MAURICE F. HURLY and THE TORONTO DOMINION BANK (*Plaintiffs*) ..... APPELLANTS;

1965
*Oct. 12, 13
Nov. 9

AND

THE BANK OF NOVA SCOTIA (*Defendant*) ..... RESPONDENT;

AND

LAWRENCE DUNKLEY (*Defendant*).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Banks and banking—Sale of cattle subject to bank's security—Proceeds of sale deposited in debtor's account—Failure of bank's claim—Bank Act, 1953-54 (Can.), c. 48, s. 88.

The appellant H and the respondent bank were in contest over the distribution of a fund of $59,311.48, which was in court on a sheriff's interpleader and came from the sale of approximately 400 head of cattle. H claimed the first $45,633.01. The balance was not enough to pay the bank's claim. The Courts below directed a *pro rata* distribution of the fund which gave H 171/390ths and the bank 219/390ths. H founded his claim on ownership of a certain number of the cattle. The bank's claim was under s. 88 of the *Bank Act,* 1953-54 (Can.), c. 48, on security taken from its customer D.

Held: The appeal should be allowed.

The bank knew that its customer, from whom it had taken s. 88 security, had sold the cattle in question to H, had taken a cheque for this sale and had deposited that cheque in his account. The bank could not take the money, the proceeds of the sale, and at the same time say to a purchaser who had bought the herd that the herd was still subject to its security. By taking the money it consented to the sale. The herd then belonged to H and when it was sold on the market, he was entitled to the proceeds.

This dealing between D and H was not a mortgage transaction. It was an outright sale to H for immediate cash and a purchase back for a slightly higher consideration with this purchase price to be paid only when the herd was sold. In the meantime, H reserved the title.

The bank had no claim to the herd under its s. 88 security. But, in any event, the bank was bound by the terms of a subsequent agreement made by D, H and itself. The contention that this agreement was not binding on the bank because it was never carried out according to its exact terms failed. Under the agreement alone, H was entitled to priority to the extent of the indebtedness recited in the agreement.

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

1965

HURLY *et al.* v. BANK OF NOVA SCOTIA *et al.*

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Primrose J. Appeal allowed.

G. H. Steer, Q.C., for the plaintiffs, appellants.

J. M. Robertson, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Maurice F. Hurly and the Bank of Nova Scotia are in contest here over the distribution of a fund of $59,311.48, which is now in court on a sheriff's interpleader and comes from the sale of approximately 400 head of cattle. Hurly claims the first $45,633.01. The balance is not enough to pay the bank's claim. Up to this point the Alberta Courts have directed a *pro rata* distribution of the fund which gives Hurly 171/390ths and the bank 219/390ths. Hurly founds his claim on ownership of a certain number of the cattle. The bank's claim is under s. 88 of the *Bank Act*, 1953-54 (Can.), c. 48, on security taken from its customer Lawrence Dunkley.

Dunkley was in business as a licensed livestock dealer and cattle feeder near Grande Prairie, Alberta. From 1961 to March of 1963, he had extensive business dealings with Hurly, who was also a licensed livestock dealer. The course of these dealings was that Hurly would acquire cattle for feeding and sell them to Dunkley. Dunkley would feed the cattle for a certain period and then sell them for beef. In almost all cases these sales were made through Hurly. When Hurly acquired cattle which he sold to Dunkley, he would deliver an invoice setting out the number of cattle and their cost to him. To that cost was added 50 cents per cwt. and interest at 6 per cent for the stated period of the feeding. Dunkley would then give to Hurly a post-dated cheque payable at the end of the feeding period. When the cattle were sold the proceeds were sent to Dunkley, who would deposit the money in his account with the Bank of Nova Scotia. Hurly would then present his post-dated cheque for payment. In all these dealings Hurly reserved the title to the cattle and there is no question raised either by the bank or Dunkley that this was not an effective reservation of title.

[1] (1965), 52 W.W.R. 513.

To the extent that the fund of $59,311.48 represents the proceeds from the sale of cattle, which at the time when the trouble came were in the possession of Dunkley on these terms, Hurly's right is not disputed and no more needs to be said about this aspect of the case.

