

SOPHIE M. SEIFERT AND ELISA ELIANOFF, PETITIONERS, VS. MARY MCDONALD BACHRACH, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF THE DECEASED E. M. BACHRACH, AND CONRADO BARRIO...

G.R. No. L-1379. December 19, 1947

Ponente: PERFECTO, J.

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PERFECTO, J.:

Petitioners, sisters and heirs of the late E. M. Bachrach, who died in Manila on September 28, 1937, pray for a command from this Court calculated to compel the lower court to execute its order of October 2, 1940, which reads as follows:

"Upon consideration of the petition of Sophie M. Seifert, Ginda M. Skundina, Elisa Elianoff and Annie Bachrach Levine, of September 16, 1940, wherein they pray that the administratrix and usufructuary of the properties left by the deceased E. M. Bachrach be authorized to pay them, beginning July 1, 1940, and until they receive their share of the estate left by the deceased E. M. Bachrach upon the death of his widow, a monthly allowance of P500; P250; P250; and P250, respectively, and the additional sum of P3,000 to the said Sophie M. Seifert, who is in poor health, the said allowances to be deducted from their shares of the estate of the deceased E. M. Bachrach upon the death of his widow, Mary McDonald Bachrach;

"All the parties interested in the estate left by the deceased E. M. Bachrach having expressed their conformity to the said petition, and there existing no reason why the same should not be granted.

"Petition granted; and the administratrix and usufructuary Mary McDonald Bachrach is hereby authorized and instructed forthwith to pay to the said Sophie M. Seifert, Ginda M. Skundina, Elisa Elianoff and Annie Bachrach Levine a monthly allowance of five hundred (P500) pesos; two hundred fifty (P250) pesos; two hundred fifty (P250) pesos; and two hundred fifty (P250) pesos, respectively, beginning July 1, 1940, and until the said heirs receive their share of the estate left by the deceased E. M. Bachrach upon the death of his widow, and the additional sum of three thousand (P3,000) pesos to the heir Sophie M. Seifert.

"The payment of the monthly allowances herein granted to the said heirs Sophie M. Seifert, Ginda M. Skundina, Elisa Elianoff and Annie Bachrach Levine other than those corresponding to the months of July, August and September, shall be made on or before the 5th day of each month, beginning October, 1940; shall be taken from the properties to be turned over to the heirs of the deceased E. M. Bachrach and the usufruct of which will belong to his widow, Mary McDonald during her life; and shall be deducted from the share of the said heirs of the estate of the deceased E. M. Bachrach upon the death of his widow.

"Upon verbal petition of Attorney Carrascoso, and it appearing from the record that two of the clients whom his law firm represents reside outside of the Philippines, the administratrix and usufructuary, Mary McDonald Bachrach, is hereby authorized and instructed to pay directly to Attorneys Ross, Lawrence, Selph & Carrascoso the monthly allowances corresponding to the heirs Sophie M. Seifert, Ginda M. Skundina, and Elisa Elianoff.

"No opposition having been filed to the amended report, rendition of accounts, and liquidation of the community property of the conjugal partnership of E. M. Bachrach, deceased, and Mary McDonald Bachrach as surviving spouse presented by the administratrix under date of September 17, 1940, the same are hereby approved and granted. It is so ordered."

"QUIRICO ABETO

"Judge"

The petition in virtue of which the above order was issued and to which all the interested parties in the estate have expressed their conformity, as stated in the order, reads as follows:

"Comes now Sophie M. Seifert, Ginda M. Skundina, Elisa Elianoff, and Annie Bachrach, and to this Honorable Court respectfully state:

"1. That paragraph sixth and eighth of the will of the deceased E. M. Bachrach provide as follows:

" 'Sixth: It is my will and do herewith bequeath and devise to my beloved wife Mary McDonald Bachrach for life all the fruits and usufruct of the remainder of all my estate after payment of the legacies, bequests and gifts provided for above; and she may enjoy such usufruct and use or spend such fruits as she may in any manner wish.'

" 'Eighth: It is my wish that upon the death of my beloved wife, Mary McDonald Bachrach, all my estate, personal, real and otherwise, and all the fruits and usufruct thereof which during her life pertained to her, shall be divided as follows:

" 'One-half (1/2) thereof shall be given to such charitable hospitals in the Philippines as she may designate; in case she fails to designate, then said sum shall be given to the Chief Executive of these Islands who shall distribute it, share and share alike to all charitable hospitals in the Philippines excluding those belonging to the governments of the Philippines or of the United States:

" 'One-half (1/2) thereof shall be divided, share and share alike by and between my legal heirs, to the exclusion of my brothers.'

