

Supreme Court of Canada
Scotia Construction Co. Ltd. v. The City of Halifax, [1935] S.C.R. 124
Date: 1934-12-12

Scotia Construction Company, Limited (Plaintiff) Appellant;

and

The City Of Halifax (Defendant) Respondent.

1934: October 22; 1934: December 12.

Present: Duff C. J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Courts—Judgments—Jurisdiction—Res judicata— Arbitration — Appeal—Action for balance due under contract—Dismissal of application to set aside default judgment and give leave to defend—Appeal dismissed from refusal to set aside judgment, but reference made under terms of contract—Reference, and report of findings—Objection to jurisdiction—Confirmation of report—Appeal therefrom.

Plaintiff (appellant) recovered judgment by default against respondent City for \$14,432.11, the balance due on a construction contract, which the City had held back as protection against workmen's claims threatened

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under a wage clause in the contract. An application by the City to open up the judgment was dismissed and the City appealed. The Supreme Court of Nova Scotia *in banco* dismissed its appeal but, the contract having, by agreement, been laid before it, and its attention called to the fact that certain workmen had begun an action against the City on the basis of the said wage clause, it ordered a stay of execution as to \$5,000, discontinuance of the workmen's action, and arbitration of the workmen's claims before the City Engineer (as referee named in the contract). Before the Engineer, plaintiff objected to his jurisdiction to proceed, on the ground, *inter alia*, that the contract was merged in the judgment. Before proceeding, the Engineer prepared a stated case for directions, but the Court, on application to fix a date for hearing it, directed him to proceed without delay to hear evidence. He found that \$2,879.43 was due by plaintiff to workmen to comply with the contract terms. Plaintiff, treating the report as an award made under the terms of the contract, moved the Court to set it aside on the said jurisdictional ground and on the ground that it purported to set up a new contract between plaintiff and its workmen. The Court referred the matter back to the Engineer for definite findings on a point as to rate of wages. The Engineer filed a supplementary report. The City then moved for an order confirming both reports and to make them a rule of court, and plaintiff moved to set aside the award. The Court, by a majority, granted the City's motion and dismissed plaintiff's motion. From that judgment plaintiff brought the present appeal.

Held: The appeal should be dismissed. The jurisdiction of the Engineer to investigate and report depended entirely upon the jurisdiction of the Court *in banco* to make the order of reference; and this order, not having been appealed from at the proper time, could not now be reviewed; plaintiff, therefore, could not now impeach the award on the ground that the rights of the parties to the contract had become merged in the default judgment (which

ground was the basis of objection to the jurisdiction of the Court *in banco* to make the order and of the Engineer to proceed under it); and there was no uncertainty or manifest error of law on the face of the award.

As to the order of reference of the Court *in banco*:

Per Duff C.J.: The Court *in banco* had discretionary authority to set aside the default judgment, and had jurisdiction to grant the stay, and to impose, as a term of its refusal to set aside the judgment, that the amount, if any, found due by the contemplated award should be treated as payment *pro tanto* on account of the judgment; which was in substance the effect of its decision. It is gravely questionable whether this Court had jurisdiction to hear an appeal from that judgment; and whether, if jurisdiction existed, the judgment dismissing the appeal having been acted upon, any appeal would not have been barred *exceptione personali*. But whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing (with some reservations not here material) authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction; and, disregarding any question of personal estoppel by acceptance of the judgment, the Court in the subsequent proceedings was bound by its own judgment (*Samejima v. The King*, [1932] Can. S.C.R. 640, at 647).

Per curiam: Had the City defended the action it would have been entitled under the contract to withhold moneys due by it to plaintiff to make

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good to workmen any deficiency in the wages found to be payable to them under the wage clause; and the result of the proceedings taken under the order of reference was precisely the same as that which would have followed had the Court set aside the default judgment and allowed the City to defend; and was one which seemed to meet the justice of the case as it was brought before the Court with concurrence of both parties to the contract.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco*¹.

