

**JOVENCIO CONCHA AND EULALIA P. CONCHA, SPOUSES,
PETITIONERS, VS. HON. JOSE C. DIVINAGRACIA, JUDGE, COURT OF
FIRST INSTANCE OF NEGROS OCCIDENTAL, BRANCH VII, SAN
CARLOS CITY, FER...**

G.R. No. L-27042. September 30, 1981

Ponente: CONCEPCION JR., J.

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CONCEPCION JR., J.:

Petition for certiorari, to annul and set aside an order of the respondent court ordering the herein petitioners to deliver a certain parcel of land to the private respondents to allegedly conform with this Court's decision in Civil Case G.R. No. L-17966, entitled: "Fermin de la Victoria, et al., petitioners, versus Levy Hermanos, Inc., et al., respondents," and prohibition, to restrain the execution of said order.

On June 5, 1951, the spouses Fermin de la Victoria and Concepcion Nemenzo, Juan Ortega, Marcelino Ortega, and Irene Ortega, thru her guardian ad litem Juan Ortega filed an action with the Court of First Instance of Negros Occidental against Levy Hermanos, Inc. and the spouses Jovencio and Eulalia Concha for the annulment of the foreclosure of mortgage proceedings in Civil Case No. 8176 of the Court of First Instance of Negros Occidental and to be declared the absolute owners of Lot No. 121-A2-C-2-A of the San Carlos Cadastre. The plaintiffs further prayed that the defendants be sentenced to pay damages.[1]

After hearing the parties, the court dismissed the complaint; declared the defendant spouses Jovencio and Eulalia Concha the owners of that portion of Lot 121-A formerly belonging to Juan, Anacleto, Marcelino, and Irene, all surnamed Ortega, covered by TCT No. RT--1349; and ordered the spouses Fermin de la Victoria and Concepcion Nemenzo to deliver possession of the property or whatever part thereof is actually occupied by them to the spouses Jovencio and Eulalia Concha. On appeal, the judgment was affirmed in toto.[2]

Upon a review of the case,[3] however, this Court found that the spouses Fermin de la Victoria and Concepcion Nemenzo had earlier taken possession of a portion of the land corresponding to the total 2/8 pro indiviso shares of Anacleto and Marcelino Ortega, in good faith, and erected thereon two buildings, one used for residential, and the other for commercial purposes; and that the aforementioned spouses have not been duly impleaded in the foreclosure case so that the said spouses cannot be deprived of the possession of the two buildings without due process; and the judgment was modified "in the sense that Civil Case No. 8176 of the Court of First Instance of Negros Occidental is declared without effect insofar as the right, interest and participation of spouses Fermin de la Victoria and his wife Concepcion Nemenzo over Lot 121-A of San Carlos Cadastre is concerned, especially the portion belonging to them as well as the improvements they constructed thereon."

In due time, the records of the case were remanded to the lower court for execution. To enforce the judgment, the respondent court issued an order on September 20, 1966 ruling that "the area which should pertain to Fermin de la Victoria is only 2,062.82 square meters," and "(T)his area must be satisfied and delivered to Fermin de la Victoria from the portion of Lot 121 presently occupied by Jovencio Concha and which adjoins the portion presently

occupied by Fermin de la Victoria."[4]

The defendant spouses Jovencio and Eulalia Concha filed a motion for the reconsideration of the aforesaid order stating, among others, that the decision of this Court did not mention a specific portion of Lot 121 which should be adjudicated to the plaintiff spouses Fermin de la Victoria and Concepcion Nemenzo other than that portion wherein the latter had erected their residential and commercial buildings and made improvements thereon; that said decision did not give the plaintiff spouses the right to choose which portion of Lot 121 should pertain to them; and that to take the portion presently occupied by defendant spouses will not satisfy the judgment because the defendants are only occupying a portion with an area of 600 sq. m., more or less.[5] After conducting an ocular inspection of the pre-mises, the respondent court denied the motion on December 16, 1966.[6]

Whereupon, the spouses Jovencio and Eulalia Concha filed the present petition, claiming that the respondent court had varied the terms of the executory judgment without or in excess of its jurisdiction, and that there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law other than the present petition.

There is merit in the petition. The respondent court correctly held, in its order dated September 20, 1966, that the area which should pertain to Fermin de la Victoria and his wife is only 2,062.82 sq. m. because this area corresponds to the total 2/8 pro indiviso shares of Anacleto and Marcelino Ortega in Lot 121-A of the San Carlos Cadastre which were sold to Fermin de la Victoria and his wife and wherein the latter spouses had erected their residential and commercial buildings. But, the respondent court committed an error when it recognized the rights of said spouses Fermin de la Victoria and Concepcion Nemenzo over other portions of Lot 121-A, thus altering the terms of the executory judgment.