"2. That on July 22, 1940, this Court entered the following order:

" 'It appearing from the report filed by the commissioner, the Acting Assistant Clerk of the Court, that the only heirs of the deceased E. M. Bachrach, according to the evidence presented, are his widow Mary McDonald Bachrach and his sisters Sophie M. Seifert, Annie Bachrach, Ginda Skundina and Elisa Elianoff, the Court hereby declares said Mary McDonald Bachrach, Sophie M. Seifert, Annie Bachrach, Ginda Skundina and Elisa Elianoff as the only legal heirs of said deceased, all of whom are of legal age.

" 'So ordered.'

"Your petitioners who are the legal heirs of the deceased E. M. Bachrach beside his widow, Mary McDonald Bachrach, respectfully request that she, as administratrix and usufructuary of her deceased husband's properties, be authorized to pay your petitioners from and after July 1, 1940, and until they receive their share of the estate left by the deceased E. M. Bachrach upon the death of his widow, a monthly allowance of P500, P250, P250, and P250, respectively, and the additional sum of P3,000 to the heir Sophie M. Seifert, who is in poor health, the said allowances to be deducted from your petitioners' share of the estate of the deceased E. M. Bachrach upon the death of the widow;

"All parties interested in the estate left by the deceased E. M. Bachrach are agreeable to this petition.

" Manila, September 16, 1940.

"ROSS, SELPH, CARRASCOSO & JANDA

By (Sgd.) "ANTONIO T. CARRASCOSO, Jr.

Attorneys for Ginda M. Skundina,

Elisa Elianoff, and Sophie Seifert

414 National City Bank Bldg., Manila

"We agree:

(Sgd.) "ANNIE BACHRACH

(Sgd.) "MARY MCDONALD BACHRACH

Administratrix and Usufructuary

(Sgd.) "ROMAN OZAETA

"Solicitor General"

No appeal has been taken against the foregoing order by any party.

From July 1, 1940, to December 31, 1941, the administratrix, respondent Mary McDonald Bachrach, made the payments as ordered. According to respondents, the total amount paid amounted to P40,250. The monthly allowances or advances due from January 1, 1942, to July 31, 1945, were not paid. The total amount is P32,500 or P21,500 for Sophie M. Seifert and P10,750 for Elisa Elianoff. Payments were resumed from August, 1945, to January, 1947. Petitioners have been demanding from respondent Mary McDonald Bachrach the payment of the monthly allowances from January 1, 1942, to July 31, 1945, but respondent refused to pay. As alleged in her memorandum, the executrix "decided to stop the payment", among several reasons, in view of the "inconsiderate, unappreciated and unkind attitude" of petitioners, the increasing burden on Mrs. Bachrach's usufruct, and improbability of reimbursement to the estate of the payments and of the return to the executrix of the usufructuary value of said allowances.

On February 18, 1947, petitioners filed with the lower court a petition for the issuance of a writ of execution ordering, on the authority of the order of October 2, 1940, the administratrix to pay the allowances for February, 1947, and those in arrears for the period comprising January 1, 1942, to July 31, 1945, and that in case the administratrix should fail to pay the above amounts within 24 hours after receipt of notice, the Hongkong and China Banking Corporation be ordered to deliver to attorneys for petitioners the total sum of P33,000, to be withdrawn from the funds that the administratrix has on deposit in said bank in the name of the estate of E. M. Bachrach.

The petition was denied on February 27, 1947. On March 4, 1947, petitioners filed a motion for the reconsideration of said order. On March 14, 1947, the motion for reconsideration was denied. Not satisfied with the orders of February 27, and March 14, 1947, of the lower court, petitioners filed with us the petition in this case.

For a proper understanding of the controversy we quote hereunder the text of the will of E. M. Bachrach:

"I, E. M. Bachrach, a naturalized American citizen from the State of New York and resident of the City of Manila, Philippine Islands, being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of whatever nature, do hereby make, publish and declare the following to be my Last Will and Testament, to-wit:

"First: I hereby declare that I have no child or children, grandchild or grandchildren.

"Second: My failure to make any provision in this Will for my brothers is intentional.

"Third: I hereby revoke and cancel any and all Wills by me heretofore made.

"Fourth: I hereby bind, obligate, and instruct my executors or administrators to make and pay the following bequests, legacies or gifts, to-wit:

"(a) To Mary McDonald Bachrach, my beloved wife, I give one-half (½) of the proceeds of the house known as "Casa Blanca," my residence at 105 Manga Avenue, Sta. Mesa, Manila, and of the rights to the lease on the parcel of land wherein said house is built. As all the furniture, fixtures and silverware contained in the house were bought by my beloved wife Mary McDonald Bachrach out of her own personal funds, and furniture, fixtures and silverware, being her own property, I hereby order that the same be returned to her and disposed of by her as she may wish and for her own benefit.

