IN THE MATTER OF THE PETITION OF RIGHT OF THE

NORTH ATLANTIC TRADING COMPANY.....SUPPLIANT;

1912
June. 20.

AND

HIS MAJESTY THE KING..RESPONDENT

Private International Law—Foreign Syndicate or Partnership—Action in Exchequer Court—Right to sue—Practice.

Under the general rules and orders regulating the practice and procedure in cases in the Exchequer Court of Canada, a foreign partnership has no right to proceed as such in the Court, but must sue or petition in the names of the individual partners.

MOTION on behalf of the Attorney-General of Canada to dismiss a petition of right.

The grounds upon which the motion was made are stated in the reasons for judgment.

June 13th, 1912.

G. F. Shepley, K.C., for the motion.

E. Lafleur, K.C., contra.

CASSELS, J. now (June 20th, 1912) delivered judgment.

This was an application made to me to have the petition dismissed. The grounds taken are twofold. The first ground is that the petition should be dismissed or removed from the files, as no fiat was granted to the suppliant. The second ground, that the suppliant being a syndicate domiciled in Amsterdam, and not carrying on business in Canada or any of the British Colonies, is not competent to sue in the name of the North Atlantic Trading Company, but that the individual members of the Company should be suppliants.

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On the 28th November, 1904, the contract which is set out in the petition, was entered into between "His Majesty The King, represented by the Minister of the Interior of Canada, of the first part, and the North Atlantic Trading Company of Amsterdam, Holland, a body corporate and politic, hereinafter called the Company, of the second part." It would appear now from the pleadings, that the North Atlantic Trading Company, the suppliant in this particular case, is not a body corporate but merely a partnership or syndicate. The contention on the part of the Crown is, that when the fiat was granted entitling the suppliant to fyle a petition, the Minister of Justice took for granted that the suppliant was as stated in the agreement a body corporate and politic; and the contention is that had it been known that it was not a corporate body, the fiat would not have been granted. I can readily understand how anybody to whom the petition is shown, setting out in full the agreement which refers to the North Atlantic Trading Company, as being a body corporate and politic, would infer that the suppliant when asking for a fiat was asking as an incorporated body.

On the application before me, Mr. Shepley acting for the Crown, disclaimed any charge of any improper misrepresentations, and it is not suggested that any misrepresentation was made when the fiat was asked for. Nevertheless, if, in point of fact, the fiat was intended to be granted to an incorporated body, there must be, it appears to me, some means of getting rid of the fiat. I have looked carefully for authority but can find none. Assume a fiat obtained by fraudulent representations, there must be some means of getting redress and having the petition treated as if no fiat had been granted; and I think that probably the method

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adopted by the Crown of a motion is the proper form of procedure. I think, however, in a matter of such importance, the question should be tried, if it becomes material, on oral evidence.

I do not think the statement of Sir Allen Aylesworth, referred to in the affidavit of Mr. Newcombe, is proper evidence. It is a memorandum or rather an argument made at the close of the proceedings. I think if it is to be used, it should be by affidavit or by oral evidence; and I do not think that the memorandum itself can be looked upon as evidence. If the suppliant desires to proceed further with its petition, I would direct an issue to be tried before me as to whether or not the fiat should be treated as in force; on this issue the facts will come out.

On the argument before me it was stated by Mr. Lafleur that it might be taken as granted that if the names of the syndicate forming the suppliant company had to be given, they would abandon the proceeding; as they must decline to give names. Assuming the petition to remain on the files of the Court, the respondent at any time might examine the proper officials of the suppliant company for discovery and I do not see how the suppliants could protect themselves from disclosing the names of the members of the syndicate. I do not think the Crown is prevented from taking this course, if so advised, notwithstanding the alleged agreement referred to by Mr. Smart in his affidavit. I merely mention this, as if the stand taken by Mr. Lafleur is well founded, it can only be a matter of time when the suppliants would be bound to furnish the information, and if they refused, their petition would be dismissed.

The other ground, namely, that the suppliants are incapacitated from suing, I think should be brought

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up in a different way. It does not appear to me to be proper to take this ground by notice of motion. Under the old practice it would be by demurrer. It should be, it seems to me, that on the pleadings something in the nature of a demurrer should be filed and the question of law decided; this, however, is practically a matter of form, and as the matter has been argued before me I will give my views. I think the point is well taken. The Rules of the Exchequer Court provide that the practice and procedure in suits, actions and matters in the High Court of Justice should be in force where no rules of the Exchequer Court are in force applicable to the case. Under the rules and orders in force in England, a foreign partnership not having a place of business in England, must sue in the names of the individual partners. But for the special rules and orders of court, a partnership could not bring an action in the firm name; the action would have to be brought in the name of the individual members of the firm. There is no relaxation of this rule where the partnership is a foreign partnership having no place of business within the United Kingdom; and I think the Crown's objection, as I have stated, is well founded. If the parties are willing to accept this ruling in the form in which it has come before me, that will be my judgment; otherwise I think the proper procedure would be to have a plea entered on the record and the question decided as a matter of law. I mention this, as there may be no appeal from my decision, if the case is treated as a decision on an application of the nature of that made before me. The parties can speak to the matter before me in Chambers, if so advised (1).

(1) EDITOR'S NOTE.—On the 19th December, 1912, this leave was exercised by the parties, and after argument the petition was dismissed with costs.