well known passage in a judgment of Bowen L.J. in *Gandy* v. *Gandy*(1):—

> I am not certain that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn around and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the court allowed that.

Admittedly this construction of the judgment is one which defeats the intentions of the solicitors whose agreement the judgment was intended to give effect to. There is, as Chitty L.J. said (2), common error in the expression of the intentions of the parties and therefore the instrument must be rectified or set

(1) 30 Ch. D. 57, at p. 82. (2) [1897] 2 Ch. 534, at p. 551.

aside. I think *Wilding* v. *Sanderson*(1), governs this case.

It is, I think, nothing to the purpose to say that this is strictly not a judgment by consent. The paragraph in the judgment which gave rise to the difficulty was a paragraph which was intended to express the agreement of the parties and indeed, the judgment may, for the purposes of this appeal, be read as two judgments; (*Belcher* v. *McDonald* (2)); the judgment formally expressing what was orally pronounced by the trial judge and the judgment by consent expressing the result of the findings and the calculations which the parties had agreed to. It was in attempting to express the result of these findings and calculations, in other words, in attempting to give effect to that part of the judgment which rested on consent, that the solicitors unfortunately used language which was afterwards thought to give a character to the whole judgment which nobody ever intended it should bear.

Nor should effect be given to the suggestion that the proper course for the present respondent was to apply for an amendment of the judgment by the trial judge. For myself, I entertain no doubt that the trial judge would have been quite within the ambit of his competency in making the amendment, because the trial judge never intended to approve a judgment which nobody ever intended that he should approve, a judgment which should make him say that his adjudications rested upon the consent of the parties and not upon his own decision except in respect of the calculations mentioned. While that is so, it is quite clear that counsel for the bank took this position before the Court of Appeal and succeeded in maintaining it—that the trial judge was *functus officio;*

(1) [1897] 2 Ch. 534. (2) [1904] A.C. 429.

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and on that ground induced the Court of Appeal to reject the application made by appellant's counsel for an adjournment. It is not now open to the appellant bank in view of this course of conduct to argue that the present action is unnecessary.

The appeal should be dismissed with costs.

ANGLIN J.:—As between the parties to this action I think it must be taken to be *res judicata* that the judgment in the former action was non-appealable. If so, on the merits this case is clearly governed by *Wilding* v. *Sanderson*(1). On matters of procedure, such as the appellant complains of, it is the usual practice of this court not to disturb the judgments of the provincial courts.

The appeal fails and should be dismissed with costs.

BRODEUR J.:—I concur in the opinion of Mr. Justice Duff.

MIGNAULT J.:—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper & Bull.*
Solicitor for the respondents: *J. E. McMullen.*

(1) [1897] 2 Ch. 534.