1964

Board of Education of the Granite School District v. Rex H. Cox and Wilmina Cox : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

Dahl & Sagers; Attorneys for Appellant;
McKay and Burton; Attorneys for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

BOARD OF EDUCATION OF THE GRANITE SCHOOL DISTRICT, a Statutory corporation,
Plaintiff-Respondent,

vs.

REX H. COX and WILMINA COX, his wife,
Defendant-Appellant.

Case No. 10023

PETITION FOR A REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Joseph G. Jeppson, Judge

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The defendant and appellant, Rex H. Cox, in the above eititled action respectfully petitions the Court to grant a rehearing in the above entitled cause for the reason and upon the grounds that in its opinion heretofore rendered the Court erred in the following particulars:

POINT ONE

THE COURT ERRED IN AFFIRMING A MODIFICATION OF A PREVIOUSLY AFFIRMED INFERIOR COURT'S ORDER AND HAS, IN FACT, DEPRIVED THE APPELLANT-DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

POINT TWO

THE COURT ERRED IN AFFIRMING A MODIFICATION OF A PREVIOUSLY AFFIRMED ORDER AND HAS ILLEGALLY DELEGATED ITS CONSTITUTIONAL AUTHORITY TO AN INFERIOR TRIBUNAL.

The undersigned attorney for the Defendant and Appellant, Rex H. Cox, herein certifies that in his opinion there is merit to the foregoing claims and that the court committed errors in the particulars above specified.

VICTOR G. SAGERS
Attorney for Defendant-
and Appellant

ARGUMENT

POINT ONE

THE COURT ERRED IN AFFIRMING A MODIFICATION OF A PREVIOUSLY AF-

FIRMED INFERIOR COURT'S ORDER AND HAS, IN FACT, DEPRIVED THE APPELLANT-DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

The Appellant-Defendant in its original appeal before this court, Case No. 9844, practically begged this Court to assume jurisdiction of the original appeal both from equity as well as a law basis. The Appellant in that case quoted extensively of proper and applicable applications of Rule 60(b) in support of his position and in order that equity and justice would prevail. However, notwithstanding same this Court rendered its decision strictly from a legal basis, forgetting the equities, and in effect, in said prior decision said that the trial court had heard the arguments and said the split decision rendered by the trial court in the previous appeal should be affirmed.

Article 1, Section 7 of the Utah Constitution says as follows:

> "No person shall be deprived of life, liberty or property, without due process of law."

The words "life, liberty, and property," are to be taken in the broadest sense as indicative of the three great subdivisions of all civil rights. *McGrew v. Industrial Comm.*, 96 U. 203, 85 P2d 608.

"Due process of law," comes to us from the Great Charter and is synonymous with "law of the land." It means, in effect, that a party shall have his day in court

—trial. *Jensen v. Union Pac. Ry. Co.,* 6 U. 253, 21 P. 944, 4 L.R.A. 724.

Due process of law requires that notice be given to the persons whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Riggins v. District Court of Salt Lake County,* 89 U. 183, 217, 51 P.2d 645.

The Supreme Court in cases at law tried before a court without a jury, shall examine the evidence only so far as may be necessary to determine questions of law, and it should not pass upon the sufficiency of the evidence to justify finding or judgment, unless there is no legitimate proof to support it and in no case, whether tried with or without a jury, will the appellate court determine questions of fact. *Lyman v. Town of Price,* 63 U. 90, 222 P. 599. This Court in the previous decision in effect ignored either the liberal or narrow construction of Rule 60(b) U.R.C.P. and, as stated above, decided the previous appeal on the legal issue only. Yet, in this appeal the Supreme Court has said that the court has assumed jurisdiction from both an equity standpoint and a legal standpoint and has in effect reopened the previous case and has reviewed this case de novo not only on the current appeal, Case No. 10023 entire record but on the previous appeal entire record, Case No. 9844. *In Re Thompson's Estate,* 72 U. 17, 269 P. 103.

We firmly allege that the instant appeal, Case No. 10023, has nothing whatsoever to do with the previous

appeal and that the Court in this decision cannot, should not, and is duty bound not to, look into the record of the previous appeal at this time or review the facts or determine at this point whether the findings of the first case were properly determined, or supported, or justified by the evidence. We definitely do not agree with the court's decision in the previous case but as indicated in our main brief in the instant appeal we are duty bound to abide by it and believe likewise that this court is now so duty bound.

Our U.R.C.P., as indicated in the main brief, specifically sets forth the rules and procedures to be followed in connection with motions to alter or amend judgments which, of course, the plaintiff at no time has afforded itself of such rights and has, therefore, lost same. We again invite the court's attention to the fact that at no time in *any* stage of the proceedings did the plaintiff make any objections to the judgment of its own making until at such time as the defendant demanded payment of the judgment, which was after this Honorable Court had affirmed the lower court's inequitable and two-headed order setting aside the judgment as to Wilmina Cox and refusing to set aside same as to this appellant and said case had been remitted to lower court. Notwithstanding that said judgment was originally rendered without the plaintiff submitting a contract, therefore, making said original judgment erroneous as to both defendants. We allege that this appellant is being deprived of his property without due

process of law inasmuch as he has not been afforded his day in court, has been required, at great financial loss, to attempt to obtain justice through the use of our legal process, but has been denied same, by having a case which was previously determined and affirmed reopened by a court of inferior jurisdiction, thereby overruling an already settled matter.

