LOUIS DRAGER (*Plaintiff*) .....APPELLANT;

1959
Feb. 12, 13
*Jun. 10

AND

LILLIAN D. ALLISON AND WILLIAM ADOLPH DRAGER (*Defendants*) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Action—Surety—Prepayment by surety—No gift intended—Rights against debtor—Whether accelerating remedy—Whether surety's character changed to mere volunteer—Action for declaration before due date of debt.

The plaintiff, the father of the defendants, guaranteed the payments to be made by the defendants under an agreement to purchase a property. Without any demand from the vendor or any request from the defendants, he paid the balance which was not yet due. The defendants sold the property and the plaintiff claimed a lien on the property and on the monies. The defendants pleaded a gift and that the plaintiff was a mere volunteer. The trial judge maintained the action, but this judgment was reversed by the Court of Appeal.

Held: The action should be maintained.

A surety who pays the guaranteed debt in relief of the principal debtor before the debt has become legally due and without any request from the debtor, does not thereby lose his right of action altogether by becoming a mere volunteer. If no gift is intended, as in the present case, although he cannot accelerate his remedy, he may nevertheless ultimately assert his remedy at the time when the guaranteed debt should ordinarily have been paid.

In the present case, the action was properly brought. As the defendants had definitely repudiated their obligation to the surety and asserted their intention to dispose of the property and its proceeds in disregard of his rights, the plaintiff was entitled to commence an action for a declaration of his rights at the time when he did so even though the guaranteed debt had not yet become due.

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

G. H. Yule, Q.C., for the plaintiff, appellant.

E. N. Hughes, for the defendants, respondents.

The judgment of the Court was delivered by

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.

[1] (1958), 13 D.L.R. (2d) 204.

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CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] which by a majority (Gordon J. A. dissenting) reversed the judgment of Thomson J. and dismissed the appellant's action.

The evidence at the trial was conflicting and the learned trial judge accepted that of the appellant in preference to that of the respondents. The findings of fact made by the learned trial judge appear to me to be supported by the evidence and may be summarized as follows.

The appellant is the father of the respondents; he is a farmer; he can sign his name but apart from that can neither read nor write. In 1955, the respondent Lillian Allison was looking for a house; the appellant assisted in the search and found a fairly large house, belonging to one Gooding, which he suggested should be purchased by the respondent Allison and by his other daughter Martha who was about to get married. Gooding refused to sell to the two daughters of the appellant unless the latter would guarantee payment of the purchase price and this the appellant agreed to do.

Under date of October 1, 1955, an agreement under seal was entered into between Gooding as vendor and Lillian D. Allison and Martha E. Drager as purchasers, for the sale of the house above mentioned for the price of $12,500, payable as follows:

> the sum of Five Hundred ($500.00) dollars on the day of the date hereof, the receipt whereof is hereby by the vendor acknowledged; and the remaining sum of Twelve Thousand ($12,000.00) dollars as follows, that is to say, the sum of Four Thousand ($4,000.00) dollars on September 30th, 1955, the sum of Two Thousand ($2,000.00) dollars on the first day of April, 1956, the sum of Three Thousand ($3,000.00) dollars on the first day of October, 1956 and the remaining sum of Three Thousand ($3,000.00) dollars on the first day of October, 1957 all payments to be applied firstly on interest and secondly on principal. With Interest at the rate of Six (6%) per centum per annum from the day of the date hereof, on the said purchase price or so much thereof as shall from time to time remain unpaid, as well after as until the same becomes due, such interest to become due and be paid monthly and the first payment of interest to become due and be paid on the 1st day of November, A.D. 1955;

The agreement contained the following provisions:

> The Purchaser Covenants, promises and agrees with the vendor; that he will pay the said purchase price and interest at the times herein provided for payment thereof.
>
> * * *

[1] (1958), 13 D.L.R. 204.

Provided, however, that if on or before April 1st, 1956 all of the monies owing under this agreement for sale are paid in full all interest due will be deleted.

* * *

If and when the purchaser makes default in payment of any sum payable hereunder or in the performance of any covenant, promise, agreement or undertaking herein contained on his part, so much of the purchase price of the said land as is then unpaid to the vendor hereunder shall, though not then due and payable, at the option of the vendor become forthwith due and payable;

* * *

The purchaser shall have the privilege of at any time paying any sum in addition to the sums payable hereunder, on account or in full of the said purchase price and interest and in that event interest on such amount so paid shall be computed only to such date of payment.