"(b) To Mary McDonald Bachrach, my beloved wife, I give an allowance of five hundred pesos (P500) each month as living expenses.

"(c) To Mina Levine, daughter of Hyman Levine, the sum of ten thousand pesos (P10,000) to be paid to her upon my death.

"(d) To Hyman Levine, the sum of one thousand pesos (P1,000) for each year of service he has given me or the Bachrach Motor Co., Inc., that is one thousand pesos (P1,000) for each year since January, 1917, when he entered the employment of the Bachrach Motor Co., Inc.

"(e) To Martin Elianoff and his wife Luba Elianoff, the sum of Ten Thousand Pesos (P10,000) jointly.

"(f) To Afna Elianoff, daughter of Martin Elianoff, the sum of Ten Thousand Pesos (P10,000) which amount is to be deposited in any bank her father may choose, and is to be used for her education and upon her becoming of age, she may withdraw and use the remainder thereof if any, as she may deem fit.

"(g) To Temple Emil Congregation, the sum of ten thousand pesos (P10,000).

"(h) To Sofie Seifert, wife of John Seifert, now residing at San Francisco, California, the sum of ten thousand pesos (P10,000).

"(i) To Ginda Scundin, married to Henoeh Scundin, now residing at Kiev, Russia, the sum of ten thousand pesos (P10,000).

"(j) To Lisa Elianoff, widow of Abraham Elianoff, now residing at Moscow, Russia, the sum of ten thousand pesos (P10,000).

"Fifth: I hereby choose and appoint my beloved wife, Mary McDonald Bachrach, as my administratrix and executrix to hold, keep, possess and invest all my remaining properties for the benefit and advantage of the estate.

"Sixth: It is my will and do herewith bequeath and devise to my beloved wife Mary McDonald Bachrach for life all the fruits and usufruct of the remainder of all my estate after payment of the legacies, bequests and gifts provided for above; and she may enjoy such usufruct and use or spend such fruits as she may in any manner wish.

"Seventh: It is my express wish that the business of the Bachrach Motor Co., Inc., the controlling shares of which I hold and own, shall not be dissolved, disposed of, or discontinued for a period of at least FIVE years after my death, unless the company is conducted at a losing basis; and the payment of the bequests, legacies and gifts above mentioned shall be made from my income and estate as shall least disturb or disrupt the

business of the Bachrach Motor Co., Inc., as a going concern;

"Eighth: It is my wish that upon the death of my beloved wife, Mary McDonald Bachrach, all my estate, personal, real and otherwise, and all the fruits and usufruct thereof which during her life pertained to her, shall be divided as follows:

"One-half (½) thereof shall be given to such charitable hospitals in the Philippines as she may designate; in case she fails to designate, then said sum shall be given to the Chief Executive of these Islands who shall distribute it, share and share alike to all charitable hospitals in the Philippines excluding those belonging to the governments of the Philippines or of the United States;

"One-half (½) thereof shall be divided, share and share alike by and between my legal heirs, to the exclusion of my brothers.

"Before signing this Last Will and Testament, I hereby declare that I have read and understood each and every provision hereof, and hereby publish and declare the same as my Last Will and Testament.

"Done in this City of Manila, this 3d day of December, 1935.

(Sgd.) "E. M. BACHRACH"

The following facts can also be taken into consideration: (1) A report filed by respondent Mary McDonald Bachrach on January 24, 1941, giving in detail a list of properties belonging to the heirs of E. M. Bachrach, shows a total value of P1,069,494.34; (2) The administratrix has in her possession the sum of P351,016.91; (3) The administratrix has made "all the transfers or is proceeding with the transfers in the name of the estate of E. M. Bachrach for the heirs of the said E. M. Bachrach," of the properties whose total value according to the last project of partition is P1,069,494.34; (4) Among the properties in the possession of the administratrix is the sum of P351,016.91 which has already been adjudicated to, and belongs, although still pro indiviso, to the heirs of the deceased E. M. Bachrach, from which, according to petitioners, the monthly allowances due to petitioners should be paid in accordance with the order of October 2, 1940; (5) Petitioners allege that the monthly allowances due them shall not be taken from the one-half of the properties amounting to P1,069,494.34 which is the share of the charitable hospitals, but from their respective participations in said property; (6) The Solicitor General agreed to the payment of the monthly allowances as per his conformity signed at the bottom of the petition of September 15, 1940; (7) Respondent Mary McDonald Bachrach has made advance payments to charitable institutions amounting to P22,000 from the participation of the charitable hospitals without prior authority from the probate court; (8) On May 27, 1947, the Solicitor General filed a manifestation undoubtedly for the protection of one-half of each and every asset of the estate of the deceased E. M. Bachrach, belonging to the charitable hospitals, in accordance with the eighth clause of the will; (9) On June 9, 1947, petitioners answer by stating that their monthly allowances shall not be taken from the shares or participation belonging to the charitable hospitals but from petitioner's participation or interest in the other one-half of the estate of E. M. Bachrach which belongs to the heirs of the deceased; (10) On June 11, 1947, the Solicitor General filed an additional manifestation in which it expresses its satisfaction over the statement made by petitioners on June 9, 1947.

