Privy Council Appeal No. 33 of 1935

Lake View and Star, Limited - - - - *Appellants*

v.

Giocomo Cominelli and another - - - - *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY, 1937.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD MAUGHAM.
LORD ROCHE.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD ATKIN.]

This is an appeal from a judgment of the High Court of Australia who reversed a judgment of the Supreme Court of Western Australia and restored a judgment of the Warden's Court at Kalgoorlie in favour of the plaintiffs the present respondents. The appellants are lessees of a gold mine in the East Coolgardie gold field and the respondent Cominelli, and one Martino Bonazzi, of whose estate his widow Maria Bonazzi is the administrator at all material times were tributers of the mine on the terms of tribute agreements made with the appellants on 15th May, 1930, and duly approved and registered by the Warden. On 19th October, 1933, the two tributers commenced the present action in the Warden's Court claiming in substance an account of all sums due to the plaintiffs from the defendants under the tribute agreements. The defence was that by an agreement of 18th March, 1932, the parties had agreed that the defendants should pay to the plaintiffs for the gold delivered by them to the defendants certain sums other than those stipulated for by the tribute agreements, and on making such payments should be released and discharged from their liability to make the payments agreed to be made in the tribute agreements: that they duly made the said payments and that the sums were received in full settlement of all claims. The reply was that the agreement of 18th March, 1932, was illegal and void as being contrary to the provisions of the Mining Acts, 1904-25, section 152. The Warden held that the agreement was void: on appeal to the Supreme Court Northmore C.J. held that it was not and on the plaintiffs' appeal to the High Court that Court affirmed the decision of the Warden. No

account has yet been taken, and the only point to be decided in this appeal is whether the defence based on the later agreement is good.

The case up to a point is in material respects similar to that of *The Great Boulder Proprietary Gold Mines, Ld.* v. *Scriven* decided by the Judicial Committee on 22nd November, 1932, on appeal from the Supreme Court of Western Australia, and their Lordships find it unnecessary to explain the position of tributers further than was done by the judgment of the Board in that case delivered by Lord Macmillan. The tribute agreement in that case, as in the present, was subject to the provisions of the Mining Act, 1904, as amended in 1919, 1920, 1921, and 1923, which by section 152 provides that in all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions shall apply:—

(*a*) It shall be obligatory on the part of the owner of such plant [to account for all ores received on the basis of not less than 90 per cent. extraction of the assayed value of the ore].

(*b*) The owner of the treatment plant shall also account for and pay to the tributer not less than 50 per cent. of any premium received by such owner on the sale of the gold obtained from the ore treated.

By section 156 any person who contravenes any of the provisions of the Act for which no other penalty is expressly provided shall be guilty of an offence and on conviction shall be liable to a fine not exceeding £50. In the *Scriven* case the tribute agreement contained an express stipulation as to the payment of 50 per cent. of any premium received. In the present case there is no express stipulation, but the matter is controlled by the statutory provision. In both cases the lessees of the mine were the owners of the treatment plant in which the gold was extracted. In the *Scriven* case the question arose as to the meaning of the word premium. At that time there was a fixed London price for gold, £4 4s. 11½d. per fine ounce, and the question was whether when the lessees of the mine received in Australian currency by reason of the difference in exchange more than £4 4s. 11½d. Australian they received a premium, though the gold in London in fact only realised the fixed price. The contention of the lessees was that there was no excess over the fixed price which must be considered the "par" and therefore there was no premium. The Supreme Court rejected this view as did this Board: and it was held that what the lessees received in Australian currency in excess of £4 4s. 11½d. Australian per fine ounce was "premium." In the *Scriven* case the judgment of the Supreme Court was given in August, 1931, a month before England went off the gold standard in September, 1931. The judgment of the Privy Council, though given in November, 1932, had reference only to dates while England was on the gold standard and the effect of any change in respect of the matter under discussion was not discussed. In the pre-

sent case after the decision of the Supreme Court had been given in the *Scriven* case, and while the case was under appeal to the Privy Council on the 18th March, 1932, the agreement pleaded in the defence was made. It is unnecessary to discuss the circumstances in which the parties came together, for on the hearing of the appeal no attack was made on the validity of the contract apart from the statute. The agreement recited the tribute agreement and that the tributers had sold and delivered and would sell and deliver ore to the company; that the value of gold had increased and that the company had received and would receive the benefit of such increased value and that the company would receive a bounty under the provisions of the Gold Bounty Act, 1930-31. It then recited that the tributer claimed to be entitled to receive 50 per cent. of the premium on all gold sold by the company as well as the said bounty and that the company had been and would be paid by its bankers a sum equal to the bank's prevailing selling rate of exchange (London and Australia) on the value of all gold computed at the rate of £4 4s. 11½d. per fine ounce. It then proceeds:—

