1960

Arthur W. Fairclough et al v. Salt Lake County et al : Brief of Appellants

Utah Supreme Court

In the Supreme Court of the State of Utah

ARTHUR W. FAIRCLOUGH, FRED FAIRCLOUGH, ANTHONY M. CRUS, THOMAS CRUS, and JOHN CRUS, doing business as FAIRCLOUGH & CRUS,

Plaintiffs and Respondents,

vs.

SALT LAKE COUNTY, LAMONT B. GUNDERSEN, WILLIAM G. LARSON and EDWIN Q. CANNON, SR.; ROAD COMMISSION OF UTAH, C. TAYLOR BURTON, FRANCIS FELTCH, ERNEST H. BALCH, WILLIAM J. SMIRL and WESTON E. HAMILTON,

Defendants and Appellants.

Case No. 9140

BRIEF OF APPELLANTS

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ARROW PRESS, SALT LAKE

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PRELIMINARY STATEMENT

This appeal is brought pursuant to an order of the Supreme Court of the State of Utah, dated the 26th day of October, 1959, wherein on consideration of the petition of

the appellants, it was ordered that an interlocutory appeal be granted from the order of the District Court of Salt Lake County, dated September 3, 1959, denying appellants' motion to dismiss.

STATEMENT OF FACTS

In June of 1959 respondents served summons and complaint upon Salt Lake County and on each of its commissioners individually, and upon the Utah State Road Commission and each of its commissioners individually. Said complaint alleged that Salt Lake County or the Utah State Road Commission, or both, lowered the grade of 3900 South Street, adjacent to respondents' property, and as a result of such lowering, with no actual taking any of respondents' property, damage was inflicted to said property in the amount of $43,000.00 due to loss of ingress and egress and depreciation in value. As a second cause of action, respondents sought a writ of mandamus to force appellants to bring an eminent domain proceeding against them.

Appellant, Utah State Road Commission, and the commissioners thereof, filed a motion to dismiss on June 19, 1959, alleging sovereign immunity and other grounds not presently before the Court. Appellants, Salt Lake County and the commissioners thereof, filed an answer to the above complaint on the 23rd day of June, 1959, and subsequently joined with Utah State Road Commission and its commissioners in the latter's motion to dismiss.

Prior to the hearing of appellants' motion, respondents, on July 1, 1959, secured a writ of mandamus, ordering the

Salt Lake County Commissioners and the Utah State Road Commissioners to file an eminent domain proceeding against respondents in the name of Salt Lake County and the Utah State Road Commission, or to appear on July 8, 1959 to show cause why such action should not be commenced.

The next day, on July 2, 1959, respondents' attorney, noticed for hearing, on the same July 8th noted above, appellants' motion to dismiss.

Thereupon, on said July 8, 1959, before the Honorable Martin M. Larson, one of the Judges of the Third Judicial District Court, this matter was heard. At that time the court indicated that the hearing of appellants' objections to the writ of mandamus secured by respondent would be postponed pending the decision on appellants' motion to dismiss inasmuch as a denial of said motion to dismiss would obviate any necessity for the writ, and would open the way for direct action against appellants by respondents.

After the parties argued the motion to dismiss on the grounds of the sovereign immunity of the appellants, the matter was taken under advisement. On September 3, 1959, the order of the court was entered denying appellants' motion to dismiss and recalling the alternative writ of mandamus, inasmuch as it was held that respondents had an adequate and speedy remedy at law against the appellants.

It was from this order appellants' petitioned this Honorable Court for permission to file an interlocutory appeal. Pursuant to the order of this Court dated October 26, 1959,

granting such interlocutory appeal, appellants' brief is respectfully submitted.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.

By the order of September 3, 1959, the District Court held that the Road Commission and its commissioners and Salt Lake County and its commissioners were not immune, as agencies and political subdivisions respectively, of the State of Utah, from damage actions arising from alleged consequential damages. It is from this order, and this order alone, that appellants bring this appeal, and it is from this order alone that permission for this appeal was granted. Acting under Rule 72(b), Utah Rules of Civil Procedure, Utah Code Annotated, 1953, the Supreme Court properly limited the question here at issue by the following language:

> "On consideration of the Petition of Appellants herein, it is ordered that an Interlocutory Appeal be, and the same is, granted *from the order entered September 3, 1959 by the District Court of Salt Lake*

County, denying the defendants' Motion to Dismiss. (Emphasis added.)

Dated this 26th day of October, 1959."

Inasmuch as the said order specifically denied appellants' motion to dismiss on the grounds of sovereign immunity, it is this question of sovereign immunity which is the only issue now before this Court.

It is with this in mind that appellants restrict their brief to the single question, do the Utah State Road Commission and its commissioners, Salt Lake County and its commissioners, come within the cloak of sovereign immunity possessed by the State of Utah.

It is appellants' contention that they are not amenable to the type of action brought against them, and hence the District Court erred by not granting their motion to dismiss on that ground.

It cannot be questioned that the State of Utah is clothed with an inherent immunity from such damage actions unless specific consent is given. *State of Utah* v. *Fourth Judicial District Court,* 94 Utah 384, 78 P. 2d 502. This immunity is possessed by all sovereigns. 49 Am. Jur. 301; 81 C. J. S. 1300. It is equally clear that such immunity extends to the unincorporated agencies of the state. As was stated in the *Fourth Judicial District Court* case, supra:

> "The State Road Commission being an unincorporated agency of the state, a suit against it is a suit against the state."

And in *Campbell Building* v. *State Road Commission,* 95 Utah 242, 70 P. 2d 857, it was held that a suit against the Road Commission in its official capacity was a suit against the state, and, further, that members of the State Road Commission are state officers within the immunity from suit provision of the state.

Therefore, neither the State Road Commission nor its members may be sued without their consent. Such consent to be sued has been given by statute in a very limited area under Section 27-2-1, U. C. A. 1953, as amended, wherein it states:

> "* * * By its name the Commission may sue and it may be sued *only* on written contracts made by it or under its authority * * *." (Emphasis added.)

Such limited consent is, of course, restricted to the parties to said written contracts, and the instant case does not come within this consent as there are no contracts here involved between the contending parties. As this Court said in the *Campbell Building* case, supra:

> "* * * When there is statutory consent to sue the statute is the measure of the power to sue."

Salt Lake County as a political subdivision of the State of Utah, likewise shares the immunity of the parent sovereign. 14 Am. Jur. 213, states:

> "In seeking to ascertain the liability of a county, whether in tort or contract, it must be remembered that counties are only political divisions of the state, organized as a part of the machinery of the government for the performance of functions of a public

> nature, *and that, as such, they partake of the state's immunity from liability.* * * *" (Emphasis added.)

It is clear, therefore, that inasmuch as none of the appellants have, in any way, given their consent to be sued in this manner, respondents may not pursue this action as initiated.

CONCLUSION

Appellants submit that the action instituted in the court below may not be maintained, and that their motion to dismiss on the grounds of sovereign immunity should have been granted inasmuch as both appellant Road Commission of Utah and its commissioners, and appellant Salt Lake County and its commissioners, are fully clothed in the immunity from suit traditionally vested in the sovereign, and as such may not be proceeded against directly without their consent, and they further submit that no consent has been given in this case in any form, and hence no such action may be maintained.

Respectfully submitted,

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