2nd. 1950

In the Supreme Court of Canada

Record

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Formal Judgment

2nd June, 1949

Thursday, the 2nd day of June, A.D. 1949.

Present :

THE RIGHT HONOURABLE THE CHIEF JUSTICE OF CANADA

THE HONOURABLE MR. JUSTICE KERWIN

THE HONOURABLE MR. JUSTICE TASCHEREAU

THE HONOURABLE MR. JUSTICE RAND

THE HONOURABLE MR. JUSTICE LOCKE

BETWEEN

HARRY REEDER ... ... (Plaintiff) APPELLANT

AND

GEORGE E. SHNIER & CO. ... ... (Defendant) RESPONDENT

The appeal of the above named Appellant from the Judgment of the Court of Appeal for Ontario pronounced in the above cause on the 23rd day of April in the year of Our Lord One Thousand Nine Hundred and Forty-eight reversing the Judgment of the Honourable Mr. Justice Smiley rendered in the said cause on the 30th day of October in the year of Our Lord One Thousand Nine Hundred and Forty-seven, having come on to be heard before this Court on the 16th and 17th days of March in the year of Our Lord One Thousand Nine Hundred and Forty-nine in the presence of counsel as well for the Appellant as for the Respondent, whereupon and upon hearing what was alleged by counsel aforesaid this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment, this Court did order and adjudge that the said Judgment of the Court of Appeal for Ontario should be and the same was affirmed and that the said appeal should be and the same was dismissed with costs to be paid by the said Appellant to the said Respondent.

PAUL LEDUC,
Registrar.

The Judgment of the Chief Justice and Rand, J. was delivered by :—

RAND, J. :

This appeal arises out of a motion made under Rule 523 to set aside a judgment on the ground of fraud or of matters arising since the judgment. The action was brought by the Appellant on a contract to furnish what are described as " polaroid demonstrators ", consisting of a cardboard stand containing an electric light inside presenting a reflection from a photograph of a street, and furnished with a visor attached to the upper front part through which a correcting effect in vision is brought about. The visor is made of a patented material which by polaroid action on the light rays eliminates the glare which motorists frequently meet ; and it can be lifted to enable a person to appreciate by contrast the change it produces. The stands are somewhat over a foot in height and of similar dimensions in length and width and are used by retail sellers of the material. The Defendant had a licence for the sale of the product and gave an order to the Plaintiff dated February 20th, 1946, but quite evidently signed some days after that, for 2,000 demonstrators more or less, within 10 per cent. at a price of $3.00 each. The first 1,000 were delivered and paid for ; but various points of dispute arose about the second lot which the order contemplated would be spread over three months and in the result they have not actually been delivered yet.

The relief claimed was the price plus the sales tax for 1,059 units, namely $3,431.16. On opening, counsel stated the action to be in essence one for damages for non-acceptance. The trial judge found the Defendant to have been at fault ; that if untenable grounds had not been raised by him, delivery of the remainder of the articles would have taken place as with the first lot. The judgment was that the Plaintiff " recover from the Defendant the sum of $3,431.16 payable upon delivery of the 1,059 Display Stands referred to in the pleadings herein by the Plaintiff to the Defendant fully completed (if the Defendant shall within fifteen days from the the date hereof deliver to the Plaintiff the Polaroid sheeting required to complete the visor or screen of the said Stands) or upon delivery of the said 1,059 Stands completed without the Polaroid visors or screens if the Defendant shall fail to deliver the Polaroid sheeting therefor within the said period of fifteen days from the date hereof " ; and on appeal it was affirmed.

The stands were built of four or five sections of cardboard, all of which for the entire order were cut or " run " at one operation in or about April. These sections would be brought together, shaped along creases and fastened to form the enclosure. Then there was an electric unit consisting of an insulated wire with a plug at one end and bulb container at the other. A metal binder held the container, and the unit was so designed as to avoid danger of fire. The visors and bulbs were to be furnished by the Defendant. The stands were to be according to " a sample submitted to Canadian

Standard Association and approved " by that Association. A sample had been submitted by the Defendant in November, 1945. He was a member of the Association which would not deal directly with the Plaintiff, a non-member, otherwise than as representing the Defendant. Directly or indirectly through the latter, the Plaintiff received from the Association about 1,500 labels which apparently indicate approval. There was difficulty in obtaining cartons in which each stand was to be packed and made ready for shipment and the first lot was furnished by the Defendant.

