ANNA PINSKY AND WILLIAM PINSKY (PLAINTIFFS) ..... } APPELLANTS;

AND

ELLA WASS AND THOMAS WASS (DEFENDANTS) ..... } RESPONDENTS.

1952
*Nov. 5

1953
*Mar. 30

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Vendor and Purchaser—Agreement for sale and exchange of property—Escape clause—No time mentioned—Possession exchanged—Whether withdrawal from agreement permitted—Homesteads—Dower Act, S. of A. 1948, c. 7—Whether requirements complied with—Whether agreement void—Estoppel.*

In September 1949, the male respondent, as owner of a farm, and the male appellant, as owner of a property in Edmonton, agreed in writing to exchange their respective properties, each being a homestead

*PRESENT: Kerwin, Taschereau, Kellock, Estey and Locke JJ.

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within the meaning of the *Dower Act* (S. of A. 1948, c. 7). The difference in values was to be paid in cash by the respondent who was also to loan to the appellant $800 to be secured by an agreement for sale of the farm payable November 1, 1950. The transfer of the farm was to take place when the loan was paid and the transfer of the city property, when the agreement to secure the loan was signed. By an escape clause, each party was to deposit $500 and "forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal". The agreement was also signed by the wives of the parties.

Soon after the parties had exchanged possession and before the deal was completed, the male appellant gave notice of repudiation and commenced action to have the agreement declared void for misrepresentation or, alternatively, voidable under the escape clause. The respondent counterclaimed for specific performance. A second action was brought by both appellants against both respondents on the ground that the agreement was void for non-compliance with the *Dower Act*. Both actions were tried together.

*Held:* The appellants were entitled to withdraw from the agreement under the escape clause.

*Per* Kerwin and Estey JJ.: The appellants were also entitled to succeed by virtue of the provisions of the *Dower Act*. The requirements of that *Act* were not complied with and the male appellant was not estopped from asserting his rights under it.

*Per* Kellock and Locke JJ.: No question of dower rights was involved. The male appellant undertook to put himself into a position to convey and his wife must be taken to have undertaken to do whatever was necessary on her part to enable the husband to convey.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment at trial and holding that the agreement for sale and exchange of property was enforceable.

*N. D. Maclean Q.C.* for the appellants.

*G. H. Steer Q.C.* and *G. A. C. Steer* for the respondents.

The judgment of Kerwin and Estey JJ. was delivered by:—

ESTEY, J.:—Under date of September 22, 1949, Thomas Wass and William Pinsky entered into the following agreement:

Thomas Wass is the owner of E½ 20 and S.E. 28 both in Twp. 48, Rge 13-4 and agrees to sell the same Wm. Pinsky for $5,000 clear of encumbrances and taxes.

Wm. Pinsky is the owner of dwelling and lots in the City of Edmonton described as follows: Lots 10 and 11, in Block 106, King Edward Subdivision Plan 1.1 and agrees to sell the same to Thos. Wass for $7,500 clear of encumbrances and taxes.

(1) [1951] 3 D.L.R. 455; 2 W.W.R. (N.S.) 49.

Thos. Wass will pay Wm. Pinsky the difference between $7,500 and $5,000, namely $2,500, in cash and will in addition lend Wm. Pinsky the sum of $800 (so that Wm. Pinsky will have enough cash to pay off encumbrances or agreement for sale against the above described lots). For this reason an agreement for sale will be given by Thos. Wass to Wm. Pinsky covering above described farm lands under which the balance owing will be set out as being the sum of $800 with interest at 5 per cent and the whole payable Nov. 1, 1950. Transfer to be given when the said balance under said agreement is paid.

Wm. Pinsky to give transfer of above lots at time Thos. Wass gives said agreement for sale.

Each party to deposit the sum of five hundred ($500) dollars in accepted bank cheque on the signing hereof and to forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal.

Wm. Pinsky
His Wife Anna Pinsky

T. Wass
His Wife Ella Wass

On October 19 the parties exchanged possession of the aforementioned properties. On October 25 the appellant William Pinsky notified the respondent Thomas Wass that he was withdrawing from the agreement. Wass then took the position which he has maintained throughout that once the respective parties took possession the provisions of the last clause (hereinafter called the escape clause) could not be invoked.