There is no question that the monthly allowances provided in the order of October 2, 1940, were agreed upon by all the parties for the maintenance of the four sisters of the deceased E. M. Bachrach, including herein petitioners. In the order of February 27, 1947, Judge Conrado Barrios found that the heirs-petitioners Sophie M. Seifert and Elisa Elianoff "are in dire need of funds for support."

Several reasons are advanced by respondents in their opposition to the compliance with and execution of the order of Judge Abeto dated October 2, 1940. We shall pass upon the important ones.

They allege that the conformity given by Mary McDonald Bachrach to the petition of September 16, 1940, as well as the payments made by her of the monthly allowances under the order of October 2, 1940, "was an act of pure liberality on her part and, therefore, could not be construed as giving rise to any obligatory relations between said respondent executrix and the parties receiving said monthly allowances." The allegation is unacceptable. Conformity is consent. According to a universal law, recognized in our Civil Code, consent is the source of obligations. That respondent has given her conformity as an act "of pure liberality on her part" does not change the nature of the legal effect of the consent given. The commitment she made with her conformity cannot be dismissed upon the ground that it was given as "pure liberality" or for any other motive. Provided the consent was freely given, and regardless of the motive behind the act, it gives rise to all proper legal effects. The conformity or agreement of all the parties to the petition of September 16, 1940, gives it the nature of a contract. The contracting parties are bound to respect and to abide by the commitments in said contract. The contract cannot be lightly dismissed. Respondent's allegation that Mary McDonald Bachrach had given her conformity without any consideration, is belied by her own allegation to the effect that she gave said conformity as "an act of pure liberality on her part." Pure liberality is a consideration recognized by the Civil Code. No other consideration is entertained in donations. The contract in this case has the added force and solemnity of having been approved by the order of Judge Abeto of October 2, 1940. The contract has been elevated to the category of a judgment. Its enforceability depends not only on the good faith of the parties but on a legal and executory order issued by a competent court. While respondent Mary M. Bachrach cannot ignore her plighted word, she has absolutely no right to consider the order of October 2, 1940, as a mere scrap of paper. Otherwise, if their orders could be simply ignored, challenged or taken with scorn, there is no use for the existence of courts.

Respondents alleged that "there is no provision in the will of the deceased E. M. Bachrach or in any statute requiring" the payment of the monthly allowances provided in the order of October 2, 1940. But is there any prohibition for the parties to agree in the payment of said monthly allowances? Was there any reason for the lower court to withhold its approval to the agreement? The allegation seems to imply an argument based on the denial of the basic right of the parties to enter into any kind of agreement neither forbidden by law nor against public morals.

The respondents alleged that the order of October 2, 1940, "was not intended to be a judicial mandate but merely an authority for the respondent Mary McDonald Bachrach to do certain acts which she could not perform under the law or under the provisions of the will of the deceased E. M. Bachrach without judicial authority." The allegation finds no support in the order wherein Mary McDonald Bachrach is "authorized and instructed forthwith to pay" the monthly allowances in question. Instructed means commanded. The inclusion of the last word negatives respondent's allegation. Mary McDonald Bachrach did not appeal against the order. She cannot now deny validity to the command involved in the word "instructed." Besides, an "order", the title of the document, cannot be anything other than a mandate, compulsory by nature.

Impairment of her usufruct is also alleged by the administratrix. How can she now complain of the alleged impairment after alleging that she gave her conformity to the agreement, the basis of the order of October 2, 1940, as "an act of pure liberality on her part?" Was she not the owner of her usufruct? Could she not give away her usufruct or any part of it in favor of any person? If she disposed of a portion of said usufruct for the benefit of the sisters of her deceased husband, without being subject to compulsion, or fraud, or mistake, but freely and conscientiously, there is no reason for her to complain now. When she gave her conformity to the petition upon which the order of October 2, 1940, was issued, she did it undoubtedly in the same spirit of charity with which her deceased husband, E. M. Bachrach, had written his will. She deserves commendation for the beauty of her act in seconding the attitude of helpfulness of her husband towards the petitioners. Charity is the choicest flower of the human spirit. While the late E. M. Bachrach and his widow were concerned in helping charitable hospitals, they

did not forget the needy sisters of the deceased, as charity must start at home. We are not willing to help respondent withdraw now what she has given to petitioners voluntarily and with noble spirit of liberality.