When, in June, 1946, the latter failed to deliver the remaining visors and made his first attempt at declaring the contract at an end, the remaining cardboard sections were ready to be set up, but objections had been raised by the Association to features of the electric unit. The Plaintiff claimed the unit used was that approved, but he showed every disposition to meet the requirement then made and went about obtaining the necessary materials. This he was able to do by September. The writ in the action was issued August 23rd, 1946, and from, say October 1st of that year until after the judgment in appeal in June of 1947, the sections, electric units, about 500 labels and the remaining material required, except visors, bulbs, labels and containers, were held in storage in premises of the Plaintiff. During that time some damage by water to what is said to be over 300 sections was done, certain parts seemingly disappeared and one lot of 100 electric units was stolen. The correspondence makes it clear that the Plaintiff did not desire to add to the outlay already made until he knew that the goods would be paid for on delivery as the contract provided.

At the trial the real issues were the grounds of repudiation. In the course of his evidence the Plaintiff was asked briefly about the work done to the balance of the order :—

" *Q.* Was your company doing all the manufacturing work itself ?

A. No.

Q. Then part of the work was being done by sub-contractors ?

A. That is correct.

Q. Was the job done in part or all as one job, as far as the production was concerned ?

A. It was all run at one time.

Q. The entire amount was run at one time ?

A. The entire order.

Q. The entire order ?

A. Yes.

Q. Where was the assembly to take place ?

A. It took place at the different sub-contractors' premises.

Q. Was there some place in which the different parts being made by the sub-contractors were brought together ?

A. Yes, they were sent to Long Branch.

Q. To your plant at Long Branch ?

A. That is correct.

Q. Then, have you received from the Defendant any money in respect of the undelivered Polaroid Demonstrators ?

10 *A.* None.

Q. Your statement of claim says you had 1,059 on hand ?

A. Yes.

Q. Are they available to be delivered on request ?

A. We can deliver at once, yes, provided the Visor is supplied to us."

There was no cross-examination on these answers or their subject matter. When after the judgment in appeal it was discovered that there had been damage, that some of the parts were missing, and that the " assembly " was needed, that in short, the Plaintiff had not been ready " to deliver at once ", the application to set aside was launched. The 20 motion was heard by the judge who had presided at trial, and he found against fraud and dismissed it. But the Court of Appeal, taking a different view of the matter, reversed his ruling and vacated the judgment. The Court found what it considered to be convincing evidence of a wilful and deliberate intent on the part of the Plaintiff to deceive the trial judge, and in effect branded him as having committed perjury in order to obtain the judgment which he did.

Reeder had turned the matter over to his superintendent to carry through and the evidence shows him to have been in Vancouver both in the Spring of 1946 and in December of that year. It is important that from the 30 time of the writ when the matters were in effect handed over to the solicitors, until the trial in March, 1947, nothing had been done except to get in the approved electric units and keep the material in storage. In December, 1946 Reeder had been informed of the damage, but, as he asserts in the examination on his affidavit for the purposes of the motion, he did not know even on that occasion exactly the extent of the damage or what would have to be done to complete the order ; but nobody suggests he had any notion that he would be entitled to the money claimed without furnishing all the stands according to the terms of the contract. At the trial the matter

might not have occurred to him at all, or he might reasonably have thought that the question would arise only when the stands were being completed.

It is patent to me that at most what he had in mind in the litigation was what a layman might in the circumstances very easily have had, a ruling that would enable him to proceed to complete his contract and force the Defendant to do likewise. To suggest that he appreciated the distinction between an action for damages to which obviously he was entitled but for which the evidence was not led, and one for what is in substance as it appears here a decree of specific performance is to credit him with a perception of technical difference which should be reserved for those engaged in the proceeding in other capacities. When he declared that, " provided the visor is supplied to us, we can deliver at once ", he was speaking in terms of business. The Defendant was acquainted with the assembling of these parts ; he listened to this statement by the Plaintiff ; and yet not a word suggested any reason for pursuing the subject further. It must have been obvious to him and to everybody who was familiar with the facts that assembling in some degree was necessary, and if the details were not pressed for it would be an extraordinary thing to visit the responsibility on the Plaintiff. He was, in other words, using a sort of business shorthand in expression. His letter of June 3rd, 1946, before the Court, in which he refers " to the balance of your order which we are holding for assembling " puts this beyond doubt. There is also the following paragraph in the letter of June 18th :—

> " As to the other Demonstrators, namely the balance of a thousand on order referred to in your first question on page 2, if you will agree to pay for the same as per the contract when delivered, namely C.O.D., we shall proceed with them and give you a definite date. We cannot give you a date now under present conditions—we are endeavouring to locate the materials, namely several new parts required by the Canadian Standards Association."

That assurance was never given.

