

INTESTATE ESTATE OF MARIA BORROMEO, DECEASED. PILAR TELL, PETITIONER AND APPELLEE, VS. CARMEN TELL AND MERCEDES DIAZ TELL, OPPONENTS AND APPELLANTS.*G.R. No. 23431. September 29, 1925*

Ponente: VILLAMOR, J.

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On September 27, 1920, Pilar Tell, the appellee, filed a petition with the Court of First Instance of Albay, alleging that on September 10, 1920, Dña. Maria Borromeo died in the municipality of Ligao, Province of Albay, leaving money, jewels and personal and real property, situated in the municipalities of Ligao, Oas, Polangui and Daraga, of the approximate value of P20,000. The petitioner also alleged that the deceased Dña. Maria Borromeo had not executed any will, and prayed that she be appointed special administratrix of the estate of the deceased Dña. Maria Borromeo, upon the giving of the proper bond, and that after the usual publications and proceedings, she be appointed regular administratrix of the estate of the deceased Dña. Maria Borromeo.

The appointment of the petitioner Pilar Tell was opposed by Carmen Tell and her niece Mercedes Diaz Tell, legitimate daughter and granddaughter, respectively, of the deceased Dña. Maria Borromeo. And for the reasons set forth in their motion dated October 29, 1920, they prayed for the appointment of another person from among the parties, other than Carmen Tell, and also for the appointment of a guardian for the minor Mercedes Diaz Tell.

By an order dated October 27, 1920, the court, at the proposal and by agreement of both parties, appointed Jesus Alsua as special administrator of the estate left by Dña. Maria Borromeo, fixing his bond at the sum of P2,000.

After the lapse of about two years, that is to say, on August 12, 1922, the court in view of the evidence introduced by the parties declared Pilar and Carmen Tell, both of age, the only heirs of the deceased Dña. Maria Borromeo, together with the minor Mercedes Diaz Tell in representation of her deceased mother Mercedes Tell, who was also a daughter of Dña. Maria Borromeo, and entitled to inherit share and share alike the property left by the deceased; and upon the suggestion of the attorneys of the parties in interest, Attorney Ambrosio E. Calleja was appointed distributing commissioner, having presented a tentative partition on September 20, 1922.

For the reasons set forth in her motion dated February 13, 1923, Pilar Tell opposed the approval of the tentative partition, and prayed that after the filing by the administrator of a new and complete inventory of the property of the deceased, new commissioners be appointed in accordance with sections 753 and 762 of the Code of Civil Procedure to make the partition.

On the other hand, Carmen Tell, for herself and in behalf of the minor Mercedes Diaz Tell, insisted on the approval of the tentative partition filed by the commissioner Mr. Ambrosio E. Calleja, praying that after the delivery of the property to each of the interested parties, this proceeding be held terminated.

On August 11, 1923, and as proposed by the parties, the lower court appointed new commissioners to make the partition, namely, Messrs. Macario Loveria, Leopoldo Aquende and Bernardino Reniva, whom it instructed about

the manner in which they should proceed with the distribution of the property of the deceased. In the order, the court, in giving instructions to said commissioners, says:

"After having been sworn, they shall proceed to make the division of the estate left by the deceased Dña. Maria Borrromeo, according to the new inventory filed by the administrator, Mr. Jesus Alsua, on March 5, 1928, with respect to the realties; as to the cattle and money, if there is any, in accordance with the inventory dated December 14, 1920, which partition shall be made in three lots equitably equal, not only as to their area, but also as to their present assessed value; and as to the personal properties, according to the value fixed by the commissioners of appraisal in their report of March 24, 1922. Provided that after making the division of the estate into three parts, the partitioning committee should not award any part to any of the three heirs, as said awarding shall be made by lot in open court, pursuant to the agreement of the parties. Provided, further, that said commissioners shall file their report with the court within 30 days from this date, and they are required to qualify as such commissioners within 5 days from receipt hereof."

As shown on page 58 of the bill of exceptions, the partitioning commissioner, Leopoldo Aquende proposed by Carmen Tell, resigned from his office, without said heir having found another person to substitute him. On the other hand, the partitioning commissioner Macario Loveria, proposed by Pilar Tell, also declined the office, and in his place this heiress proposed Cipriano Viterio. The new commissioners filed a new tentative partition. Carmen Tell in her own behalf and that of her ward Mercedes Diaz Tell moved for the disapproval of the new proposed partition, and that in lieu thereof the tentative partition presented by the commissioner Mr. Celleja be approved.