Because petitioners perfected an appeal against the order of the lower court granting the administratrix the authority prayed for in her petition of February 19, 1947, to sell "the portion of the estate destined for charity," respondents complain that petitioners have improperly and against the principles of orderly procedure, split the order of October 2, 1940, and simultaneously perfected an ordinary appeal from a part of the order of February 27, 1947, and filed the present petition for a writ of mandamus in connection with the other part. The complaint is groundless. The present petition refers to the execution of the order of October 2, 1940, while the appeal in question has been filed against the order of February 27, 1947, granting the executrix's petition dated February 19, 1947, the basic pleading in the record on appeal of March 31, 1947.

The last important argument of respondents is that no execution can validly be issued in connection with the order of October 2, 1940, because of the moratorium provided in Executive Order Nos. 25 and 32, which is still in full force and effect. The allegation cannot be entertained. The monthly allowances provided in the order of October 2, 1940, are not among the money obligations for which a moratorium has been decreed. The allowances in question are advances of an inheritance. They have been paid and are to be paid to petitioners as advances of the respective shares in the estate of their deceased brother E. M. Bachrach. They are not debts. The moratorium refers to debts. It is enough to look at the title of the executive orders in question.

Section 1 of Rule 39 provides:

"Execution as of right.—Execution shall issue upon a final judgment or order upon the expiration of the time to appeal when no appeal has been perfected."

The provision is mandatory. There is no question that the order of October 2, 1940, has become final. Upon the facts in this case and the law applicable thereto, it is the ministerial duty of the lower court to order the execution of October 2, 1940. Failure to comply with said ministerial duty is a proper case for mandamus.

For all the foregoing, we grant the petition, and the respondent lower court is ordered to proceed with the execution of its order of October 2, 1940, and to issue the proper writs.

Paras, Bengzon, and Tuason, JJ., concur.

FERIA, J.:

I concur in the result.

CONFORME

BRIONES, M.:

Es incuestionable el derecho de las peticionarias a los adelantos devengados y acumulados durante la guerra, pero no cobrados a causa de la misma. Habiendose autorizado y ordenado el pago de dichos adelantos en virtud de auto judicial de fecha 2 de Octubre, 1940, previa conformidad expresa de la administradora recurrida, todos los beneficios y derechos derivados del mismo a favor de las peticionarias son validos y efectivos, por lo menos hasta que dicho auto se revoque o modifique mediante procedimientos apropiados al efecto. No hay nada en autos que demuestre que ese auto haya dejado alguna vez de estar en vigor. Consta, por el contrario, que cuando despues de la liberacion de Filipinas de la ocupacion japonesa las peticionarias trataron de cobrar lo que se les debia en virtud del referido auto, este tenia plena fuerza y efectividad.

Así que sin necesidad de discutir si el auto en cuestión ha creado un estado jurídico firme e irrevocable, o se halla en todo tiempo sujeto al control del Juzgado, susceptible de revocación, alteración o modificación de acuerdo con las circunstancias y condiciones variables de la testamentaria, resulta evidente que no habiéndose revocado o modificado la orden, la misma debe hacerse efectiva con efecto retroactivo. Lo contrario sería una mala práctica procesal. El buen orden de los trámites y procedimientos judiciales exige que las ordenes válidas y existentes se hagan efectivas.

Carece de importancia el que esto se llame orden de ejecución, o lo que sea. Lo importante es que el Juzgado de cumplimiento a la orden; y si no lo hace, se le puede compeler mediante *mandamus*.

En el presente caso es posible que la administradora y usufructuaria tenga derecho a pedir que se le releve o dispense de los efectos de la orden de 2 de Octubre, 1940, si tuviere buenos fundamentos para ello; pero no solo no lo ha pedido formal y seriamente, de acuerdo con la regla y práctica procesal pertinente, sino que, aunque lo hiciera, dudamos mucho que pueda prosperar el pedimento, constando, como consta, que la herencia yacente no solo no ha sufrido una dislocación irremediable, sino que cuenta con fondos montantes a 351 mil pesos—muchísimo más que suficientes para sufragar los adelantos en cuestión, sin detrimento del usufructo de la recurrida.

Además, si el Estado ya ha recibido y está recibiendo sustanciales anticipos de la mitad que le corresponde en la herencia ¿por qué las peticionarias, que son hermanas del testador, no han de tener, por lo menos, el mismo derecho?

Voto, por tanto, en favor de la concesión del recurso.

DISIDENTE

PABLO, M.:

Disiento. En mi humilde opinión no procede el recurso de *mandamus* en el caso presente. La apelación es el remedio adecuado para revisar la orden del Hon. Juez Barrios de 27 de Febrero de 1947 que desestimo la moción de las recurrentes de 18 de Febrero del mismo año. La moción de reconsideración está bien denegada.

