Cite as: Burton v, MacInnes, 1992 NSCA 75

S.C.A. No. 02604

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Chipman and Matthews, JJ.A.

BETWEEN:

JOHN E BURTON, DARRYL R. BURTON, BLAIR D. BURTON, and SHELDON J. BURTON Appellants - and - FRANK ARNOLD MACINNES, MYLES CURTIS MACINNES and J.P. MACINNES TRUCKING LIMITED Respondents	William P. Burchell for the Appellants Peter Green, Q.C. for the Respondents Appeal Heard: June 15, 1992 Judgment Delivered: July 2, 1992

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Chipman and Matthews, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of Mr. Justice Saunders. He allowed the respondents' application for a declaration that the appellants had no legal or equitable interest to lands at Whycocomagh, Inverness County, which the respondents purchased at a municipal tax sale on February 1, 1990. The appellants were the owners of the lands sold. The appeal must be allowed. The learned trial judge erred when he concluded that there was but one assessment of the appellants' property at Whycocomagh. There were two properties assessed to the appellants on the assessment roll; one property consists of lands and a dwelling assessed separately as residential account no. 02971496 (496) being lands described in Book 81, page 351 identified by map reference number 64-120625 assessed for $42,700.00. The other assessment related to a trailer park owned by the appellants which was assessed separately as account no. 02971488 (488) two lots, ten acres, described as re: land trailer site identified by map reference number 64-120626. This property was assessed commercially for $43,500.00. The fact that the lands which were conveyed to the appellants in 1984 were described as one parcel of land does not detract from the fact that the Director of Assessment from 1984 to 1989 continued to assess the two parcels of land separately; this was a carryover from the fact that prior to the acquisition of the property by the appellants in 1984 there were two separate lots as is evidenced by the abstract of title filed in the proceedings and identified as separate parcels of land by different map reference numbers. Mr. Charles J. MacKenzie, the Regional Director of Assessment for the Province of Nova Scotia , who is responsible for the preparation of the assessment roll was asked how many assessments there were on the Burton property at Whycocomagh. His answer was as follows:

> " There was two assessments. One was for the residential portion of the property and the other was for the commercial portion of the property and there was a business occupancy assessment also on the commercial portion."

Following cross-examination of Mr. MacKenzie by the appellants' counsel, with respect to the affidavit he had filed in support of the respondents' application, the respondents' counsel questioned Mr. MacKenzie as to whether the assessment applied to a portion of the property "or is it the residential assessment that's applied to the entire property." Mr. MacKenzie stated "it's a portion of the property". He went on to testify that "It would be referenced probably by book and page number in the description part of the assessment notice. That property was two separate parcels at one time, split one acre and into eight or nine acres." Mr. MacKenzie went on to say that the residential assessment described in Book 81, page 351 consists of approximately one acre and that the trailer park consisted of about eight acres according to the field notes rather than 10 acres as shown on the assessment roll.

One might say that the Director of Assessment ought to have assessed the lands acquired by the appellants in 1984 as one property when he prepared the assessment roll pursuant to the duty imposed on him by s. 25 of the **Assessment Act**, R.S.N.S. (1989) c. 23, but he did not. He continued to assess the lands purchased by the appellants as two separate parcels of land. Section 25(a) of the **Act** is relevant. It provides:

> " 25 The Director, with the assistance of the assessors having ascertained as nearly as he can the particulars of the property to be assessed, shall prepare the assessment roll in which shall be set down
>
> (a) the location and a concise description of each separate

> piece of assessable property, with the name and address of the owner thereof;"

The Director of Assessment, notwithstanding what he might have done, in fact assessed the land described in 81/351 and dwelling thereon separately as account no. 496.

Section 133 of the **Act** provides as follows:

> " 133 The assessor shall in the annual assessment roll indicate each person who is assessed for more than one lot of land giving a general description of each lot sufficient to identify it together with the valuation placed thereon by the assessor in making up the total amount assessed to the person in respect to real property."

It would appear from a review of the assessment roll that the appellants were assessed for two lots. The entries on the roll give a general description of each lot sufficient to identify each and they also show the valuation placed thereon by the assessor. There is a separate assessment for the land and dwelling described in Book 81, page 351 and a separate assessment for the trailer park lands.

The learned trial judge erred in his interpretation of the remarks of Cooper J.A. in **Harvard Realty Ltd. v. Director of Assessment in Halifax, City of** (1979), 35 N.S.R. (2d) 60 . In that case there was but one assessment No. 57-021492. There was one parcel of land but there was a residential and commercial component on the land in that part of the building was used commercially and part was apartments.

Mr. Justice Saunders, in his decision, made the following finding:

> " There was not - as the defendants would suggest - a double or triple assessment. It was simply one assessment consisting of three components: residential, commercial and business

occupancy.

In making this finding he relied on a portion of a statement made by Cooper J.A. in **Harvard Realty.** I think it would be useful to quote the full remarks of Mr. Justice Cooper as he was wrestling with the question whether there was more than one assessment in that case. He stated at p. 69:

> " In my opinion one must consider the legislation itself to determine whether in the facts and circumstances of this case there is but one assessment comprising two valuations, namely, residential and commercial property or two assessments - one of residential property and the other of commercial.
>
> In my opinion, and with deference to the chambers judge, there is here but one assessment. It seems to me that s. 25(1), which for convenience I repeat:
>
> All assessments shall be designated as being residential property, commercial property or resource property, or partly one and partly another.
>
> contemplates that an assessment may consist of three components - residential, commercial and resource properties - together making up an owner's assessment with the requirement by s. 25(2) that the "value of each such part shall be entered on the roll"."

