CLIFFORD WALLACE BROCK and FRANK PETTY (DEFENDANTS) .... APPELLANTS;

AND

LOUIS GRONBACH, DINAH ELIZABETH GRONBACH and FREDERICK KARL GRONBACH (PLAINTIFFS) ..... RESPONDENTS.

1952
*Nov. 19, 20, 21
1953
*Jan 27

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Fraud—Undue Influence—Agreement for sale—Excessive price demanded by Purchaser to release Vendor—Unconscionable Bargain—Relationship of Parties.

Barristers and Solicitors—Solicitor acting for both parties—Where neither connivance nor negligence shown, not subject to strictures.

An elderly couple entered into an agreement to sell a property at a price satisfactory to them at the time. Subsequently to secure a release therefrom they paid a large amount demanded by the purchaser, to the solicitor, who in the drawing of the agreement and the release acted for both parties. In an action to cancel the release, set aside the agreement, and recover damages from the purchaser and the solicitor jointly.

Held: 1. In the light of the evidence since no relationship was established to make it the duty of the purchaser to take care of the vendors, a claim to set aside the release and recover payment failed. *Tufton* v. *Sperni* [1952] 2 T.L.R. 516 at 519.

2. The trial judge rightly held that the solicitor neither by himself nor by connivance with the purchaser had imposed the bargain on the vendors.

*PRESENT: Kerwin, Taschereau, Estey, Locke and Fauteux JJ.

1953

BROCK AND PETTY v. GRONBACH

3. The release was not an unconscionable bargain in the sense in which the term is used in the cases but, if the Court had been able to arrive at the opposite conclusion, it would agree with the trial judge that the vendors could not secure any relief so long as they claimed they were entitled to set aside the original agreement.

Appeal allowed and judgment at trial [1951-52] 4 W.W.R. (N.S.) 49, restored.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) allowing an appeal from the judgment of Montague J. (2) dismissing plaintiff's action against both defendants.

W. P. Fillmore, Q.C. for the appellant Brock.

R. D. Guy, Q.C. for the appellant Petty.

L. St. G. Stubbs and *H. P. Beahan* for the respondents.

The judgment of the Court was delivered by

KERWIN J.:—The respondents Louis Gronbach and his wife, Dinah Elizabeth Gronbach, signed the document of January 13, 1949, fully understanding its nature and effect, and there is no doubt that, at the time, the agreement was entirely satisfactory to them. It was said in the Court of Appeal that the agreement was impossible of performance by Mrs. Gronbach because she was not the owner of the stock in trade. An inventory was to be taken of it on the evening of January 31, 1949, and Petty was to pay for it in cash at wholesale prices. Accepting the position that Mrs. Gronbach alone was the "vendor" under the agreement, there would have been nothing to prevent the Court ordering specific performance thereof against her to the extent to which that was possible. She had agreed to the sale of the lands and premises, which would include any fixtures owned by her, for $35,000 and the money to be paid for the stock in trade was in addition to that sum. In our view the evidence discloses that Louis Gronbach, the owner of the stock in trade, had agreed to its sale, but, in any event, even if that be not so, the situation as between Mrs. Gronbach and Petty would not be affected. The agreement could, therefore have been performed by Mrs. Gronbach in the manner indicated.

(1) (1952) 5 W.W.R. (N.S.) 68. (2) (1951-52) 4 W.W.R. (N.S.) 49.

Leaving aside for the moment the question of *The Dower Act,* R.S.M. 1940, c. 55, there was therefore no reason why Mr. and Mrs. Gronbach and Petty could not agree to the cancellation of the agreement. The suggestion that this should be done came from the Gronbachs and, while the sum of $8,000 demanded by Petty for the release of January 21, 1949, is large, we cannot find that any relationship existed between Petty, on the one hand, and the Gronbachs, on the other, to make it the duty of the former to take care of the latter. As stated by Sir Raymond Evershed M.R. in *Tufton* v. *Sperni* (1): "Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief." Therefore, the claim to set aside the release and recover the $8,000 from Petty fails.

The trial judge has dealt satisfactorily in most respects with the position of the appellant Brock and we are of opinion that he came to the right conclusion that the solicitor, neither by himself nor by connivance with Petty, imposed on the Gronbachs the bargain demanded by Petty. We also agree that it has not been shown that the solicitor was negligent. For these reasons we must with respect express our disagreement with any of the strictures passed by the Court of Appeal upon the solicitor and, therefore, the decisions referred to in their reasons for judgment on that aspect of the matter are not applicable.

Under the circumstances as shown in the evidence, the release cannot be held to be an unconscionable bargain in the sense in which that term is used in the cases but, if we had been able to arrive at the opposite conclusion, we would then agree with the trial judge that the Gronbachs cannot secure any relief when they persist in their attitude that they are entitled to set aside the original document of January 13, 1949. The Court has no jurisdiction to reopen the cancellation agreement and decree what ought to be paid by the Gronbachs to Petty.

The Dower Act was never referred to in the pleadings or at the trial and it was only after the hearing before the Court of Appeal that that Court requested argument upon the point. Mr. Fillmore pointed out that if it had been raised, evidence might have been led to show of what, if anything, the homestead consisted. The Manitoba Dower

(1) [1952] 2 T.L.R. 516 at 519.

1953

BROCK AND PETTY v. GRONBACH

Kerwin J.

Act is not the same as the Alberta Statute considered recently by this Court in *McColl-Frontenac Oil Co. Ltd.* v. *Hamilton* (1), but even if the proper conclusion would be that the agreement of January 13, 1949, so far as any homestead of Mrs. Gronbach is concerned, was absolutely null and void for all purposes, and assuming that the point is open on the pleadings and should be dealt with by an Appellate Court, the money paid under the release of January 21, 1949, was paid under a mistake in law.

The option of January 21, 1949, (exhibit 7), was not binding on Mrs. Gronbach but no order need now be made as the two years from February 1, 1949, referred to in that document have already expired. We also agree that the agreement of January 13, 1949, was not binding upon the respondent Frederick Gronbach. The fact that no order as to costs was made by the trial judge sufficiently takes care of both these matters as the main dispute was as to the position of Louis and Dinah Elizabeth Gronbach under the agreement of January 13, 1949, and under the release. The appeals are allowed with costs here and in the Court of Appeal and the judgment at the trial restored. The cross-appeal is dismissed without costs.

Appeal allowed with costs.

Solicitors for the appellant, Petty: *Fillmore, Riley & Watson.*

Solicitors for the appellant, Brock: *Guy, Chappell, Wilson & Hall.*

Solicitors for the respondents: *Stubbs, Stubbs & Stubbs.*

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(1) [1953] S.C.R. 127.