Privy Council Appeal No. 18 *of* 1942

Trower & Sons Limited - - - - - - - *Appellant*

v.

Ripstein, since deceased - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1944

Present at the Hearing:

THE LORD CHANCELLOR
LORD MACMILLAN
LORD WRIGHT
LORD PORTER
LORD SIMONDS

[*Delivered by* LORD WRIGHT]

This is an appeal from a judgment of the Supreme Court of Canada, dated the 3rd February, 1942, whereby by a majority of three Judges (Rinfret, Crocket and Taschereau JJ.), to two Judges (Davis and Hudson JJ.), an appeal of the present respondent was allowed from a judgment of the Court of King's Bench for the Province of Quebec (Appeal Side), dated the 28th February, 1940, whereby the Judges of that Court (Letourneau, Hall, Galipeault, Walsh and Barclay, JJ.), unanimously affirmed a judgment of the Superior Court for the District of Montreal, dated the 15th March, 1939, whereby Mr. Justice Décary maintained a preliminary or declinatory exception made by the present appellant and dismissed the action brought by the respondent as against the appellant, on the ground that the Superior Court did not have jurisdiction.

The appellant is a limited company formed in 1929 under the English Companies Act. At the date of the commencement of the action it had no assets in the Province of Quebec, and no place of business or domicile there. The action was brought against the appellant along with two other defendants Gillespie and Redpath, who were described as carrying on business together as partners under the firm name of Redpath & Co., in the district of Montreal. These two latter defendants are not parties to this appeal. In the action which was instituted by writ of summons in the Superior Court of the Province of Quebec in the district of Montreal the respondent claimed a declaration that an agreement as afterwards varied and extended was a partnership agreement in existence from the 27th March, 1927, to the 27th March, 1937, and asked for an account and a partition of the assets of the partnership and in default a sum of $225,000 as representing the respondent's share in the partition. The declaration also claimed that there had been breaches of the agreement and incorrect accounting by the defendants. The respondent on the 23rd June, 1938, applied for an order that the appellant should be called through the newspapers on the ground that it had no known office or place of business in the City and District of Montreal nor in the Province of Quebec, nor any officer or representative in the Province. The order was made and appellant was duly called through the newspapers. The writ was not served personally upon it. On the 23rd August, 1938, it entered an appearance without prejudice and on the 1st September, 1938, it moved by way of declinatory exception that the action should

be dismissed as against it on various grounds, in particular on the grounds that it was not domiciled in the district of the Court, that the process had not been personally served upon it, that the whole cause of action was not alleged to have arisen in the district or elsewhere in the Province and did not in fact so arise, and that no property of the appellant was alleged to be or was in fact, situate in the district or Province. Such was the substance of the main objections founded upon in the declinatory exception when it came after various amendments before Décary J. sitting as a Judge of the Superior Court for the District of Montreal. The question in debate was whether the Court had jurisdiction under the Code of Civil Procedure of the Province of Quebec to summon the appellant. The Superior Court held that it had not, and its judgment was affirmed by the Court of King's Bench (Appeal Side) of the Province. But their decision was reversed by the Supreme Court of Canada by a majority, two judges dissenting. Hence the present appeal to His Majesty in Council.

