ARMSTRONG GROWERS' ASSOCIATION v. HARRIS

[1924] 1 D.L.R. 1043 (also reported: [1924] 1 W.W.R. 729, 33 B.C.R. 285)

British Columbia Court of Appeal, MacDonald C.J.A., Martin, Galliher and McPhillips, JJ.A., 8 January 1924

Indians I--Rights--Garnishment--Property exempt--Debt--Situs.

An Indian's property that is exempt from taxation, that is all his property both real and personal that is on the Reserve, is also exempt from attachment by way of garnishment. Therefore a debt owing to an Indian for crops grown on the Reserve cannot be attached. The debtor is bound to seek out his creditor and the debt is payable on the Reserve and so personal property exempt from taxation.

APPEAL by the plaintiff from the order of Swanson, Co. Ct. J., setting aside a garnishee Order. Affirmed.

A. H. MacNeil, K.C., for appellant.
W. C. Brown, K.C., for respondent.

MACDONALD, C.J.A.:--This is an appeal from an Order setting aside a garnishee Order attaching monies owing to an Indian for the price of wheat grown by him on an Indian Reserve, and sold to a purchaser thereof on credit.

It is provided by sec. 99 of the Indian Act, R.S.C. 1906, ch. 81, that no Indian shall be taxed on his real and personal property, except such property as he may own outside the Reserve, and sec. 102 declares that no person shall take any security or obtain any lien or charge whether by mortgage, judgment or otherwise, upon an Indian's real or personal property, which is free from taxation.

The wheat while on the Reserve would not, I think, be subject to taxation, nor to process of execution, and I am of opinion that the language of the Act does not render the proceeds of it subject to taxation. It might, I do not say it would, be different where the Indian received the proceeds and deposited it, say, in a bank outside the Reserve, but here, the debtor was obliged to seek his creditor at home on the Reserve and pay him there. But even apart from this technical rule, I think there is a clear intention shewn in the Act to exempt from taxation such a chose in action as we have here.

I would, therefore, dismiss the appeal.

MARTIN, J.A. (dissenting):-- This appeal should, I think, with all deference to contrary opinions, be allowed, on the short ground that upon the evidence before us the only inference to be drawn is that this was a matter of business transacted outside the Indian Reserve, and the money due to the Indian arising therefrom was a debt owing to him outside the Reserve, and therefore could be attached within the general principle to be extracted from the cases cited as to Indian outside such Reserves.

The formal objections to the proceedings should, I think, be over-ruled; the sufficiency of the affidavit is supported by the authorities I cited during the argument. *viz., Walker* v. *Rooke* (1881), 6 Q.B.D. 631, and Chitty's K.B. Forms, 15th ed., p. 576. And it is moreover to be noted that the garnishee has admitted the debt and paid it into Court without any "dispute" or "suggestion" of non-liability or other claims, as contemplated and provided for by secs. 12-17 of the Attachment of Debts Act. R.S.B.C. 1911. ch. 14. If the person garnished, *viz.*, "J. S. Galbraith." is in fact the person who comprises the firm business as "J. S. Galbraith and Son." then the attach- Order was rightly issued in his name alone, as *Walker* v. *Rooke*, (a decision of three Judges of the Queen's Bench Division) shews, but if that fact is disputed by the respondent herein, that question can only be tried and determined as the statute directs in said sections cited, *viz.*, by an issue to be tried in the Court below; it cannot clearly be entertained by this Court by anticipating the statutory tribunal of first instance and in the absence of the evidence that would be given at said trial.

GALLIHER, J.A.:--I agree with Mr. Brown s submission that the Registrar had no jurisdiction to issue the garnishee Order.

While the garnishee Order is issued as against J. S. Galbraith as garnishee, the affidavit of the defendant Harris, that the grain for which the money garnished is due, was sold to J. S. Galbraith & Son, and that is not denied.

Now, J. S. Galbraith & Son, imports a firm or partnership and if it is not, the plaintiff could and should have shewn it. Taking it as a partnership, the garnishee Order which has been vacated by the Judge below, should have been made under sec. 20 of the Attachment of Debts Act, the Registrar, in my opinion, having no jurisdiction to make it. On that ground I would dismiss the appeal.

