SISCOE GOLD MINES LIMITED (DEFENDANT) ..... APPELLANT;

AND

FELIX BIJAKOWSKI (PLAINTIFF) ..... RESPONDENT.

1934
*Nov. 8
*Dec. 21

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

Evidence—Contract—Admissibility of oral testimony—Transfer of shares —Verbal condition as to their return—Whether a loan or a gift.

The respondent, by virtue of a transfer of their rights by two associates to himself, claimed to be the owner and demanded the delivery to him of 30,000 shares of the Siscoe Gold Mines Limited, which he alleged had been lent by way of a transfer by himself and his associates to the appellant company, on the condition that a like number of shares would be returned by the appellate company upon its mining properties being brought into production. The appellant company pleaded that the above transaction was carried out by the president of the company without authority expressed or implied and was never ratified by it, and, in the alternative, that in any event the above shares were not lent as alleged by the respondent, but were given or donated without condition as to their return. On the first point raised by the appellant company, after hearing its counsel, this Court decided that the findings of fact of the trial judge in favour of the respondent, unanimously affirmed by the appellate court, should not be disturbed; but this Court decided to hear the respondent on the question of law, raised by the appellant company in support of its second point, concerning the admissibility of oral evidence to prove the loan of the shares.

Held that, under the circumstances of this case, oral testimony was admissible. As both parties were admitting the existence of some contract for the transfer of the shares, parol evidence could be adduced to determine whether the transfer was conditional or unconditional and whether the shares were to be returned to the respondent and his associates as having been merely loaned. *Campbell* v. *Young* (32 Can. S.C.R. 547) foll.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Loranger J. and maintaining the respondent's action and condemning the appellant to deliver to respondent 30,000 shares of appellant's capital stock and to pay to the respondent the sum of $4,200.00 the amount of dividends declared on a like number of shares, or in the event of the appellant failing to deliver the said shares, to pay to the respondent the sum of $51,600.00, being the market value of the said shares with the dividends aforesaid.

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

1934

SISCOE GOLD MINES LTD. v. BIJAKOWSKI.

The material facts of the case and the questions at issue are stated in the above headnote and in the judgment now reported.

Henry N. Chauvin K.C. and *E. S. McDougall K.C.* for the appellant.

Aimé Geoffrion K.C. and *B. Robinson* for the respondent.

The judgment of the Court was delivered by

CANNON J.—This appeal is asserted from the unanimous judgment of the Court of King's Bench confirming the judgment of the Superior Court (Loranger J.), which maintained respondent's action and condemned appellant to deliver to respondent 30,000 shares of appellant's capital stock and to pay to respondent $4,200, the amount of dividends declared on a like number of shares; or, in the event of the appellant failing to deliver the said shares, to pay to the respondent the sum of $51,600, being the market value of the said shares, reserving also a recourse to be discussed later.

The respondent claims to be the owner and demands the delivery to him of 30,000 shares of the Siscoe Gold Mines Limited which, he alleged, had been lent by himself and his associates, Joseph Hoffman and Joseph Pluto, to appellant on the 21st day of January, 1927, on the condition that a like number of shares would be returned by the appellant upon its mining properties being brought into production. Artifice, fraud and error were also alleged as vitiating the transaction.

The respondent sues in the right of himself and his associates by virtue of a transfer by Pluto and Hoffman to respondent.

The appellant says in defence that the transactions in connection with the above-mentioned shares were carried out by one J. T. Tebbutt, the president of the appellant company, without authority, expressed or implied, and that whatever contract was entered into or understanding arrived at between him and other persons associated with him is not binding upon appellant, who, moreover, never ratified the action of its president.

Under reserve of the foregoing plea, the appellant pleaded, in the alternative, that in any event the said shares which were transferred to the Eastern Trust Com-

pany as trustee of certain shares of the capital stock of the appellant were not lent, as alleged by respondent, but were given or donated without condition as to their return.

The respondent and his two associates Pluto and Hoffman were the original discoverers of the Siscoe Gold Mines and obtained for their interest a certain number of shares in the appellant company. The president, Mr. Tebbutt, went to Timmins and gathered together the three illiterate associates and, according to their version, which was unanimously accepted by the courts below, disclosed to them that the company needed funds, and that, in order to carry out a plan which would bring production and profit, other members of the syndicate and officers, including Mr. Tebbutt and Mr. Siscoe, the president and the vice-president of the company, had already loaned to the company a certain number of shares. These foreigners agreed to the demand of the president and took his word that this was a loan, and signed the document which he prepared, i.e. an authorization to split up three certificates of 20,000 shares each so that half would go the company and the other half back to each of them. Eventually the division took place and each received back a certificate of 10,000 shares; and the other shares were placed in the company's treasury account with the Eastern Trust Company. In reply to a demand for a return of these shares, the appellant contended that it never received them, that it had nothing to do with them, or, in the alternative, that they were donated unconditionally.