The terms of the agreement on which the respondent's claim was based are to be found set out in a written document bearing date the 27th March, 1927, expressed to be made between a partnership firm of Trower & Sons, carrying on business as wine merchants in the City of London and the defendant Gillespie and the respondent. In fact as it has been (rightly in their Lordships' judgment) found by Décary J. and the Court of Appeal in Montreal that the actual agreement was made orally in London, between the partnership firm of Trower & Sons, the defendant Gillespie and the respondent, the two latter being represented by the defendant Redpath. The written agreement having been prepared in London and signed by the firm was forwarded to Montreal where it was signed by Gillespie and the respondent in or about August, 1927, but was dated back to March, 1927, from which date the parties had been doing business on its basis. The parties continued to do business on the terms of the agreement but when the appellant company was formed in 1929 it acquired the rights of Trower & Sons, and thereafter it was treated as taking their place in regard to the agreement. It is clear that this substitution must have involved a novation; the original agreement was changed in the sense that the parties were changed from some date in 1929. The evidence is defective because it does not show where that change was effected since it is the changed or new agreement on which the action was brought against the appellant, at least in regard to matters since 1929, nor is there any allegation in the proceedings to show this. Whatever changes however were made, the original agreement still remained a necessary fact to be proved as part of the cause of action. The case has proceeded on the footing that the original agreement which was made in London continued until it terminated in March, 1937, after being extended until that date.

The terms of the agreement may be summarised as follows. The firm were to open and maintain at their own expense an office in Montreal (the Canadian office as it was called) for the sale of their goods and were to appoint the defendant Redpath as manager of that office. The defendant Gillespie and the respondent were to use their best endeavours to introduce customers in Canada and the United States to the firm. They were to be paid commission on orders obtained by them. But customers' payments for goods sold were to be made direct to the firm's London office, which was to remit each month the commission due to the Canadian office. That commission was to be divided in equal thirds between the firm, Gillespie and the respondent. The commission was to be net, all expenses of the Canadian office, all expenses in Canada and the United States being debited to the Canadian office, that is to the firm or the appellant. At a later date the defendant Redpath was allotted a share of the commission, the shares of the other parties abating proportionately. It has not been suggested that wherever the variation of the agreement was made, the circumstance affects the issue in the particular proceedings, any more than the other variations of the agreement mentioned above.

It is clear in their Lordships' opinion that the agreement did not constitute a partnership. The business was not carried on in common by the parties but was the business first of the firm and later of the appellant.

There was no sharing of profits and losses. The respondent and the defendant were employees or agents of the firm or the appellant. The share of net profit which they were to receive was their remuneration for the services which they rendered under the agreement. Their Lordships agree with the finding of both Courts in Quebec that there was no partnership under the agreement. Davis J. in his dissenting judgment in the Supreme Court also agreed. The majority in the Supreme Court did not find it necessary to decide the point. Their Lordships will proceed on the basis that no partnership was constituted under the Code of Civil Procedure of the Province of Quebec, and need not further consider any arguments which are based on the assumption that there was a partnership.

The articles of the Code which were particularly relied upon in these proceedings as giving jurisdiction to the Court to order service on the appellant were articles 27, 94, 102 and 103 of the Code. The trial Judge held that the Court had not jurisdiction under any of these articles. He held that the Court had no jurisdiction under article 94 (3) as the whole cause of action had not arisen in Montreal: that the Court had no jurisdiction under article 94 (4) as the appellant had no goods in the Province: and that the Court had no jurisdiction under article 94 (5) because the contract had been made orally in London. The appeal from his judgment was heard by five Judges, who unanimously dismissed it. Their reasons for the decision where substantially in agreement. They all agreed that no one of the heads under section 94 of the Code applied: the Court was not the Court of the appellant's domicile nor was it the Court of the place where he was personally served, nor was it the Court of the place where the whole cause of action had arisen, nor was it the Court of the place where the whole or part of his property was situate, nor was it the Court of the place where the contract was made. They held that article 103 of the Code of Civil Procedure did not apply, and that article 27 of the Civil Code was irrelevant.

On appeal to the Supreme Court, the judgment of the majority composed of Rinfret J. (now C.J.), Crocket J. and Taschereau J., was delivered by Rinfret J. The judgment was primarily based on the conclusion that the whole cause of action as constituted had arisen in the City and District of Montreal, and hence under article 94 (3) of the Code of Civil Procedure, the respondent was entitled to bring his action in that Court. It held that whatever the nature of the agreement, the intention of the parties was that the whole business covered by it should be, as it was, carried on in and from the Canadian office in Montreal even though the business had ramifications outside the district of Montreal and throughout the Province of Quebec, Canada and the United States. The business, it said, and the transactions in the course of it, originated in the Canadian office in Montreal, whence the goods were shipped and invoiced to customers and where books, records and accounts were kept. As an accounting of that business and of these transactions was what the respondent prayed for in his action, it should be decided that the whole cause of his action had arisen in Montreal.