MCPHILLIPS, J.A.: I intimated during the argument of this appeal, that I had no doubt that the Order under appeal setting garnishee order was rightly made, and upon further I may say that I am still further convinced that Swanson, J., arrived at the right conclusion.

MR. A.H. MacNeill, K.C., in a very careful and forceful argument, presented the view that the moneys attached were not exempt under sec. 102 of the Indian Act, the moneys being personal property subject to taxation under sec. 99 of the Act--and therefore capable of being attached.

In support of this contention, *Avery* v. *Cayuga* (1913), 13 D.L.R. 275, 28 O.L.R. 517; *Rex* v. *Hill* (1907), 15 O.L.R. 406; *Sanderson* v. *Heap* (1909), 1ø Man. L.R. 122; *Lovitt* v. *The King* (1910), 43 S.C.R. 106, at p. 131; *Att'y-Gen'l* v. *Giroux* (1916), 30 D.L.R. 123, at p. 111, 53 S.C.R. 172, and *Sero* v. *Gault* (1921), 61 D.L.R. 327, at p. 331, 50 O.L.R. 27, were relied upon--and it was pressed that upon the facts the *situs* of the moneys was in the City of Vernon. The facts of the present case would not appear to me to admit of the authorities cited being of any value. Here we have a sale of grain made by an unenfranchised Indian residing upon the Okanagan Indian Reserve, No. 3, (Prairie Reserve) near Larkin in the county of Yale. There is no evidence to warrant it being said that the wheat was withdrawn by Harris from the Reserve--and I assume as I am rightly entitled to assume in the absence of evidence to the contrary--that the sale was made upon the Reserve and delivery made there. It is the requirement in law for the debtor to seek out his creditor and make payment of debt to him, and that would be to make payment to Elarrir upon the Reserve. It is too clear for argument that the present case is not one which will admit of the upholding of the garnishee process. Mr. W. C. Brown, K.C., counsel for the respondent, very effectively met the argument of the counsel for the appellant and relied upon the following authorities, *Wharton's Law Lexicon*, at p. 856, (12th ed., Taxation); *The Carleton Woollen Co.* v. *Town of Woodstock* (I907), 38 S.C.R. 411; *Murray* v. *Stentiford* (1914), 20 B.C.R. 162; *Walker* v. *Rooke* (1881), 8 Q.B.D. 631.

It is clear that the property of an Indian is not subject to any form of attachment if it be not taxable--and in the pre- sent case unquestionably no case has been made out to shew that the moneys or property in question are subject to taxation. It is idle contention in my opinion, upon the facts of the pre- sent case--to press the view and make the submission that the moneys due and payable are personal property outside of the Indian Reserve--nothing supports this--and no property, in my opinion, can be said to be outside the Reserve.

It is to be noted that the garnishee process in any case, is ineffective in that Harris made the sale of his wheat to J.S. Galbraith & Son of Vernon--and the garnishee Order is against J. S. Galbraith only. This alone indicates the futility of the proceedings had and taken. The Indians are wards of the National Government (The Government of Canada) and the statutory provisions are aimed to provide statutory protection to the Indians--and the public must govern itself accordingly, otherwise we would see the Indians over-reached on every hand and the Government required, in even a greater degree, to provide for and protect the Indians from the rapacious hands of those who ever seem ready to advantage themselves and profit by the Indian's want of business experience and knowledge of world affairs.

I do not import at all that the appellant here has taken any advantage of Harris--in truth, I assume which I have no doubt the fact to be that the appellant is rightly entitled to the claimed debt, *i.e.*, that it is a meritorious one; still, the business community and the public generally, must understand that in doing business with the Indians different considerations obtain, and it must be understood that legal process cannot be invoked against Indians when the subject matter comes within the protective clauses of the Indian Act; and that is the present case. The appeal, in my opinion, should stand dismissed, and the Order of Swanson, J., affirmed.

Appeal dismissed.