The appellant William Pinsky thereafter brought an action alleging fraudulent misrepresentation and asking that the agreement be declared null and void and, in the alternative, that he had a right to withdraw under the escape clause and consequential relief. The respondent counterclaimed for specific performance.

When it was later discovered that the appellant Anna Pinsky had been, at all times material hereto, owner of lots 10 and 11 a second action was brought by both appellants against both respondents in which, inter alia, it was alleged that the appellant Anna Pinsky was at all times the owner of lots 10 and 11 referred to in the agreement and that the *Dower Act* (1948 S. of A., c. 7) had not been complied with and, therefore, the agreement was null and void. These actions were tried together.

The learned trial judge found that there had been no fraudulent misrepresentation. This was affirmed in the Appellate Division (1) and is not an issue in this appeal.

(1) [1951] 3 D.L.R. 455; 2 W.W.R. (N.S.) 49.

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The appellants here contend that under the escape clause they were entitled to withdraw from the agreement and further that in any event the agreement is null and void because of non-compliance with the *Dower Act*.

As to the escape clause the learned trial judge stated:

> I have come to the conclusion that the clause must be given literal recognition, that the Pinskys before completion changed their minds as the agreement permitted them to do, and that their demand for the house property should have been acceded to.

Chief Justice O'Connor agreed. The other learned judges of the Appellate Division, upon the construction of this clause, agreed with Mr. Justice W. A. Macdonald who, after stating that the agreement would not be completed until November 1, 1950, continued:

> I am unable to conclude that the agreement as a whole means that each party may go on diligently fulfilling his obligations under its terms, only to find in the end that the whole deal has collapsed by virtue of the withdrawal clause. The agreement must be read as a whole, and this clause must be reconciled insofar as reconciliation is possible with the other provisions of the agreement. It is conceded that on the date of the agreement and thereafter so long as matters remained in statu quo either party was free to withdraw and to put an end to the deal. But I do not think this clause enables either party to continue to affirm the agreement and to take benefits under it and still to retain the right to repudiate it. Once a definite step is taken by the parties in part performance of its terms and the continued existence of the agreement is recognized in this manner, then and thereafter the withdrawal clause ceases to have any effect. Such a step took place when the parties exchanged possession and in so doing each elected to be bound by the agreement. The validity of the withdrawal clause and of the agreement as a whole will be dealt with later.

This agreement must be read and construed in relation to the position in which the parties found themselves at the time of its execution and in this regard the evidence is not contradictory. An important circumstance was that Thomas Wass would not be in a position to pay the $2,500 and the loan of $800 until he had sold his grain and cattle. The date of this sale being uncertain, by common consent of the parties a date for the completion of this agreement was not inserted.

The agreement contemplates that it would be completed by the loan of $800, the removal of the encumbrances from lots 10 and 11, the payment of $2,500, the transfer of lots 10 and 11 and an agreement for sale in respect of the farm

for the sum of $800 to be paid November 1, 1950. When all this was done the contract was completed.

I am in agreement with the learned judges who state that this escape clause must be read and construed with the agreement as a whole, but, with great respect, I cannot agree that November 1, 1950, is the date fixed for completion of the contract. On the contrary, the terms of this contract, in the fall of 1949, after Wass had raised the necessary money and the items therein specified had been completed, would be carried out. These items would include an agreement relative to the $800 to be paid on November 1, 1950. This latter agreement, however, while arising out of the contract here in question, would itself constitute another and different contract. The parties had provided that withdrawal might take place under the escape clause at any time up to the date for the completion of the aforesaid items. It would, therefore, appear that the appellants exercised their right to withdraw well within the prescribed time.

It is contended that the exchanges of possession on October 19 and the transfer of the gas, water, light and telephone accounts in Edmonton from appellants to respondents constituted an election, or created an estoppel which prevented either party having recourse to the escape clause. Counsel for the respondents contends that the election is here similar to that of an infant upon becoming of age or a defrauded party upon attaining knowledge of the fraud. The essential difference is, however, that the law places a duty upon such an infant and the party defrauded to make an election upon the happening of the events mentioned, while in this case the contract gave to each party a right to withdraw prior to the completion of the agreement. In the exchanges of possession they were acting in accord with their intention to carry out the contract, indeed the same intention with which they entered into the agreement on September 22 and transferred the post office box at Viking from respondents to appellants. This is not a case where an obligation rested upon either party to do anything in furtherance of their intention to carry out the contract, but whatever they might do they knew was subject to the terms of their contract, including the right to withdraw.

