

**TIBURCIO ALCOBER, APOLONIA ALCOBER AND LUCIA ALCOBER,
PETITIONERS, VS. HON. HONORATO GARCIANO, PRESIDING JUDGE,
COURT OF FIRST INSTANCE, CARIGARA, LEYTE, SATURNINO
GARDON, GREGO...**

G.R. No. L-24665. May 23, 1968

Ponente: CONCEPCION, C.J.

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CONCEPCION, C.J.:

This is a petition for certiorari with preliminary injunction, to annul an order for the execution of the decision of the Court of First Instance of Leyte, Carigara, in Civil Case No. 433 thereof. Upon the filing of said petition we authorized the issuance of the writ of preliminary injunction prayed for, upon the filing and approval of the requisite bond.

Petitioners Tiburcio, Apolonia and Lucia, all surnamed Alcober - hereinafter referred to as the Alcobers - were defendants in said civil case, which was instituted by respondents Saturnino Gardon and Gregoria Gler - hereinafter referred to as the plaintiffs - to establish their title to a parcel of land described in the complaint, as alleged owners of said land, and to annul the title thereto issued in favor of the Alcobers, with damages. Respondents, Tranquilino and Herculano Basea - hereinafter referred to as the Baseas - were intervenors in said case.

On February 17, 1965, respondent Judge, Honorato Garciano, who presided over said court, rendered judgment in favor of the plaintiffs and the Baseas and against the Alcobers. The latter filed, on March 10, 1965, their notice of appeal. Their appeal bond and record on appeal were approved by respondent Judge on April 3, 1965. Four days later, or on April 7, 1965, the plaintiffs filed a motion for the execution of said decision pending appeal, which motion was granted by respondent Judge, in an order dated April 20, 1965, directing the issuance of the writ prayed for, upon the posting of a bond of P500,00. The next day, April 21, 1965, the Baseas, likewise, moved for the execution of the same judgment, during the pendency of the appeal, at the same time stating that they adopted as theirs plaintiffs' motion of April 7, 1965.

On April 22, 1965, the Alcobers moved for a reconsideration of said order of April 20, 1965, and filed, on May 5, 1965, a motion for the approval of a supersedeas bond in the sum of P1,000.00 posted by them and the stay of said execution. However, on May 17, 1965, respondent Judge denied said motion for reconsideration, as well as the motion to stay execution, and granted the motion of the Baseas dated April 21, 1965. Forthwith, the Alcobers moved to set aside the order of April 20, 1965, which respondent Judge denied on May 29, 1965. Meanwhile, or on May 24, 1965, the clerk of court had issued the corresponding writ of execution, whereupon the Alcobers commenced the present action.

This case hinges on the question whether or not respondent Judge had jurisdiction to issue its order of April 20, 1965, directing the execution of the decision rendered in the main case, considering that plaintiffs' motion for execution had been filed after the perfection of the appeal from said decision taken by the Alcobers.

Respondent Judge resolved the issue in the affirmative, upon the authority of *Laurilla vs. Uichangco*[1] and, also, upon the ground that "the plaintiffs on the day the record on appeal was submitted for approval, manifested to the Court (their intention) to file a motion for execution pending appeal, which was actually filed on April 7, 1965 x x x."

The *Laurilla* case is not in point. The motion for execution of the judgment therein was actually filed before the perfection of the appeal therein taken, although it was not granted until after the approval of the record on appeal. This Court, accordingly declared that:

"x x x the approval given to the record on appeal filed by the petitioner in the court below was merely provisional; and that both the court and the parties understood that such approval was not final, since there was another question still pending, to wit, whether a writ of execution should be issued pending appeal. It is to be presumed that the court and the parties knew that if the court granted the writ of execution, its order had to be included in the records to be elevated to the appellate court (Rule 39, sec. 2) and hence, the record of appeal, as it stood before the court acted on the motion for execution, could not be considered complete and definitive. It is plain that if the approval of the record was final and not merely provisional, there was no sense in giving the parties time to submit memoranda on the merits of the motion for execution. The fact that the appellant, now petitioner, did not call attention at the time to the futility of submitting a memorandum, since upon approval of the record of appeal the court would no longer have jurisdiction to issue execution, confirms our view that the approval of the record was understood by all concerned to be provisional in character. That being the case, the court retained jurisdiction to resolve the motion for execution and to order it issued unless the appellant filed the corresponding supersedeas bond. The subsequent issuance of the writs of execution were mere implementations of the power thus reserved and consequently, it can not be said that the court acted without or in excess of its jurisdiction in issuing the same." (Underscoring supplied)

Upon the other hand, Section 9 of Rule 41 of the Rules of Court provides that "upon the approval of the record on appeal and of the appeal bond" - "if the notice of appeal, the appeal bond and the record on appeal have been filed in due time," - the "trial court loses its jurisdiction over the case, except": (1) to "issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal;" (2) to "approve compromises offered by the parties prior to the transmittal of the record on appeal to the appellate court," and (3) to "permit the prosecution of a pauper's appeal."

