Ishitaka v. British Columbia Land and Investment Agency, Ltd.

Between
Ishitaka, and
British Columbia Land and Investment Agency, Limited

[1911] B.C.J. No. 41

16 B.C.R. 299

British Columbia Court of Appeal
Vancouver, British Columbia

Macdonald C.J.A., Irving and Martin JJ.A.

Heard: November 23, 1910.
Judgment: June 6, 1911.

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1 **MACDONALD C.J.A.**:-- The defendant was mortgagee of chattels owned by the plaintiff, and the mortgage moneys being in arrear, sold the chattels to one J.R. Bowes about the 1st of April, 1909, the sale being conditional upon the failure of the plaintiff to discharge the sum due on the mortgage before 12 o'clock noon on the 1st of May. About the 21st of April defendant served a notice on the plaintiff that if be did not pay this sum before the hour above mentioned the chattels would be sold by private sale for $1,500, and on the same day a bailiff was sent, accompanied by the purchaser, to seize and take possession of the chattels. The purchaser says that he was really acting for the bailiff and as man in possession until the 1st of May, after which date if the plaintiff failed to pay the amount due on the mortgage the purchase was to become absolute. The [16 BCR Page301] plaintiff was no party to this arrangement, and does not even appear to have been notified of it otherwise than by the notice above mentioned. Bowes, the purchaser, paid at least part of the purchase moneys to defendants' solicitors before the 1st of May. There is no evidence that any attempt was made by defendants to obtain a better price than $1,500, which was the sum claimed by it under the mortgage. No advertisements were published, nor was anything done by the mortgagor other than to make this conditional sale to Bowes and to notify the plaintiff as aforesaid. The purchaser admits in his evidence that he got a "highly desirable" bargain.

2 Before the 1st of May, Mr. Wallbridge, plaintiff's solicitor, made several attendances upon Messrs. Livingstone, Garrett & King, defendants' solicitors, in an endeavour to come to some arrangement that would be satisfactory to the defendants, but without success. On the morning of the 1st of May, before 12 o'clock noon, Mr. Wallbridge states in his evidence that be attended the defendants' solicitors prepared to pay off the mortgage, but that Mr. Garrett told him the chattels were sold, and that he was too late. This evidence is corroborated by entries in Mr. Wallbridge's day

book, which he says were made on his return. The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this point, because he was not present when this conversation took place. The learned trial judge finds that there was a misunderstanding between these solicitors, but be does not discredit the evidence of Mr. Wallbridge; on the contrary, at the close of the trial, when the matter was fresh in his mind, he said:

> "What I say now is that I feel I am right to accept Mr. Wallbridge's version of what took place at the time referred to."

3 Now, if Mr. Wallbridge's evidence is to be accepted, and I think it must be accepted as the only consistent and satisfactory evidence upon this point, the plaintiff was entitled to succeed in his action. There does not appear to have been an actual tender, but that was dispensed with when plaintiff's solicitor was told that he was too late. It cannot, I think, be successfully contended that a sale conducted in the manner that this [16 BCR Page302] one was could be supported as a provident one apart from the opportunity given the plaintiff to pay before noon on the 1st of May. It may even be open to question whether that opportunity would support it, in view of the mortgagor's duty to take all reasonable steps to obtain the best price. But be that as it may, without that opportunity, or with it cut down in the manner it was, the defendants acted unlawfully in making the sale, and it makes no difference whether the sale was in truth made before 12 o'clock or after 12 o'clock, the plaintiff being misled by the statements made to his solicitor. Nor was care taken to seize and sell only the chattels included in the mortgage. I think others were taken, perhaps of small value, but the seizure, I think, was conducted in a high-handed and reckless manner.

4 There should be judgment for the plaintiff, with costs here and below, and the action should be referred back to a judge of the Supreme Court to assess the damages and dispose of any further costs.

5 IRVING J.A.:-- I would dismiss this appeal. I assume that, the sale was made actually and completed before noon of the 1st of May, but no tender was made. Blumberg v. Life Interests, &c., Corporation (1897), 1 Ch. 141, affirmed (1898), 1 Ch. 27, is authority for the proposition that if you wish to make a tender to a solicitor, it must be a tender of cash, as the solicitor is not authorized to receive a cheque. But apart from that, the power of sale in the mortgage did not stipulate for notice prior to sale. In Hawkins v. Ramsbottom & Co. (1814), 1 Price 138, a sale made without notice, but after default was upheld. In Major v. Ward (1847), 5 Hare 598, the sale was valid although made before the expiration of the time named in the notice. The defendants had a right to sell, notwithstanding the misleading notice.

6 In Williams v. Stern (1879), 5 Q.B.D. 409, the plaintiff was in default, the defendant said he would wait for a week, but nevertheless sold before the promised time had expired. It was held that as it was not shewn that plaintiff had changed his position, this promise, being without any consideration to support it, did not deprive the defendant of his accrued legal right. [16 BCR Page303]

7 As to selling at an undervalue, the goods were in a remote part, far from any market, and the evidence as to their condition is very unsatisfactory. We must remember that a mortgagee is justified in accepting a fair price, even without advertising: Davey v. Durrant (1857), 1 De G. & J. 535. The mortgagee is not a trustee of a power of sale for the mortgagor: Warner v. Jacob (1882), 20 Ch. D. 220; Farrar v. Farrars, Limited (1888), 40 Ch.D. 395; Kennedy v. De Trafford (1896), 1 Ch. 762 at p. 772.

8 There is still another ground. The plaintiff asks damages for seizing and selling. How can any action be maintained for seizing? When the plaintiff made default in April, 1909, the property had passed; the right to possession passed by the terms of the agreement. The utmost that remained to the plaintiff was a right to redeem: see Johnson. v. Diprose (1893), 1 Q.B. 512, per Bowen, L.J. at p. 517. The damages for selling (if any) would not be the full value of the property sold; the plaintiff had only an equity of redemption in the property. The plaintiff has only lost (if anything) the actual damages sustained: Moore v. Shelley (1883), 8 App. Cas. 285 at p. 294; that is the value of the equity of redemption.

9 MARTIN J.A.:-- This is a case in which I feel I must bring myself to say, with all deference to the learned trial judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors - when the plaintiff endeavoured to redeem the mortgage must be found substantially as testified to by the plaintiff's solicitor. Such being the case, there is really no legal point of substance calling for consideration, and the appeal should be allowed and the case sent back for the entry of the proper judgment in favour of the plaintiff, and assessment of damages.

Appeal allowed, Irving J.A. dissenting.

Solicitors for appellant: Bowser, Reid & Wallbridge.

Solicitors for respondent Company: Brydone-Jack, Ross, Price & Woods