It was proven that the company actually received the shares and disposed of them in order to reimburse itself of a commission of 10 per cent in cash and 15 per cent in stock payable to W. R. Baillie through whom one G. N. Coyle had agreed to invest $75,000 with the company, under the express condition that no commission was to be paid out of the funds of the company. Whatever may have been the promise made by Siscoe to Coyle, the fact is abundantly established that the commission was paid by the appellant and that the proceeds of the sale of the 30,000 shares were deposited to the credit of the respondent. After these shares were transferred to the treasury in the hands of the Eastern Trust Company, they lost their identity and could not be further traced.

1934

SISCOE GOLD MINES LTD. v. BIJAKOWSKI.

Cannon J.

After hearing the appellant, this Court decided that the findings of fact of the trial judge, unanimously confirmed by the Court of King's Bench, should not be disturbed; and, we, therefore, in view of the character of the evidence given, say that the shares were not donated to Tebbutt, nor to the company, by the respondent; that they were loaned to the company, who received them and placed them in its treasury, in the care of the Eastern Trust Company.

If respondent agreed to deliver, and did deliver, their shares to appellant, what that company or its officers did after is more or less irrelevant, except to show that it benefited from them. If they are not in the treasury, they must have been disposed of for the purposes of that company. In either case, the company's liability towards the respondent would not disappear.

The company was in operation when the action was taken and the time had then arrived when the loan had to be repaid. If, as pleaded, the company never authorized this agreement nor the receipt of these shares, there seems to be no good reason why it should not return them. There can be no question of a donation to the company, because the latter has expressly pleaded that never, at any time, through its board of directors or by officers duly authorized, were these shares accepted. Moreover, the evidence and the findings of the courts below disprove this contention. Both courts below reached the conclusion that the only witness heard on this point on behalf of the appellant is unreliable, and on this question of credibility, great consideration must necessarily be given to the findings of the trial judge who heard and saw the witness. Moreover, it is more than doubtful that such a gift could be legally made in the form of a verbal agreement. Art. 776 C.C.

This Court, therefore, decided to hear the respondent only on the question of law raised by the appellant concerning the admissibility of oral evidence to prove the loan of these shares.

In view of the rejection by the trial judge of Tebbutt's version of what took place when the respondent and his associates signed the authorization to transfer the 30,000 shares to the appellant and the adoption below and by

this Court of respondent's evidence, the only possibility for the appellant to succeed was to have this verbal evidence set aside as illegal. Our attention was drawn to the following part of respondent's testimony:

Q. Before you brought Hoffman, Pluto and Steinslick, did Mr. Tebbutt tell you what he wanted?

By defendant's counsel: I make a preliminary objection to anything said by Mr. Tebbutt, to the witness prior to the signing of these documents, in view of the fact we have not only this document referred to by Mr. Genest, but we have a transfer signed by the plaintiff and the other parties, of the shares in question.

And I make formal objection to any evidence as to what was said, which was preliminary to the signing of these documents.

By the Court: It explains the circumstances under which the deed was signed. Reserved.

Tebbutt was subsequently brought forward by the appellant to prove the alleged donation or gift of the shares, after he had explained to them that he had to have this stock to liquidate the alleged personal debt of vice-president Siscoe to Baillie. The trial judge gave his decision in the final judgment:

Objection est faite à toute preuve verbale comme tendant à contredire l'écrit. En remarquant que le document P. 1 ne définit aucunement la nature de la convention, pour l'interpréter il faut donc connaître les circonstances dans lesquelles l'écrit a été signé afin de se rendre compte de l'intention des parties et de lui donner effet; sans cela, il est impossible de décider le bien ou mal fondé de la réclamation. Qu'est-ce que l'écrit comporte? Est-ce un don manuel? Est-ce un prêt? Pour répondre à ces trois questions, il faut nécessairement savoir ce qui s'est passé; et seule la preuve peut nous le révéler. L'objection est rejetée.

Exhibit P. 1 reads in part as follows:

We the undersigned owners of 20,000 shares each of the Siscoe Gold Mines Company stock do hereby authorize the secretary of the Siscoe Gold Mines Company or the Eastern Trust Company of Montreal to split each 20,000 shares of stock into two certificates, one certificate for ten thousand shares to be made out to the Siscoe Gold Mines Company, and one certificate for ten thousand shares to the undersigned.

Joseph Pluto.
Joseph Hossman.
Felix Bijakowski.

