Supreme Court of Canada
Maher v. Archambault, (1918) 56 S.C.R. 488
Date: 1918-05-07

Dame Mary Maher and Others (Plaintiffs) Appellants;

and

Joseph Archambault (Defendant) Respondent.

1918: April 17; 1918: May 7.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Partition—Limitation:—Parties—Irregularity—Second action in partition—Arts. 1038, 1185 C.P.Q.

The father of the appellants, co-heir owner of a lot of land, was not made a party to a suit for partition, as prescribed by art. 1038 C.P.Q., apparently on account of his insanity and his absence from Canada. The respondent became the *detenteur* of the lot through sales following such licitation. The appellants, alleging the above nullity, took another action in partition against the respondent.

Held, Idington J. dissenting, that the judgment entered in the first partition proceedings should have been first set aside on the ground of nullity before a second action in partition could be taken; and such relief cannot be granted in the present action as all the parties to the first proceedings are not before the court.

APPEAL from the judgment of the Court of King's Bench, appeal side[1], reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiffs' action with costs.

The circumstances of the case are fully stated in the above head-note and in the judgments now reported.

F. J. Laverty K.C. for the appellants.

J. O. Lacroix K.C. for the respondent.

THE CHIEF JUSTICE:—I am of opinion that the appeal should be dismissed with costs.

[Page 489]

DAVIES J.—I will not dissent from the judgment proposed to be given by a majority of my colleagues confirming the judgment of the Court of King's Bench, Quebec, though I entertain grave and strong doubts as to its correctness.

[1] Q.R. 25 K.B. 436.

IDINGTON J. (dissenting)—The appellants claim that their late father Edouard Trudel who was admittedly owner of a share of certain lands in the Province of Quebec died without parting with such ownership and that respondent is the owner of the remaining shares therein and seek to have a partition or sale of said lands.

The respondent claims as heir or devisee of one Desparois whose title (if any) in or to the share of the appellants' father in said lands rests entirely upon certain alleged proceedings taken for partition resulting in an alleged licitation.

Edouard Trudel had lived and married in New York State and become insane long before said proceedings and so continued during same and for many years until his death.

Art. 1038 C.P.Q. provides that:

> 1038. All the co-heirs or co-proprietors must be parties in the suit for a partition.

This seems imperative. Edouard Trudel was not made a party. A consent judgment sanctioned only by those owning other shares was entered. Later on upon it being discovered, as it must have been known to those acting, if care taken, that he was entitled to the share now claimed, an irregular entry was made on the *cahier de charges* that for his share of proceeds he would be entitled to claim. There is nothing to connect deceased with this particularly unauthorized proceeding. Nor is there even the

[Page 490]

shadow of pretence for it in law, but later on, through steps taken by one or more of the parties concerned, the wife of deceased was improperly induced to accept a sum of money pretended to be proceeds of the sale and hence it is pretended the appellant and her children are bound thereby.

No curator was ever appointed for him in Quebec. By a New York Court his wife was afterwards appointed his committee.

It is proven by expert testimony that by the law of New York this gave her no authority in respect of the sale of his real estate. She could collect rents of real estate but that is as far as her authority went even in New York State.

Assuming for the moment that a foreign state where his land was could recognise her power in that respect, there was no such recognition or direction given by any one having

power to give ft in Quebec. Nor does it seem very clear what could have been done in that way.

I am unable, therefore, to understand how such proceedings can be held otherwise than a nullity so far as the share of the deceased was concerned.

This court, in the case of *Serling* v. *Levine*[2], held that the minor who was sued without a tutor being named and shortly afterwards came of age, and then had acted in many ways in such a manner as to induce some of us to hold that he had waived the right to object to the want of a tutor at the initiation of the proceedings, could not complain of such absence of a tutor. Instead of defying and disregarding the court when he came of age, he had submitted and acted in many ways that some

[Page 491]

of us thought precluded him from insisting upon such an objection.

The court above, however, overruled us, and held the whole proceedings a nullity[3].

The acts and submissions of the defendant in that case after his majority (which if memory serves me were more than detailed in the judgment of my brother Brodeur) seem to me to have been more important in the way of overcoming the initial difficulty than anything relied upon herein as done by the committee of the insane person in the way of ratification.

In principle I cannot distinguish that case from this in regard to the question of nullity.

There are many reasons why an insane man should be more jealously protected than an infant of somewhat mature years at least.

The law seems to make no distinction.

It seems idle to suggest that the proceedings are different, especially in face of the imperative language of the article I have just quoted. And in view of the fact that the first step to inquire as to in a partition suit is whether or not partition can advantageously be accomplished. See Art. 698 C.C. and 1040 C.P.Q., and other articles in each of the respective sections where they appear.