On August 23, 1924, the lower court entered the following order:

"When this case was called for hearing upon the report of the partitioning committee of July 5, 1924, wherein is set forth the proposed physical division of the two parcels of land known as 'tax No. 7936' and 'tax No. 14481,' and the adjudication by lot among the heirs of the parts into which the said two parcels were divided in accordance with the order of this court of April 30, 1924, the heiress Pilar Tell appeared with her attorneys Messrs. Domingo Imperial and Mariano Locsin, Carmen Tell not having appeared for herself and as guardian ad litem of the other minor heir, Mercedes Diaz Tell, either personally or through an attorney to represent them. Thereupon Attorney Domingo Imperial after making it of record that said heirs, Carmen Tell and Mercedes Diaz Tell, had been duly notified of the day of this hearing, asked the court to proceed with the hearing upon the additional report presented by the partitioning committee for its due approval, as well as the awarding by lot of the portions mentioned in said report;

"It appearing from the record that the heirs, Carmen Tell and Mercedes Diaz Tell, the latter duly represented by the former in her capacity as guardian ad litem, were duly notified of the day of this hearing without having appeared either personally or through counsel;

"It also appearing from the record that under the date of August 22, 1924, the attorney, Mr. Vicente Roco, on behalf of the heirs Carmen Tell and Mercedes Diaz Tell, filed an opposition to the report of said partitioning committee, now under the consideration of this court, in the last paragraph of which they expressed in advance their exception to, and intention to appeal to the Supreme Court from, any order that might be rendered upon the result of the new drawing of lots and the approval of said additional report, which fact evidently shows the intention of said heirs, Carmen Tell and Mercedes Tell, not to appear at the hearing of today; and it also appearing that the physical division of the two parcels aforementioned, contained in the report of July 5, 1924, filed by the partitioning committee, was made in accordance with the instructions of this court in the order dated April 30, 1924, and said physical division appearing to be equitable as graphically outlined in the two sketches which form a part of said report;

"Said report is hereby approved with the proposed physical division of the aforesaid two parcels 'tax No. 7936' and 'tax No. 14481' of the inventory, and it is ordered that said three portions mentioned in said report be

awarded by lot among the heirs, Carmen Tell, Pilar Tell and Mercedes Diaz Tell, and to that end Messrs. Doroteo Amador and Simeon Loria, provincial fiscal and provincial deputy sheriff, respectively, are designated to perform the drawing of lots, and the clerk is directed to prepare six equal slips of paper in three of which the names of the three heirs are to be written, and in the other three the numbers 1, 2 and 3, which represent respectively the three lots described in the report.

"The drawing of lots having been made in open court, the result was that lot No. 3 went to the heir Carmen Tell, lot No. 2 to the heir Mercedes Diaz Tell, and lot No. 1 to the heir Pilar Tell.

"For the foregoing, lot No. 3 of the report of July 5, 1924, now under the consideration of the court, is awarded to the heir Carmen Tell, lot No. 2 to the minor Mercedes Diaz Tell, and lot No. 1 to the heir Pilar Tell.

"It is ordered that the administrator deliver to each heiress all the property pertaining to her, according to the order of this court dated April 30, 1924, in connection herewith.

"It is, further, ordered that the administrator render a final account of the cash pertaining to the estate that is in his possession and of all the products of the property Of the estate that are not included in the partition made, as well as of all the expenses he may have incurred in the administration and which are not included in the preceding accounts, stating also the amount or amounts he may have paid to any heir by order of this court on account of her share, in order that the same may properly be settled.

"Let the exception of the heiress, Carmen Tell, for herself and as guardian ad litem of the minor Mercedes Diaz Tell, to this order be noted in the record, as well as her notice of appeal to the Supreme Court, for which appeal the bond to be filed by her is fixed at P200."

The heirs, Carmen Tell and Mercedes Diaz Tell, entered an exception to all the proceedings in the lower court and took an appeal by bill of exceptions.

At the hearing of this case Attorney Felipe Canillas presented oral argument in behalf of the appellants and the only important question raised in his argument has reference to the nullity of the proceedings for lack of legal representation of the minor Mercedes Diaz Tell.