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There is no misrepresentation here present upon which an estoppel might be founded. Each party went into possession on October 19 before Wass had completed his sale and, therefore, before the contract was completed. They did so apparently for their own convenience and with full knowledge of their contractual rights to withdraw. It is in principle similar to that of *Toronto Electric Light Company* v. *Toronto Corporation* (1), where the issues raised concerned the right of the city to remove poles of the Electric Light Company, including those erected by it with the implied consent of the city. The contention that the city, having impliedly consented to the erection of certain poles, could not remove them was dismissed, with the statement at p. 99:

> No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights.

I am equally of the opinion that the appellants succeed by virtue of the provisions of the *Dower Act 1948* (1948 S. of A., c. 7). The Legislature of Alberta in 1917 enacted the first *Dower Act*. It is unnecessary to review the history of that *Act* and subsequent legislation, as in 1948 the then dower legislation (1942 R.S.A., c. 206) was repealed and the Legislature, in enacting a new *Dower Act* (1948 S. of A., c. 7), adopted a somewhat different and more comprehensive approach. While the prevention of the disposition of a homestead by a married person without the consent of that married person's spouse remains the intent and purpose of this dower legislation, the statute of 1948 contains many new features. Dower rights are now given to the husband as well as the wife and for the first time these are specifically defined.

The material part of the definition of dower rights reads as follows:

> 2. In this Act, unless the context otherwise requires,—
>
> (*b*) "Dower rights" means all rights given by this Act to the spouse of a married person in respect of the homestead and property of such married person, and without restricting the generality of the foregoing includes,—
>
> (i) the right to prevent disposition of the homestead by withholding consent;

(1) [1917] A.C. 84.

This definition of dower rights, by including the words "without restricting the generality of the foregoing," discloses an intention not to restrict the spouse to the remedies therein specified. It was never the intention of the Legislature that, though withholding consent in writing and filing a caveat under s. 9, the spouse must then await developments. The creation of a present interest, while the position of the parties remains as in this case, supports an action, such as here brought, for a declaration that the agreement is unenforceable and for an order that possession be restored.

Section 3 expressly prohibits the married person making a disposition of the homestead without the consent in writing of the spouse.

> 3. (1) No married person shall make any disposition by act inter vivos of the homestead of the married person whereby any interest of the married person shall or may vest in any other person at any time during the life of the married person or during the life of the spouse of such married person living at the date of the disposition, unless the spouse consents thereto in writing or unless a judge has made an order dispensing with the consent of the spouse as hereinafter provided for.
>
> (2) Every married person who makes any such disposition of a homestead without the consent in writing of the spouse of such married person or without an order dispensing with the consent of the spouse shall be guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding two years.

The opening words of this s. 3 specifically prohibit "any disposition by act inter vivos of the homestead of the married person . . . unless the spouse consents thereto in writing . . ." Then in s.-s. (2) provision is made for the imposition of a penalty when any married person violates the provisions of s.-s. (1). This direct prohibition, together with the provision for a penalty, makes the agreement legally unenforceable at the instance of the married person. Indeed, under the general rule, the contract would be void. That, however, is a matter of construction, as stated by Viscount Haldane in *Cornelius* v. *Phillips* (1):

> These words do not appear to be ambiguous . . . So standing they are clear, and they prohibit, and therefore make void, any contract which contravenes them . . . There might have been inserted in the statute a special context which would have modified the application of the general rule, but there is nothing in the actual context to exclude the ordinary result which follows in law when a statutory prohibition is disregarded.

(1) [1918] A.C. 199 at 211.

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There is here present, in the actual context, a clear intention that the agreement shall not be void but contemplates that the agreement may be carried out and a transfer pursuant thereto registered in the Land Titles Office; that upon such registration the land shall be no longer a homestead (s. 4(2) (1)) and thereafter the married person shall be liable to the spouse in damages (s. 12(1)) which, when not recovered, may be satisfied from the assurance fund (s. 2(*b*) (iii)). These sections indicate that the Legislature intended the agreement should be voidable rather than void and emphasize that the position of the spouse prior to registration is quite different from that after registration.

