WARTIME HOUSING LIMITED (DEFENDANT) ..... APPELLANT;

1945

*Feb. 6
*Feb. 12

AND

JOSEPH MADDEN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Action against incorporated company before Superior Court—Exception to the form—Defendant alleging company an emanation of the Crown—Could only be sued by way of petition of right in the Exchequer Court of Canada—Exception to the form dismissed—Whether "final judgment"—Supreme Court Act, section 2 (b).

In an action brought by the respondents against the appellant, a company incorporated under the provisions of the Dominion *Companies Act*, the latter fyled an exception to the form, alleging that it was an emanation of the Crown and that it could only be sued by way of petition of right in the Exchequer Court of Canada. The judgment of the Superior Court, dismissing the exception to the form, was affirmed by a majority of the appellate court. The appellant company having appealed to this Court, the respondents moved to quash the appeal for want of jurisdiction.

Held that the judgment, from which the appellant desires to appeal, is not a "final judgment" within the meaning of section 2 (*b*) of the *Supreme Court Act* and that this Court is without jurisdiction to entertain the appeal. The action having been instituted in the province of Quebec, the judgment appealed from, as it has been already settled by several judgments both in that province and in this Court, is only provisional and does not determine, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment on the merits. *Davis* v. *The Royal Trust Company* ([1932] S.C.R. 203) and *Willson* v. *The Shawinigan Carbide Company* (37 Can. S.C.R. 535) followed.

The present case is not distinguishable from the above cases and several similar decisions, on the ground that all these cases were only between individuals, while here the Crown is alleged to be in reality the party affected by the judgment appealed from. Such a distinction cannot be made, at least in respect of the point raised by the respondents and which has to do with the finality of that judgment. *The Corporation of the City of Ottawa* v. *The Corporation of the town of Eastview et al.* ([1941] S.C.R. 448) and *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* ([1927] S.C.R. 545) distinguished.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ.

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MOTION to quash the appeal for want of jurisdiction.

Exception to the form by Wartime Housing Limited, appellant, alleging that it was an emanation of the Crown and that respondents should have proceeded against it by way of petition of right before the Exchequer Court of Canada.

The exception to the form was dismissed by the Superior Court, Gibsone J. and that judgment was affirmed by a majority of the appellate court (1). The appellant appealed to this Court.

Antoine Rivard K.C. for the motion.

Fernand Choquette K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion to quash for want of jurisdiction on the ground that the judgment appealed from is not a final judgment within the meaning of the Interpretation section of the *Supreme Court Act* (s. 2 (*b*)).

The appellant is a company incorporated under the provisions of the Dominion *Companies Act*.

On or about the 24th of December, 1942, the respondents sued the appellant company and one North, to have it declared that a certain agreement, referred to in the declaration, was binding upon the appellant and enforceable against it.

The action was brought in the Superior Court of the province of Quebec. The appellant then fyled and served an exception to the form, alleging that it was an emanation of the Crown, and that it could not be sued in the courts of Quebec, but only by way of petition of right in the Exchequer Court of Canada.

The exception was dismissed by Mr. Justice Gibsone and his judgment was affirmed by the majority of the Court of King's Bench (Appeal Side), Marchand J.A. dissenting.

The Company has appealed to this Court and the respondents now move to dismiss the appeal for want of jurisdiction, on the ground that the judgment appealed from is not a final judgment, as already mentioned above.

(1) Q.R. [1944] K.B. 366.

The case arises in the province of Quebec and it is already settled by several judgments, both in that province and in this Court, that the judgment appealed from is only provisional and does not determine, in whole or in part, any substantive right in controversy, as the decision is still open to revision by the final judgment on the merits. That question was decided in this Court in *Davis* v. *The Royal Trust Co.* (1), where the whole jurisprudence of the courts in Quebec was passed in review and particular reference was made to *Willson* v. *Shawinigan Carbide Co.* (2), *which* was there considered as conclusive on this point.

The result of these judgments, either referred to in the *Davis* case (1) or the *Davis* case (1) itself, as well as the *Shawinigan Carbide* case (2), was to the effect that, under Quebec law, an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be fyled immediately after the rendering of the interlocutories; and Girouard J., delivering the judgment of this Court in the *Shawinigan* case (2), added:—

> Such has been the well settled practice and jurisprudence of the province of Quebec.

It follows that the judgment *a quo* cannot be considered as a final judgment, because it does not determine in whole or in part any substantive right of any of the parties in controversy herein.

Counsel for the appellant endeavoured to distinguish the present case from that of *Willson* v. *Shawinigan Carbide Co.* (2) or that of *Davis* v. *Royal Trust Co.* (1), on the ground that these other cases were only between individuals, while, in the premises, the Crown is alleged to be in reality the party affected by the decisions. He argued that, if the appellant was right in its contention that it was an emanation of the Crown, the proceedings against it could be brought only by way of petition of right before the Exchequer Court of Canada after the issue of a *fiat;* and that the Crown could not otherwise be sued before any court.

We do not think that such a distinction can be made, at least in respect of the point raised by the respondents and which has to do with the finality of the judgment appealed from.

(1) [1932] S.C.R. 203.
(2) (1906) 37 Can. S.C.R. 535.

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The Supreme Court of Canada is a statutory court whose jurisdiction is founded exclusively on the provisions of the *Supreme Court Act;* and, unless the right to appeal to this Court is expressed in the Act, it has no jurisdiction to hear any case not therein provided for.

