JOSEPH P. DIEWOLD (DEFENDANT).....APPELLANT;

AND

PETER J. DIEWOLD (PLAINTIFF).....RESPONDENT.

1940
* Oct. 15.
* Dec. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Farmers' Creditors Arrangement Act, 1934 (Dom., c. 53)—Sale of land—Action by vendor against purchaser under agreement of sale—Order nisi—Effect of terms thereof—Subsequent formulation and confirmation of proposal by Board of Review under said Act—Validity or invalidity of proposal—Existence or non-existence of a "debt."

Plaintiff, vendor, sued upon an agreement of sale of land on which defendant, purchaser, had made default in payment. Plaintiff claimed: specific performance; payment of arrears and interest due, and, under an acceleration clause, payment of the balance of purchase price; in default of payment, cancellation of the agreement and forfeiture of moneys paid thereunder; immediate possession of the land. Defendant did not defend and plaintiff obtained an order *nisi* which fixed the amount due at $8,804.64, of which $4,104.64 was in arrear; ordered that defendant pay into court by a certain date $4,104.64 and interest and costs to be taxed; that in default of payment the agreement be cancelled and determined and all moneys paid thereunder be forfeited and retained by plaintiff; provided that upon payment of $4,104.64 (the sum in arrear) and interest, defendant be relieved from immediate payment of what had not become payable by lapse of time; and ordered that plaintiff have immediate possession of the land. Subsequently to said order *nisi* and before expiry of the time for payment thereunder, the Board of Review, under the *Farmers' Creditors Arrangement Act, 1934* (Dom., c. 53), formulated a proposal reducing the amount owing to plaintiff and extending the time for payment, which proposal was rejected by plaintiff but confirmed by the Board. Thereafter plaintiff issued a writ of possession, which was executed by the sheriff who placed plaintiff in possession. Defendant moved to set aside the writ of possession. The Local Master dismissed the motion. His order was reversed by Bigelow J. ([1940] 1 W.W.R. 204) but was restored by the Court of Appeal for Saskatchewan ([1940] 1 W.W.R. 657). Defendant appealed.

Held: Defendant's appeal should be dismissed. At the time when the Board formulated and confirmed its proposal, there was no "debt" owing by defendant to plaintiff within the meaning of the Act, and therefore defendant was not entitled to the benefits of the Act. When plaintiff elected to take out a judgment in the form in which he did in the order *nisi*, he ceased to have any personal right against defendant. Sec. 11 (1) of the Act did not aid defendant. After the order *nisi* the plaintiff's position was negative, that of defendant, if he wished to retain the land, was positive. Plaintiff had the title to the land and an order for possession. Defendant had no title and no rights unless he actively did what the order *nisi* called for.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Hudson and Taschereau JJ.

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APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) which (reversing an order of Bigelow J. in chambers (2)) held that, after the issue of a certain order *nisi* obtained by the plaintiff in a certain action upon an agreement for sale of land (in which agreement the plaintiff was the vendor and the defendant the purchaser), there was no "debt" owing by the defendant to the plaintiff within the meaning of the *Farmers' Creditors Arrangement Act, 1934* (Dom., c. 53), and therefore a certain proposal formulated and confirmed by the Board of Review under said Act subsequent to the said order *nisi* was a nullity, as the agreement in question was then outside the Board's jurisdiction. The order of the Court of Appeal restored an order of the Local Master dismissing defendant's motion for an order vacating and rescinding a writ of possession of the land issued by the plaintiff. The material facts of the case are more particularly set out in the reasons for judgment of this Court now reported, and are indicated in the above head-note. Special leave to appeal to this Court was granted by the Court of Appeal for Saskatchewan. By the judgment of this Court now reported the appeal was dismissed with costs.

F. P. Varcoe K.C. for the appellant.

R. M. Balfour for the respondent.

The judgment of the Court was delivered by

HUDSON J.—The question in this appeal is whether or not the appellant is entitled to the benefits provided by the *Farmers' Creditors Arrangement Act, 1934,* and amendments. On the 4th of December, 1933, the respondent agreed in writing to sell farm lands in Saskatchewan to the appellant for the sum of $7,500, payable $300 cash, $500 a year for a number of years and a final payment in 1947, with interest in the meantime at the rate of 7%. The appellant covenanted to pay these sums and also taxes. The agreement contained an acceleration clause by which, in case of default, the total amount should become payable at once. Default was made in payment of various sums and on the 18th

(1) [1940] 1 W.W.R. 657; [1940] 2 D.L.R. 499.
(2) [1940] 1 W.W.R. 204; [1940] 1 D.L.R. 712.

of October, 1938, the respondent commenced an action, alleging that there was due under the agreement as of 1st October, 1938, the sum of $8,804.64, and claiming specific performance of the agreement, payment of the said sum with interest and, in default of payment, cancellation of the agreement and forfeiture of all moneys paid thereunder and, lastly, immediate possession of the lands.