The plaintiff company recovered judgment, in default, of defence, against the defendant city for \$14,432.11, the balance payable under a contract between it and the city for construction by it for the city of sidewalks, etc.

Certain workmen had claimed that they had been paid by the plaintiff wages below that required by clause 12 of the contract, and they brought action against the city and the plaintiff in regard to the same.

The contract provided (*inter alia*) as follows:

12. The rate of wages to be paid by the Contractor for labour and truckage shall not be less than the rate paid by the City for similar classes of labour and truckage. The rate of wages for other workmen or mechanics shall be that current for workmen or mechanics engaged in the respective trades in the City of Halifax.

15. Any dispute or difference between the parties hereto—

¹ May 26, 1934. Apparently not yet reported.

(a) in respect to the proper amount payable under this agreement or the proper amount of any certificate of the Engineer for any work done, or the final settling of accounts, or

(b) arising out of or relating to this memorandum of agreement, including the plans, drawings, specifications and details of the work to be done and material supplied, or the construction and meaning thereof, or

(c) In any other way arising out of or concerning this agreement or the work to be done thereunder shall be referred to the Engineer, whose sole written decision thereon shall be absolutely final, binding and conclusive between the parties hereto, and all persons concerned and every such reference and decision, may be made a rule of court as a submission or as an award respectively, and no action or other proceedings shall be instituted or prosecuted in reference to any matter so in dispute or difference until the said matter is so referred to the Engineer and he has given his written decision thereon, and then only for the purpose of enforcing such decision.

17. (1) If the Contractor fails to pay for any labour or materials after payment is due, the City may appropriate any amount due the Contractor under this contract, or any amount held by the City by way of deposit as security for this contract, and apply the same or any part thereof towards the payment of such liabilities and the amount of any such payment shall be considered payment out of the amount due to the Contractor, or out of the value of the work performed or materials provided.

(2) If the Contractor and any labourer, or any person who has provided material, cannot agree as to the amount due, the Engineer shall

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immediately after notice to the parties concerned, hear and determine any question as to such amount, and the amount so found to be due by the Engineer shall be final and conclusive between the parties.

(3) The City shall not in any way be liable for any such wages or materials or for any payment or appropriation made under this section, nor shall the City be bound to act under this section or to make any such appropriation.

“Engineer” (defined in the contract) meant the city engineer of the said city.

The city applied for leave to reopen the judgment entered against it by the plaintiff and to defend the action. Hall J. dismissed the application². The city appealed to the Supreme Court of Nova Scotia *in banco*. That court³ dismissed the appeal, but, the contract having been laid before it by agreement of counsel and its attention called to the fact of the workmen’s action, it ordered a stay of execution as to \$5,000 for 30 days, with leave to apply for a further extension; it also ordered that the workmen’s action be discontinued and that proceedings to arbitrate the workmen’s claims be proceeded with without delay before the city engineer.

On objection by counsel for the plaintiff as to the engineer’s jurisdiction to proceed, on the ground, *inter alia*, that the contract was merged in the judgment, the engineer,

² [1933] 1 D.L.R. 640.

³ [1933] 3 D.L.R. 156, at 160.

before proceeding with evidence, prepared a stated case to the Supreme Court for directions, but the court, on application to fix a date for hearing, directed him to proceed without delay to hear evidence. He did so and made a report. The plaintiff moved to set it aside. The court referred the matter back to the engineer to make definite findings upon a certain point, and the engineer accordingly filed a supplementary report. The above proceedings are set out with some further particularity in the judgment of Crocket J. now reported. The city moved for an order confirming both reports and to make them a rule of court so that they might be enforced as upon a judgment; and the plaintiff moved to vacate and set aside the award. The court granted the city's motion and dismissed the plaintiff's motion (Hall and Doull JJ. dissenting). It was from this judgment that the plaintiff's present appeal was brought.

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R. McInnes K.C., for the appellant.

C. P. Bethune for the respondent.

DUFF C.J.—I entirely concur with my brother Crocket. The substantial question involved is whether or not there was manifest error of law on the face of the award.

