

TEODORO E. LERMA, PETITIONER VS. THE HONORABLE COURT OF APPEALS AND CONCEPCION DIAZ, RESPONDENTS.*G.R. No. L-33352. December 20, 1974*

Ponente: MAKALINTAL, C.J.

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Before Us for resolution are: (1) the petition for review by certiorari filed by Teodoro E. Lerma on March 21, 1971 to set aside the resolution of the respondent Court of Appeals in CA-G.R. No. 44906-R dismissing his petition for certiorari and prohibition with preliminary injunction filed therein; and (2) the petitioner's motion for reconsideration of our resolution dated February 8, 1974 denying his urgent motion for the issuance of a writ of preliminary injunction and/or restraining order to enjoin the enforcement of certain orders of the Juvenile and Domestic Relations Court of Quezon City (hereinafter referred to as the lower court) ordering the petitioner to pay support pendente lite to Concepcion Diaz, the private respondent herein.

Petitioner Lerma and respondent Diaz are husband and wife. They married on May 19, 1951. On August 22, 1969 the petitioner filed a complaint for adultery against the respondent and a certain Teodoro Ramirez (Crim. Case No. 0519 of the Court of First Instance of Rizal.) On November 18, 1969 the respondent filed with the lower court, presided by Judge Leonor Ines Luciano, a complaint[1] against the petitioner for legal separation and/or separation of properties, custody of their children[2] and support, with an urgent petition for support pendente lite for her and their youngest son, Gregory, who was then and until now is in her custody. The respondent's complaint for legal separation is based on two grounds: concubinage and attempt against her life.

The petitioner filed his opposition to the respondent's application for support pendente lite, setting up as defense the adultery charge he had filed against the respondent.

Judge Luciano granted the respondent's application for support pendente lite in an order dated December 24, 1969, which she amended in an order dated February 15, 1979 to the following effect: (1) the respondent was declared entitled to support pendente lite from the date of the filing of the complaint; and (2) the amount of such monthly support was reduced from P2,250.00 to P1,820.00.

On March 12, 1970 the petitioner filed with respondent Court of Appeals a petition for certiorari and prohibition with preliminary injunction to annul the aforementioned orders on the ground that they were issued with grave abuse of discretion. The next day the respondent court gave due course to the petition and issued a writ of preliminary injunction to stop Judge Luciano from enforcing said orders.

The respondent court, in its decision of October 8, 1970, set aside the assailed orders and granted the petitioner an opportunity to present evidence before the lower court in support of his defense against the application for support pendente lite.

The respondent moved to reconsider the decision on the ground that the petitioner had not asked that he be allowed to present evidence in the lower court. The respondent court, in its resolution of January 20, 1971, set

aside the decision of October 8 and rendered another, dismissing the petition. This is now the subject of the instant proceeding for review.

On January 23, 1974 the petitioner filed an urgent motion for a writ of preliminary injunction and/or restraining order, alleging (1) that during the pendency of this appeal and until December 5, 1973 the respondent had never sought the enforcement of the assailed orders of the lower court granting support pendente lite; (2) that on December 5, 1973 the respondent filed with the lower court an urgent motion praying that the petitioner be ordered to pay the awarded support pendente lite, both current and in arrears, on the ground that in the absence of an injunction from this Court the assailed orders should be executed; (3) that the petitioner filed his opposition to the motion, pointing out that for the previous three years the respondent did not ask for the enforcement of the orders and her belated move came only "after petitioner had filed new adultery charges against her and her second paramour" and after the petitioner had sought custody of their son Gregory; (4) that in connection with the first adultery charge, the respondent and her co-accused, Teddy Ramirez, had been convicted by the Court of First Instance of Rizal in its decision rendered on September 26, 1972 and said judgment of conviction was pending appeal in the Court of Appeals; (5) that Judge Luciano issued an order dated January 19, 1974, ordering the petitioner to pay the respondent the awarded support pendente lite within 15 days; and (6) that unless the lower court was enjoined from enforcing its assailed orders, the present petition would be rendered moot and academic, to the prejudice of the petitioner.

On January 28, 1974 this Court, acting on the petitioner's motion, resolved "to issue a temporary restraining order effective immediately and until further orders from this Court." The order was addressed to Judge Luciano, her agents and representatives.

Required to comment on the petitioner's urgent motion for preliminary injunction, the respondent filed an opposition, with a prayer for the immediate lifting of the temporary restraining order issued ex-parte. The opposition reiterated the grounds of her motion dated December 5, 1973 filed in the lower court, to wit: (1) that an order granting support pendente lite, although interlocutory, is immediately executory even if appealed, unless enjoined; (2) that the dismissal of the petition by the respondent Court of Appeals rendered functus officio the writ of preliminary injunction it had previously issued; and (3) that under Article 292 of the New Civil Code, which provides that "during the proceedings for legal separation, or for annulment of marriage, the spouses and children shall be supported from the conjugal partnership property . . .," such support is mandatory even if there be a showing that the wife is guilty of adultery.

