CHISHOLM v. HERKIMER

(1909), 19 O.L.R. 600 (also reported: 1 O.W.N. 139, 14 O.W.R. 919)
Ontario High Court, Riddell J., 5 November 1909

***Parties--Band of Indians--Representation of Class--Con. Rule 200--Order of Local Judge--Jurisdiction--Con. Rules 47,368--Petition to Set aside Proceedings--Practice--Motives of Petitioners--Status*.**

In an action against a Band of Indians collectively and against five individual members of the Band, to recover moneys alleged to be due to the plaintiff for professional services rendered to the Band, an order was made by a local Judge, on the application of the plaintiff, and on the consent of a solicitor instructed by a resolution passed at a meeting of the Band, that the five individual defendants should defend on behalf of the Band for the benefit of all members of the Band, and that all members of the Band should be bound by any judgment that might be pronounced in the action, etc. Upon this order were founded a judgment for the plaintiff and an order appointing a receiver to receive all moneys due to the defendants from the Dominion Government, to be applied upon the judgment:--

Upon the petition of six members of the Band, on behalf of themselves and all other members, the Superintendent General of Indian Affairs and the Minister of Justice also joining as petitioners, to set aside the proceeding before the local Judge so far as they affected the rights of the Band or its members other than the individual defendants:--

***Held*, that the six petitioning members had the right, as representing the class to which they belonged, the members of the Band, to petition or move against the proceedings, and it was immaterial what their motives, or those of the other petitioners, in so petitioning, were, nor was it important whether they came before the Court by way of petition, appeal, or otherwise.**

An order for representation can only be made by the Court: Con. Rule 200; a local Judge is not the Court, and has no power to make such an order. Con. Rule 368 applies only to business properly brought before a Judge in Chambers; and Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county; here the solicitors for all those who were formally parties did reside in the county; but, before an order can be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county.

PETITION to set aside a judgment and other proceedings in this action. The facts are stated in the opinion.

The petition was heard by RIDDELL, J., in the Weekly Court at Toronto, on the 4th November, 1909.

W.E. Middleton, K.C., and *H.S. White*, for the petitioners.
R.V. Sinclair, K.C., and *H.E. Rose*, K.C., for the plaintiff.

November 5. RIDDELL, J.:--The plaintiff, a solicitor, sets up that he was employed by the Mississaguas of the Credit, a band of Indians, to press a claim in respect of certain moneys to which it was asserted they were entitled in the hands of the Crown at Ottawa.

He took proceedings in the Exchequer Court of Canada, and was successful in obtaining a decree for a large sum. The proceedings are reported in *Henry v. The King* (1905), 9 Ex.C.R. 417.

The solicitor claimed for his services a considerable sum, which was not paid. He thereupon brought an action on the 3rd March, 1909, against Herkimer, Sault, Laforme, McDougall, and Tobicoe, "Chief Councillor and Councillors of the Mississaguas of the Credit, on behalf of themselves, as well as all other members of said Mississaguas, and the said Mississaguas of the Credit," as defendants.

On the 5th March, 1909, a meeting of the Band was held to consider the question of their indebtedness to the plaintiff; and that meeting--a small number of the Band being there present--passed a resolution stating that they wished their council to deal with the matter and were willing to abide by their decision; the council met and decided to call a public meeting of the electors of the Band to consider the matter. On the 14th May, 1909, this meeting was held--a small number again being present--and decided to give instructions to Mr. McEvoy to represent them and the Mississagua Band in the action and to consent to judgment for the amount sued for, also to consent to the appointment of a receiver and to a restraining order, "provided that said judgment is only to be paid out of the funds of the Mississaguas of the Credit at Ottawa . . . and it not to be binding in any way against the property of said . . . Band on their reserve, or of any member of the Band on the reserve . ."

Mr. McEvoy received authority accordingly "to act for them in the above matters and endeavour to carry out the terms of the above resolution on their behalf." Armed with this, he appeared with the plaintiff before His Honour Judge Elliott at London on the 12th June, 1909. That local Judge first made an order, "It appearing that the class being numerous and the five individual defendants are members of said Mississaguas of the Credit . . that the said "five persons," do defend on behalf of said Mississaguas of the Credit for the benefit of all members of said Mississaguas of the Credit, and that all the members of said Mississaguas of the Credit shall be bound by any judgment that may be pronounced in this action in the same manner and to the same extent as if they were personally made parties to this action."