The issue as to jurisdiction disappears when the true nature of the order of the full court of the 18th of February, 1933, is understood. It is explained in the reasons of Mellish, J.:

“Proceedings on the judgment to the extent of \$5,000 were,” he says, “stayed to enable the city to proceed under said clause 15 of the contract, and have the question in dispute as to whether clause 12 of the contract had been complied with by the contractors determined” and the further amount due to the labourers by the contractors under the terms of the contract ascertained. “*Subject to this* the appeal was dismissed with liberty to apply for further directions.”

There can be no doubt that the Full Court had discretionary authority to set aside the judgment by default, or that it had jurisdiction to grant the stay, and to impose as a term of its refusal to set aside the judgment, that the amount, if any, found due by the contemplated award should be treated as payment *pro tanto* on account of the judgment. That, as Mellish J. points out, is, in substance, the effect of the Full Court's decision of February.

It is gravely questionable whether this court had jurisdiction to hear an appeal from this judgment; and whether, if jurisdiction existed, the judgment dismissing the appeal having been acted upon, any appeal would not have been barred *exceptione personali*. In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a

court of general jurisdiction, possessing (with some reservations not here material) authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction; and, disregarding any question of personal estoppel by acceptance of the judgment, the court in the subsequent proceedings was bound by its own judgment (*Samejima v. The King*)⁴.

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In view of this qualification introduced into the order of Hall J., the appellants, obviously, were precluded from impeaching the award on the ground that the rights of the parties to the contract had become merged in the default judgment; and I agree that there is no manifest error of law on the face of the award, and that the award is not void for uncertainty.

An award can be set aside, (1) when it has been improperly procured, and (2) on the ground of misconduct of the arbitrator. "Misconduct" is in this relation a term of very comprehensive denotation, and includes ambiguity and uncertainty in the award, as well as manifest error of law on the face of the award. The appellants have not established the existence of any of these grounds.

The appeal should be dismissed with costs.

The judgment of Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ. was delivered by

CROCKET J.—This case has already been before the Supreme Court of Nova Scotia *en banc* three times.

The first appeal to that Court was against a judgment of Mr. Justice Hall dismissing an application of the City to reopen a judgment by default which had been entered against it at the suit of the appellant for \$14,432.11 and costs. This amount was a balance due on a contract for the construction of sidewalks, curbs, etc, which the City had held back to protect itself against claims which were being threatened against it by certain workmen, under a fair wages clause contained in the contract, requiring the contractor to pay them not less than the rate paid by the City itself for similar classes of labour. The Supreme Court dismissed this appeal but, the contract having been laid before it by agreement of counsel and its attention called to the fact that an action had been begun by certain of the workmen against the City for wages on the basis of the fair wages clause, it ordered a stay

⁴ [1932] Can. S.C.R. 640, at p. 647.

of execution as to \$5,000 for thirty days with leave to apply for a further extension. It ordered at the same time that the workmen's action be discontinued and proceedings to arbitrate the workmen's claims before the City Engineer be proceeded with without delay. When the hearing came on before the

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City Engineer counsel for the contractor objected to his jurisdiction to proceed with the reference on the ground, *inter alia*, that the contract was merged in the judgment. The Engineer before proceeding with any evidence prepared a stated case to the Supreme Court for directions, but the Court, on an application by him to fix a date for hearing the proposed case, directed him to proceed without delay to hear evidence. In the end he found that the minimum rate of wages contemplated by the contract was 40 cents per hour, and that the sum of \$2,879.43 was due by the contractor to some 159 workmen if the terms of the contract were complied with. The men had been paid at the rate of 35 cents per hour.

The contractor, treating the report as an award made under the terms of the contract, moved the Supreme Court to set it aside on the jurisdictional ground already mentioned, as well as upon the ground that it purported to set up a new contract between the company and its workmen. On this motion there was a marked difference of opinion among the members of the Court as to whether the Engineer had made any finding which could safely be acted upon as to what the rate was which the City was paying for similar classes of labour during the currency of the contract, but a majority of the Court decided that the matter be referred back to the Engineer to make a definite finding upon this point. Mellish and Carroll, JJ., thought the finding already reported was sufficient.

