1920
*Oct. 27, 28.
1921
*Feb. 1.

B. E. KELLY (PLAINTIFF).....APPELLANT;

AND

C. H. WATSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Part performance—Terms vague—Specific performance—Construction—Powers of the courts.

Though, where there has been part performance of an agreement, the courts, when asked to decree specific performance, should struggle against any difficulty arising from vagueness in the terms of the agreement in order to effectuate the real intention of the parties, they cannot do what would amount to making an agreement as to some of the essential terms on which the parties were never *ad idem*.

Judgment of the Appellate Division (15 Alta. L.R. 587) reversed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Walsh J. (1) and dismissing appellant's action.

The material facts of the case are fully stated in the judgments now reported.

C. C. McCaul K.C. for the appellant.

H. R. Milner for the respondent.

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

(1) [1919] 15 Alta. L.R. 587; [1920] 1 W.W.R. 939.

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The Chief Justice.

THE CHIEF JUSTICE.—I have had the opportunity of reading the reasons for judgment on this appeal prepared by my colleagues Anglin and Mignault JJ. and find that they have expressed very clearly the views which I had myself formed after hearing the argument and carefully reading and considering the reasons for judgment of the trial judge and Mr. Justice Beck speaking for the Appellate Division.

It is one thing, and no doubt commendable, for a court in cases where there has been part performance of an agreement to struggle against the difficulty ensuing from vagueness in the terms of the agreement and, if possible, without creating a new agreement, to spell out one which they conclude from the evidence represents the real intention of the parties. It is quite another thing, however, to make a new agreement for the parties as to which they themselves were never *ad idem*.

With great respect for the Appellate Division I cannot help concluding after reading over the evidence that they have done the latter in this case and have made an agreement for the parties which they themselves never intended. It may be, I do not doubt it, a very fair agreement and one calculated to do justice to both parties, but it is not the agreement the parties themselves reached or intended.

I concur in the proposed judgment allowing the appeal with costs throughout and restoring the judgment of the trial judge.

IDINGTON J. (dissenting).—This is an action of ejectment in which respondent counterclaimed asking for specific performance of a contract of sale and purchase under which the vendor put the respondent

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in possession of the land in question, and the latter, in reliance upon the good faith of said vendor, made substantial improvements in way of buildings and fencing and cultivation.

The appellant admittedly has no higher rights than the vendor, who was her father.

He admits negotiating with the respondent for a sale of the premises to him and gave a written memorandum which defined the land accurately, named the price and the cash deposit to be paid on a stated date, and the rate of interest for the balance. And thereby he induced respondent to enter into possession and make the said improvements in question.

The learned trial judge held that as the parties differed in some of the minor details as to later payments, there was no enforceable agreement.

The Appellate Division unanimously reversed that judgment and by accepting respondent's version as to the first crop to be reaped that year, and the vendor's version as to those details relative to later payments, properly, as I hold under the circumstances, declared the respondent, on assenting thereto, to be entitled to specific performance.

I have no doubt that according to what was within the common knowledge of the learned judges in appeal, so deciding, there was nothing very substantial in the possibly different results likely to be reaped from the operative effect of either version relative to these details.

And the vendor's repeated assertion that the terms of payment, which he was to become bound to observe in the contract with his vendor, should govern those he was to receive from respondent, seems to furnish, if believed, a clear ground for the completion of the contract in an enforceable form.

Those terms had been fixed and never were changed but the original vendor had stipulated he was not to be bound until a third party, then abroad, had assented to such terms of payment.

That party might have made some change but in the ultimate result he did not. That detail of the contract was in suspense, as it were, but all else was settled absolutely and the result I have adverted to effectually disposed of that suspensive condition.

Indeed if respondent had been as astute as the Appellate Division and had, on the development of this unsubstantial difference in the probable result of these details in evidence, simply said to the learned trial judge: "This is a quarrel about nothing, I am, though literally correct in my version, content to accept that of the other party to the contract, and be bound thereby," I incline to think the result might have been satisfactorily settled at the trial. At least I can see no answer there would have been to the counterclaim for specific performance within the principles upon which the courts of equity have long rested their judgments in cases dependent upon part performance of the contract.

Unfortunately the conduct of the respondent's vendor had been so wanting in straightforward dealing as to provoke the former into an insistence on his version of the details being correct and what should be observed.

I think the Appellate Division has taken a view that is quite maintainable and that this appeal should be for the reasons it has assigned, dismissed with costs throughout.

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Duff J.

