COCA-COLA COMPANY OF CANADA LIMITED (DEFENDANT) ..... } APPELLANT;

1944
*Nov. 15.

AND

FLORENCE MATHEWS (PLAINTIFF)... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Leave to appeal to Supreme Court of Canada granted by provincial Court of Appeal on terms which left no issue to be decided between the parties—Court declining to hear appeal.

Appellant, against whom judgment had been given in the Court of Appeal for Ontario directing that respondent recover $350 damages, with costs of the action and of the appeal, was granted by said Court leave to appeal to this Court (the Supreme Court of Canada) on appellant undertaking to pay to respondent in any event of the cause the amount of the judgment ($350) and costs of the trial, of the appeal to the Court of Appeal and of the appeal to this Court.

Held: This Court should decline to hear the appeal, on the ground that there was no issue before it to be decided between the parties.

It may now be regarded as well settled that this Court will not decide abstract propositions of law (even if to determine the liability as to costs, which was not the case in the present instance); and this situation may not be affected by the fact that the provincial Court of Appeal has granted leave to appeal to this Court.

Semble, a provincial Court of Appeal, in giving leave to appeal, and in suitable cases, may impose terms upon the appellant as a condition of his being permitted to appeal to this Court; he may be asked to undertake to pray for no costs in this Court, or even to meet the costs of both sides in any event, or to be put on terms of a similar character, provided the terms for leave to appeal are not so framed as to take away from the respondent any interest in the result of the appeal whatever.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (Henderson J.A. dissenting) (reversing the judgment at trial dismissing the action) directed that the plaintiff recover from the defendant the sum of $350 (damages), with costs of the action and of the appeal. Leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario on an undertaking by the defendant, the terms of which undertaking are set out in the reasons for judgment in this Court now reported, the effect of which terms is

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

(1) [1944] O.R. 207; [1944] 2 D.L.R. 355.

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expressed in said reasons in this Court as being "that no further *lis* exists between the parties and that they leave nothing for the respondent to fight over"; and it is to that situation that the judgment now reported is directed.

C. W. R. Bowlby K.C. for the appellant.

A. M. Lewis K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—In this case the respondent claimed damages from the appellant for injuries and sickness suffered as a result of circumstances for which it held the appellant responsible.

The case came before the Judge of the County Court of the County of Wentworth, who dismissed the action with costs.

Upon appeal, the Court of Appeal for Ontario set aside the judgment of the County Court and directed that the respondent do recover from the appellant the sum of $350, with costs of the action and of the appeal.

Then, upon motion by the present appellant, the Court of Appeal granted leave to appeal to the Supreme Court of Canada upon the following terms:—

> The [appellant] through its counsel undertaking to pay to the [respondent] in any event of the cause the amount of the judgment which she now has in the sum of $350, together with her party and party costs of the trial, the appeal to this Court [the Court of Appeal for Ontario] and the appeal to the Supreme Court of Canada, all to be taxed.

The result is that the terms put on the appellant are such that no further *lis* exists between the parties and that they leave nothing for the respondent to fight over.

As was said by Lord Loreburn, L.C., in *Glasgow Navigation Co.* v. *Iron Ore Co.* (1):—

> It is not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts.

The appellate jurisdiction of the Supreme Court of Canada is from a judgment pronounced in a "judicial proceeding" (*Supreme Court Act,* section 36); and the words "judicial proceeding" mean and include any action, suit, cause, matter or other proceeding in disposing of

(1) [1910] A.C. 293, at 294.

which the court appealed from has not exercised merely a regulative, administrative, or executive jurisdiction (section 2 (*e*)). It will be apparent that if this Court were to entertain the appeal, under the conditions stated in the order granting leave, it would not be called upon to decide, as between the parties, the issue presented in the judicial proceeding which was before the Court of Appeal. It would not have to decide whether the respondent is entitled to recover the damages for which she has brought action. It would have to merely express its view upon a legal question on which the appellant would hope to get a favourable opinion from the Court without in any way affecting the position between the parties.

The Courts have been instituted to decide cases or litigious matters, but not to entertain applications for advice upon legal questions, except, of course, in certain special procedures which are provided for under special statutes.

This is not the first time that this question comes before this Court. In *Moir v. Huntingdon* (1), the head-note is as follows:—

> Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—
>
> *Held,* that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal.

In *McKay v. Hinchinbrooke* (2), it was disclosed that the only matter in dispute between the parties was a mere question of costs and the Court decided that it would not entertain the appeal.

A fortiori in this case, where, as a result of the order granting leave, there is not even a question of costs left between the parties.

In *Commissioner of Provincial Police* v. *The King on the prosecution of Pascal Dumont* (3), Dumont had launched *mandamus* proceedings directed against the Commissioner of Police to compel him to return certain motor licences. The *mandamus* was granted by the Court of Appeal. After the judgment of the Appellate Court, the

(1) (1891) 19 Can. S.C.R. 363. (2) (1894) 24 Can. S.C.R. 55.
(3) [1941] Can. S.C.R. 317.

