

Supreme Court of Canada

Bingham v. Shumate

3 W.W.R. 837

Bingham et al (Plaintiffs) Appellants v. Shumate (Defendant) Respondent

Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ.A.

Judgment: October 29, 1912

Counsel: *H. A. Maclean, K.C.*, for plaintiffs, appellants.
E. V. Bodwell, K.C., for defendant, respondent.

The Chief Justice:

1 I agree that the appeal should be dismissed with costs.

2 There is no evidence of the alleged partnership with respect to the seven timber claims. By the terms of the agreement, as I understand it, Shumate had the sole right to sell the property during the period of five years, at a fixed price per acre, and for his services in that connection he was to receive a commission.

3 The cross-appeal depends entirely on the character of the transaction which the respondent Shumate calls a sale to one Fields. I am satisfied that Shumate had no power to sell to Fields the interest of the appellants in the land and to make a subsequent arrangement with Fields as to his own interests. Incidentally I may observe that no notice of the cross-appeal was given as required by the rules of practice, but as we have reached the conclusion to dismiss it no further question arises.

Idington, J.:

4 These parties, having had some negotiations relative to the acquisition of timber licences in British Columbia, concluded same by an agreement of October 24, 1907.

5 This document declared the respective shares each of the parties was to have in said timber licenses and provided that for five years thereafter the respondent Shumate should have the power to sell the property at not less than a price named therein.

6 The appellants charged they had been induced by fraud of respondent Shumate to enter into said contract and asked the court to rescind the same, remove him from the trusteeship and have a receiver appointed and accounts taken, etc.

7 The charges of fraud failed before the learned trial judge and the Court of Appeal and the action was dismissed.

8 The time within which Shumate was empowered to sell was about to expire when this appeal was argued and no effective sale had been made.

9 Notwithstanding that appellants urged two things, first, that an account should be taken of the matter of expense alleged to have been fraudulently misrepresented by Shumate relative to the cost of the property, and next that he should be removed from his trusteeship and a receiver appointed in his stead.

10 The appellants seem to have misconceived their legal position. If the contract had been in fact induced by fraud entitling appellants to its rescission, they might have got that, lost all rights under the contract and become entitled to a refund of the money they had been induced to put into the venture.

11 They cannot get rescission of the contract on such a ground and maintain the contract at the same time to enable them to get an account thereunder.

12 They might have been entitled to affirm the contract and sue for damages resulting from the fraud inducing them to enter into it.

13 If that was what their action was launched for they should, if successful, have proven the damages and asked the court to assess them. An account and its results cannot of necessity measure the damages in such a case.

14 This, however, they did not do and so far as I could gather from Mr. Maclean's argument the whole discrepancy seemed to have been a matter of about \$200.

15 Any way one can look at the matter in face of the findings of fact there is no ground for either such relief here.

16 And as the trusteeship, so far as Shumate's selling the property is concerned, is about to expire, there remains nothing in regard to that but a mere academic question. Therefore I see no reason to disturb the judgment of the court below in that regard, which was the chief contention set up here.

17 It was urged that the title to the licences should have been recorded in the names of all the parties interested.

18 It was explained this could not be done under the new regulations of the government, and I heard no reply to that save complaint that it might have been done at an early stage in the history of this dealing. If so these parties should have seen to it at the inception of their joint and several ownership. Obviously that would not have suited the working out conveniently of the purposes of the agreement.

19 It results, from the foregoing story, that these parties are entitled to shares in a number of properties standing in the name of Shumate in whom they clearly have no confidence, and one would imagine it is desirable a sale of the properties should be had and a division made of the proceeds.

20 Indeed the statement of claim suggests by implication this mode of relief as an incident to arise out of the receivership asked for.

21 However, appellants could not claim that sort of relief so long as Shumate was entitled to conduct the sale. He had rights incidental to that position which could not be properly interfered with, unless forfeited by misconduct. And I cannot see how we can here and now, because his power and such right are about to expire, interfere by any judgment giving a mode of relief the appellants were neither when the suit was launched nor at the trial or hearing in appeal entitled to under the findings of fact in the case.

22 The courts could not consistently with such findings properly grant any such relief.

23 And our jurisdiction is limited to giving the judgment either of said courts should have given.

24 The counterclaim seems to have been properly dismissed for the reasons assigned by the learned Chief Justice of the court below.

25 The pleadings are so wide in seeking the relief for winding-up asked for, that it may possibly be argued hereafter in litigation seeking such relief that the dismissal of this action is a bar.

26 To avoid any such misunderstanding I think the judgment may be so varied as to read without prejudice to any future proceedings the appellants may be advised to take.

27 Subject to that modification by way of precaution the appeal and cross-appeal should be each dismissed with costs.

Duff, J. agreed that the appeal and cross-appeal should be dismissed.:

Anglin, J.:

28 The findings in the provincial courts that the defendant Shumate did not make the fraudulent misrepresentation charged against him are sufficiently supported by the evidence and we are not in a position to reverse them. Neither upon the pleadings nor in the course taken at the trial do I find any cases made for the relief which the appellants now ask, namely, the removal of the defendant as trustee. Moreover, the misconduct now alleged in connection with the Fields transaction as a

ground for such removal is not satisfactorily established by the evidence. On the other hand the respondent has not shown that he made an actual sale to Fields within the power which he professed to exercise which would have entitled him to the commission for loss of which he claims damages.

29 Both the appeal and the cross-appeal fail and should be dismissed with costs.

Brodeur, J.:

30 The plaintiffs, appellants, ask to set aside the agreement of October 24, 1907, and charge the defendant with fraud.

31 The evidence is somewhat conflicting and the trial judge has positively asserted that the plaintiffs have deliberately entered into the agreement complained of and that no fraud has been proved or established. In those circumstances the decision of the trial judge on that point should stand. The appellants themselves do not claim now before this court that the judgment of the trial judge should be disturbed on that ground, but they have asked before the Court of Appeal and before us that Shumate should be removed from the trusteeship provided in the said agreement.

32 That is an issue absolutely different from the one raised by the pleadings and it was not given also as one of the reasons of appeal. In the circumstances the Court of Appeal was justifiable in refusing the relief sought for.

33 As to the counterclaim that has been made by the respondent in which he asked that the plaintiffs be ordered to execute the sale which he alleges having made to Messrs. Field, I see there was no necessity for such a proceeding. He had under the trusteeship the power to make the sale himself and to execute the necessary deeds, and he had no need of the plaintiff's concurrence.

34 The judgment of the Court of Appeal ought to be dismissed with costs.

Appeal and cross-appeal dismissed with costs.