DONALD H. BAIN LIMITED (DEFENDANT) ..... APPELLANT;

AND

H. W. J. MADDISON (PLAINTIFF) ..... RESPONDENT.

1929
*Oct. 1, 2.
*Nov. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Breach—Sale of goods—Pleading—Breach of duty to employer—Evidence of plaintiff's contract of hiring with employer—Admissibility—Fraud.

In an action for breach of a written contract the defence was raised that the respondent was guilty of a breach of duty towards his employer in entering into the contract, but as no fraud was alleged in this regard, the paragraph was struck out with leave to amend. The amend-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

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ed paragraph alleged that the contract was made by the appellant's agent without authority and contrary to instructions and that the agent and the respondent fraudulently conspired together to bring about the contract, that the contract was procured by fraud and the respondent fraudulently obtained from the agent a price lower than the market price of the goods. The trial judge refused to admit evidence of the respondent's contract of hiring with his employer on the ground that a defence of illegal contract had not been raised on the pleadings; and the jury found in favour of the respondent. It was argued by the appellant before this court that the price named in the contract being less than the market price, a profit would have accrued to the respondent if the contract had been carried out and that such concession to the respondent had been given by the appellant's agent, and accepted by the respondent, as a bribe to induce him to advance the interests of the appellant in the dealings of the respondent's employer with it through the respondent; and it was further argued by the appellant that the facts already disclosed by the evidence point to the existence of such a conspiracy or illegal agreement and that, notwithstanding the insufficiency of the pleadings, it was the duty of the trial judge to investigate the facts and for that purpose to receive further evidence supporting the appellant's argument above stated.

Held that the trial judge was right in rejecting the evidence offered by the appellant. If such an agreement, affecting the contract sued upon, had been embodied in a document put in evidence by the respondent, and the character of it had been thereby plainly disclosed, or if the nature of it plainly appeared from other evidence adduced by the respondent, then, if the court was satisfied it has before it all the facts, the respondent would have necessarily failed; and, in such circumstances, it was immaterial whether or not the agreement had been pleaded in defence. It is otherwise, however, where the appellant, in order to shew that the contract sued upon was unenforceable, was obliged to adduce evidence of the corrupt inducement. The appellant was not entitled to present such evidence unless the respondent has had notice, through the pleadings, of the nature of the defence. *North Western Salt Co.* v. *Electrolytic Alkali Co.* ([1914] A.C. 461) followed.

Judgment of the Court of Appeal (40 B.C. Rep. 499) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Macdonald J., with a jury and maintaining the respondent's action, awarding damages for breach of a contract for the sale of goods.

By contract in writing of the 2nd of September, 1926, the respondent purchased from the appellant 1,000 cases (55 pounds each) of Manchurian shelled walnuts at 24 cents per pound, shipment to be made from the Orient in December, 1926, to be delivered in Vancouver. The ap-

(1) (1929) 40 B.C. Rep. 499; [1929] 1 W.W.R. 437.

pellant failed to deliver the goods and the respondent claimed $5,500 being the difference between the contract price of 24 cents per pound and 34 cents per pound the market price at the time of the breach. At the time the contract was made, the respondent was manager of the wholesale grocery department of the Hudson's Bay Company in Vancouver, his duties including the purchase of walnuts for his employer and one Mason was the appellant's agent in Vancouver with whom the respondent made the contract in question. The appellant alleged that the respondent and Mason in breach of their respective duties fraudulently conspired together to enter into the contract for the sale of walnuts at a price less than the market price at which the appellant was selling walnuts to their other customers.

Glyn Osler K.C. for the appellant.

W. F. Chipman K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—This is an appeal from a judgment of the Court of Appeal of British Columbia (1), pronounced on the 8th of January, 1929, dismissing an appeal from the judgment of Mr. Justice W. A. McDonald, awarding the respondent $4,000 damages for breach of a contract for the sale and delivery to him by the appellant company, of 1,000 cases of Manchurian shelled walnuts. The issues raised by the pleadings were submitted to the jury by the learned trial judge, in a charge which the majority of the Court of Appeal, with whose view we agree, held to be free from objection, and these issues, by the general verdict of the jury, were disposed of in plaintiff's favour.

At the trial evidence was offered in support of a defence which in its most advantageous form, and substantially as put by Mr. Osler, may be stated thus: The respondent was the manager of the wholesale grocery department of the Hudson's Bay Company at Vancouver. As such, he acted for his employers in their dealings with the appellant company, in the purchase, that is to say, of various kinds of commodities, including shelled Manchurian walnuts.

(1) 40 B.C. Rep. 499; [1929] 1 W.W.R. 437.

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The price named in the contract sued upon, it is said, was considerably less than the market price, and by reason of this, a profit of several hundred dollars would have accrued to the respondent if the contract had been carried out; and this concession to the respondent was, it is alleged, given by the agents of the appellant company, and accepted by the respondent, as a bribe to induce him to advance the interests of the appellant company in the dealings of the Hudson's Bay Company with them through the respondent. These allegations, if established, would no doubt have constituted a defence (*Harrington* v. *The Victoria Graving Dock Co.* (1); but the learned trial judge rejected the evidence offered in support of them on the ground that the defence had not been pleaded.

It is quite clear that no such defence is set up in the pleadings; but it was argued by Mr. Osler, on behalf of the appellant company, that the facts disclosed by the evidence point to the existence of such a conspiracy, and that, notwithstanding the state of the pleadings, it was the duty of the learned trial judge to investigate the facts, and for that purpose, to receive the evidence tendered.

