EDWIN CHASE (*Plaintiff*) .....APPELLANT; 1962

*Feb. 12, 13
Apr. 24

AND

COLIN CAMPBELL (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Cash payment for services in staking and recording claims—Prospector to be given a share of proceeds if claims developed or dealt with—Subsequent agreement settling prospector's participation in any sale that might be made—Nothing in nature of partnership subsisting between parties—Inapplicability of s. 27 of Partnership Act, R.S.B.C. 1960, c. 277 or of similar common law rule.

The plaintiff agreed to stake certain properties as agent for the defendant who agreed to pay him a specified sum of money to cover his expenses and a further sum for his services; these amounts were paid in part at the time of the agreement and the balance after the claims were staked and recorded. The plaintiff alleged that there was also an agreement in which his interest in the claims was defined as 48 *per cent*, and it was on this alleged agreement that the claim advanced in the statement of claim was based, though an alternative claim, alleging the staking of the claims was a joint venture and that the interests of the parties in the claims were equal, was pleaded. The evidence of the plaintiff as to the alleged agreement was rejected and the Courts below dealt with the case on the footing of the defendant's evidence, according to which the defendant had agreed that if he decided to do anything further with the property he would give the plaintiff a share in it.

The defendant did decide to spend some money on initial development and advised the plaintiff that he would give him 10 *per cent* of the net return resulting from the development of the property as his interest in the matter and employ him in some capacity to assist in its further development. The defendant then prepared an agreement between a proposed company and the plaintiff whereby the latter, for claims discovered by him, was to be entitled to "10% interest in the usual vendor's share of any new company formed by the Company on said claims or in any other sale consideration received by the Company in respect to said claims." Following the signing of this document additional claims were staked by the plaintiff and recorded in the defendant's name.

Diamond drilling carried on upon the property indicated an extensive deposit of iron ore and, in the result, the defendant was able to effect a sale of all the said claims. In a subsequent action, the judgment of the trial judge declared that the plaintiff was entitled to 10 *per cent* of the moneys payable to the defendant after deducting therefrom defendant's expenditures made upon the claims. The plaintiff's appeal was dismissed by the majority of the Court of Appeal, whereupon a further appeal was brought to this Court.

Held: The appeal should be dismissed.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Martland and Ritchie JJ.

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The proper construction to be placed upon the evidence of the defendant as to the arrangements made at the time of his original interview with the plaintiff was that, in addition to the cash payment made for the plaintiff's services in staking and recording the first group of claims, he agreed in the event of his deciding to develop or deal with the claims to give the plaintiff some fair share of the proceeds, if any, that were realized. Thereafter the defendant who was under no obligation to spend money on the development, before undertaking the very considerable expenditure which would be necessary to have the claims diamond drilled, settled the question of the plaintiff's participation in any sale that might be made by agreement with him.

There was nothing of the nature of a partnership subsisting between the parties at any time and neither the provisions of s. 27 of the *Partnership Act*, R.S.B.C. 1960, c. 277, nor the rule at common law that in the absence of an agreement defining such interests all the partners are entitled to share equally in the capital of a business touched the matter. *Briggs v. Newswander* (1903), 32 S.C.R. 405, discussed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Lord J. dismissing the action. Appeal dismissed.

P. E. Hogan, for the plaintiff, appellant.

D. McK. Brown, Q.C., and *D. E. Jabour,* for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which, by a decision of the majority of the members, Sheppard J.A. dissenting, dismissed the appeal of the present appellant from a judgment of Lord J. dismissing the action.

The appellant is a mining prospector and on January 18, 1960, called upon the respondent at his office in Vancouver and endeavoured to interest him in staking certain ground in Vancouver Island which, it was indicated by a report in his possession, might contain deposits of iron ore.

As to what transpired between the parties at this interview there is a wide difference in the evidence tendered by the parties. It is, however, common ground that at this time the appellant signed a letter dated January 18, 1960, dictated by the respondent and addressed to him, which read:

For $1.00 and other considerations I agree to stake the two properties at Serita River and the iron property northwest of Maggie Lake as your agent.

[1] (1961-62), 36 W.W.R. 1, 30 D.L.R. (2d) 106.

The respondent agreed to pay the appellant $250 to cover his expenses in staking and recording the claims and a further sum of $250 for his services, and these amounts were paid in part on January 18 and the balance on the appellant's return from Vancouver Island. The claims designated as C.C. 1 to 16 were staked and recorded, as required by the *Mineral Act,* R.S.B.C. 1960, c. 244, in the name of the respondent.

According to the appellant, who had denied signing the letter above mentioned when examined for discovery but admitted having done so at the trial, a further written agreement was made and signed by him on January 18 in which the respective interests of the parties in the claims were defined as 48 *per cent* to the appellant and 52 *per cent* to the respondent. It was on this alleged agreement that the claim advanced in the statement of claim was based, though an alternative claim, alleging that the staking of the claims was a joint venture and that the interests of the parties in the claims were equal, was pleaded.