On the same day, no appearance having been entered, an order was made by the same local Judge, reciting the order just mentioned, and that the five defendants named appeared by their counsel and had submitted the rights of their co-defendants, the other members of the Band, and of the Band, to the Court, and submitted, as well on their own behalf as on behalf of all other members of said Mississaguas of the Credit, and said Mississaguas of the Credit, to such order as might be made herein, and then ordering that the plaintiff be at liberty to enter final judgment against the defendants for the sum of $10,700.47 and interest . . . and that said judgment should be binding upon "the whole of the members of the Mississaguas of the Credit in the same manner and to the same extent as if they were personally made parties to this action." It will be noticed that the judgment is not declared to be binding upon "the Mississaguas of the Credit." Upon this order a judgment was entered on the 15th June, 1909: "It is this day adjudged that the plaintiff recover against the said defendants $10,824.01 to be paid to the plaintiff."

On the 29th June, 1909, an order was made by the same local Judge appointing the plaintiff receiver to receive all moneys due the defendants from the Government, to be applied on the plaintiff's judgment, and restraining the defendants, either by themselves or by their agent Van Loon, or other agent, from receiving it until the plaintiff's judgment was paid. On the 2nd July an order was made appointing the local Master at Ottawa receiver in the room and stead of the plaintiff, but not otherwise varying the previous receiving order.

The Band is composed of some 267 persons, men, women, and children.

Now come six members of the Band, and also the Superintendent- General of Indian Affairs and the Minister of Justice, by petition to the Court, and ask, amongst other things, that it may be declared that the proceedings before the local Judge were and are null and void in so far as they purport to affect the rights of the tribe or the members of the said tribe other than the individual defendants, and that they be set aside and vacated. The six petitioners come to Court asking relief "on behalf of themselves and all other members of the Mississaguas of the Credit;" the Superintendent-General of Indian Affairs and the Attorney-General and Minister of Justice for Canada join in the petition; they, the six first named petitioners, being themselves members of the Band.

Upon the matter being opened before me in Weekly Court, I offered an issue to be tried upon all the points in controversy-- this was declined: I therefore proceed to dispose of the case on the material before me.

I take it for granted that the plaintiff has an honest claim to quite the amount of his judgment, and that he has acted in good faith throughout.

I do not think that anything turns upon how the petition came to be lodged; apparently it was at the instance of the authorities in Ottawa. The petitioners are before the Court--the matter is before the Court. "It is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court . . . must decide according to law . . . whatever be the motives and wishes of the respective litigants:" Lord Halsbury, L.C., in *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143, at p. 157; *Freeman v. Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296, 299; *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123.

The petitioners may petition or move as representing the class to whom they belong, *i.e.*, the members of the Mississagua Band. Whether the Superintendent-General of Indian Affairs or the Attorney-General and Minister of Justice for the Dominion can, need not be considered.

Nor do I pay any attention to the manner in which the case is brought before the Court. If the proper practice should be by appeal under Con. Rule 48 (see Con. Rule 47 *(a) (b) (c)*), I shall consider this such an appeal, or if in another way, then I consider it so brought, making all necessary amendments, extension of time, etc. All these niceties of practice go to costs, and I do not think this a case for costs in any event.

The order for judgment does not make the judgment binding upon the Band--and any order for receiver, etc., based upon the proposition that the Band are bound by the judgment, is, of course, irregular and cannot stand.

But the chief difficulty is as regards the judgment binding the several members of the Band. That could only be if the order for representation is valid. Such an order can only be made by the Court: Con. Rule 200. The local Judge is not "the Court," and has no power to make such an order: *Re Reid* (1909), 13 O.W.R. 915, 1026.

A very ingenious argument was advanced by Mr. Sinclair as follows: Con. Rule 47 (1242) gives the local Judge, in actions brought in his county, "the like powers of a Judge in the High Court, in Court or Chambers;" and Con. Rule 368 provides that "a Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court." Therefore, it is argued, as the Court could make this order, a Judge in Chambers could do so also, and consequently so could the local Judge. But there are two weak points: (1) Con. Rule 368 applies only to business properly brought before the Judge in Chambers: *Re Reid, ubi supra*; and (2) Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county. Here the petitioners had no solicitor; and they did not consent. I do not forget that the petitioners were not formally parties to the action, and that the solicitors for all those who were formally parties did reside in the county; but I think, before an order can be made by a local Judge binding those not formally before the Court, that they must either agree that the motion be heard by him or have a solicitor residing within the county at least.

The order for representation will be set aside and also all orders and judgments based upon this order, except so far as they affect the individual defendants.

I express no opinion upon the other questions argued: it may be well for all parties to consider whether this is not a proper case for a settlement.

The plaintiff has, I am convinced, acted in good faith throughout, and it is not a case for costs; especially is this so, as much of the relief sought could not be obtained in this summary way; but, even had the other relief not been sought, I would still, as a matter of discretion, have directed that no costs should be paid by either party.