The Engineer accordingly filed a supplementary report, whereupon the City moved for an order confirming both reports as awards made by the Engineer, "sitting as arbitrator in the matter of an arbitration between the Scotia Construction Co. Ltd. and certain workmen" and to make them a rule of court so that they might be enforced as upon a judgment. The majority of the Court granted this motion, Hall and Doull, JJ., dissenting, and the case now comes before us on appeal from the last named judgment.

The judgment on appeal concerns only the confirmation of the two awards or findings of the Engineer. No appeal was taken from the judgment of the Court *en banc* staying

execution and referring the matter in controversy to the Engineer for investigation and report. Although that

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judgment was in a sense an interlocutory proceeding it was nevertheless, to quote the language of Duff, J., in delivering the judgment of this Court in *Diamond v. The Western Realty Co.*⁵, “a final decision in the sense that in the absence of appeal it became binding upon all parties to it.” The jurisdiction of the Engineer to investigate and report depended entirely upon the jurisdiction of the Court to make the order of reference, and, this order not having been appealed from at the proper time, we are of opinion that we cannot now review it. In the words of Lord Macnaghten in delivering the judgment of the Judicial Committee of the Privy Council in *Badar Bee v. Habib Merican Noordin*⁶, quoted by Duff, J., in *Diamond v. The Western Realty Co.*⁷, “if the decision was wrong, it ought to have been appealed from in due time.” So far, therefore, as that question is concerned, it must be taken to have been already settled.

All the objections which are now urged against the validity of the Engineer’s awards or findings, save one, are in reality grounded on the alleged extinction of the contract with all its fair wages and arbitration provisions by reason of its merger in the default judgment. This was the whole basis of the objection to the jurisdiction of the Court *en banc* to make the order of reference and of the Engineer to proceed under it. Though these questions are not now open for the reason already stated, it may not be inappropriate to observe that, notwithstanding the contract was dead as between the City and the Company, it was expressly agreed by counsel for both parties that it should be laid before the Court for consideration on the first appeal from Mr. Justice Hall’s judgment, and that it was thus that the dispute regarding the alleged breach of the fair wages clause and the claims of the workmen upon it were brought to the Court’s attention, and, moreover, that, had the City defended the original action instead of deliberately allowing judgment to pass against it by default, it would have been entitled under clause 17 to withhold any amount due by it to the Company to make good to the

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workmen any deficiency in the wages found by the Engineer to be payable to these workmen under the fair wages clause. The result of the proceedings which have been

⁵ [1924] Can. S.C.R. 308, at 316.

⁶ [1909] A.C. 615, at 623.

⁷ [1924] Can. S.C.R. 308, at 316.

taken by the order of the Court, therefore, is precisely the same as that which would have followed had it set aside the judgment by default and allowed the City in to defend, and is one which seems to meet the justice of the case as it was brought before the Court with the concurrence of both parties to the contract.

Apart from the jurisdictional grounds the single ground put forward against the validity of the judgment now on appeal is that the awards or findings were bad for manifest error of law because of their uncertainty and indefiniteness. While one perhaps might have expected the Engineer to be more explicit in his supplementary finding in view of the reason given by the Court for sending the case to him a second time, I agree with the majority of the Judges that it cannot well be taken to be other than a finding that the rate which the City paid for similar work performed by itself during the currency of the contract was 40 cents an hour, and that the contractor had not, therefore, fully paid these workmen the wages they were entitled to receive under the fair wages clause. In my opinion this objection cannot be sustained. The awards being good on their face, we cannot go behind them in the absence of any fraud or misconduct on the part of the Engineer in the performance of the duty which the Court committed to him, of which there has been no suggestion. We must assume that he has rightly and regularly performed that duty.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Russell McInnes.

Solicitor for the respondent: C. P. Bethune.