C. G. GRIMALDI (PLAINTIFF) .... APPELLANT;

1935
* Oct. 7.
* Nov. 7.

AND

SYDNEY D. PIERCE (DEFENDANT) ..... RESPONDENT.

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

Sale—Bankruptcy—Deed of sale—Void after bankruptcy—Agreement by trustee with conditions—Whether legal—Duty of the trustee—Section 43 of the Bankruptcy Act—Articles 2058, 2061 C.C.

The appellant brought a petitory action against the respondent for the recovery of an immovable known as the Lord Renfrew Apartments. In September, 1930, the respondent was owner of those apartments and, as security for the loan of $150,000 made to him at that time he hypothecated the apartments in favour of Canada Permanent Mortgage Corporation. The sum of $150,000 was repayable in capital and interest, in equal monthly instalments of $1,300.50 each. A short time later, the apartments were sold by the respondent to the appellant for the sum of $27,851.57 and the deed of sale provided that the purchaser would not be personally responsible for the amount of the hypothec. The appellant was in possession of the property for about a year, when financial difficulties intervened. He did not pay the monthly instalments due to the Mortgage Corporation for some months and allowed municipal taxes to accrue. Finally, he went into bankruptcy. The Mortgage Corporation pressed for payment; and the trustee and inspectors of appellant's bankrupt estate, unable to raise funds or secure a purchaser for the property, secured permission from the Court to sell the property under the formalities of the *Bankruptcy Act* and placed advertisements for its sale in the Quebec *Official Gazette.* The charges against the property at that time consisted of a balance of the loan then in excess of $140,000, the indemnity of 6 per cent due to the lender in case of a forced sale, the taxes due to the city of Montreal of approximately $10,000, the taxes to the Provincial Government of $4,000 and the fees and commission due to the solicitor for the bankrupt estate and the trustee. The trustee valued the property at $360,000, but, being of the opinion that the time was not opportune for a sale in view of the condition of the real estate market and fearing that any equity for the estate would be lost if a forced sale took place, he attempted to secure a delay from the Mortgage Corporation for a period of approximately one year, when he hoped that a more receptive market might be found. Following negotiations, an agreement was reached on March 4, 1932, whereby the Mortgage Corporation gave to the trustee an extension of approximately one year for repayment of the past due portion of the loan. This agreement was made possible by the intervention of respondent who would have been responsible for any deficiency between the sale price of the property and the charges thereon. By the agreement the respondent paid to the Mortgage Corporation the arrears of capital and interest on the loan and also paid the arrears of taxes, the fees and expenses of the trustee and

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Kerwin JJ.

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solicitors and other incidental expenses. The conditions of the agreement were that the respondent should hold and administer the property until January 25, 1933, but that on that date, or any time prior thereto, the trustee of the appellant's bankrupt estate or his nominee would have the right to resume possession of the property and to keep title by repaying the respondent's disbursements and assuming payment of the debt to the Mortgage Corporation. If the trustee or his nominee failed to do this within the stipulated delay, the property was to be vested in the respondent. The arrangement of the 4th of March, 1932, was previously approved by the inspectors of the estate, and the trustee was authorized to sign the agreement by the registrar in bankruptcy. The appellant was made aware of the negotiations and was informed of the trustee's intention to enter into such agreement. Subsequently the appellant succeeded in having a proposal of composition accepted by his creditors and approved by the bankruptcy court. On the 31st of May, 1932, he secured his discharge, the receiving order was cancelled and the court further ordered that all of the appellant's assets, including any equities of redemption and the interest of the appellant in any property then vested in the trustee, should be returned to him. The trustee re-transferred to appellant his assets and included in the transfer the Lord Renfrew Apartments. On the 27th of July, 1932, and again on the 22nd of November, 1932, the appellant made attempts to comply with the conditions of the agreement of the 4th of March, 1932, and on the latter date the appellant's lawyers wrote to the respondent asking him to furnish them immediately a statement of all disbursements made by him. The respondent answered that he was forwarding such an account to a firm of lawyers who under the agreement had been constituted respondent's attorneys. On January 20, 1933, the appellant instituted a petitory action against the respondent, claiming back the apartments as owner, invoking no other title than the original deed of sale from the respondent to him, dated the 26th of November, 1930. The delay accorded to the trustee or his nominee to retake possession of the property upon repayment of the respondent's disbursements would have expired on the 25th day of January, 1933, or four days after the service of the action. Before the date fixed for the respondent's appearance, the time allowed for repossession of the property by the trustee or his nominee had expired.