Davis J., who with Hudson J. dissented, held that the whole cause of the action within article 94 (3) meant all the material facts which must be proved in order to entitle the plaintiff in the action to recover and that all these facts must have arisen within the jurisdiction of the Court. He held that in this case " the making or assuming of a contract by the company, the receipt of payments by the company in London from Canadian and American sales, the failure of the company to remit from London to Montreal certain commissions on these sales and probably other facts necessary to establish the alleged cause of action did not arise within the jurisdiction of the Quebec Court." He was for dismissing the appeal. Hudson J. was of the same opinion. He said that " the whole cause of action " referred to in article 94 (3) must signify all the facts, causes, moyens and motifs alleged in the declaration which, if traversed must be proved. This interpretation, he said, had been placed on the article by many decisions in the Court of Quebec. While he agreed with Rinfret J. that the place from where the services rendered by the plaintiff radiated was Montreal which was also the place where the accounts were kept and where the eventual division of profits was to be made, he went on to

observe that the contract itself was made in London, England, and moneys collected as a consequence of the plaintiff's work were collected by the appellant in London, and though the plaintiff asked for an accounting in respect of business done at or through Montreal, yet he also asked for an accounting by the appellant in respect of all transactions under the agreement whether in Canada or the United States of America or England. The learned Judge held accordingly that the whole cause of action could not be said to have arisen within the District of Montreal and was for dismissing the appeal.

With all respect to the three Judges of the Supreme Court who formed the majority in that Court their Lordships are unable to concur in their decision despite the forcible reasoning in support of it expounded by Rinfret J. The question here is whether the Court has power in the circumstances of this case to exercise jurisdiction over a person or corporation not personally served within it. If a party has been personally served within the jurisdiction, even though merely temporarily there, the jurisdiction of the the Court is generally established. But a Court will not generally be entitled to assume jurisdiction over a person who is outside the jurisdiction and has not been formally served within it and who does not submit to the jurisdiction. If that power is to be exercised, it must be given to the Court by legislation. Thus it was stated in *Berkley* v. *Thompson*, 10 App. Cas. 45 at p. 49 by Lord Selborne, L.C.:

> " The general principle of law is that ' *actor sequitur forum rei* '; not only must there be a cause of action of which the tribunal can take cognisance, but there must be a defendant subject to the jurisdiction of that tribunal: and a person resident abroad, still more ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction is prima facie not subject to the process of a foreign Court: he must be found within the jurisdiction to be bound by it."

If he is found within the jurisdiction of the Court and served there he will generally be bound by the process equally he may be bound if he submits to the jurisdiction. But otherwise the Court has no power unless it is expressly conferred upon it. It is not a question of practice but of jurisdiction, whether the Court has the power to serve a summons on a party resident abroad, so that the party may be brought within the jurisdiction of what is to him a foreign Court. The exercise of the power involves the exercise of extra-territorial jurisdiction. In England, the power depends on Order XI of the Rules of the Supreme Court which have the force of a statute. In Quebec it is conferred by articles of the Code of Civil Procedure of the Province. The Court is strictly bound by the terms of these articles. It has no general power to proceed on what might be described as the " equity " of the articles. It cannot, because in the particular case before it, it would be more convenient to apply some other rule than can be found on the true interpretation of the articles, depart from or amplify their meaning. It has no discretionary power to go outside the terms of the articles, merely because in its opinion it would be the *forum conveniens*.