The declaration alleges that the above document was signed at the request of Tebbutt, the president of the company appellant, who represented that a group of shareholders were lending a portion of their holdings to the company in order to bring it into production sooner; that the president took advantage of the fact that the plaintiff and his two companions were illiterate foreigners and

1934

SISCOE GOLD MINES LTD. v. BIJAKOWSKI.

Cannon J.

deliberately drafted the document in indefinite terms, leading them into error and making them believe that they, in consort with other large shareholders, were lending to the company a large amount of stock which would be returned immediately after the company would begin producing; and that the plaintiff, Pluto and Hoffman were induced to sign the said document through artifice and fraud.

Plaintiff's allegation that the whole transaction was tainted with fraud and false representation, might have supported the trial judge's decision to admit parol testimony, although his judgment does not mention that ground and he did not find fraud against Tebbutt. In support of the admissibility of the evidence, it might also have been considered whether or not the writings, the books of the company, the attitude of some of the appellant's witnesses in the box, which was severely criticized by the trial judge, were not sufficient to constitute a "commencement de preuve par écrit" which would make probable the loan alleged by the respondent. In fact, some of the learned judges below adopted the view that such a foundation for oral testimony existed and quoted this Court's decision *re Campbell* v. *Young* (1). Under that precedent, both parties admitting the existence of some contract, parol evidence could be adduced to determine whether the transfer was conditional or unconditional, whether the shares were to be returned or not.

Moreover, even if the verbal evidence of what took place at Timmins, when exhibit P. 1 was prepared by Tebbutt, president of the company, and signed by the respondent, be rejected, we must not lose sight of the overwhelming evidence in writing showing that the company acted pursuant to the authority given, received the shares, placed them in its treasury and refused to hand them over.

To justify the possession and retention of the shares, the appellant alleges a free gift or donation. It was incumbent upon it to prove its title. *Reus excipiendo fit actor.* It failed to discharge the onus and the appellant having admitted respondent's ownership of the shares before the transfer, the plaintiff's case was complete and he was entitled to judgment. The transaction was either *res inter alios acta,* or is really, as found by the trial judge, part of

(1) (1902) 32 Can. S.C.R. 547.

the business of the company and has been repeatedly ratified and acted upon by it, as appears in the books of the appellant and its bank account. The appellant, having received both the shares and the full benefit thereof (although it contended it had nothing to do with them), and having failed to prove its title thereto, cannot succeed. The attempt to bring Tebbutt before the Court to prove the contention that no one was bound to return respondent's property proved futile. This verbal evidence of Tebbutt, essential to prove appellant's version, was tendered by it after it had objected to similar verbal evidence on the same point by plaintiff, Hoffman and Pluto. It was allowed by the trial judge, but evidently was not believed.

We, therefore, reach the conclusion that the point raised before us by the appellant cannot prevail.

But, says the appellant, if the conclusion be reached that the act of the company was such as to justify the finding that the company actually received the shares, the respondent, in that event, should recover only the amount for which the shares were sold, viz $9,750.

On the other hand, the plaintiff seeks the application of article 1782 of the civil code. He claims to be entitled to the return of the shares loaned or, in default, to their full value which, under the circumstances of this case, would include the increased value of the shares since the appellant refused to remit them to the respondent.

The trial judge made a special reservation of the rights of the respondent for the losses he might suffer through the fluctuations of the market.

The trial judge fixed the value of the shares on the basis of 30,000 at $1.58 a share, the price of the stock on the day of the judgment. Since that date, the stock may have gone up in price and, by the failure to deliver the stock, the respondent may have been deprived of the opportunity of disposing of the shares at a favourable price. The appellant is given the alternative to deliver the shares or to pay the amount of the judgment. Without the reserve made by the trial judge in favour of the respondent to claim any loss resulting from the company's failure to deliver the stock at the proper time, the appellant to-day would pay the amount of the judgment and not deliver the stock. It could then dispose of the shares which belong to the re-

1934

SISCOE GOLD MINES LTD. v. BIJAKOWSKI.

Cannon J.

spondent and profit unduly at the expense of the respondent to the extent of any difference between $1.58 and the price to-day.

This reservation would seem to be within the scope of 1073, 1074 and 1075 of the civil code because, when the company decided to refuse delivery of the stock, it must have known and it knew that the value of the shares would fluctuate and it accepted the risk of paying the highest price between the time of the demand and the delivery.

We, therefore, see no good reason to strike the reservation from the judgment as suggested by appellant's counsel. These remarks are made without prejudice to the rights of either party, should it become necessary for the respondent to take another action to recover over and above the amount of the judgment, in case the company would not return the shares.

We will therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wainwright, Elder & McDougall.*

Solicitors for the respondent: *Robinson & Shapiro.*