DUFF J.—Equity has gone very far in affording relief to a person who, occupying land, has spent money in making improvements or in connection with his occupation under the belief created or encouraged by the owner of the land that an interest would be granted to the occupier sufficient to enable him to enjoy the benefit of his expenditures. Relief is not afforded on the ground of agreement but on the ground that it would be unjust to permit the owner to dispossess the occupant in the circumstances without at all events making compensation. The cases are discussed and summed up in the judgment of Lord Hobhouse in *Plimmer* v. *Corporation of Wellington* (1). The respondent is not entitled to stand upon this ground in this appeal because a claim to relief upon this ground was never put forward and no such claim has been the subject of investigation.

The courts would also give effect to a properly-founded inference arising from the conduct of the parties that possession of land was taken or continued under an understanding amounting to an agreement for sale either upon terms ascertained in fact or upon reasonable terms as to price and otherwise to be determined in case of dispute by the judgment of a competent court.

I think the judgment of the trial judge was right that the parties never arrived at an agreement in terms and I think moreover that the facts disclosed in the evidence are not sufficient to support an inference that they proceeded upon such an understanding as that just indicated.

It follows that the appeal should be allowed and the judgment of the trial judge restored.

(1) [1884] 9 A.C. 699.

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Anglin J.

ANGLIN J.—With very great respect I am of the opinion that the learned trial judge reached the correct conclusion upon the evidence in this record and that what the Appellate Division has done, under the guise of exercising to its fullest extent or even straining its power and duty to ascertain the terms and to enforce the complete performance of a somewhat vague contract of which there had been part performance, (*Wilson* v. *West Hartlepool Ry. Co.* (1)), amounts in fact to the making of a new contract for the parties.

In regard to the amount of the second instalment it is no doubt common ground that some agreement was reached. The memorandum, however, is indefinite. Raymer, who made the contract with the defendant and is a witness for the plaintiff, deposes that it was to comprise the whole, the defendant that it was to consist of half of the proceeds of the 1918 crop. In view of this direct contradiction in the evidence the learned trial judge was unable to determine which story should be accepted. The Appellate Division, however, has seen fit to accept that of the defendant and to reject that of Raymer, fixing the value of one-half of the 1918 crop at $500. While that may not be making a contract but merely determining what one term of the contract actually made really was, the sufficiency of the ground for rejecting the conclusion of the trial judge on this branch of the case seems to me to be questionable.

As to the remaining instalments, however, the only provision of the memorandum signed by Raymer is that the balance of the purchase money should be payable in yearly payments with interest at 8%. The defendant's story is that it was agreed that each of these instalments was to be one-half the proceeds of the annual crop whatever it might amount to. On the other

(1) [1865] 2 de G. J. & S. 475 at p 494

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hand, Raymer says that the amounts of the instalments were to be arranged after the terms of his own purchase of the land from Mr. Symington had been agreed upon, that they were to be of fixed sums, and were to be paid out of the proceeds of the annual crops so far as they might suffice, but that any deficiency was to be supplemented in cash. Here again the learned trial judge was unable to decide to which version credence should be given. The Appellate Division, however, has entirely rejected the defendant's story on this branch of the case and has determined that there shall be five equal annual instalments of $800 each payable with interest at 8% on the balance from time to time remaining unpaid, making the dates of those payments synchronize with those of the five payments of $700 each to be made to Symington, thus accepting in part Raymer's story of what it was his intention to exact when the final agreement should be made. It seems to me, with great deference, that this is nothing else than making an agreement for the parties in respect to matters which they themselves had left open for future settlement and goes beyond any powers that courts of equity have ever asserted—great and wide as those powers undoubtedly are. This is not the case of a completed agreement couched in general terms and omitting only some details which the law will supply. Neither is it a case of nothing being left to be done except the embodiment in a formal instrument of terms fully agreed upon and sufficiently evidenced. Here essential elements are left open to be made the subject of future agreement. The language of Kay J. in *Hart* v. *Hart* (1), and that of Turner L. J. in *Wood* v. *Midgley* (2), cited by Mr. McCaul, seems closely in point.

(1) [1881] 18 Ch. D. 670, at p. 689. (2) [1854] 5 deG. M. & G. 41 at p. 46.

I would allow the appeal with costs in this court and in the Appellate Division and would restore the judgment of the learned trial judge.