The learned trial judge rejected the evidence of the appellant as to this and this finding of fact was accepted by all of the members of the Court of Appeal, the case being dealt with on the footing that the respondent's account of what had transpired on January 18 was to be accepted. According to the respondent, the only evidence produced to him of the nature of the ground proposed to be staked was a document referred to as Linderman's report, which the appellant said he had bought from the British Columbia Department of Mines in 1959. It appears that the probability that there was iron ore in the area had been reported in the annual report of that department in 1903.

The respondent's evidence is that, at the interview on January 18, the appellant had asked for a 50 *per cent* interest in the claims, in addition to the payments of money then agreed upon. This the respondent refused but said that:

> I made a proposal to him that I would take a chance or a gamble on this with the understanding that he would go and stake the property as my agent and that at some future date if the thing proved worthwhile I would give him an interest in it.

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And again:

> It was to be at my discretion if I did anything further with the property. The majority of these things that you go and investigate never prove to be anything; I would say 90 out of 100, so I didn't see any point in going into a great deal of detail at the time other than the fact that he would act in the capacity of my agent and I would have complete control of the property at my discretion.

During cross-examination, in answer to a question reading:

> So, in other words, when he left you on January 18th part of the agreement was he was to participate in this ground?

he said:

> That is correct.

Prior to the staking and recording of the claims, an agreement as to the appellant's interest so expressed would clearly be unenforceable. Different considerations arise, however, when this was done and the property recorded in the respondent's name.

The arrangement made on January 18 does not, however, stand alone since the rights of the parties in the proceeds of the sale of the claims later made to the Noranda Company were subsequently defined.

With the information available to him after the staking of the 16 claims, the respondent estimated that there was a substantial ore body of magnetite or magnetic iron on the property. Whether it was sufficient in extent to make a mine could only be determined by diamond drilling. The respondent, a contractor by occupation, after making inquiries decided, as he said, to risk $20,000 to $25,000 in diamond drilling and initial development and, after informing the appellant that he was prepared to do so, advised him that he would give him 10 *per cent* of the net return resulting from the development of the property as his interest in the matter and employ him in some capacity to assist in its further development. The respondent says that the appellant accepted this, saying that it was very satisfactory to him.

Having made this arrangement, the respondent instructed his solicitors to incorporate a company to handle the work on the claims. The proposed name of this company was Western Ferric Ores Ltd. but, before the certificate of incorporation had issued, the respondent had prepared an agreement between the proposed company and the appellant and,

while this document said nothing as to the arrangement which according to the respondent he had made shortly theretofore with the appellant, it appears to me to lend support to the respondent's version of that arrangement. By this document the company purported to agree to employ the appellant for two months from March 21, 1960, at $400 per month, in addition to an allowance for food and travelling expenses, and to supply him with the required equipment, the appellant agreeing to diligently prospect for mines and to record any mining claims staked in such names as the company should direct. For claims discovered by the appellant he was to be entitled to "10% interest in the usual vendor's share of any new company formed by the Company on said claims or in any other fair sale consideration received by the Company in respect to said claims." For other claims located but not discovered by the appellant he was to receive a lesser amount. The agreement further provided that the manner in which the claim should be developed and the terms upon which they should be disposed of should be in the absolute discretion of the company and that the company might allow all or any of the claims to lapse. Following the signing of this document, nine further claims named Mollie 1 to 9 were staked by the appellant and recorded in the respondent's name.

The diamond drilling carried on upon the property indicated an extensive deposit of iron ore and, in the result, the appellant was able to effect a sale of all of the said claims to Noranda Exploration Co. Ltd. The agreement made with that company provided for a purchase price of $1,150,000 to be paid $50,000 in cash and the balance by the payment of a royalty of .50¢ for each long ton of ore shipped by the purchaser from the property. In addition, the purchaser agreed to assume certain obligations of the vendor under a drilling contract and to expend a minimum of $25,000 upon the claims. The agreement, however, provided that the Noranda Company should not be obligated to expend more than $75,000, which amount included the cash payment, the company to have the privilege of continuing the work or abandoning the claims. The respondent, prior to action, offered to pay to the appellant 10 *per cent* of the cash payment of $50,000 made by him surplus to the amount of

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his expenditures for diamond drilling and developing the property, and when this was refused paid a sum of $2,900 into court.

The learned trial judge accepted the evidence of the respondent as to the making of the arrangement by which the appellant would receive 10 *per cent* of the moneys realized from the sale of the claims after deducting the expenditures made upon the claims by the respondent. The judgment entered declared that the plaintiff was entitled to that percentage of the moneys payable to the respondent after deducting therefrom the expenditures made by him amounting to $11,961.78 and dealt with the costs of the action.