La orden de 2 de Octubre de 1940 que concede pensión a las recurrentes (*monthly allowance*) no es irrevocable, que con el simple transcurso del tiempo ya es deber ministerial del Juzgado el cumplir o mandar cumplir por medio del Sheriff sus disposiciones. La naturaleza de la obligación de dar pensión está sujeta en algunos casos a las fluctuaciones de la capacidad económica del obligado; en otros, en la necesidad del pensionista. Uno que presta pensión de P200 mensuales, por ejemplo, que está recibiendo en sus negocios un ingreso líquido de P2,000 no está obligado a continuar concediendo la misma cantidad si, por las vicisitudes de una guerra, no obtiene ganancias sino que queda arruinado. Un niño recién nacido no ha de recibir una pensión igual a la que recibiría si estuviese estudiando medicina. Aunque existiera una sentencia final sobre la prestación de una pensión, su cuantía no es irrevocable, ni firme: está sujeta a varias circunstancias de cada caso particular y es el Juzgado el que tiene la facultad de determinar su aumento o disminución, su pago completo o suspensión, después de oír a las partes interesadas. "Se concede considerable amplitud al juzgado de primera instancia para modificar o revocar sus propias ordenes, en tanto en cuanto estén pendientes las actuaciones en el mismo juzgado y se presenten en tiempo oportuno solicitudes o mociones para tales modificaciones por las partes interesadas." (Oñas contra Javillo y otros, 54 Jur. Fil., 643.)

Es absurda la teoría de que la orden de 2 de Octubre de 1940 dictada en la Testamentaria de E. M. Bachrach es

ejecutoria y es deber ministerial del Juzgado el hacer cumplir sus disposiciones. El artículo 1.º de la Regla 39 no es aplicable al caso presente; no es aplicable a las actuaciones sobre la administracion y distribucion de los bienes de difuntos; es solamente aplicable a los asuntos ordinarios.

Y si es final esa orden de 2 de Octubre de 1940, como si fuera una sentencia dictada en un asunto ordinario, entonces seria mas improcedente aun el mandamus. Desde la fecha de su promulgacion hasta el 27 de Febrero de 1947 en que se dicto la orden, cuya revocacion piden las recurrentes, han transcurrido ya seis años, cuatro meses y veinticinco dias. Despues del transcurso de cinco años ya no se puede pedir por medio de una simple mocion la ejecucion de una sentencia. (Artículo 6, Regla 39.)

Si es erronea o no la orden de 27 de Febrero de 1947, el error debe corregirse en una apelacion y no en un recurso especial de mandamus. Solamente se puede hacer uso de tal remedio cuando no existe en el curso ordinario de los procedimientos un medio facil, adecuado y expedito como la apelacion. (Herrera contra Barretto, 25 Jur. Fil., 253; Gala contra Cui y Rodriguez, 25 Jur. Fil., 540; Provincia de Tarlac contra Gale, 26 Jur. Fil., 356; Napa contra Weissenhagen, 29 Jur. Fil., 188; Gobierno de las Islas Filipinas contra Juez de Primera Instancia de Iloilo y Bantillo, 34 Jur. Fil., 166; Ello contra Juez de Primera Instancia de Antique, 49 Jur. Fil., 160; Santos contra Juzgado de Primera Instancia de Cavite, 49 Jur. Fil., 416; Regala contra Juez del Juzgado de Primera Instancia de Bataan, 77 Phil., 684; Ong Sit contra Piccio, 78 Phil., 785.)

Debe denegarse la solicitud.

DISSENTING

HILADO, J.:

I am constrained to dissent from the foregoing opinion of the majority. In my view of the case, its final analysis boils down to the pivotal question of whether the petition dated September 16, 1940, filed by the instant petitioners (Sophie M. Seifert and Elisa Elianoff) and Ginda M. Skundina and Annie Bachrach, bearing the conformity of the instant respondent Mary McDonald Bachrach as "administratrix and usufructuary", as well as that of the Solicitor General, and transcribed on pages 3-5 of the majority decision, became so binding upon the probate court after it granted said petition by its order of October 2, 1940, inserted on pages 1-3 of the same decision, that it became the ministerial duty of said court to subject the estate under administration absolutely and unqualifiedly to the payment of each and every monthly allowance specified in the said petition, regardless of the vicissitudes which the estate might go through before its final settlement and distribution after payment of "the debts, funeral charges, and expenses of administration, the allowances to the widow, and inheritance tax", or any of these concepts, as provided in Rule 91, section 1. The majority opinion enumerates these so-called allowances, quoting from the lower court's order of October 2, 1940, as follows:

Sophie M. Seifert P500.00 monthly;

Ginda M. Skundina 250.00 monthly;

Elisa Elianoff 250.00 monthly;

Annie Bachrach Levine 250.00 monthly

beginning July 1, 1940, through the war years, to the present, plus an additional P3,000 to Sophie M. Seifert "who is in poor health".