The pertinent rule is not open to doubt. If such an agreement, affecting the contract sued upon, is embodied in a document put in evidence by the plaintiff, and the character of it is thereby plainly disclosed, or if the nature of it plainly appears from other evidence adduced by the plaintiff, then if the Court is satisfied it has before it all the facts, the plaintiff must necessarily fail; and, in such circumstances, it is immaterial whether or not the agreement has been pleaded in defence. It is otherwise, however, where the defendant, in order to shew that the contract sued upon is unenforceable, must adduce evidence of the corrupt inducement. The defendant is not entitled to present such evidence unless the plaintiff has had notice, through the pleadings, of the nature of the defence. Lord Moulton said, in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (2):

> At the trial before Scruton J. the plaintiffs put their manager into the witness box to give evidence on some issue of fact raised in the pleadings. In commencing his cross-examination of this witness counsel for the defendants put a question to him admittedly not relevant to any matter

(1) (1878) 3 Q.B.D. 549.

(2) [1914] A.C. 461, at p. 474.

pleaded, but directed solely to shew that the contract was, in fact, a contract in restraint of trade, and thus void or unenforceable. Objection was taken to the question on the ground that if the defendants intended to raise such a defence they ought to have pleaded it. The objection was sustained by the judge. He could scarcely have done otherwise in face of the specific provision in the Rules that the defendant must raise by his pleading all matters which shew the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, as, for instance, fraud, facts shewing illegality either by common or statute law. The defendants thereupon asked leave to amend their pleading so as to raise the defence of illegality, but the judge refused such leave, on the ground that it would be unfair to the plaintiffs to allow such an amendment to be made when the trial had already commenced.

The reasonableness of this refusal is not now in question. No appeal was brought against it, and the defendants have at no stage of the case renewed their application. It is evident, and, indeed, it is not denied. that the point was before the minds of their counsel from the first, and that it was not by inadvertence, but by choice, that it was not pleaded originally, or that leave to add such a plea was not applied for during the period of more than eighteen months that elapsed between the delivery of the points of defence and the trial.

In the result the judge found in favour of the plaintiffs for £1,055 4s. 10d. damages. The defendants appealed, and on the hearing of the appeal their counsel raised the contention that the contract sued on, when considered with the facts of the case as shewn by the evidence, was in restraint of trade, and was a contract having for its purpose and effect the maintenance of an illegal monopoly injurious to the public; that the Court was entitled, and, indeed, bound, to take cognizance of this contention; and that accordingly it ought to allow the appeal and dismiss the action, regardless of the fact that the issue of illegality was not raised in the pleadings. The Court of Appeal by a majority accepted this view of the case, and allowed the appeal on that ground. Questions as to the proper measure and amount of damages, therefore, became irrelevant, and the Court of Appeal has neither considered nor pronounced upon these matters.

The present appeal is from this decision of the Court of Appeal, and the discussion before this House has related solely to the question whether the Court was justified in dismissing the action on the ground that the contract was illegal and unenforceable. The argument on behalf of the defendants is a very specious one. It is conceded that if a written contract is *ex facie* in restraint of trade so as to be against public policy, the judge is entitled, and, indeed, bound, to take the point, and the decision is for him, and not for the jury. The same must be true when the question is whether a contract, when taken in connection with the surrounding circumstances, is in like manner against public policy. This must be so because the question is one of law, and therefore is for the Court and not for the jury; although it is needless to say that if there be a dispute as to the facts, that dispute has to be settled by the tribunal which has the duty of deciding as to fact before the judge can exercise his function. If, therefore, say the defendants, the Court, taking the contract in connection with the facts appearing in the plaintiff's case or otherwise legitim-

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ately brought before the Court at the trial, comes to the conclusion that is against public policy, it is entitled and bound to dismiss the action.

This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, *de non apparentibus et de non existentibus eadem est ratio,* is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence, they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the Court at the end of the case are therefore only casual selection from the surrounding circumstances, and the Court has no longer the right to treat them as properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

Lurking beneath the argument for the defendants was the idea that the public good is a matter of such supreme importance that the Courts should not require proof in due form and in accordance with the recognized requirements of our legal procedure of any charge of illegality or offence against the rules of public policy. But our judicial procedure is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold that this wholesome rule should be relaxed when he is charged with something so grave as acting against the common weal. Such a proposition partakes of the absurdity of the rule in criminal proceedings that prevailed in England centuries ago, namely, that, because felony was so very wicked, persons accused of it should not be allowed the assistance of counsel. Happily we have shaken ourselves free from all such notions, and the principle that in all cases fair notice should be given to the plaintiff of all the defences that are to be raised is now so fully recognized in our procedure that it is formulated in the rule above quoted, in language which permits no misunderstanding as to the general rule, and which, in particular, specifically includes such a case as the present.

With these observations of Lord Moulton, Lord Haldane and Lord Parker in substance agree. They apply to the present case.

Nor, in view of the course of the litigation, is it possible to give the appellant company a further opportunity of establishing this defence. For the purpose of raising it, the appellant company was given an opportunity, by order of the Court of Appeal, of amending its defence (*Maddi-*

son v. *Bain* (1)), but deliberately elected to proceed to trial without doing so. At the trial, the trial judge having ruled that, on the state of the pleadings, the defence was not open, no application was made for leave to amend, nor does the appellant company appear to have asked for such leave in the Court of Appeal. Such being the history of the proceedings, the appeal and the litigation must now be determined upon the pleadings as they stand.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. John, Dixon & Turner.*
Solicitor for the respondent: *Knox Walkem.*