The Chief Justice suggests a like concealment by Reeder from his own counsel : but I should say that if counsel was not aware of the actual state of things, i.e. the fact that the sections had to be assembled as the Plaintiff had in mind, then the fault was not that of the Plaintiff : and what possible benefit or advantage the appellant could have thought to obtain by such a deception, I am at a loss to imagine, unless as I decline to do, we treat this man as being as unintelligent as he has been held to be dishonest. There was, as is seen, no precise limit of time under the judgment within which these stands were to be delivered and the inconvenience resulting from the work still to be done and that omission, has now become evident. But these features are simply strong reasons against the form of judgment. The controlling and uncontested circumstance is that it expressly contemplated further work to complete the stands.

In these circumstances, to find that perjury has been committed by a man whom the court has not seen against the opinion of the judge who heard him as a witness is, I think, to pay an insufficient regard to the long settled rule in such situations, especially when such serious consequences to reputation are involved, as well as to the principle of the finality of judgments and the termination of litigation. If formal adjudications are to be set aside on evidence of this sort and by attributing appreciation of technical considerations of law to men not familiar with them, it would be difficult to say where the process would stop. To take the Plaintiff as speaking in any other than business terms behind which as between himself and the Defendant there was an understanding of all the matters except that of the damage, would, I think, be quite unwarranted.

To brand a man with such a grave offence in proceedings in which the evidence is in part by affidavits and part by examination on them conducted out of court, it is imperative that the proof leave no serious doubt in the tribunal of his guilt ; but with the greatest respect for the Court of Appeal, I am quite unable to give to the facts relied on here any such weight or value. I would, therefore, allow the appeal and restore the order of the judge who heard the motion with costs here and below.

The Judgment of Kerwin and Taschereau, JJ. was delivered by :

KERWIN, J. :

The appeal should be dismissed with costs for the reasons given by the Chief Justice of Ontario. The evidence of the plaintiff Reeder on the trial of the action, at page 31 of the record, is the important evidence and there, with reference to the 1,059 Polariod Demonstrators, he said :—" We can deliver at once, yes, provided the visor is supplied to us ". It has now been shown that this statement was false. When read in connection with the other evidence and in the light of the kind of action that was brought, it appears to me, as it did to the Court of Appeal, that Reeder committed a fraud on the Court and should not have recovered a judgment such as he did if what are now shown to be the facts had been presented to the Court.

LOCKE, J. :—

I agree with the reasons for judgment delivered in this matter by the learned Chief Justice of Ontario and with his conclusion and would dismiss this appeal with costs.

In the Privy Council — Order in Council granting special leave to Appeal to His Majesty in Council — 21st December, 1950

[L.S.]

AT THE COURT AT BUCKINGHAM PALACE.

The 21st day of December, 1949

Present :

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR. SECRETARY SHINWELL

MR. SECRETARY NOEL-BAKER — MR. STRAUSS

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 12th day of December 1949 in the words following, viz :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Harry Reeder in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and George E. Shnier & Company Respondent setting forth (amongst other matters) : that the Petitioner desires special leave to appeal from a Judgment of the Supreme Court dated the 2nd June 1949 which by a majority dismissed the Petitioner's Appeal from a Judgment of the Court of Appeal of Ontario dated the 23rd April 1948 which (i) had set aside an Order in the Petitioner's favour dated the 30th October 1947 (ii) had set aside a Judgment in the Petitioner's favour dated the 19th March 1947 in an action by the Petitioner against the Respondent (iii) had restrained the Petitioner from enforcing a previous Order of the Court of Appeal and (iv) had ordered the Petitioner to pay costs : that the dispute between the parties arose from a contract dated the 20th February 1946 but not signed until about the 26th February 1946 for the supply by the Petitioner to the Respondent of 2,000 (10 per cent. more or less at the Petitioner's option) display stands according to sample submitted to and approved by The Canadian Standards Association 1,000 immediately and 1,000 as required within the next three months packed in cartons ready for shipment at a price of $3 each plus sales tax the Petitioner not being responsible for delays caused by failure to get material strikes fires or other causes not fully within the Petitioner's power or control : that in April the Petitioner delivered 950 or 1,000 display stands for which the Respondent eventually under pressure paid : that on the 5th June 1946 (after written complaint by the Petitioner that the Respondent was not calling for delivery of the balance within three months as provided in the contract) the Respondent purported by reason of an alleged non-conformity to sample in the display stands

delivered to cancel the balance of the order ' pending satisfactory deposition of the first thousand ' : that the case is of the greatest importance to the Petitioner because the Court of Appeal in Ontario and the majority in the Supreme Court of Canada have (wrongly in the Petitioner's submission) held that the Petitioner was guilty of obtaining a Judgment in his favour by knowingly giving false evidence and had therefore been guilty of fraud and perjury: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the Supreme Court dated the 2nd June 1949 and for such further or other Order as to Your Majesty in Council may seem just:

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 2nd day of June 1949 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

" AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.