Paragraph VI of the petition alleges that of the above amounts the administratrix, who is the same widow of the

deceased, did not pay petitioners the monthly allowances from January 1, 1942, to July 31, 1945, or a total of P21,500 for petitioner Sophie M. Seifert, and P10,750 for petitioner Elisa Elianoff. Roughly, this would comprise the war years when the business of the aforesaid estate was laid prostrate and its properties suffered heavy losses, which facts and circumstances must have been taken into consideration by the respondent judge Hon. Conrado Barrios, when by his order of February 27, 1947, he denied petitioners' petition filed on February 19, 1947, excepting that part relating to the "allowances" of petitioners Sophie M. Seifert and Elisa Elianoff for the months of February and March, 1947, which said judge ordered to be paid "out of the available funds of the estate." These so-called allowances cannot be, in my opinion, other than advancements on account of petitioners' hereditary portions. They are not real allowances in the sense of something which they have a right to receive from the estate pending actual delivery of their hereditary portions. There is no law that would give them that right, in view of the fact that they are not the widow nor the minor or incapacitated children, or members of the family, of the deceased.

Under section 684 of the Code of Civil Procedure, those entitled to such allowances were the widow and minor children of the deceased. In section 753 of the same Code these are referred to as "the family of the deceased." And under Rule 84, section 3, of the present Rules of Court those entitled to such allowances are "the widow and minor or incapacitated children" of the deceased. But even their right to receive the allowance is there provided to be made "under the direction of the court," which implies the continuing power of the probate court to control at least the amount of the allowances, according to the varied and unpredictable circumstances under which the estate may pass from time to time during the judicial administration thereof. The last cited provision ends, in referring to the allowances, with the important clause: "such allowances as are provided by law." And article 147 of the Civil Code ordains that the amount allowed for support, in the cases referred to in article 146, shall be reduced or increased proportionately according to the increase or reduction of the necessities of the recipient and the means of the person obliged to give it. Even if petitioners had been included in the cases referred to in article 146 (which are those mentioned in article 143) of the Code—which would have given them a legal right to support—it would seem clear, even in that hypothesis, that the probate court, in granting the aforesaid petition of September 16, 1940, should not be deemed to have given up its legal authority and duty to exercise a continuing control over the amount of the allowance, as contemplated in said article 147 and as held in *Gorayeb vs. Hashim*, 47 Phil., 87, 88, hereinafter more particularly discussed. Neither could said court have validly renounced such a vital part of its jurisdiction.

The pertinent legal provisions to which reference is thus made are found in articles 143, 146, and 147 of the Civil Code. Article 147 expressly provides that the amount allowed for support (allowance) in the cases to which article 146 refers shall be reduced or increased proportionately according to the increase or reduction of the necessities of the recipient and the means of the person obliged to give it. And it was upon such provision that this Court held in *Gorayeb vs. Hashim*, *supra*, as follows:

"With reference to the amount of the maintenance allowance awarded by the court below, it may be observed that inasmuch as in respect to modifications, a judgment rendered in a suit for separate maintenance is not regarded as final and may be modified at any time for sufficient reasons upon application to the court having original jurisdiction, the appellate courts will, as a rule, not interfere with the findings and conclusions of the lower courts in regard to such allowances. Upon the evidence before us, we cannot say that in this case the allowance is so excessive as to call for our interference."

Of course, while the case just cited was concerned with the allowance of a wife, the governing legal the same in other cases of support comprised within the same codal articles providing for a wife's support.

If even in cases of allowance or support provided for by law the competent court retains a continuing power in the

proceedings or the case involving the same, to control and direct the giving thereof as regards its amount, and if "in respect to modifications, a judgment rendered in a suit for separate maintenance (the rule should be the same in an estate proceeding because the reason therefor is the same in both cases) is not regarded as final and may be modified at any time for sufficient reasons upon application to the court having original jurisdiction", why should the probate court in the instant case be denied that power or control when the allowances claimed are not even provided for by law, nor by will, nor by contract?

Title VI of Book I of the Civil Code does not contain any provision for such an allowance to parties situated as are petitioners herein. The will of the deceased E. M. Bachrach does not contain any provision therefor.