---

[2] 47 Can. S.C.R. 103; 7 D.L.R. 266.
[3] 19 D.L.R. 108; [1914] A.C. 659, at p. 662.

It so happens in most cases all the steps thus indicated as possible are needless, for a mere glance at the circumstances so demonstrates the situation and sensible people act accordingly and proceed to licitation.

They proceeded in this instance by a consent judgment, but who consented?

The folly of disregarding the article requiring all co-heirs or co-proprietors to be made parties became

[Page 492]

apparent in this instance for the consent should never have been given because one of the parties who should have been joined therein was in an insane asylum without a curator or committee. If that had been disclosed no doubt the judgment never would have been entered.

The conduct of someone was at fault and no need for harsh words, but yet it seems quite incomprehensible without suspecting someone of at least crass negligence.

To maintain such a proceeding it seems to me would be putting a premium on worse conduct in the like cases.

Having considered all the articles of the Civil Code and Code of Procedure cited to us, and many others, I do not see the necessity for elaborating the matter.

The case of *Bank of Montreal* v. *Simson*[4], illustrates how the law in Quebec has always looked at the interest of minors and the limited powers of tutors in regard to certain classes of property held by the minor.

Curators stand in the same position relative to any powers they may have unless when expressed otherwise.

And when we contemplate the shadow of one as it were acting by reason of an analogous appointment in a foreign state and not renominated under the law of the country where an immoveable is in question, I fail to be able to attach any importance to her acts or omissions as having any bearing upon what is really involved.

[4] 14 Moo. P.C. 417.

And the importance sought to be drawn herein from what was done as if judicially done, suggests I should refer the inquiring mind to the case of *Davis* v. *Kerr*[5],

[Page 493]

at page 244, where Taschereau J. is reported as making some pertinent remarks which might well be applied to some things done or permitted in the proceedings in question herein.

Holding the entire proceedings a nullity so far as the share of the deceased was concerned, I need not trouble myself as to the possibility or propriety of taking another course than that taken by those instituting the proceedings.

Nor do I see any difficulty in regard to the proof of the marriage of deceased and legitimacy of the appellants. Much less has been acted upon judicially.

Indeed I respectfully submit if the ground taken by the court below and in respondent's argument that the original record was quite regular and the adjudication therein valid and the appellants' action denying positions so groundless as these suggested I do not see why that feature of the case and the utterly void conduct of the committee in what she did as representing the court in New York should be laboured with or given prominence as it is at every turn in both judgment and argument.

The English system relative to the insane and their property of which New York law is, as it were, the heir, does not furnish quite as much safeguarding or restriction as the French system in force in Quebec relative to the appointment of a guardian called in the one a "committee" and in the other a "curator." The results are surprisingly alike, though possibly differing in origin and mode of appointment.

But in the last analysis the entire power of a committee of a lunatic is statutory and there is not a vestige of authority in the state of New York to maintain that which the wife of deceased was induced to assume. And it does not require much penetration to discern by whom and why she was so induced.

[Page 494]

[5] 17 Can. S.C.R. 235.

Inasmuch as the principle upon which a licitation sale is rendered by Art. 1054 C.P.Q., in its results analogous to the effect of a sheriff's sale, our decision in the case of *Leroux* v. *McIntosh*[6], may be worth considering.

The appeal should be allowed with costs here and below and the judgment of the learned trial judge restored.

Since writing the foregoing the case has been re-argued but I see no reason for changing my opinion as the result thereof.

ANGLIN J.—We have heard this appeal argued twice. While careful consideration of it on each occasion has not entirely dissipated all doubt in my mind whether the conclusion of the learned trial judge—at all events in so far as it established the title of the plaintiffs other than Mary Maher—should not be restored for the reasons stated by him and by Mr. Justice Cross, I am not convinced that the several judgments entered in the partition proceedings, through which the defendant claims title, must not first be set aside, That relief, if sought, could not properly be granted in this action in which the parties to those proceedings are not before the court.

Although it is expressly provided by art. 1038 C.P.Q.

> that all the co-heirs or co-proprietors must be parties in the suit for a partition,

it is conceded that there was no representation whatever of the interest of Edouard Trudel, one of the coheirs, in the partition proceedings until after the property had been sold and the record shews that

[Page 495]

neither he nor his foreign curatrix was made a party to them at any stage.

I am by no means satisfied that under the law of the Province of Quebec a foreign curatrix or committee of a lunatic, who, according to the law of the forum of her appointment, was not authorized to dispose of his real property, could, by her approval and ratification of proceedings already had for the sale of the lunatic's interest, vest it in the purchaser. If she could, I question whether the terms of the power of attorney given by her to Mr. Prefontaine would enable him to give such approval or ratification on her behalf, or to represent her in the proceedings subsequent to its date. He does not appear to have had

[6] 52 Can. S.C.R. 1; 26 D.L.R. 677.

any other authority. As a matter of fact, although Edouard Trudel's interest as a co-heir was brought to the attention of the court, as appears from the *cahier des charges,* as already stated, neither he, nor his committee or curatrix, was ever joined as a party to the proceedings.