We have examined the record before us and have found that the appellant Carmen Tell, in all the various pleadings filed by her in the court below, has appeared as tutor or guardian ad litem of the minor Mercedes Diaz Tell, and in the order of the court dated April 30, 1924, it appears that Carmen Tell was appointed guardian of the minor Mercedes Diaz Tell and as such was authorized by the court to withdraw from the Postal Savings Bank the sum of P500 to defray the expenses of the education of said minor in a college. And in the same order dated August 23, 1924, it also appears that Mercedes Diaz Tell was duly represented by Carmen Tell in her capacity as tutor or guardian ad litem. In view of the facts appearing from the record, we are persuaded that the minor heiress, Mercedes Diaz Tell, was legally represented in this proceeding. And while it is true that the bill of exceptions contains no copy of the appointment of Carmen Tell as tutor or guardian ad litem, yet there can be no doubt that the court below has regarded Carmen Tell as tutor or guardian ad litem of the minor Mercedes Diaz Tell in this proceeding.

In the brief filed by appellants' counsel, error is assigned to the failure of the court to proceed in accordance with section 187 of the Code of Civil Procedure. This section refers to the sale of the property in case it is shown that it cannot be divided without serious inconvenience to the interested parties. But in the instant case there is no question but that the property could not have been divided without serious inconvenience to the parties. The objection of the appellants is based chiefly on the manner in which the property was divided. As stated in the record, the partitioning commissioners were instructed as to how they should divide into three lots equitably equal the estate of the deceased. The personal and real property and cattle of the estate having been divided into three

lots equitably equal, the parties agreed, as appears in the order of the lower court, dated August 11, 1923, that the awarding of said portions should be made by lot in open court.

If the parties have agreed to this manner of awarding, as is the fact, we cannot see how the lower court could have committed any error in approving said agreement, which probably had been adopted to avoid possible difficulties in the selection of the specific lot for each determinate heir. Counsel for appellants intimate in his brief that there was no such agreement; but it appears in the order of August 11, 1923, that the parties have agreed upon the manner in which the awarding should be made.

Section 184 of the Code of Civil Procedure provides that when the interested parties cannot agree upon the partition, the court shall appoint three judicious and disinterested landowners as commissioners to make the partition. This section is among those relating to the partition of real property in an action of partition, but as a rule of procedure, we think that it is equally applicable to a case of partition between coheirs. Indeed, section 762 of the Code of Civil Procedure provides that upon the filing of a petition for partition, the court shall appoint a committee to make the partition; and the latter's proceedings, as well as those of the court, after said committee has filed its report, shall be those provided by this Code for the partition of real property by action, that is, the partition of real property provided in section 181 and the following of the same Code of Civil Procedure.

As to the orders of the lower court assigned as errors in the brief of the appellants, suffice it to say that it was within the discretion of the court to make the orders it deemed fit in connection with the appointment of commissioners of partition, and as no abuse of discretion has been shown, said orders cannot be altered on appeal.

Another of the errors assigned by the appellants is that the trial court failed to order the parties to introduce evidence in support of or against the second proposed partition. This assignment of error is of no importance, for it appears from the order of May 2, 1924, that the attorneys for both parties have agreed that the new commissioners of partition should be instructed by the court (and it was so stated in the order of August 11, 1923) to proceed with the partition of the real property according to the new inventory, containing an estimate of the property, presented by the administrator, Mr. Jesus Alsua, and dated March 5, 1923; and of the cattle and money, according to the inventory of December 14, 1920, the value of the real property to be taken into account being that fixed by the committee of appraisal in their report of March 24, 1922.

If the tentative partition, submitted to the court for approval, was made in conformity with the agreement of the parties and the instructions of the court, is in fact it was, according to the aforesaid order of March 2, 1924, there was no need of any evidence, inasmuch as the appellants do not claim that the partition was effected in violation of the agreement of the parties and the instructions of the court.

For all of the foregoing, the order of the lower court approving the partition and award to the parties in interest made by the commissioners must be, as is hereby affirmed with the costs against the appellants. So ordered.

Avanceña, C. J., Johnson, Street, Malcolm, Ostrand, Johns, Romualdez, and Villa-Real, JJ., concur.

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