

100 Phil. 785

[ G. R. No. L-9633. January 29, 1957 ]

**EMILIO SORIANO, PETITIONER AND APPELLEE, VS. ANTONIO ASI, RESPONDENT AND APPELLANT.**

**D E C I S I O N**

**REYES, J.B.L., J.:**

Antonio Asi prays for the reversal of the decision of the Court of First Instance of Batangas, vacating a previous final order (rendered in Special Proceedings No. 126, entitled "Testate Estate of Crisanta Soriano") whereby the alleged will of Crisanta Soriano was admitted to probate, and appointing Antonio Asi as administrator of her property.

It is not denied that in the petition for probate of the will of Crisanta Soriano filed by appellant Antonio Asi, the latter intentionally omitted the name of appellee Emilio Soriano, although Asi knew that Emilio was a nephew of the alleged testatrix, and was one of her heirs intestate, she having died without any surviving spouse, ascendants or descendants., As a result, Emilio Soriano was not given notice of the pendency of the petition for probate nor of the date of hearing set by the probate court, in violation of sections 2 and 4 of Rule 77:

Sec. 2. *Contents of petition.*-A petition for the allowance of a will must show, so far as known to the petitioner:

- (a) The jurisdictional facts;
- (b) Whether the person named as executor consents to act, or renounces his right to letters testamentary;
- (c) The names, ages, and residences of the heirs, legatees, and devisees, of the decedent;
- (d) The probable value and character of the property of the estate;
- (e) The name of the person for whom letters are prayed; (/) If the will has not been delivered to the court, the name of the person

having custody of it.

*Sec. 4. Heirs, devisees, legatees, and executors to be notified by mail or personally.*-The court shall also cause copies of the notice of the time and place fixed for proving the will to be addressed to the known heirs, legatees, and devisees of the testator resident in the Philippines at their places of residence, and deposited in the post office with the postage thereon prepaid at least twenty days before the hearing, if such places of residence be known. A copy of the notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Personal service of copies of the notice at least ten days before the day of hearing shall be equivalent to mailing.

On April 22, 1952, Emilio Soriano filed a sworn petition to vacate the order admitting his aunt's will to probate, on the ground that, because of the omission of his name as detailed above, and because of his unfamiliarity with Spanish (the notice of hearing had been published in the newspaper "Nueva Era" in that language), petitioner had been deprived of his day in court, and of opportunity to object to the probate; and that he learned of the questioned proceedings only on April 4, 1952, through a communication from the lawyer of Antonio Asi.

Because of the facts aforesaid, Judge Edilberto Soriano, then of the Court of First Instance of Batangas, overruled the objections of Antonio Asi, and vacated the probate order complained of as obtained through extrinsic fraud to the detriment of Emilio Soriano. Antonio Asi then appealed directly to this Court on questions of law, but the appealability of the order of Judge Soriano has not been questioned, notwithstanding section 8 of Rule 38.

Now appellant first alleges that, notwithstanding the lack of personal notice, the Court of First Instance acquired jurisdiction over the case, by virtue of the newspaper publication, probate proceedings being proceedings *in rem*. The objection is improperly raised, because Emilio Soriano does not question the jurisdiction of the probate court; his petition for relief on the ground of fraud precisely assumes that the Court had jurisdiction to issue the order complained of. Without jurisdiction, said order would be a total nullity, and no petition for relief would be required (*Gomez vs. Concepcion*, 47 Phil., 717; *Lipana vs. Court of First Instance of Cavite*, 74 Phil, 18).

It is next averred that the petition for relief was filed out of time, because the order admitting the will to probate was rendered on October 10, 1951, while the petition for relief was filed only six (6) months and twelve (12) days afterward, on April 22, 1952. The period of six months is incorrectly computed by the appellant from the *rendition* of the judgment or order complained of; it should be counted from the *entry* of such judgment or order. This is evident from section 3 of Rule 38:

*Sec. 3. When petition filed; contents and verification.*- A petition provided for in either of the preceding sections of this rule must be verified, filed within sixty days after the petitioner learns of the judgment, order, or other proceeding to be set aside, and not more than six months after such judgment or order was entered, or such proceeding was taken; and must be accompanied with affidavits showing the fraud, accident, mistake, or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be, which he may prove if his petition be granted.

Under Rule 35, section 2, a judgment or order is entered by the clerk after expiration of the period for appeal or motion for new trial, i.e., after thirty days (Rules 87 and 41). This means that the probate order of October 10, 1951, could be entered, at the earliest, on November 9, 1951; wherefore, the petition for relief, filed on April 22, 1952, was within the six months allowed by law.

That the fraud practiced upon Emilio Soriano was collateral or extrinsic is unquestionable: it was not on a matter raised, controverted or decided in the probate order. It was entirely foreign to the issue raised in the probate proceedings, which was the due execution of the will of the deceased. Fraud that prevents a party from having a trial has been ruled to be extrinsic in *Varela vs. Vttjanueva*, 50 Off. Gaz., 4242, 4249.

Wherefore, it appearing that Emilio Soriano was fraudulently deprived of his day in court through no fault of his own, and that he has seasonably applied for relief, the court below committed no error when it vacated the probate decree. The decision appealed from is affirmed, with costs against appellant. So ordered.

*Paras, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Bautista Angelo, Labrador, Endencia, and Feli., JJ., concur.*

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