

**RUFINO CASTAÑO, GUALBERTO CASTAÑO, BRIGIDO CASTAÑO,
SOCORRO CASTAÑO AND SERVILLANO CASTAÑO, WHO ARE ALL OF
MINOR AGE, AND JACINTA PALAGAN, AS GUARDIAN AD LITEM,
PLAINTIFFS AND A...**

G.R. No. L-7192. January 31, 1955

Ponente: LABRADOR, J.

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LABRADOR, J.:

On June 14, 1949 plaintiffs-appellants filed this action in the Court of First Instance of Misamis Occidental, alleging that they are the adulterous children of Ramon Castaño, deceased, by one Jacinta Palangan, and the defendants his legitimate children by his legal wife, Antonina Paburada; that Ramon Castaño died in Cebu on October 21, 1936, survived by all the above-mentioned adulterous and legitimate children and wives; that the deceased left considerable property, private and individual, not conjugal, worth not less than P100,000; that upon his death proceedings for the distribution of his properties were instituted and said properties were partitioned, each of the defendants receiving a corresponding share therein; and that the plaintiffs as well as their mother have no property, or trade, or profession from which to derive support and maintenance, which is P30 for each of them.

The complaint was docketed as a pauper's case and on July 5, 1949 defendants presented a motion to dismiss on the following grounds: that the plaintiffs have no legal capacity to sue; that the court has no jurisdiction over the persons of the defendants; that the complaint states no cause of action; and that said cause of action, if any exists, has already been barred by prior judgment. The first is based on the fact that the guardian proposed in the complaint was not actually appointed at the time of the filing of the complaint; the second, on the fact that the order appointing the guardians was not attached to the original copy of the summons; the third, on the allegation that no final judgment in a criminal or civil action had been rendered wherein the filiation of the plaintiffs-minors is expressly acknowledged; and the fourth, for the reason that on July 18, 1940 a former civil action between the same parties and for the same cause (Civil Case No. 602) was dismissed for failure of the plaintiffs to amend their complaint after a demurrer thereto had been sustained.

The court dismissed the case on the first, second and fourth grounds mentioned above. The case was appealed to the Court of Appeals, and the latter has certified it to us for the reason that only questions of law are involved in the appeal. Two assignments of error are made in the plaintiffs-appellants' brief, thus:

"1. The Court erred in holding that the plaintiffs have no legal capacity to sue and the court has no jurisdiction of the person of the defendants.

2. The court erred in holding that the cause of action is barred by prior judgment."

The record shows that when the complaint was served upon the defendants there was yet no appointment of a guardian ad litem, although a request for such appointment is made therein. But on September 17, 1949, on noting

the absence of an order appointing a guardian ad litem for the plaintiffs, the court immediately ordered the desired appointment and the mother of the plaintiffs-minors, who was appointed, immediately qualified therefor. This was done before the court heard the motion to dismiss. The motion to dismiss was granted on October 22, 1949. As the appointment for the guardian ad litem was actually made on September 17, 1949, before the order of dismissal, the first ground for the order can not be sustained. As to the second ground, i.e., that no appointment for a guardian ad litem was attached to the complaint served upon the defendants, the defect is a mere technicality and the most that the court could have done was to order that a new summons, with copy of the appointment of the guardian ad litem, or the latter merely, be served upon the defendants. The service of the summons was sufficient to subject the defendants to the court's jurisdiction (*Pagalaran vs. Ballatan*, 13 Phil., 135). The first assigned error must, therefore, be sustained.

As to the second error, the record discloses that civil case No. 602 is for the same cause, support and maintenance for the plaintiffs-appellants. The reason why the demurrer interposed to the complaint was sustained was the failure to allege therein a sufficient cause of action, because it appeared from the complaint that the properties of the deceased Ramon Castaño had not yet been distributed and the defendants, as his legitimate children, had not yet received their respective participation therein. The order runs thus:

"La accion de los demandantes versa sobre una reclamacion de alimentos contra los aqui demandados como herederos del finado Ramon Castaño, que en vida se separe de su legitima esposa y su unio con Antonina Paburada con quien tuvo varios hijos que son los aqui der mandantes.