The majority opinion rendered its decision by stating that this court is utilizing hindsight in applying Rule 60(b) of our U.R.C.P. We allege that this is indeed a poor basis of rendering a decision and counter by stating that if our foresight was as good as our hindsight Mr. Cox would not now be before the court attempting to obtain justice as he and the other defendant would have sought counsel prior to an illegal judgment having been rendered against them. The majority opinion further sets forth the rule that its opinion should not affect any issues in the pending action against the other defendant. This certainly appears to be extremely ineffectual because if this Honorable Body can allow an inferior court to overrule this court's decision by altering an already affirmed judgment then it is inconceivable to believe that this court's decision in the instant appeal will not be used against the defendant, Wilmina Cox, in the determination of her rights and could rightfully be cited as a precedent.

Also, issue is taken with the granting of costs to the plaintiff as the court has by this decision in effect said to each and every defendant or appellant that there

is no basis whatsoever for you to win against a public corporation or utility regardless as to whether or not you are being deprived of your property rightfully or without due process.

POINT TWO

THE COURT ERRED IN AFFIRMING A MODIFICATION OF A PREVIOUSLY AFFIRMED ORDER AND HAS ILLEGALLY DELEGATED ITS CONSTITUTIONAL AUTHORITY TO AN INFERIOR TRIBUNAL.

At the risk of appearing facetious, which is certainly not the writer's intent, we call the court's attention to the specific jurisdiction of both the Supreme Court of the State of Utah and the District Courts of the State of Utah as follows:

Article 8, Section 4 of the Utah Constitution sets forth the jurisdiction of the Supreme Court as follows:

> " . . . In other cases the Supreme Court shall have appellate jurisdiction only, . . . "

Article 8, Section 7, Utah Constitution describes the jurisdiction of the District Court as follows:

> "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law, . . . "

The powers given these respective courts by these provisions cannot be enlarged or abridged by the legis-

lature. *State ex rel. Robinson v. Durand,* 36 U. 93, 104 P. 760.

Although District Courts of this state are courts of original jurisdiction, having jurisdiction in all matters both civil and criminal which are not excepted by law or the Constitution, one District Court has no power to exercise control over another. *Nielson v. Schiller,* Judge, 92 U. 137, 66 P. 2d 365. Even though the statutes provide that the Supreme Court and the District Courts have the right to promulgate certain rules and regulations the Constitution specifically prohibits the enlargement of the jurisdiction in the respective courts and we definitely believe the intent of the various Statutes of the State of Utah and the Constitution of the State do not provide for, nor was it intended to permit, a District Court (a court of inferior jurisdiction to the Supreme Court) to overrule a previously affirmed judgment by the Supreme Court of a previous District Court's judgment. Such construction must be put upon the powers which are conferred, and the restrictions which are imposed upon each tribunal, as is most consonant with the general design and will be most effectual in enforcing and carrying into effect the will of framers of Constitution. *State v. Johnson,* 100 U. 316, 114 P. 2d 1034.

It appears that this Court has perpetrated a two-headed monster inequitable decision in the previous case and has in effect allowed itself to be overruled by a court of inferior jurisdiction as well as permitting one

inferior court judge to change at will a previously affirmed decision of the same court, which, of course, is improper and illegal. If this decision is permitted to stand then no judgment whatsoever heretofore having been made will be permitted to stand as a final decision and will certainly encourage everyone to continue to litigate and relitigate each case at will.

CONCLUSION

In addition to the arguments previously set forth in the main brief, we believe Chief Justice Henroid's dissenting opinion briefly sets forth the appellant's position and which is in accordance with our Constitution and Statutes and we quote at length as follows:

> " . . . The judgment for $42,000 persisted in favor of Cox without complaint or motion for modification on the part of the plaintiff, either before, during pendency of appeal, or for a considerable time after this court affirmed the judgment and remitted the case for execution thereof. At that time there was a valid, subsisting judgment for $42,000 in favor of Cox personally, which could have been assigned by him for value. The condemnation proceeding as yet has not been pursued to a conclusion against Mrs. Cox.
>
> "I am of the opinion that after remittitur by this court affirming the judgment, it was too late arbitrarily to cut it in half, which amounts to a reversal by the trial court of half this court's affirmance.
>
> "The contract was to pay two joint vendors $42,000 and either or both were entitled to collect

that sum on principles of joint tenancy where each has an undivided moiety of the whole. It does not lie in the mouth of the grantee to assess the relative values of joint tenant interests.

"Cutting the price in half not only puts a price tag on Cox's interest, but impliedly, at least, puts the same tag on Mrs. Cox's joint interest, —and she was not a party to any contract. She was not subject to specific performance at all. She may consider her joint interest in the property to be in excess of $21,000, and her rights in a condemnation suit are no answer. The $21,000 paid to Cox no doubt would be advanced as an argument to show what a willing seller and a willing buyer agreed upon with respect to identical or similar property in the area.

"Cutting the judgment in half as to Cox is not the proper procedure. Conceivably an equity suit would lie to require him to deliver full title to the property, conditioned on penalty for failure to perform . . . "

The judgment of the lower court reducing the previous judgment should be set aside and reversed and costs should be awarded to the appellant.

Respectfully submitted,

VICTOR G. SAGERS

Attorney for Defendant-and Appellant