* * *

I, Louis Drager, in consideration of the Vendor selling the said property to the purchasers on the terms and conditions herein set out do hereby covenant and agree with the vendor that the purchasers will pay the monies payable hereunder at the times and in the manner herein set forth and that on default by them I will pay the monies as aforesaid and perform all things herein required of the purchasers.

The agreement was signed and sealed by the appellant.

It is common ground that the deposit of $500 and the $4,000 payable on September 30, 1955, were paid to the vendor by the appellant and were gifts by him to his daughters.

By agreement dated March 29, 1956, Lillian Allison and Martha Drager assigned the agreement of October 1, 1955, to the said Lillian Allison and the respondent William Adolph Drager. The payment of $2,000 due on April 1, 1956, was paid by William Adolph Drager, on March 29, 1956, out of monies paid to him by the appellant partly for arrears of wages and partly as a gift.

At this point it will be observed that the legal relationship of the parties was as follows: Gooding, the vendor, was entitled to immediate payment of the instalments of interest which had fallen due on the 1st days of November and December, 1955, and of January, February and March, 1956; the respondents, the purchasers, owed the balance of the purchase price; this balance was not yet due and payable but would fall due, $3,000 on October 1, 1956, and $3,000 on October 1st, 1957; the appellant was under

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the usual liabilities of a guarantor and could be called upon by Gooding to make any payments as to which there was default by the purchasers. The fact that the agreement contained an acceleration clause is not of importance as there is no suggestion that Gooding sought to avail himself of its provisions.

On March 29, 1956, at the time when William Adolph Drager paid the $2,000 due on April 1, 1956, the appellant was about to leave for Vancouver, and without any demand from Gooding or any request from the respondents or either of them he paid to La Roche, Gooding's agent, the balance of the purchase price of $6,000, together with the registration fees and instructed him to have the title registered in the names of the respondents. La Roche carried out these instructions.

On returning from Vancouver about 20 days later the appellant went to La Roche, "asked for the title" and was told by La Roche that the respondents had made a sale of the house to one Senft. The appellant thereupon took the position that he was entitled to the $6,000 which he had paid. After some discussion the appellant agreed to accept $3,000 which the respondents agreed to pay him but the making of this agreement was denied by the respondents and its only relevance is to the question of credibility.

On August 28, 1956, the appellant commenced this action alleging that he had paid the $6,000 as surety and claiming a lien on the property and on the monies owing to the respondents under the agreement with Senft.

In their statement of defence the respondents pleaded that the $6,000 was paid as a gift; but at the trial and in the Court of Appeal and before us argued that, even if there was no intention on the part of the appellant to make a gift, he had no cause of action as he had paid their debt when it was not due without demand or request and was in law in the position of a mere volunteer who pays the debt of another.

The learned trial judge found that the appellant paid the $6,000 as guarantor and not with the intention of making a gift to the respondents. I agree with the finding of the learned trial judge that there was no intention to make a gift; it is supported by the evidence, was affirmed

by Gordon J. A. and was not rejected by the majority in the Court of Appeal; the issue in that Court was stated by McNiven J. A., who delivered the judgment of the majority, to be as follows:

> The plaintiff asserts and the defendants deny that the payment of $6,000.00 was made pursuant to the guarantee. That is the sole and only issue and much of the evidence adduced was extraneous to that issue. If the said payment was not made pursuant to the guarantee, it matters little either at common law or in equity whether the said payment was made as a gift or merely as a volunteer. If made pursuant to the terms of the guarantee, the plaintiff had a right to be subrogated to the rights of the vendor under the agreement, if not at common law, then in equity. That right was determined at the time the payment was made.

The learned Justice of Appeal went on to hold that, as at the time of the payment of the $6,000 there was no default under the agreement, no demand from the vendor and no request either express or implied from the respondents that the appellant should make the payment, he should be held to have made it not under his guarantee but as a mere volunteer and had no right of action. The authorities cited by the learned Justice of Appeal in support of the proposition that a mere volunteer who pays the debt of another does not thereby acquire a right of action against him were not questioned.