Held that the appellant's action should be dismissed. The title deriving to the appellant from the deed of sale of the 26th of November, 1930, ceased to have any effect in his favour from the moment that, by force of the bankruptcy order, the Lord Renfrew Apartments became vested in the trustee; and, by the agreement of the 4th of March, 1932, the respondent became the absolute owner of the apartments, unless, under its terms, the trustee, or his nominee, rendered that agreement of no effect as regards the respondent by complying with the several conditions therein stipulated up to and including the 25th day of January, 1933, or unless the agreement so made between the trustee and the respondent can be set aside on the ground of fraud (and no fraud had been alleged) or illegality. The trustee, or his nominee (the appellant) have never complied with the terms and conditions required to render the agreement of no effect.

Moreover, the agreement of the 4th of March, 1932, was not illegal, as the trustee had the power, under section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to enter into such

agreement. It was the trustee's duty to do everything in order to maintain for the estate any equity that it ought to have in the apartments and to preserve, as far as possible, the rights of the bankrupt estate in that property. The hypothecary claim against the appellant, or his trustee, and its consequential result under articles 2058 and 2061 of the Civil Code may well be regarded as a "claim out of, or incidental to, the property of the debtor made or capable of being made on the trustee by any person" with respect to which the trustee is empowered by subsection (*i*) of section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to "make such *compromise* or other arrangement as may be thought expedient."

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing a judgment of the Superior Court, De Lorimier J. and dismissing appellant's petitory action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

T. Brosseau K.C. for the appellant.

J. L. O'Brien for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellant was adjudged bankrupt and a receiving order was made against him on the 24th day of December, 1931. One Frederick Henry Pope was in due course appointed trustee of the bankrupt estate.

Among the assets of the appellant which passed to and vested in the trustee was the apartment house known as "Lord Renfrew Apartments," together with the land on which it was erected.

The appellant had acquired the property in question through a deed of sale from the respondent, dated the 26th November, 1930, for the price of $27,851.57, and for the further consideration that he would pay all taxes and assessments imposed upon the property from the 1st day of September, 1930, as well as his proportion from said date of all taxes for the current year. It was declared in the deed

that said property is affected by a first hypothec of $150,000 in favour of Canada Permanent Mortgage Corporation, under the terms of the deed registered at said registry office under no. 256430, payment whereof is not assumed by the purchaser (Grimaldi).

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The hypothec so declared was the result of a deed of loan by Canada Permanent Mortgage Corporation to the respondent payable in 180 monthly instalments of $1,300.50 each on the twenty-fifth day of each month, during a term of fifteen years, the first of such instalments to be paid on the twenty-fifth day of September, 1930. The hypothec was to secure the reimbursement of the loan and of the instalments, together with any overdue interest. Among other conditions in the deed of loan, it was provided that, in case of default on the part of the borrower to pay the taxes on the property, or to pay the instalments in reimbursement of the loan, or to fulfill any of the conditions stipulated in the deed, the Mortgage Corporation could, if it chose,

exact the amount of the loan with all interests then accrued; and this without any demand or notice being necessary.

Further, the borrower was to pay all fees, legal and notarial, in respect of the loan and all registration fees.

At the date of the appellant's bankruptcy, default had been made in the payment of several instalments due to the mortgage corporation and also in the payment of taxes and assessments due to the city of Montreal in respect of the property on the 1st October, 1930, and on the 1st October, 1931. It follows that, then and there, Canada Permanent Mortgage Corporation had the right to exact the payment of the full amount of the loan and to bring against the appellant, or subsequently against the trustee of the bankrupt estate, an hypothecary action in enforcement of its claim, or, in default of payment thereof, to compel the surrender of the property, in order that it may be judicially sold.

The respondent was advised by the trustee and by the Mortgage Corporation that the property was threatened with sale. This appeared agreeable to him as the best way out of the situation. However, the trustee and the inspectors for the estate represented to him that they could save the equity of the estate in the property if a judicial sale could be avoided and if he could give them some opportunity to find a purchaser. They had endeavoured to find one who would assume the property for the arrears of mortgage and arrears of taxes, but had been unable to do

so, nor had they been able to borrow the money required. "After a tremendous amount of negotiations," and as "the outcome of interviews proceeding perhaps for weeks or months," the respondent finally consented to take over the administration of the property upon the terms that he would immediately pay to the Mortgage Corporation the arrears of capital and interest owing under the deed of loan, and assume to the exoneration of the trustee all taxes affecting the property. He was also to discharge forthwith certain legal and notarial fees and disbursements, as well as the trustee's fee of $2,000.