The dispute is over an item of $15,390 and a herd of 86 steers. The dealings between Dunkley and Hurly concerning this herd were different from those just outlined. In the first place, it was Dunkley himself who bought this herd. His previous course of dealing had been to buy from Hurly. Hurly was not anxious to see Dunkley go into this deal. However, Dunkley bought on his own and then wanted to sell them to Hurly and buy them back on the same terms as were embodied in the previous agreements, namely, a reservation of title in Hurly and a post-dated cheque to be presented at the date when the cattle were sold. Pursuant to this arrangement, Hurly did buy this herd of 86 steers, which will be referred to as the "Ross herd", and gave Dunkley his cheque for $14,752. Dunkley deposited this in his account in the Bank of Nova Scotia on February 6, 1963. Hurly then had second thoughts about the matter and stopped payment of the cheque, but, on February 13, 1963, he decided to go on and gave Dunkley another cheque, which replaced the first cheque, for $14,444.63. This also was deposited by Dunkley in his account and the first cheque was charged back. Therefore, as between Dunkley and Hurly at this time the position was that Hurly owned the Ross herd and had paid cash for it. The herd was in the possession of Dunkley where it had been since its acquisition from Ross. The bank knew the precise deal between Dunkley and Hurly, certainly on February 13 when the second cheque was deposited, and possibly on February 6 when the first cheque was deposited. The bank also had precise knowledge of the previous course of dealing between the two men. The terms of the deal between Dunkley and Hurly concerning the Ross herd are set out in the following agreement, which is in the same terms as the previous agreements:

> These above steers are branded 44 BAR on the left rib. These above steers are to be branded LAZY H7 on the right hip. Post-dated cheque dated June 5, 1963 received for the above amount of $15,390.00. The above steers remain the property of M. F. Hurly until post-dated cheque received is cleared through the bank.

1965

HURLY *et al.* v. BANK OF NOVA SCOTIA *et al.*

Judson J.

The proceeds of the sale of this herd form part of the fund now in court and Hurly claims them because he was the owner. The bank says that this herd came under its s. 88 security.

The bank knew that their customer, from whom they had taken s. 88 security, had sold the Ross herd to Hurly, had taken a cheque for this sale and had deposited that cheque in his account. It has been admitted all through the case that when Dunkley acquired this herd from Ross it did become subject to the bank's s. 88 security. But how can the bank, knowing that the cheque deposited on February 13 was for the purchase price of that herd, take the money and say that the herd is still subject to its s. 88 security? The bank had to take a position with respect to this particular herd on either February 6 or February 13. It could have said to its customer, "You had no right to sell this herd without our consent. We will not take the money and we will enforce our rights on the herd." But it could not take the money, the proceeds of the sale, and at the same time say to a purchaser who had bought the herd that the herd was still subject to its security. By taking the money it consented to the sale. The herd then belonged to Hurly and when it was sold on the market, he was entitled to the proceeds.

The Appellate Division has characterized this dealing between Dunkley and Hurly concerning the Ross herd as a mortgage transaction. In other words, while the herd in Dunkley's hands was subject to the s. 88 security, he mortgaged it to Hurly, who must take subject to the prior security. I do not see this as a mortgage transaction. It was an outright sale to Hurly for immediate cash and a purchase back for a slightly higher consideration with this purchase price to be paid only when the herd was sold. In the meantime, Hurly reserved the title. It is true that at all times possession was in Dunkley but throughout the whole course of this litigation no one has asserted a right to avoid any of the transactions between Hurly and Dunkley for non-compliance with legislation relating to bills of sale and chattel mortgages or conditional sales. The case has been presented and argued throughout on this basis. Whether it could have been done otherwise, I do not know. It is, however, clear that when the bank came to make the agreement with Dunkley and Hurley, which I deal with next, it recognized that the relationship between these two

in their dealings with the Ross herd was that of vendor and purchaser, that the title was in Hurly and that it held no security on the herd.