The appellant did not defend and on the 10th of November, 1938, the respondent recovered a judgment in the form of what is called an order *nisi*, whereby the amount due in respect of principal and interest under the agreement was fixed at $8,804.64, of which sum $4,104.64 was in arrears. It further ordered the defendant to pay into court to the credit of the cause on or before the 19th day of February, 1939, the said sum together with interest thereon, and costs to be taxed. It was further ordered that in default of payment into court as aforesaid the agreement should be cancelled and determined and that all moneys paid thereunder by defendant to the plaintiff be forfeited and retained by the plaintiff. There was a proviso, however, that on payment of $4,104.64, the sum in arrears, together with interest, the defendant should be released from immediate payment of so much of the purchase money as may not have become payable by lapse of time. It was further ordered that the plaintiff should have immediate possession of the lands. There was also a provision for rectification of the name of one of the parties, which is not material to the question here involved.

It is important at this point to determine the rights of the parties upon the signing of this judgment. It is clear that the defendant ceased to have right to the possession of the land. It is also clear that he had a right to the restoration of his position as purchaser under the agreement of sale upon payment of the sum of $4,104.64, with interest and costs, and the right to acquire title to the land on payment of the total sum due, providing one or other of these payments was made within the time prescribed by the order of the court, or such extension as might thereafter be given.

The plaintiff became entitled to immediate possession of the land and he had and retained title to the land,

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subject only to the right of the defendant to the restoration of his possession as purchaser under the agreement, on payment of the sum or sums above mentioned.

There remains the question of whether or not the vendor still retained any right to collect the moneys theretofore due under the agreement of sale from the defendant personally. It was held by the learned judges in the court below that he had no longer any such right because he had elected to take the judgment for cancellation. In arriving at this conclusion, it is stated by Mr. Justice Gordon, speaking for the court, that in his opinion this was the effect of the judgment of this court in the case of *Davidson* v. *Sharpe* (1), and a decision of the Saskatchewan Court of Appeal delivered by the late Mr. Justice Lamont in a later case of *Primeau and Imperial Lumber Yards Ltd.* v. *Meagher* (2). Mr. Justice Gordon further states that

> the practice in this Province has been settled for many years and in my view the plaintiff elected to take an order for the determination of his agreement with the defendant when he took out the order *nisi* in its present form.

It was contended on behalf of the appellant that the decisions referred to could not be held to deprive the vendor of a right to collect until after the expiration of the time provided by the order or judgment for final payment. On consideration, it seems to me that the conclusion reached by the learned judges in the Court of Appeal is well founded, and that when the respondent elected to take out a judgment in the form in which he did, he ceased to have any personal right against the appellant.

Subsequently to this order *nisi* and before the time for payment prescribed by the judgment had expired, the Board of Review under the *Farmers' Creditors Arrangement Act* formulated a proposal for submission to the defendant and the plaintiff, who was said by the court below to have been the only creditor of the defendant. This proposal reduced the amount owing to the plaintiff under his agreement for sale to $3,000 as of January 1st, 1939, and extended the payments for ten years. The plaintiff having rejected this proposal, it was confirmed by the Board on February 21st, 1939. Thereafter, the plaintiff issued a writ of possession and this was executed by the

(1) (1920) 60 Can. S.C.R. 72. (2) [1923] 3 W.W.R. 1308..

sheriff, who placed the plaintiff in possession. Following this, there was a motion to set aside the writ before the Local Master, who dismissed same. The defendant appealed to the Judge in Chambers and this application was heard before Mr. Justice Bigelow who allowed the appeal and set aside the writ. From that decision, the plaintiff appealed to the Court of Appeal, where his appeal was allowed as above stated.

The defendant contends that section 7 of the *Farmers' Creditors Arrangement Act* gives the Board of Review authority to formulate the rights of plaintiffs and argued that there was a debt owing by the defendant to the plaintiff. The preamble of the Act states in part as follows:

> Whereas * * * it is necessary to provide means whereby compromises or rearrangements may be effected of *debts of farmers* who are unable to pay.

The word "debt" is not defined by the *Farmers' Creditors Arrangement Act* or the *Bankruptcy Act,* but subsection 2 of section 2 of the *Farmers' Creditors Arrangement Act* provides that expressions in the Act shall be given the same meaning as in the *Bankruptcy Act,* unless it is otherwise provided or the context otherwise requires. The word "debt" is defined in Stroud's Judicial Dictionary as "a sum payable in respect of a liquidated money demand, recoverable by action," and I think that this definition can be accepted as applicable here.

By section 9 of the *Farmers' Creditors Arrangement Act* it is provided that subsection 5 of section 16 of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension or scheme of arrangement made by any farmer. Now, section 16, subsections 1 and 5, provide:

> The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.
>
> * * *
>
> 5. No composition, extension or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt or authorized assignor.

It was argued that the fact that subsection 5 was expressly excluded had some bearing on the interpretation of the

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Act before us, but this I cannot see. In the argument before us, special reliance was placed on section 11 (1) of the *Farmers' Creditors Arrangement Act* as follows:

> On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act,* or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose; Provided, however, that the stay of proceedings herein provided shall only be effective until the date of the final disposition of the proposal.

Special emphasis was placed on the words "or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, *or the realization of any security unless with leave of the court.*" Now it seems to me that this section does not aid the appellant in the present case.

After the judgment of the court, the position of the respondent was negative, that of the appellant, if he wished to retain his land, was positive. The respondent had the title to the land and he also had an order for possession. The appellant had no title and no rights unless he actively did what the judgment called for.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *P. G. Hodges.*

Solicitors for the respondent: *Balfour, Hoffman & Balfour.*