As a consideration for these payments and the obligations thus assumed by him, the respondent was to receive $1,000 a year for the administration of the property; and a conditional sale was made to him, to take effect on the 25th of January, 1933, upon which date he would become absolute owner, provided the trustee, or his nominee, had not before then reimbursed to him all disbursements

on account of interest, taxes, capital, or for repairs or improvements of the property, or the general administration or maintenance thereof,

including the legal and notarial charges paid by him, and in general all *bona fide* out of pocket expenses.

The agreement to the above effect was signed on the 4th March, 1932, between Canada Permanent Mortgage Corporation, the respondent Pierce and the trustee Pope. The document was duly registered on the 12th of May, 1932.

Mr. D. McKenzie Rowat, notary public of Montreal, representing the mortgage corporation, when giving evidence, summed up the situation as follows:

> My opinion was that it was absolutely in good faith, and a concession by us in favour of Mr. Grimaldi, who had defaulted. We could have foreclosed the mortgage at once, but instead of doing that we gave him months, or a year or something of the kind, to redeem it. He owed us. We were collecting the rents. We had power under our mortgage to collect the rents in default of payment of interest. So we thought, and it was clearly understood by all the inspectors at a round table conference which lasted the whole day (at which the solicitor here present was representing some of the parties). There were three or four lawyers there, and myself, and two notaries, and we worked all day on it. It was admitted by everybody that we were making a concession saving Mr. Grimaldi by giving him until January 25, 1933—nearly a year. We could have foreclosed, and cleaned him right out. He was insolvent, and we could have rushed the thing right through and wound it up, but we said: "We will give you nearly a year more to redeem."

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That was the sum and substance of the transaction, and everybody felt we were acting in good faith and in the common interest of everybody.

And the trustee adds:

As I saw it, it seemed to me it would give the estate an opportunity of approximately one year in which to sell the property and to get an equity out of it for the benefit of the creditors.

The arrangement of the 4th March, 1932, was previously approved by the inspectors of the estate, two of whom were lawyers, one a banker, another a real estate operator, and the fifth one a very large creditor. The trustee was authorized to sign the agreement by the registrar in bankruptcy.

The appellant was made aware of the negotiations and was informed of the trustee's intention to enter into the agreement. He was told

It was a question of either signing that agreement or allowing the Canada Permanent Mortgage Corporation to go ahead and foreclose. There was no other alternative.

He made no objection to it. As a matter of fact, he was present at a meeting of the inspectors on March 8, 1932, and then stated

that if the assets were sold, the estate would realize nothing.

On March 11, 1932, in a general letter addressed to the creditors, the trustee stated as follows:

As to the assets we may say that the Lord Renfrew Apartments have been turned over to Mr. A. S. Pierce, in consideration of him paying the arrears of taxes, interest, etc., with the rights of redemption of the property to the estate within one year, which means if we can sell over and above the mortgage and moneys advanced the estate can repossess it immediately at the time of sale, otherwise at the expiration of one year, the ownership will be vested in Mr. Pierce.

The subsequent events were that the appellant Grimaldi succeeded in having a proposal of composition accepted by his creditors and approved by the bankruptcy court. On the 31st of May, 1932, he secured his discharge; the receiving order was annulled and it was ordered

that all the assets of the said debtor (Grimaldi), including any equities of redemption and the interest of the debtor in any property now vested in the said Fred. H. Pope, shall be vested in the debtor, his heirs and assigns.

On the 27th of July, 1932, and again on the 22nd of November, 1932, he made attempts to comply with the conditions of the agreement of the 4th of March; and, declaring that he was

desirous to exercise the rights confirmed to him through Pope by the above deed which shall expire on the 25th day of January, 1933, and

retake possession of said property upon paying (the respondent Pierce) the above charges as mentioned in art. VII of said deed of agreement,

he wrote to the respondent asking him to furnish immediately a statement of all disbursements made by him

on account of interests, taxes, capital, or for repairs or improvements to the property, or the general administration or maintenance thereof, including any expenses whatsoever relating to the Lord Renfrew property, and including in particular the legal and notarial charges * * * , and in general all *bona fide* out of pocket expenses, and all the rentals which you may have collected during possession of the above property Lord Renfrew.