In the more usual case the spouse would not be a party to the disposition. In this case William Pinsky, under the belief that he was the owner of lots 10 and 11, was a party to the agreement. Throughout he acted only after consultation with his wife and, once it was ascertained that she was the owner, it has been, quite properly I think, accepted throughout this litigation that whatever he did was as her agent. In the result, however, I do not think that alters the position in law. The statute requires (s. 6) that the spouse, in this case William Pinsky, must evidence his consent in writing and acknowledge, apart from his wife, that he was aware of the nature of the disposition; that he had a life estate in the homestead and the right to prevent its disposition; that he consented for the purpose of giving up his life estate and other dower rights and that he did so freely and voluntarily, without any compulsion on the part of the married person. This requirement of the statute was not complied with, nor does the evidence establish any basis for holding that he is estopped from asserting his dower rights. There is no evidence that he was aware of his dower rights; in fact, throughout they were never mentioned. In these circumstances William Pinsky, as spouse, is not estopped from the insistence upon his dower rights.

Mrs. Pinsky deposes that the premises described herein as lots 10 and 11 were her home and that the basement and rooms in the upstairs had been rented "off and on." This evidence is not sufficient to justify a conclusion that these premises are not her homestead. The evidence discloses that William Pinsky owned a farm, but he states positively that he had lived at these Edmonton premises

four or five years. Under these circumstances the contention that this is not the homestead of Anna Pinsky and that William Pinsky is not entitled to dower rights therein cannot be maintained.

The agreement in writing specifically provided that both agreed to sell their respective properties. While Pinsky agreed to transfer his property, Wass undertook to transfer his property and pay an amount of money. With great respect to the learned judge who expressed a contrary view, this writing would appear to constitute an "agreement for sale" and, therefore, a disposition within the meaning of s. 2(*a*).

The appeals should be allowed with costs here and in the Appellate Division. No question was raised as to the learned trial judge's direction that the respondents might retain the $500 and his judgment should be restored, with para. 5 thereof varied to read as follows:

AND IT IS FURTHER ORDERED AND ADJUDGED that the claim of the plaintiffs based upon misrepresentation be dismissed.

TASCHEREAU J.—I do not think that for the determination of these appeals, it is necessary to consider the question raised as to the application of the *Dower Act*.

For the reasons given by my brothers Kellock and Estey on the effect of the "Escape Clause", I would allow the appeals, and restore the judgment of the trial judge with costs here and in the court below.

The judgment of Kellock and Locke, JJ. was delivered by:—

KELLOCK, J.:—Two points arise in this appeal. In the first place, it is said on behalf of the appellants that as the Edmonton premises were in fact the property of the appellant, Anna Pinsky, the appellant William Pinsky was entitled to dower rights, and that as the agreement of September 22, 1949, did not comply with the provisions of the relevant statute, 1948, c. 7, the respondents must fail.

In my opinion this statute does not afford any assistance to the appellants. Under the agreement in question, William Pinsky contracted as "owner". As at that time the title was in his wife, he was in fact contracting to put himself into a position to convey. The appellant Anna Pinsky, by her execution of the document, must be taken

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to have been undertaking with the respondents to do whatever would be necessary to enable her husband, at the proper time, effectively to convey. Accordingly, in my opinion, no question of dower rights on the part of the male appellant is involved. This is the only point taken with respect to the statute.

The remaining question arises under the so-called "escape clause", which reads as follows:

> Each party to deposit the sum of five hundred ($500) dollars in accepted bank cheque on the signing hereof and to forfeit the same in case he changes his mind or for other reason cannot complete contemplated deal.

Under the earlier terms of the agreement, the respondent Thomas Wass agreed (1) to pay to appellant William Pinsky $3,300 (of which $800 was to be a loan), and (2) to enter into an agreement of sale of the Wass farm to the male appellant for $800, payable November 1, 1950, with interest at 8 per cent. Concurrently with the execution and delivery of this agreement of sale, Pinsky was to execute and deliver to Wass a transfer of the Edmonton property. Pinsky, however, was not to receive a transfer of the farm until the monies called for by the agreement of sale should be paid.