I endorse the statement made by Cooper J.A. in the **Harvard Realty** case. However, on the facts of this case there was not one but two assessments of separate parcels of land to the appellants; the residential lands (account no. 496) and the commercial lands (account no. 488).

Interestingly enough the learned trial judge after quoting from Mr. Justice Cooper's decision went on to state:

> " I do not accept the defendants' assertion that they were

> confused about the method or reason for assessing their land. They received separate Notices of Assessment from the time they acquired the property. Separate Notices of Assessment were served on the defendants each year.

These notices themselves are evidence that the municipality assessed the appellants' as owning two parcels of land and no doubt did contribute to the appellants' confusion having acquired only one parcel of land as described in the deed. There was a third assessment for business occupancy but that related to the trailer park lands separately assessed as commercial.

Pursuant to s. 143 of the **Act**, the treasurer of the municipality obtained from the Warden of the municipality a warrant to sell for arrears of taxes the lands assessed as account no. 496 being the lands shown on the assessment roll as land and dwelling in Book 81/ 351 which from the evidence of the assessor consisted of approximately one acre of land and the dwelling.

The lands assessed as account 496 were duly advertised. At the sale on February 1, 1990, the Municipality sold, not only the lands assessed separately as account no. 496 but also the eight acres, more or less, of trailer park land which was assessed separately as account no. 488 on which the taxes were not in arrears. The respondents purchased all the appellants' lands for $3,000.00. Mr. John Burton in his affidavit filed in the proceedings stated that the appellants had an investment of approximately $200,000.00 in the home and the trailer park.

The appellants did not redeem the property within the year as permitted by the **Act**. There was evidence at trial that they did not know the lands had been sold for arrears

of taxes. The respondents obtained a deed from the municipality of the entire property, both the residential property and the trailer park property.

The municipality had no right to sell the trailer park property for arrears of taxes on the residential property.

Although one hardly need any authority for concluding that a sale, under such circumstances, must be set aside I would refer to **Manning, Assessment and Rating,** (Toronto: Canada Law Book Company, 1962) p. 542 where it is stated:

> " The inclusion in a particular sale and deed under the same warrant of lands liable to assessment and sale with land not so liable (the assessment being void by reason of the irregularity) vitiates the sale, nor can a sale of lands in one parcel which by the Act could only be assessed legally in two parcels be sustained, and similarly the sale of two parcels for the aggregate arrears on both is illegal."

In view of my conclusion that the appeal ought to be allowed there is no need to deal with the issue of whether or not the learned trial judge erred in deciding the appellants were given proper notice of the pending sale of their lands for arrears of taxes. Suffice to say, there are serious issues raised as to the procedures of the municipality in this instance.

The respondents have argued that notwithstanding any errors s. 161 of the **Act** provides that the deed conveying the land purchased at a tax sale is conclusive evidence that all the provisions of the **Act** with reference to the sale were fully complied with so as to vest title in the purchasers. Section 161 states:

> " 161 Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein described have been fully complied with and every act and thing necessary for the legal perfection of such sale has

> been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances whatsoever."

In my opinion, when the Legislature enacted s. 161 it did not intend to validate a sale of real property by a municipality notwithstanding the owner's taxes on the property were not in arrears nor was the sale of the property authorized by the warden of the municipality pursuant to s. 143 of the **Act**. Such an intention is clear from a review of the extensive provisions of the **Act** requiring: (i) careful preparation by municipal officials of the lists showing properties on which taxes are in arrears and liable to be sold; (ii) notices to owners and encumbrancers of pending sales; and, (iii) the right to redeem up to a year after the property has been sold. It is clear that the objects and purposes of the tax sale provisions of the **Act** are not only to enable municipalities to collect arrears of taxes but to ensure that an owner's real property is not sold other than for arrears of taxes and only after the procedures in the **Act** have been complied with so that an owner is given every opportunity to avoid the serious consequences of having a property lost by reason of tax arrears.

In **O'Brien v. Cogswell** (1889), 17 S.C.R. 420, in writing for the majority, Gwynne J. considered a section of the Halifax City Charter similar to s. 161 of the **Assessment Act**. He stated at p. 464:

> " It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring."

In this case the Municipality did not have authority to sell the trailer park lands as the taxes on those lands were not in arrears. This was not a valid sale. Therefore, s. 161

of the **Act** does not apply.

CONCLUSION

The appeal ought to be allowed; the Order dated December 23, 1991, giving effect to the declaratory relief granted by the trial judge set aside and the deed conveying the appellants' lands at Whycocomagh to the respondents set aside. A copy of the order giving effect to this decision should be recorded in the Registry of Deeds so as to give notice to all that the Tax Deed has been set aside.

The Order of December 23, 1991, provided that:

> " the Defendants pay to the Plaintiffs the Plaintiffs' costs in an amount to be determined on further application to this Court."

We have been advised by the prothonotary that an order dealing with costs has not been taken out. The parties shall have until July 22, 1992 to make written submissions on costs.

J.A.

Concurred in:

Chipman, J.A.

Matthews, J.A.