In the elaborate judgments of the judges of the Appeal Court of the Province, a careful examination was made of the terms of the relevant articles of the Code, supported by a copious citation of authority. Their Lordships have examined these authorities which seem to them amply to justify what the Appeal Judges said, in particular in respect of the sub-clauses of article 94 which were principally relied upon. When the appeal came before the Supreme Court, the argument seems to have become concentrated for all practical purposes (as indeed it was before this Board) on article 94 (3) in which power is given to summon a defendant " before the Court of the place where the whole cause of action has arisen." Now it is clear from the series of decisions cited in the Appeal Court that these words have been consistently construed according to their natural meaning which is well expressed in the language of Davis J. and of Hudson J. already quoted by their Lordships in this judgment. There is no strict parallel in English law to aid in the construction of this sub-article of the Code, because Order XI which defines the power of allowing service out of the jurisdiction, does not contain the same phrase or impose the same condition. But the words or analogous words have been

used for the purpose of defining the jurisdiction of some local Courts. Thus, in *Read* v. *Brown*, 22 Q.B.D. 128, the phrase to be construed was " a cause of action arising in the City ". That was defined as meaning " every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved ". Such was the definition given by Lord Esher, M.R. (at p. 131) which followed a similar decision given in *Cooke* v. *Gill*, L.R. 8 C.P. 107 and earlier decisions. As it is a question of jurisdiction, the Court must be satisfied that the conditions which justify its exercise, are satisfied. Lord Esher's definition agrees with the definitions given by Davis, J. and Hudson, J. which have already been cited and with the definitions given by the Judges in the appeal in Quebec. It also agrees with the definitions given by numerous Judges in the authorities cited, in particular by Hall, J., Walsh, J. and Barclay, J., in their judgments. In the judgment delivered by Rinfret, J., their Lordships do not find any precise definition. But he seems to accept or approach one in his words " all the essential facts which together gave rise to the action brought by the appellant [that is the then appellant, the present respondent] or in other words the whole cause of action has arisen in the City and District of Montreal ". But the action was based on a contract, and in their Lordships' opinion, it is impossible to treat the place where the original contract was made as immaterial in the way that the learned Judge does. It was in their Lordships' view an element in the definition of the whole cause of action. He does indeed enumerate a number of acts or things necessarily occurring in the course of the transactions which occurred in Montreal, but against this may be set the lists given by Davis, J. and Hudson, J. of matters which took place outside Montreal and which it was necessary to prove in order to establish the cause of action. The Supreme Court may have been influenced by considering that the action was for an accounting and that as the books of the Canadian office and other material papers and accounts were kept in Montreal, Montreal was the more convenient forum. But in their Lordships' opinion even if that were so, it is not, as they have explained, the true test. It is not necessary again to refer to the many material elements in the conduct of the business which took place outside Montreal, and constituted part of the cause of action.

Their Lordships, with all respect are unable to concur with the views of the majority of the Supreme Court. In their judgment the views of the minority of that Court and of all the Judges in the Courts below were correct and should be affirmed.

Two other minor points only call for mention at this stage. One is in reference to article 103 of the Code, which as it then stood, Davis, J. rightly construed as meaning by " districts ", judicial districts within the Province of Quebec. He rightly said it had no application to a person resident outside that Province. Since then the article has been amended by the Quebec Legislature, by the Act 7 George VI C. 47, Sec. 5 and may sometime call for consideration in its new form. The other point is that article 27 of the Civil Code is not dealing with service outside the jurisdiction. It is merely a general provision to show that aliens are not as such exempt in proper cases from the jurisdiction of the Courts of the Province.

On the whole case their Lordships are of opinion that the appeal should be allowed and the judgments of the Quebec Courts restored. The respondent will pay the costs of the appeal and of the proceedings in the Courts below.

They will humbly so advise His Majesty.

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In the Privy Council

TROWER & SONS LIMITED

v.

RIPSTEIN, since deceased

DELIVERED BY LORD WRIGHT

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