Later in February, 1963, it became evident that Dunkley was in difficulty. On February 26, 1963, Dunkley, Hurly and the bank made an agreement. This agreement recites that Dunkley owes Hurly $45,631.01; that he owes the bank $30,000; that he is in possession of approximately 400 head of cattle and that the bank and Hurly have the right to seize these cattle and sell them to satisfy the indebtedness.

Then the parties agree as follows:

1. The party of the first part (Dunkley) shall have from the date hereof to five o'clock in the afternoon of the 1st day of March, A.D. 1963 in which to repay to the party of the second part and the party of the third part the indebtedness as above set out.

2. In the event that the party of the first part (Dunkley) has not, at the expiration of the time limited herein, repaid his said indebtedness, the parties of the first and second parts (Dunkley and Hurly) hereby agree to sell the said cattle above set out, crediting all sums received from the said sale to the satisfaction of the said indebtedness. The said sale shall commence at five o'clock in the afternoon of the 1st day of March, A.D. 1963.

3. The said sale shall be under the joint direction of the party of the first part and the party of the second part (Dunkley and Hurly), but in the event that the said parties cannot agree as to the sale price of any or all of the said cattle, the said cattle shall then be consigned to Messrs. Weiller and Williams, Livestock Commission Agents, Western Stockyards, Edmonton, Alberta, for sale by Public Auction.

4. The party of the second part (Hurly) shall deduct from the proceeds of the sale such monies that are owing to him, and he shall thereafter remit the balance of all monies received from the said sale to the Bank of Nova Scotia at its Grande Prairie branch.

5. All sums received by the party of the second part (Hurly) pursuant to this Agreement, shall be credited on the Agreements for Sale of the cattle and the postdated cheques held by him from the party of the first part.

When this agreement was executed, the bank knew that Hurly owned the Ross herd and recognized that ownership by including in Hurly's claim of $45,631.01 the $15,390 owing for the Ross herd.

The bank now says that this agreement is not binding on it because it was never carried out according to its exact terms. What happened was this: Hurly and Dunkley could not agree on the sale of the cattle. On March 1, the bank made a seizure of all the cattle. After the seizure had been made, Dunkley, Hurly and the bank manager met and

1965

HURLY *et al.* v. BANK OF NOVA SCOTIA *et al.*

Judson J.

arranged that the cattle would be shipped to Edmonton and sold through Messrs. Weiller and Williams. This was done. The sheriff received the proceeds of the sale, the fund of $59,311.48 already referred to. Then the bank said that because Dunkley and Hurly had been unable to agree and it had become necessary to make a seizure, the agreement was at an end and the bank was free to make a claim on the Ross herd under its s. 88 security.

I have already dealt with the bank's claim to the Ross herd under its s. 88 security. It had no such claim. But I am equally clear that in any event, the bank is bound by the terms of this agreement, which did not come to an end because the bank chose to seize on March 1. This merely brought matters to a head and was a mode of enforcing performance of the agreement, which was in fact carried out through the designated sale agent with the proceeds paid to the sheriff. In my opinion, under the agreement alone, Hurly is entitled to priority to the extent of the indebtedness recited in the agreement.

I would allow the appeal and direct (1) that out of the moneys in court there be paid to Dunkley the sum of $1,193.08, plus interest at 4½ per cent from the date of sale, (this represents the value of his exemptions, as to which there is no question); (2) that the sum of $45,631.01, together with interest at 4½ per cent from the date of the sale, be paid to Hurly; (3) that the balance be paid to the Bank of Nova Scotia. The appellants Hurly and the Toronto Dominion Bank are entitled to one set of costs against the Bank of Nova Scotia at trial, on appeal and in this Court. I would not disturb the order for costs of $620 made in favour of Dunkley at the trial and added to his claim for exemptions nor the order for costs in the Appellate Division made in favour of Hurly against Dunkley.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Milner, Steer, Dyde, Massie, Layton, Cregan and Macdonnell, Edmonton.

Solicitors for the defendant, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan and Fraser, Calgary.