The appellant was told that Mr. Pierce had not yet been notified by the trustee that the latter had assigned his rights to anyone, or that the appellant had obtained his discharge, but that, at all events, the respondent was having an account prepared of all the amounts disbursed by him during his administration of the property and was forwarding this to a firm of lawyers who, under the agreement of the 4th March, 1932, had been constituted the irrevocable attorneys of the respondent. Nothing further appears to have been done by the appellant until, on the 20th day of January, 1933, he brought this action asking that, by the judgment to intervene, he be declared the owner of the Lord Renfrew Apartment, invoking no other title than the original deed of sale from the respondent to him, dated the 26th of November, 1930, and ignoring altogether the other events (including his bankruptcy) and the subsequent agreements which had taken place in the meantime. The judges of the Court of King's Bench unanimously dismissed the action of the appellant, on the ground that the respondent had legally become the owner of the Lord Renfrew Apartment through the agreement made between him, the Canada Permanent Mortgage Corporation and the trustee Pope, on the 4th day of March, 1932; and the appellant has failed to convince us that he was entitled to succeed in his appeal from that judgment.

It is quite evident that the title deriving to the appellant from the deed of sale of the 26th November, 1930, which is the sole title invoked by him in his petitory action, ceased to have any effect in his favour from the moment that, by force of the bankruptcy order, the Lord Renfrew Apartments became vested in the trustee.

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It is also evident that, by the agreement of the 4th of March, 1932, the respondent became the absolute owner of the Lord Renfrew Apartments, unless, under its terms, the trustee, or his nominee, "rendered that agreement of no effect" as regards the respondent by complying with the several conditions therein stipulated "up to and including the 25th day of January, 1935," or unless the agreement so made between the trustee and the respondent can be set aside on the ground of fraud or illegality.

The trustee, or his nominee (the appellant), have never complied with the terms and conditions required to render the agreement of no effect.

Although fraud was alleged, none was entertained either by the Superior Court or by the Court of King's Bench; and none was proven.

As for illegality, we are of opinion that the trustee had the power, under section 43 of the *Bankruptcy Act,* with the permission in writing of the inspectors, as was done in this case, to enter into the agreement in question.

It was the trustee's duty to do everything in order to maintain for the estate any equity that it might have in the Lord Renfrew Apartment and to preserve, as far as possible, the rights of the bankrupt estate in the said property.

It is true that the appellant had not assumed personally the payment of the loan of $150,000, to secure which the property was affected by a first hypothec. If the appellant, or the trustee, were willing to surrender the property, there would be no personal liability on their part; but as long as they wished to hold it and enjoy the revenue thereof, they had to make the payment of the instalments as they became due. The appellant was fully aware of this obligation on his part and, as a matter of fact, he had made the payments to the Mortgage Company up to the time when his insolvency prevented him from continuing.

The Canada Permanent Mortgage Corporation had against the appellant, or his trustee, an hypothecary action to enforce its claim. The appellant, and subsequently his trustee, held as proprietors the immoveable hypothecated for that claim (Art. 2058 C.C.) and

> The object of the hypothecary action is to have the holder of the immoveable condemned to surrender it in order that it may be judicially sold, unless he prefers to pay the debt in principal, interests as secured by registration, and costs. (Art. 2061 C.C.).

The claim against the appellant, or his trustee, and its consequential result under articles 2058 and 2061 of the Civil Code may well be regarded as a

> claim arising out of, or incidental to, the property of the debtor, made or capable of being made on the trustee by any person.

with respect to which the trustee is empowered by subsection (*i*) of section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to

> make such *compromise* or other arrangement as may be thought expedient.

In our view, the agreement of the 4th March, 1932, was such an arrangement.

In the premises, the trustee got the permission of the inspectors and the authorization of the registrar, as provided for by section 159 of the *Bankruptcy Act* and sections 4 and 5 of the Bankruptcy Rules. The attack, on the ground of illegality, made upon the deed of agreement of the 4th of March, 1932, therefore, fails, and the appeal should be dismissed with costs.

We reach that conclusion quite independently of the argument made by the respondent that, under all the circumstances, the appellant fully acquiesced in the arrangement, and in such a manner as to preclude him from disputing the validity thereof—an argument in regard to which the appellant was certainly unable to find a satisfactory answer.

Appeal dismissed with costs.

Solicitors for the appellant: *Brosseau & Brosseau.*

Solicitors for the respondent: *Audette & O'Brien.*