Under section 36 of the Act an appeal lies to this Court only from a final judgment, or from a judgment granting a motion for a nonsuit or directing a new trial. No distinction is made in the Act, with regard to a final judgment, whether the parties involved in the appeal are individuals or one of the parties happens to be the Crown.

It is true that, as a consequence of the two judgments so far rendered, if, in the end, upon an appeal to this Court on the merits, we should come to the conclusion that the appellant should not have been brought before the Superior Court in Quebec, but the proceedings should have been initiated by way of petition of right after the issue of a *fiat,* the appellant will have been put to the inconvenience of having to appear and defend itself before a forum which is not competent; it is only a temporary inconvenience which will disappear when this Court, being properly seized of an appeal, renders a decision according to the rights of the parties as the Court will define in its judgment.

In that respect, the inconvenience is not greater, or different, from that to which any other party might be put to, and we apprehend that this happening would only be the unavoidable result of contrary decisions in the courts of law acting within their jurisdiction.

Counsel for the appellant referred to the decision of this Court in *The Corporation of the City of Ottawa* v. *The Corporations of the Town of Eastview and The Village of Rockcliffe Park* (1); and also to another decision of this Court in *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co.* (2).

Both of these cases are distinguishable. In the *Montcalm* case (2) a street railway company, operating within the province of Quebec, whose undertaking was subsequently declared by a Dominion Act to be a work for the general advantage of Canada, had been held by the

(1) [1941] S.C.R. 448. (2) [1927] S.C.R. 545.

Quebec Public Service Commission to be subject to the jurisdiction of the Commission, notwithstanding a declinatory exception made by the street railway company. Upon appeal from the Order of the Commission to the Court of King's Bench (Appeal Side), it was held that, in respect of the matter of complaint, the Commission had jurisdiction, notwithstanding the fact that the appellant company was incorporated by and derived its powers from the Parliament of Canada, and it was found that there was no error in the judgment rendered by the Commission affirming its jurisdiction.

In this Court, the respondent, the Montcalm Land Co., raised the preliminary point that this Court had not jurisdiction to entertain the appeal. It was said that the judgment of the Court of King's Bench was not pronounced in a judicial proceeding and was not final. The judgment of the majority of this Court, delivered by Newcombe J., was to the effect that the decision of the court of appeal had determined a substantive right of the appellant which was in controversy in that proceeding (p. 560). But it must be noted that this was not an appeal from the Superior Court of the province of Quebec; it was an appeal from the Public Service Commission, or Board. In that case the judgment of the court of appeal was final on the question of jurisdiction and it would not have been open to the Commission, or Board, to review that decision. The question of jurisdiction was decided once and for all and could not be raised again before the Commission, or Board (see chap. 17 of R.S.Q. 1925, sections 10 and 58, which were then in force).

Likewise, in the *Ottawa and Eastview* case (1) the respondents had applied to the Ontario Municipal Board to vary or fix the rates for water supplied by the city of Ottawa. The city applied to the Board for an Order dismissing the applications on the ground that the Board had no authority or jurisdiction to hear and determine them, by reason of the provisions of the special Acts relating to the appellant city and the powers vested in its council under such Acts. The Board dismissed the city's application and the dismissal was affirmed by the

(1) [1941] S.C.R. 448

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Court of Appeal for Ontario. The city, by special leave from the Court of Appeal, appealed to this Court. The respondents moved to quash the appeal for want of jurisdiction on the ground that the judgment appealed from was not a final judgment within the meaning of subsection 2 (*b*) and section 36 of the *Supreme Court Act*. The appeal and the motion to quash were heard together. It was held that the point in controversy in the Court of Appeal, and upon which that Court had made an adjudication, was in respect to the jurisdiction of the Ontario Municipal Board and the right of the respondents to bring the appellant before that Board for the object mentioned (p. 466); and, in the view of this Court, the judgment of the Court of Appeal had determined a substantive right of the parties which was in controversy in that proceeding, and accordingly a matter well within the definition of "final judgment" in subsection 2 (*b*) of the *Supreme Court Act*. And the *Quebec Railway, Light & Power Co.* v. *Montcalm Land Co*, case (1) was referred to.

There again, if the judgment of the Court of Appeal affirming the jurisdiction of the Ontario Board had been allowed to stand without challenge by an appeal to this Court, the matter of jurisdiction would have been finally decided, and it would not have been open to the city of Ottawa again to raise the question before the Ontario Board, when it would hear the applications of the town of Eastview and the village of Rockliffe Park on their merits.

On the contrary, in the present case it follows from our judgments in *Willson* v. *Shawinigan Carbide Co.* (2) and *Davis v. The Royal Trust Co.* (3) that the whole question of the jurisdiction of the Superior Court is still open and can yet be raised upon the argument on the merits of the case, either before the Superior Court, or before the court of appeal in Quebec, or before this Court, if the case later comes before it. Indeed this Court would no doubt be competent to raise the question *proprio motu* when the appeal properly comes before it after a judgment on the merits by the courts below.

(1) [1927] S.C.R. 545. (2) (1906) 37 Can. S.C.R. 535.
(3) [1932] S.C.R. 203.

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In the circumstances, we think the respondents are right in alleging that the judgment from which the appellant desires to appeal is not a final judgment within the meaning of the *Supreme Court Act* and that this Court is without jurisdiction to entertain the appeal.

The motion to quash should, therefore, be maintained and the appeal should be quashed, with costs against the appellant.

Motion allowed and appeal quashed with costs.

Solicitor for the appellant: *Fernand Choquette.*

Solicitors for the respondents: *Rivard & Blais.*