No time was fixed by the written agreement for the payment of the $3,300 and the execution and delivery of the documents, but it is common ground that this was to occur only after the respondent Wass had been able to sell his farm, stock and implements. Thus, the "contemplated deal" would be completed. The evidence of the male respondent is perfectly clear on this point. He deposed also that he was depending upon the sale for the money to enable him to complete. It is, therefore, to the period between the execution of the agreement of September 22, 1949, and the date of completion to which the escape clause relates. At any time within this period either party might, according to the express term of the contract, withdraw.

Before the sale of the farm stock and implements occurred, the respondent Ella Wass and her son, on October 19, moved into the Edmonton house, and the Pinskys, with their son-in-law, moved out to the farm, but the respondent Thomas Wass continued to live there also. The day following the execution of the agreement of September 22,

the Pinskys, who had spent the night on the Wass farm, changed over the rural mail box from the respondents to the appellants and when the respondent Ella Wass and her son moved into the city house, the city gas and water services were changed over to Wass.

It appears that the Pinskys had intended that the farm should be operated by their son-in-law, a veteran, who, following upon the execution of the agreement of September 22, applied to a department of the provincial government for a loan upon the farm under certain legislation pertaining to veterans. The loan, however, was refused by the government official in charge on the ground of the poorness in quality of the land. On learning this, the Pinskys, on October 25, the day preceding the sale, advised the male respondent that they declined to go on with the transaction and their reason for so doing. On the 27th of October, the day after the sale of the stock and implements, they and their son-in-law left the farm.

It is argued on behalf of the respondents that it was then too late for the Pinskys to attempt to avail themselves of the escape clause. Before considering this contention, it may be observed that had there been no change of possession at all, but had Wass nonetheless sold his stock and implements, the appellants might still, under the term of the agreement, have declined to complete. In such case, the only recourse of Wass would have been to retain the appellants' deposit of $500. Such a situation would have been much more prejudicial to Wass than was the actual situation when the appellants advised him of their change of intention. At that time he had not carried out his proposed sale and, had he seen fit, could have cancelled it.

Had the sale, when it did occur, failed to produce the necessary monies to enable Wass to carry out the transaction, it is difficult to see how the express right given him by the contract to decline to go on "in case he . . . for other reason *cannot* complete" would no longer have availed merely because, in the expectation that no such difficulty would arise, he had allowed the Pinskys on to the farm and had placed his wife and son in the city house. If that be so in the case of the respondents, there would seem to be no more reason why the same result should not

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follow in the case of the appellants when a situation arose which they had not expected. All this, it seems to me, is covered by the express term of the agreement between the parties. In my opinion the clause must be given its literal effect, and should be construed as a provision designed to meet all eventualities, the only consequence of failure to complete being the loss of $500.

The problem which arises in the case at bar is not without analogy to that arising under the implied condition that a vendor in the absence of something to the contrary must make out a good title. In the present case the time within which to comply with that condition would be at any time prior to the date of closing.

As stated in the 8th edition of Dart, p. 443: "Possession, if taken . . . with the consent of the vendor is not in itself, as a general rule, any waiver of the purchaser's right to a good title. Spragge, V.C., in *Mitcheltree* v. *Irwin* (1), puts the matter thus at 542:

> The mere taking of possession by a purchaser is not necessarily a waiver of the right to an inquiry as to title. The Court will not hold it to be so unless satisfied that it was the intention of the purchaser to take the land without such inquiry; . . .

In my opinion, it is at least equally the case that under a clause such as that here in question the mere taking of possession is not sufficient to establish that the respondent Wass intended to preclude himself from the right to refuse to complete if it should turn out that he did not receive sufficient monies from the sale of his stock and implements to enable him to do so. If that be so, the appellants equally are not precluded from relying upon a "change of mind" which the agreement expressly provides could occur at any time up to the actual exchange of documents.

The appeal should be allowed and the appellants should have judgment for the relief granted by the learned trial judge with costs throughout.

*Appeal allowed with costs.*

Solicitors for the appellants: *Maclean & Dunne.*

Solicitors for the respondent: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

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(1) (1869) 13 Gr. 537.