> " And whereas disputes and differences have arisen between the company and the tributer as to the meaning of ' premium ' and concerning the amount which the tributer is entitled to receive from the company in respect of premium and bounty on the gold aforesaid.
>
> " And whereas litigation is impending or has been threatened by the tributer against the company concerning the said disputes and differences.
>
> " And whereas the company and the tributer have mutually agreed to settle and compromise the said disputes and differences upon the terms hereinafter expressed now this agreement witnesseth as follows:—
>
> " 1. In consideration of the premises and of the covenants and promises by the company hereinafter expressed the tributer agrees to accept from the company in full satisfaction of any claims which he may or shall have or may have had against the company for premium and bounty in respect of all such gold as aforesaid.
>
> " (*a*) Fifty per centum of any bounty hereafter received by the company in respect of such gold under the provisions of ' The Gold Bounty Act, 1930-31 ' or any amendment thereof.
>
> " (*b*) Twenty per centum of the amount actually received or to be received by the company in Australia as and by way of exchange as aforesaid on the value computed at £4 4s. 11½d. per ounce of fine gold of all such gold heretofore or hereafter exported and sold by the company as aforesaid.
>
> " (*c*) Fifty per centum of the difference between—
>
> " (i) The value of all such gold computed at the said price of £4 4s. 11½d. per fine ounce in Australian money, and
>
> " (ii) The value of all such gold computed at the price actually received by the company for the same in England as though such price were Australian money."

According to the appellants' contentions here was a *bona fide* compromise of a genuine dispute, and the mutual covenants and also the payments made under the agreement

operated as a discharge of the liabilities under the tribute agreement made for good consideration. And at any rate it was said that even if section 152 of the Mining Act operated to invalidate the provision of only 20 per cent. on the exchange benefit the agreement would be good as to the past and as to past transactions the payments actually made would afford a good discharge. It will be sufficient to say that in their Lordships' view the payments cannot operate so as to lead to an inference of a contract to discharge supplemental to or independent of the original contract of 18th March, 1932. They are payments under that contract and nothing else: and if that contract is invalid the payments in pursuance of it will have no independent efficacy. As to the agreement of compromise itself it appears to their Lordships to be made illegal by section 152. The Mining Act of 1904 as amended, certainly in this provision and apparently in others, e.g. section 146, is an Act intended to protect the class of tributers in respect of their own contracts. It is intended to interfere with their liberty of contract in their own interests. It terms are plainly obligatory. "In all contracts the following provisions shall apply." The owner of a plant therefore may not account for and pay to the tributer less than 50 per cent. of any premium. To suggest that a tributer may renounce the right to 50 per cent. is to defeat the very terms of the Act, for there would then be a tribute agreement to which the statutory provision did not apply.

It cannot be doubted that the provision contained in clause 1 (*b*) is contrary to the terms of section 152 (6) when one has the guidance of the decision in the *Scriven* case as to the meaning of premium. For instead of paying not less than 50 per cent. of any premium received the owner is to pay only 20 per cent.

These provisions appear to fall precisely within the principles enunciated in the House of Lords in *Netherseal Colliery Co.* v. *Bourne* 14 App. Ca. 228 (1889) which served to protect miners in respect of contracts made contrary to the terms of the Coal Mines Regulation Acts: principles followed in the decision of *Brace* v. *The Abercarn Colliery Co.* [1891] 2 Q.B. 699. And as the agreement is invalid as to the future so is it in respect of the past. The stipulation that for ore already delivered the company shall pay less than 50 per cent. of the premium equally offends against the Act. As this agreement is drawn it seems impossible to distinguish between the past and future: the effect is that in respect of past as well as future deliveries the tributers agree to accept less than 50 per cent. But if the sum had been a lump sum arrived at on the same basis the same result would have followed. Moreover the parties cannot support a plain violation of such an Act by failing to agree on its meaning, and calling an agreed variation a compromise. They misunderstand it at their peril.

It is plain, therefore, that this stipulation as to 20 per cent. of the difference in exchange is in violation of the statute, and is illegal and void. It forms part of the consideration for the release which appears to depend upon the covenants on either side. The release is therefore invalid, and the defence fails. Their Lordships have not thought it necessary or desirable to consider the exact meaning of "premium" in the statute, as it is clear that in respect of the exchange over £4 4s. 11½d., the exact point decided in *Scriven's* case, there is a breach of the statute. The judgment of the High Court contains this passage:—

> "For these reasons the judgment of the Supreme Court ought to be reversed and the order of the Warden restored. That order does not declare that the amounts obtained by the respondent company in respect of the gold in excess of £3 17s. 10½d. per ounce of standard gold are premiums. Although we do not doubt that that was the Warden's opinion, yet we agree with the contention of the respondent that, under the order made, it remains open to the respondent company to contend on the taking of accounts that some or all of this excess does not constitute a premium, notwithstanding the decision of the Privy Council in *Scriven's* case (unreported). We do not desire to encourage this contention, but as counsel for the respondent company submitted that the question did not arise upon this appeal, which concerned only the order made by the Warden, and that we ought not to decide the question so as to conclude the parties, and, as he did not argue it fully before us, we refrain from expressing any final opinion upon it.

Their Lordships concur in what was there said, and with equal lack of encouragement. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs of the appeal.

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In the Privy Council

LAKE VIEW AND STAR, LIMITED

v

GIOCOMO COMINELLI AND ANOTHER

DELIVERED BY LORD ATKIN

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