The motion for execution filed by the plaintiffs in the lower court does not come under any of these exceptions. In fact the writ of execution issued in pursuance of the order of respondent Judge of April 20, 1965, directed that the plaintiffs be placed in possession of one-third (1/3) of the litigated property; that one-half (1/2) thereof be placed in the possession of the Baseas; that the Alcobers be made to execute the corresponding deeds of conveyance of said portions in favor of the plaintiffs and the Baseas, as well as to pay the costs and attorney's fees in the sum of P500.00, in addition to the expenses incidental to the execution of the decision appealed from - the propriety of which is the very issue litigated in the appeal taken by the Alcobers. Hence, in *Añonuevo vs. Zurbano*,[2] we used the following language:

"The sole question now before this Court is whether or not the trial court may issue partial execution of its judgment after appeal therefrom had been perfected.

"By statute, once the appeal is perfected, 'the trial court loses its jurisdiction over the case, except to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal' (Sec. 9, Rule 41, Rules of Court). Execution of a judgment is a proceeding affecting the rights of the parties, involving the matter litigated by the appeal. Its purpose is not to preserve and protect the subject of the litigation. The lower court accordingly has lost its power to issue a writ of partial execution of the judgement herein. (*Marcelo vs. Estacio*, 69 Phil., 145, 148, 149, citing *Syquia vs. Concepcion*, et al., 60 Phil.

186, 190-191; Abrasaldo vs. Fernandez, et al., 97 Phil., 964-965)."

This view was, in effect, reiterated in our decision in *Cabilao vs. Hon. Judge of the Court of First Instance of Zamboanga del Sur*,^[3] from which we quote:

"It is different, however, with respect to the order of execution pending appeal granted by the trial court after perfection of the appeal. It is settled that the execution of a judgment is a proceeding affecting the rights of the parties, which are the subject matter thereof, and from which appeal is taken, and its purpose is not to protect and preserve the subject matter of the litigation (*Sumulong vs. Imperial*, 51 Phil., 251; *Vda. de Syquia vs. Concepcion*, 60 Phil., 186; *De la Fuente vs. Jugo*, 76 Phil., 718).

"Summarizing, therefore, the above considerations, We find that the trial court had jurisdiction to reconsider the approval of the record on appeal, solely for the purpose of ordering its completion or correction; said order did not produce the effect of reviving the trial court's full jurisdiction over the case, and said court still had no power to order execution of its judgment pending appeal.

"The trial court's order of execution issued on April 12, 1961, and the writ of execution issued pursuant thereto, on May 9, 1961, are, therefore, null and void. Accordingly, the execution had thereunder should be set aside and the status quo restored." (Underscoring supplied)

The case of *Borromeo Bros. Estate Inc. vs. Court of Appeals*,^[4] invoked by the plaintiffs, does not justify the order complained of. That case involved the execution of an order appointing the widow of a deceased person as administratrix of his estate and ordering the former administrator, who had been removed as such - by virtue of an order that had become final and executory sometime before - to deliver to her certain records in his possession and notifying the bank, in which some assets of said estate were deposited, of the change of administration. Said order merely sought to protect and preserve the decedent's estate, because there was no one in charge thereof since the removal of said former administrator. Although an appeal had been taken from the order appointing the new administratrix, the aforementioned order directing the turn over of the records and notifying the bank falls under one of the exceptions set forth in Section 9 of Rule 41 of the Rules of Court, to which class the motion for execution of the plaintiffs in the main case involved herein does not belong. It should be noted that the aforementioned administratrix had not been authorized to dispose of any of the properties of the decedent.

WHEREFORE, the order of respondent Judge dated April 20, 1965, and the writ of execution subsequently issued in compliance therewith are null and void, and, hence, may not be enforced, with the costs of this instance against respondents herein, except respondent Judge.

Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Sanchez, Castro, and Angeles, JJ., concur.

[1] 104 Phil., 171.

[2] L-22277, May 19, 1966.

[3] L-18454, August 29, 1966.

[4] L-12240, April 5, 1959.

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