It is only

> after the observance of all the formalities above required,

including the joinder of all co-heirs or co-proprietors as parties, as prescribed by art. 1038, that the adjudication, under art. 1054 C.P.Q., transfers the property. Whatever there may be in the nature of an estoppel against the plaintiff, Mary Maher, the curatrix, by reason of her receipt and retention of the moneys representing her husband's share of the proceeds of the sale does not affect her co-plaintiffs. Nor, so far as I am aware, have their rights been extinguished by the expiry of any period of prescription.

Yet, while it may be a little difficult to understand on what ground a judgment pronounced in a proceeding to which neither he, nor any person representing or in

[Page 496]

privity of estate with him was a party, should be held so far binding on the owner of an interest in property that he is obliged to have it set aside before asserting his title in the courts against a person whom he finds in possession and claiming ownership, the procedure provided for by art. 1185 C.P.Q. *et seq.* would seem to indicate that this is necessary. On this ground alone, therefore, though not without hesitation, I concur in the dismissal of this appeal.

BRODEUR J.:—La présente action en partage est mal dirigée contre le défendeur Archambault. Ce dernier, d'après le demandeur, serait le détenteur d'un lot de terre qui appartenait jadis à la succession Trudel et qui aurait été vendu en 1893 par l'autorité judiciaire sur action en partage. La demanderesse prétend que cette vente judiciaire est nulle parce que son mari, l'un des héritiers, n'aurait pas été régulièrement mis en cause.

Il appert par les procédures qui ont amené cette vente qu'Edouard Trudel, le mari de la demanderesse, n'avait pas été assigné comme l'une des parties. Plusieurs années auparavant quelques-uns de ses frères avaient disposé de ses intérêts dans la propriété, vu qu'il était incapable de vaquer à ses affaires et qu'il était alors dans un asile d'aliénés.

Le tout paraît avoir été fait par ses frères avec la meilleure foi du monde et dans son meilleur intérêt.

La part qu'il avait était de peu de valeur. Cela avait été fait évidemment pour éviter des frais. A tout événement lorsque le cahier des charges sur l'action en partage de 1893 fut préparé, on a dû découvrir que la vente des droits d'Edouard Trudel était nulle et alors on a inséré une clause dans les conditions de vente par laquelle les droits d'Edouard

[Page 497]

Trudel à un onzième indivis de la propriété étaient reconnus. Des procédures furent prises par la demanderesse pour se faire nommer curatrice à son mari et pour retirer sa part dans le prix de vente.

La propriété fut vendue par la cour. La demanderesse toucha la somme qui représentait les droits de son mari. La propriété passa entre les mains de divers acquéreurs; et, suivant la demanderesse, le défendeur Archambault en serait maintenant le propriétaire. Elle le poursuit en partage en alléguant que le premier partage est nul.

Il est de principe élémentaire que les parties ne peuvent intenter une nouvelle action pour sortir de l'indivision tant que la nullité de la première vente n'est pas prononcée. Baudry-Lacantinerie, vol. 8, No. 3513; Demolombe, vol. 15, No. 518.

Maintenant contre qui cette action en nullité doit-elle être dirigée? Est-ce contre le détenteur de la propriété ou contre ceux qui ont été partie au partage?

Cette première vente constitue un contrat judiciaire qui, comme les autres contrats, est susceptible dans certains cas d'être annulé ou d'être nul. L'action en nullité attaque un contrat qui est présumé avoir réuni le concours de tous les héritiers. Je considère que cette action doit être dirigée contre tous les co-partageants. Duranton, vol. 7, No. 584; Demolombe, vol. 17, No. 457; Aubry & Rau, vol. 6, p. 577; Laurent, vol. x, No. 497.

Avant d'instituer la présente action, il était donc du devoir de la demanderesse de se présenter devant les tribunaux et de réclamer, en présence de ses cohéritiers, la nullité du contrat auquel ils ont été partie en 1895, lors de la première action en partage.

Il peut se soulever entre ces co-héritiers des débats

[Page 498]

de comptes et partages qui pourraient anéantir ses droits dans l'immeuble en question en cette cause-ci.

Il me semble que la demanderesse, avant d'attaquer Archambault, devra s'adresser à ses co-héritiers.

La Cour d'Appel a donc bien jugé en renvoyant son action.

L'appel est renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: Blais, Laverty & Hale.

Solicitor for the respondent: J. O. Lacroix.