In the modificatory decision, the Court recognized the rights of Fermin de la Victoria and his wife over only that portion acquired by the said spouses from Anacleto and Marcelino Ortega wherein they have erected two buildings which they used for residential and commercial purposes. The Court said:

"On the strength of the facts related above there is no doubt that when the lot in question was mortgaged by the Ortegas on August 6, 1936 to Levy Hermanos, Inc. to secure the payment of a car which they had purchased from it the right, interest and participation therein belonging to Anacleto and Marcelino had already been conveyed to Fermin de la Victoria and his wife, and the corresponding deeds of conveyance annotated on the back of its title as a consequence of which said spouses took possession of the portions conveyed to them and constructed thereon two buildings, one for residence and the other for business. However, when the foreclosure case was instituted the company only impleaded the Ortegas but failed to include Fermin de la Victoria and his wife with the result that after the property was sold to Jovencio Concha and his wife these spouses were declared with the right to take possession of the land and eject therefrom Fermin de la Victoria and his wife. This is now assigned as error by appellants.

"We find merit in this contention. While it is true that under Rule 70, Section 3, of our Rules of Court the sale of a mortgaged property shall not affect the rights of persons holding prior incumbrances prior to that of Levy Hermanos, Inc., it should not however be overlooked that said spouses were placed immediately in possession of the land after the conveyance and have erected thereon two buildings one for residence and the other for business at their cost. Hence, said spouses cannot be deprived of the possession of the two buildings without due process for apparently they acted on the matter in good faith. In fact, their possession remained undisturbed until the foreclosure case was started by the Levy Hermanos, Inc. Evidently, the court a quo acted unfairly when it ordered them to deliver to spouses Concha the possession of the property not being parties to the case."6

It thus results that the respondent court had no jurisdiction or exceeded its jurisdiction in ordering the spouses Jovencio and Eulalia Concha to deliver a definite portion of Lot 121-A of the San Carlos Cadastre to the spouses

Fermin de la Victoria and Concepcion Nemenzo, over and above that recognized as pertaining to said spouses.

To restate, the spouses Jovencio and Eulalia Concha are the owners of that portion of Lot 121-A formerly belonging to Juan, Anacleto, Marcelino, and Irene, all surnamed Ortega, covered by TCT No. RT-1349, except that 2/8 pro indiviso portion previously sold by Anacleto and Marcelino Ortega to Fermin de la Victoria and his wife wherein the latter spouses had constructed two buildings.

WHEREFORE, the petition is granted and the orders of respondent court in Civil Case No. 1970, dated September 20, 1966 and December 16, 1966, are hereby ANNULLED and SET ASIDE. The parties are hereby ordered to effect a partition of that parcel of land known as Lot 121-A of the San Carlos Cadastre, with an area of 8,250.50 square meters, covered by TCT No. RT-1349 of the Register of Deeds of Negros Occidental in the names of Juan, Marcelino, Irene, and Anacleto, all surnamed Ortega, and submit the same to the trial court within thirty (30) days after this decision shall have become final and executory, and should they fail therein, the trial court should effect such partition in accordance with Rule 69 of the Revised Rules of Court.

SO ORDERED.

Barredo, (Chairman), Abad Santos, and De Castro, JJ., concur.
Aquino, J., see attached concurrence.

[1] Civil Case No. 1970.

[2] CA-G.R. No. 17874-R, Feb. 26, 1962.

[3] G.R. No. L-19766, August 31, 1965; 14 SCRA 996.

[4] Rollo, p. 16.

[5] Id., p. 17.

[6] Id., p. 20.

6 See Decision in G.R. No. L-19766, Aug. 31, 1965; 14 SCRA 996.

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CONCURRING OPINION

AQUINO, J.:

I concur in the result.

In this Court's decision in De la Victoria vs. Levy Hermanos, Inc., 122 Phil. 330, 14 SCRA 996, the spouses, Fermin de la Victoria and Concepcion Nemenzo, were, in effect, declared to be the owners of a proindiviso one-fourth (1/4) portion, with an area of 2,062.62 square meters, of a part of Lot 121-A of the San Carlos, Negros Occidental cadastre. The total area of the portion of Lot 121-A formerly owned by the Ortegas is 8,250.50 square

meters.