In my opinion the learned trial judge was right in holding that the appellant paid the $6,000 not as a mere volunteer but because of his potential liability under his covenant as guarantor. He knew that the respondents could not make the payment of the $6,000 on or before April 1, 1956. It is true that they were under no obligation to make the payment, although they had the right to make it and thereby escape payment of all the interest that would otherwise have been payable. It was to the advantage of both the appellant and the respondents that the payment should be made; but it is clear, as is stressed by McNiven J. A., that the appellant was neither bound nor requested to make the payment at the time he made it. I do not find it necessary to consider whether the legal situation is affected by the circumstances that five monthly payments of interest were overdue on March 29, 1956. The question of law on which the majority of the Court of Appeal have differed from the learned trial judge is whether a surety who

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pays the guaranteed debt in relief of the principal debtor before the debt has become legally due and without any request from the debtor thereby loses his right of action altogether or whether it is merely postponed until such time as the debt becomes legally due.

The gist of the judgment of the learned trial judge on this branch of the matter is contained in the following passage in his reasons:

> A surety so often as he pays anything under his guarantee in relief of the principal debtor, has an immediate right of action against the latter. That, however, is subject to the exception that he cannot accelerate his remedy by paying the guaranteed debt before it becomes legally due. *Halsbury's Laws of England,* Third Edition, Volume 18, Page 478 (Sec. 881). *While he cannot accelerate his remedy, he may nevertheless ultimately assert his remedy at the time when the guaranteed debt should ordinarily have been paid.*

It is with the final sentence, which I have italicized, in the passage quoted that the majority in the Court of Appeal are in disagreement; but with the greatest respect, I am of opinion that the learned trial judge has correctly stated the law.

It is common ground that a surety can not by prepayment accelerate his remedy but I can find no ground in principle or authority for holding that by prepayment he changes his character from that of guarantor to that of mere volunteer and thereby forfeits his rights altogether. Counsel were unable to find any case in which it was so held and I have found none.

In *Coppin v. Gray*[1], the plaintiff had accepted for the defendant an accommodation bill which fell due on February 15, 1828; he paid it on January 15, 1828, a month before it was due. He brought suit against the defendant on February 12, 1834, which it will be observed was more than six years after the date of payment but less than six years after the maturity of the bill. In rejecting the defence based on the *Statute of Limitations* the Vice-Chancellor (Sir J. L. Knight Bruce) said, at p. 210 of the report in 1 Y. & C. Ch.:

> . . . the mere fact that he paid the bill before the time when, according to its tenor, it became due, would not, I apprehend, give him a right of suit before that time against the drawer, by way of loan to whom he accepted it.

[1] (1842), 1 Y. & C.C.C. 205, 62 E.R. 856, 11 L.J. Ch. 105.

and at p. 106 of the report in the Law Journal:

> I think that for the purpose of the Statute of Limitations, the bill of exchange must be considered as paid when it arrived at a state of complete maturity, and that the defendants cannot set up the fact of the bill having been prepaid for the purpose of defeating the claims of the plaintiff.

This case is of only limited assistance on the question before us but, since the acceptor of an accommodation bill is a surety for the payment by the drawer (vide Halsbury, 3rd ed., vol. 18, p. 414, para. 773), the above quoted statements of the Vice-Chancellor appear to indicate that he assumed that while prepayment would not accelerate a surety's remedy it would not destroy it.

In my opinion as between the appellant, the surety, and the respondents, the principal debtors, the payment of $6,000 made on March 29, 1956, should be considered as having been made as to $3,000 on October 1, 1956, and as to $3,000 on October 1, 1957, and their rights should be determined accordingly.

No question appears to have been raised at any stage of the proceedings as to whether the commencement of the action was premature in view of the fact that the writ was issued before the appellant became entitled to claim payment of either of the sums of $3,000. In my view the action was properly brought. The respondents had definitely repudiated their obligation to the appellant and asserted their intention to dispose of the property and its proceeds in disregard of his rights, and under the principles enunciated in *Kloepfer v. Roy*[1], the appellant was entitled to commence an action for a declaration of his rights at the time when he did so.

For the above reasons, I would allow the appeal. We were informed by Counsel that if we should be of opinion that the appeal succeeds we need not concern ourselves with the precise form of the order that should be made as, by arrangement between the parties, the purchase moneys paid by the purchaser from the respondents are being held to await the outcome of the appeal.

[1] [1952] 2 S.C.R. 465, 3 D.L.R. 705.

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I would accordingly allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: G. H. Yule, Saskatoon.

Solicitors for the defendants, respondents: Francis, Gauley, & Hughes, Saskatoon.