"No se alega en la demanda, sin embargo, que ya se ha verificado la liquidacion judicial de los bienes del difunto Ramon Castaño y que lbs aqui demandados como sus herederos legitimos hayan recibido sus participaciones para que los aqui demandantes puedan tener derecho de acci6n contra los referidos demandados. * * *."

The issue squarely brought before us is, Is the order of dismissal issued after the plaintiffs had failed to amend their complaint, which had been demurred to, a final judgment barring the present action? Rule 30, section 3, of the present Rules of Court can not be cited to sustain the Affirmative view, because the orders sustaining the demurrer to the complaint in the first case and dismissing same were issued under the old rules of court and before the present rules were in force. The effect of the orders must be governed not by the latter but by the former, which expressly provided:

"* * *; but if the party fails to amend his pleading¹ within the time limited or elects not to amend the court shall render such judgment upon the subject-matter involved in the pleading and demurrer as the law and the facts of the case as set forth in the pleading warrant. * * *." (Sec. 101, Code of Civil Procedure.)

The order of dismissal of the first complaint is final and conclusive only as to the absence of a sufficient cause of action at the time, i.e., because the defendants had not yet received their share in the inheritance of the common father. But it is not conclusive as to the new complaint, where allegation is made that the defendants have already received their shares in the inheritance left by the common father. When the first complaint was filed in 1939, no cause of action had accrued against the defendants because they had not yet received their shares in the inheritance, their liability arising from the fact of their receipt of said shares. Under the new complaint the cause of action has accrued, the cause upon which the defendants' obligation depends having happened. It would be unjust and unfair, at this juncture, and which this new fact in mind, to say that the previous order of dismissal is a bar to the new complaint. Of practical application is what this Court said in *Bayot vs. Zurbito*, 39 Phil., 650, thus:

"* * *; but on the contrary the authorities show that a person who relies on a former judgment as a conclusive adjudication of any controversy must takes the prior judgment for what it appears to be on its face; and if it is not a judgment on the merits, it does not conclude the right of action.

This point came under consideration in *Wanzer vs. Self* (30 Ohio St., 378), where the judgment relied upon as *res judicata* contained the reservation 'without prejudice.' It was argued that the insertion of these words in the judgment was erroneous and unwarranted and that as the case had been in fact tried upon the merits the judgment must be considered as a conclusive bar to another action. Said the court:

"The actual judgment rendered does not appear to be one that is conclusive of the merits of the case. To give it the effect to such a judgment would not only create that which does not exist, but might work a great wrong to the plaintiff by finally determining a just cause of action which the court did not adjudge against him, and by misleading him to acquiescence in a judgment from which he would appealed had it been regarded as conclusive. * * *. The : judgment is an entirety, and if it has any validity, it must stand as rendered. * * *. Upon that judgment the party must stand, and, being without prejudice to a future action, it is not a bar to the action to which it was pleaded' (30 Ohio St., 381, 382)."

From another point of view, it may be stated that the said case was dismissed because the action was premature. The order of dismissal, therefore, is no bar to the present suit.

"A judgment for defendant or an order dismissing the action, for the reason that it was prematurely brought, either because the amount claimed is not yet due, or because plaintiff has failed to perform some preliminary act necessary to perfect the cause of action, such as making demand before suit, giving notice of claim, furnishing security for costs, or paying the costs of a previous action was ordered, will not bar another action for the same cause when the right of action becomes complete. * * *." (34 C.J., 777-778; *Italics supplied*).

"* * *. It is true that he was named as one of the assignors of various claims involved in the first action, but that case went off on demurrer; and the judgment therein entered does not constitute *res judicata* upon any question of fact. * * *." (*Maxion vs. Manila Railroad Co.*, 44 Phil., 597, 607.)

For the foregoing considerations, the order of dismissal appealed from should be, as it is hereby reversed, with costs against defendants-appellees.

Paras, C. J., Pablo, Bengzon, Padilla, Montemayor, Reyes, A., Jugo, Bautista Angelo, Concepcion, and Reyes, J.B.L., JJ., concur.

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