The remainder or the three-fourths proindiviso share, with an area of 6,187.88 square meters, of said part of Lot 121-A was regarded as the property of the spouses, Jovencio Concha and Eulalia P. Concha. They purchased it at an auction sale which was held in connection with the foreclosure proceeding brought by Levy Hermanos, Inc. against the former co-owners, Juan, Marcelino, Irene and Anacleto, all surnamed Ortega.

Although the one-fourth share of Fermin de la Victoria and his wife is unsegregated or is an ideal and abstract share, they took possession of a definite portion of Lot 121-A and constructed two buildings thereon. On the other hand, the spouses Jovencio Concha and Eulalia P. Concha also took possession of a part of Lot 121-A, which part has an area of around six hundred square meters (p. 18, Rollo).

The De la Victoria spouses filed in the lower court a motion dated April 18, 1966, praying for a writ of execution "requiring the sheriff with the aid of a licensed surveyor to delineate the boundaries of the respective lands" of the De la Victorias and the Conchas. That motion was really a demand for partition.

The lower court made an ocular inspection of Lot 121-A (it identifies the lot as Lot 121). It found that the lot is occupied by De la Victoria, Concha and "other persons who claim right of ownership over the portions occupied by them" (p. 20, Rollo). It resolved the motion for execution in its order of December 16, 1966, by requiring the Conchas, alternatively, to deliver to the De la Victorias "the portion that is being occupied" by them to the extent of 2,062.82 square meters, but if that area is not sufficient, then the De la Victorias "may seek other remedies for the full satisfaction" of this Court's judgment.

It is evident that the trial court was not aware of the exact areas of the portions of Lot 121-A actually occupied by the Conchas and the De la Victorias. As already stated above, the Conchas alleged that they are occupying an area of only 600 square meters. Fermin de la Victoria has not stated the exact area occupied by him.

That 1966 order is assailed in the instant petition for certiorari and prohibition filed by the Conchas on January 4, 1967. They contend that this Court in its 1965 decision merely declared that the De la Victorias own an undivided one-fourth (1/4) share in the disputed land and that the Conchas own the other undivided three-fourths (3/4) share but that this Court did not order the Conchas to deliver a segregated portion of the land. The Conchas ask that the said order of the trial judge be set aside but they have not offered any concrete solution as to how the one-fourth share of the De la Victorias should be segregated or as to how the land should be partitioned.

On the other hand, respondents De la Victoria pray that the petition be dismissed. In doing so, they ignore the fact that the Conchas are entitled to the possession of a three-fourths portion of the disputed portion of Lot 121-A in the same way that they are entitled to possess a definite one-fourth portion and that it is necessary to partition the land or to terminate the co-ownership.

The trial judge in his answer to the petition manifested that he could segregate the area of 2,062.62, owned by respondents De la Victoria, "without the necessity of ventilating another case between the same parties". That was precisely what the trial court failed to do in this case. In its questioned order, it just ordered the Conchas to surrender to respondents De la Victoria the portion which they have been occupying, without taking into account the contention of the Conchas that they are occupying only an area of 600 square meters and without taking into account the right of the Conchas to possess three-fourths of the land with an area of 6,178.68 square meters.

Petitioners Concha are correct in contending that this Court's 1965 decision is merely declaratory of the undivided and unsegregated aliquot portions (3/4 and 1/4) of the disputed land owned by the parties. In this Court's decision, there was no directive for the partition of the land. In the complaint filed by the De la Victoria spouses, there was no prayer for partition and adjudication of possession.

The trouble with the instant proceeding is that the parties and the trial court have not bothered to state categorically and with certitude the facts regarding the parties' possession of the portions of the disputed land. A graphic sketch, showing the portions and the areas thereof actually occupied by the contending parties, would have facilitated the partition and the resolution of this case. The salient and ultimate facts as to the parties' possession of the land are blurred. And the parties have not agreed as to whether the land should be partitioned in the old case or in a new proceeding. That explains why there has been a delay in the disposition of this case.

In my view, the trial court should designate a surveyor who should make a survey and plan of the land formerly owned by the Ortegas with an area of 8, 250.50 square meters, indicating therein the areas of the portions occupied by the Conchas, the De la Victorias and other persons. The parties should share equally the expenses of the survey.

After the survey plan is submitted, the parties may agree on how they should partition the land. If they cannot agree on the manner of partition, then the trial court should appoint commissioners and proceed in accordance with Rule 69 of the Rules of Court.

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