MIGNAULT J.—In this case, although the learned trial judge (Walsh J.) found that Raymer and the respondent had agreed for the purchase and sale of the property here in question conditionally on Raymer acquiring it from Symington, the total sale price being $4,800; he also found that they never were *ad idem* as to the terms of payment and that therefore there never was any agreement which could be enforced. This judgment was reversed by the Appellate Division, Mr. Justice Beck, with whom the other learned judges concurred, stating, after having cited the conflicting versions given by Raymer and the respondent Watson as to the terms of payment, that he accepted the respondent's evidence that the first payment was to be $300 and half of the 1918 crop, (which would give $500, the respondent having valued this crop at $1,000). Mr. Justice Beck also expressed the opinion that the balance, $4,000, was to be apportioned so as to accord with the terms of the sale agreement between Symington and Raymer's daughter, the appellant, and should be paid at the same dates at 8% interest. He proceeds to determine the issues between the parties as follows:—

> The judgment will contain a declaration to the effect that the contract is one for the payment of $300 on the 10th of July, 1918, and for the payment of one-half of the proceeds of the crop of 1918, the value of the one half being fixed (on the defendant's evidence) at $500; and for the payment of the balance, $4,000, of the purchase money, in five equal annual instalments with interest at 8%, on the 25th February in each of the years 1919-23; interest on the purchase price of $4,800 (except the $300 which was refused by the plaintiff) to be calculated from the 8th of April, 1918.

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The judgment should also provide in some form for the protection of the defendant against the plaintiff's non-payment to Symington. It should allow the defendant one month from the date of his acceptance of this judgment for the payment of the arrears owing to the plaintiff.

These amounts can be calculated and inserted in the formal judgment.

If the defendant declines to accept this judgment his counterclaim will be dismissed with costs, and the judgment for the plaintiff will stand. If the defendant accepts this judgment he will have his costs of the action, and the plaintiff's action will be dismissed with costs. If the defendant accepts this judgment he will have his costs of the appeal, otherwise the appeal will be dismissed with costs.

In view of the finding of Mr. Justice Beck that the contract is as stated in the first paragraph of the above excerpt it seems strange (may I say so with all deference) that the defendant is left free to decide whether he will accept or refuse the judgment. However he accepted it and the plaintiff now asks that this judgment be set aside and the judgment of the learned trial judge restored.

Recognizing to the fullest extent that where a contract has been partly performed, the court, when asked to decree specific performance, will struggle against the difficulty ensuing from the vagueness of the contract, still it is obvious that the court cannot make a contract for the parties if the latter have not agreed on its material terms. So the proper inquiry on this appeal is whether what the Appellate Division declares to be the contract was really what the parties had agreed on, for if they had not agreed on these terms the contract contained in the judgment is one made by the Court for the parties and obviously cannot be sustained.

A careful reading of the evidence has convinced me that the terms of payment stated in the judgment were agreed to by neither Raymer nor Watson.

They had made and signed a memorandum stating their agreement as far as it had gone, viz., a sale of the property for $4,800; a cash payment of $300 on or before July 10th, 1918; a further payment to be made from the proceeds of the crop to be grown on the land; an agreement for sale to be executed during the season; and the balance of payments to be payable yearly at 8% interest. It would really be difficult to imagine anything more indefinite than this memorandum (the wording of which I have followed as closely as possible) in so far as the terms of payment are concerned, and the confusion becomes greater still when we refer to the testimony of Raymer and Watson.

The former says he was to get $300 in cash; the entire crop for 1918; and the balance of the payments were to be governed by the contract he would make with Symington.

According to Watson he was to pay $300 in cash, make a half crop payment in 1918, and give half the crop from that on.

In view of this testimony I must find that the contract, as stated by the judgment of the Appellate Division, agrees with neither of the versions of the parties. It takes from Watson's story the half crop payment of 1918 and from Raymer's evidence the division of the balance of the sale price so as to fit in with the payments to be made to Symington. This in my opinion could not be done.

We have therefore this result that the parties by their testimony contradict each other as to the material terms of their contract and that the terms contained in the judgment of the Appellate Division are inconsistent with either of their versions. It follows that

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the judgment really makes a contract for the parties, and, unless I do the same, I find it impossible, on my consideration of the evidence, to state what the agreement between Raymer and Watson really was. Under these circumstances, the conclusion of the learned trial judge that the parties were never *ad idem* in respect of the terms of payment seems inevitable.

With some reluctance, for the good faith of Raymer of whom the appellant is merely the nominee seems open to suspicion, I have therefore come to the conclusion that the appeal must be allowed and the judgment of the learned trial judge restored. Costs will go to the appellant here and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Lymburn & Reid.*

Solicitors for the respondent: *Hyndman, Milner & Matheson.*