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Commissioner of Police complied with the order and delivered up the licences and number plates to Dumont. The Commissioner of Police then appealed to this Court. Chief Justice Duff, delivering the judgment of the Court, said (at p. 320):—

> From that point of view the appeal had no practical object. Even if the appellant's technical objection to the proceeding by way of *mandamus* had been well founded, the licences and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on the appeal would be the academic technical question with regard to the propriety of proceeding by *mandamus* and the question of costs.

Again in the recent judgment of this Court in *The King ex rel. Tolfree v. Clark et al.* (1), an application was made to this Court for special leave to appeal from the judgment of the Court of Appeal for Ontario affirming the striking out by Hope J. of notice of motion in the nature of *quo warranto* for an order that the respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding *The Legislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*. Since the date of the judgment of the Court of Appeal, the "then present" Legislative Assembly was dissolved. The application for leave came before the full Court and was refused. In the course of the judgment delivered for the Court by the Chief Justice, it was said (p. 72):—

> Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of *The Legislative Assembly Act*. Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment fore-judging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties, except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower

(1) [1944] S.C.R. 69.

Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle. *Archibald* v. *Delisle* (1); *Delta* v. *Vancouver Rly. Co.* (2).

It may now, therefore, be regarded as well-settled that this Court will not decide abstract propositions of law, even if to determine the liability as to costs, which is not the case in the present instance. Moreover, this situation may not be affected by the fact that the provincial Court of Appeal has granted leave to appeal to this Court.

In *Harris* v. *Harris* (3), notwithstanding that the Court of Appeal for Ontario had granted leave, this Court, having come to the conclusion that it had no jurisdiction, refused to entertain the appeal. See also the decision of this Court in *The Corporation of the City of Toronto* v. *Thompson et al.* (4).

We do not wish to mean that a provincial Court of Appeal in giving leave to appeal, and in suitable cases, may not impose terms upon the appellant as a condition of his being permitted to appeal to this Court. The appellants may be asked to undertake to pray for no costs in this Court, or even to meet the costs of both sides in any event, or to be put on terms of a similar character, provided the terms for leave to appeal are not "so framed as to take away from the respondent any interest in the result of the appeal whatever". These are the words of the Lord Chancellor in the decision of the House of Lords in *Sun Life Assurance Company of Canada v. Jervis* (5). In that case the Court of Appeal had given leave to the appellants to appeal to the House of Lords on the following terms:—

> On the defendants undertaking to pay the costs, as between solicitor and client, in the House of Lords in any event, and not to ask for the return of any money directed to be paid by this order, it is ordered that the defendants be at liberty to lodge a petition of appeal to the House of Lords.

(1) (1895) 25 Can. S.C.R. 1, at 14, 15.
(2) (1909) Cameron's Supreme Court Practice, 3rd edit. (1924), p. 93.
(3) [1932] S.C.R. 541.
(4) [1930] S.C.R. 120.
(5) (1944) 113 L.J.K.B. 174.

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It was held that, as the terms placed on the appellants by the Court of Appeal in giving leave were such as to have made it a matter of complete indifference to the respondent whether the appellants won or lost, the respondent in either event remaining in exactly the same position, the House would not hear such an appeal, as it would only be deciding an academic question and not an existing *lis* between the parties.

Likewise, in the Privy Council in *Attorney-General for Ontario v. The Hamilton Street Railway Co.* (1), certain questions had been referred to the Court of Appeal by the Lieutenant-Governor of Ontario and the Court of Appeal's answers were brought before the Privy Council. Their Lordships' opinion on the first question rendered it unnecessary to answer the second; but with regard to the remaining questions they stated that it was not the practice of the Board to give speculative opinions on hypothetical questions and that the questions must arise in concrete cases and involve private rights.

Again, in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), their Lordships held that:—

> Inasmuch as the Social Credit Board and the Provincial Credit Commission, as constituted under the Alberta Social Credit Act, 1937, no longer existed, that Act having been repealed since the order of the Supreme Court on the reference in this case, those bodies could not perform the powers proposed to be conferred upon them in respect of the Press Bill and the Credit Regulation Bill, which Bills, therefore, could not now be brought into operation, and their Lordships, in accordance with the established practice of the Board in such circumstances, declined to hear arguments on this appeal so far as it related to those two Bills.

In view of these reasons, we are unanimously of the opinion that this Court should decline to hear this appeal on the ground that there is no issue before the Court to be decided between the parties.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. R. Bowlby.*

Solicitor for the respondent: *A. M. Lewis.*

(1) [1903] A.C. 524.

(2) [1939] A.C. 117 at 118.