The majority opinion, however, holds that "the conformity or agreement of all the parties to the petition of September 16, 1940, gives it the nature of a contract." I cannot subscribe to this holding. The conformity of respondent to that petition was given in her double capacity of "administratrix and usufructuary." As administratrix, she was a mere agent of the probate court and was not acting in her personal capacity. And while as usufructuary she was acting in such personal capacity, in the very nature of things, the fundamental inquiry which now demands our consideration is whether the probate court's granting of the aforesaid petition made it so binding upon said court that it has no other alternative but to order or authorize specific payment of all the monthly allowances mentioned in the petition—that the court by granting said petition lost all control over the matter and became thenceforward completely powerless to order a reduction of the so-called allowances even though facts and circumstances subsequently supervening advised such reduction in the court's judgment and discretion. Such a proposition amounts to nothingless than to assert that the probate court was by the will of the parties divested of a very substantial part of its jurisdiction and control over the estate. It is said that "the conformity or agreement of all the parties to the petition of September 16, 1940, gives it the nature of a contract." If we were to consider such an alleged contract to have been entered into by respondent, as judicial administratrix, it could not be her personal contract—if at all, it would be the contract of the probate court, of which she was a mere agent as such administratrix, and which granted the petition; but this is entirely unthinkable. A probate court, or any other court of justice for that matter, cannot, and never does, enter into any contract or agreement regarding its jurisdiction, much less to barter it away wholly or partially. And even if it should be said that respondent Mary McDonald Bachrach entered into that agreement or contract also as a usufructuary—altho I do not admit even this—it is obvious that her will, as thus expressed therein, was and is subordinated to the superior will of the probate court. In other words, the fact that she, as usufructuary, may agree that she be authorized by the court to pay the so-called allowances, if the probate court, which is the guardian and keeper of the estate of the deceased, should at any time consider such burden as too onerous upon the estate for the reasons already stated above or any other that the court might have had, it is the will of said court that must prevail and not that of the usufructuary. Such a contingency concretely happened with respect to the "allowances" corresponding to the war years, which the court evidently considered unjustifiable due to the "reduction * * * of the means" of the estate by reason of the war; and the court in effect ordered a reduction of the "allowances" in general by refusing to order payment of those corresponding to said years.

Under clause eight of the will of the deceased (pp. 8-9, majority opinion) the testator's legal heirs will have no right to receive the half of his estate, personal, real and otherwise, bequeathed to them, until his widow's death—"upon the death of my beloved wife," is the testator's textual phrase. During the judicial administration of the estate the probate court had the duty to give preferential consideration to the payment of the deceased's debts and obligations, aside from the administration expenses. The probate court must have considered that during that period the estate might suffer losses which would diminish its assets, as it actually did during the late war when the business and properties of the estate suffered heavy losses and were subjected to a terrible financial frustration. Consequently, in the exercise of its control over the disbursements to be made, among other things, by

way of the so-called allowances to the present petitioners, that court had to consider all these matters and even eventualities, and to act accordingly, not permitting the widow and the legal heirs to deviate it from the course most in consonance with the will of the testator and the law, in the court's best judgment and discretion. And I am persuaded that this is exactly what Judge Barrios did when he denied authority for the payment of the so-called allowances corresponding to the war years. If we held the probate court, and after the closing of the estate proceeding, the widow, absolutely bound to the payment of each and all of the so-called monthly allowances to petitioners, regardless of losses in the meantime suffered by the estate, until the widow's death it may happen that upon the arrival of the time predetermined by the testator—the demise of his widow—for his legal heirs to receive their portion in the estate, petitioners will have received, by way of "allowances", more than the portion intended by the testator, to the damage and prejudice of other legal heirs who have not given their conformity to what the majority opinion calls an "agreement" or a "contract" between petitioners and the widow.

Furthermore, a sounder construction of the petition of September 16, 1940, would be that whatever may have been agreed upon by the parties therein was without prejudice to the continuing control and power of the probate court over the subject-matter thereof under the applicable provisions of the law and rules.

Even though petitioners are among the "legal heirs" mentioned by the testator in the 8th clause of his will, under said clause they will not be entitled to take delivery of and receive their shares in the estate until the demise of the decedent's widow. So that the so-called allowances, or more accurately, advancements spoken of in the court's order of October 2, 1940, were not granted as a matter of right.

Consequently, I am of the considered opinion that the respondent judge acted entirely within the powers of the probate court that he was presiding in refusing to issue a writ of execution or otherwise to order payments, as prayed for by petitioners, and in entering its order of February 27, 1947. And, as in *Gorayeb vs. Hashim*, supra, I believe we should here apply the same rule that "the appellate courts will, as a rule, not interfere with the findings and conclusions of the lower courts in regard to such allowances". It is submitted that the instant petition should be denied.

MORAN, C. J.:

I concur in this opinion of Mr. Justice Hilado.

PADILLA, J.:

I concur in the foregoing dissent.

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