Tysoe J.A., with whom Bird J.A. agreed, found that this finding of the learned trial judge was supported by the evidence and agreed with it. That learned judge considered that whatever obligation rested upon the respondent under the arrangement made in January crystallized into an obligation to give the appellant a 10 *per cent* interest in the proceeds of the sale under the arrangement made before the written agreement of March 21, 1960, was signed and that, from that time, the appellant's interest was established at 10 *per cent* and the claims impressed with a trust in favour of the appellant to that extent.

Sheppard J.A. considered that since the appellant, by virtue of the arrangement made on January 18, was entitled either to an undivided interest in the claims or in the proceeds of their sale and since, relying upon this, he had recorded the claims in the respondent's name, there was a resulting trust in his favour. Since that interest had not been defined by the agreement of January 18, 1960, he was of the opinion that the decision of this Court in *Briggs v. Newswander*[1], governed the rights of the parties and that, accordingly, it should be declared that the respondent held the claims subject to a trust as to a half interest for the appellant.

In *Briggs'* case the facts were that the plaintiff had staked two mineral claims in the Ainsworth Mining Division in British Columbia and the defendants had subsequently wrongfully staked the same ground. The resulting dispute was settled by two agreements made between the parties under which the defendant Newswander purchased the

[1] (1902), 32 S.C.R. 405.

claims and agreed, *inter alia,* to immediately form a company under the laws of the Province and that Briggs should receive, in addition to a sum in cash, "a reasonable amount of the stock of said corporation according to the value thereof." Instead of doing this, Newswander and his co-defendants Crown granted the claims, failed to form the company mentioned and, relying apparently upon the vague nature of the undertakings in the agreements, proceeded to operate the property for their own purposes. The action failed before the Court *en banc* in British Columbia but the plaintiff's appeal was allowed in this Court.

It is to be noted that the head-note at p. 405 of 32 S.C.R. incorrectly states the result of the appeal. Sedgwick J. who delivered the judgment of the Court did say that, in strictness, upon the failure of the defendants to incorporate the company, Briggs was entitled to a reconveyance of the claims but, after consultation with the other members of the Court, he came to the conclusion that the relief granted should be to direct a conveyance to Briggs of a one-quarter interest in the claims rather than a one-half interest, there being in addition to Newswander two other persons who were also defendants on whose behalf Newswander had contracted and whose interests were equal to his own. As the report at p. 415 shows, Sedgwick J. considered that the rights of the parties were to be determined in accordance with a rule stated in s. 25 of the *Partnership Act* of British Columbia, R.S.B.C. 1897, c. 150. That section declared, *inter alia,* that the interest of partners in the partnership property should be determined, subject to any agreement, express or implied, between them, by the rule that all the partners are entitled to share equally in the capital of the business. Section 25 appears as s. 27 of c. 277, R.S.B.C. 1960. That rule, it was said, is merely a statement of what has always been the English law.

With great respect, I do not think that anything decided in that case affects the disposition to be made of the present matter where, by agreement between the parties, their respective rights to the proceeds of the sale have been defined.

In my opinion, the proper construction to be placed upon the evidence of the respondent as to the arrangements made on January 18, 1960, is that, in addition to the cash payment made for the appellant's services in staking and

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recording the first group of claims, he agreed in the event of his deciding to develop or deal with the claims to give the appellant some fair share of the proceeds, if any, that were realized. Neither party knew at that time whether there was enough ore in these locations to make a mine and, if it were an iron mine, it was never contemplated by either that it would be developed by the respondent himself, since to bring any considerable iron property into production would, according to the appellant's own evidence, involve an expenditure of at least $2,500,000. The respondent expressly stipulated that he should have control of the disposition of the property at the outset. Thereafter, as pointed out by Tysoe J.A., the respondent who was under no obligation to spend money on development, before undertaking the very considerable expenditure which would be necessary to have the claims diamond drilled, settled the question of the appellant's participation in any sale that might be made by agreement, and it was not until this was done that he incorporated the Western Ferric Ores Ltd. and expended the moneys necessary to ascertain the extent of the ore deposit and to stake the Mollie claims, to protect those originally staked. It is a proper inference from the evidence that it was upon the faith of the agreement so made that those expenditures were undertaken. According to the respondent, the appellant did not claim that he was entitled to 48 *per cent* of the claims or anything realized from them until after the respondent had agreed to sell the property to the Noranda Company.

There was, in my opinion, nothing of the nature of a partnership subsisting between these parties at any time and neither the provisions of s. 27 of the *Partnership Act* nor the rule at common law touch the matter. When the appellant proposed that he should have a 50 *per cent* interest at the outset, the suggestion was rejected at once and the arrangement was made which has been above described.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Hogan, Webber & Woodliffe, Vancouver.

Solicitors for the defendant, respondent: Russell & Du Moulin, Vancouver.