In a minute resolution dated February 8, 1974 We denied the petitioner's urgent motion for a writ of preliminary injunction. On February 28, 1974 the petitioner filed this instant motion for reconsideration. On March 6, 1974 We issued another resolution setting aside the resolution of February 8, 1974 and reinstated the temporary restraining order previously issued until further orders. On the same, day the respondent filed her opposition to the motion for reconsideration and later asked that it be set for oral argument. The petitioner's pending motion was set for hearing on April 22, 1974 and then reset for May 20, 1974. On the latter date counsel for both parties appeared. In lieu, however, of oral argument the Court allowed them to file memoranda.

The petition assails the resolution of the respondent Court of Appeals on two main grounds:

I. IT IS ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE LOWER COURT, IN GRANTING SUPPORT PENDENTE LITE TO RESPONDENT CONCEPCION DIAZ, DID NOT COMMIT A GRAVE ABUSE OF DISCRETION.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PROVISIONS OF ARTICLE 292 OF THE CIVIL CODE MAKE IT MANDATORY DURING THE PENDENCY OF LEGAL SEPARATION

PROCEEDINGS TO GRANT SUPPORT PENDENTE LITE TO HEREIN RESPONDENT."

The foregoing alleged errors refer to the two aspects, procedural and substantive, of the disputed orders granting support pendente lite.

As correctly stated by the respondent court in its decision (which was later reconsidered in its resolution under review), the procedural law on support pendente lite is Rule 61 of the Revised Rules of Court, specifically Section 5 thereof, which partly provides:

"The court shall determine provisionally the pertinent facts, and shall render such order as equity and justice may require, having due regard to the necessities of the applicant, the means of the adverse party, the probable outcome of the case, and such other circumstances as may aid in the proper elucidation of the questions involved. x x x"

The petitioner maintains that the above-quoted provision was disregarded by the lower court when it issued the disputed orders without provisionally determining the pertinent facts of the case, particularly insofar as they might have a bearing on its probable outcome, merely relying on the bare allegations of the complaint. The petitioner also claims he was deprived of the opportunity to present evidence in support of his defense of adultery against the respondent's application for support pendente lite.

The question of whether or not the petitioner should be allowed to present evidence in the lower court in support of his defense that his wife had committed adultery has become moot and academic. The petitioner, in his motion filed February 28, 1974 for reconsideration of the denial by this Court of his petition for preliminary injunction, manifested that on September 26, 1972 the Court of First Instance of Rizal decided the adultery case of the respondent and found her and her co-accused, Teodoro Ramirez, guilty of the charge, sentencing them to a term of imprisonment. This has not been denied by the respondent. Neither is it denied that on March 30, 1970, as a result of the adulterous relations with Teodoro Ramirez for which she was later on convicted, the said respondent gave birth prematurely to a baby boy, who however died the same day. When the respondent entered the hospital for delivery, she registered under the assumed name of "Gloria Santos," and when the child died had it falsely identified in the death certificate as the child of one Rosario E. Salita, a close friend of hers. For the falsification thus committed Rosario E. Salita was criminally charged and convicted, although the respondent herself was acquitted on reasonable doubt. The petitioner's motion of February 28 also states, without denial on the part of the respondent, that after, Teodoro Ramirez another man, this time a Manila policeman by the name of Jose Gochangco, became her paramour, as a consequence of which criminal charges of adultery have been filed against them before the City Fiscal of Manila. Photographs of the two, showing them in an intimate pose, were submitted to this Court. Their veracity has not been disputed.

The legal issue posed by the foregoing, facts is whether adultery is a good defense against the respondent's claim for support pendente lite. In *Quintana vs. Lerma*, 24 Phil. 285, which was an action by the wife against the husband for support, based upon a written contract, this Court held that adultery is a good defense. This ruling was reiterated in the subsequent cases of *Sanchez vs. Zulueta*, 68 Phil. 110, and *Mangoma vs. Macadaeg, et al.*, 90 Phil. 508. See also *Olayvar vs. Olayvar*, 98 Phil. 52.

The respondent Court of Appeals, in upholding the questioned orders of the lower court, relied on Article 292 of the Civil Code which reads:

"ART. 292. During the proceedings for legal separation, or for annulment of marriage, the spouses and children shall be supported from the conjugal partnership property. After the final judgment of legal separation, or of annulment of marriage, the obligation of mutual support between the spouses ceases. However, in case of legal separation, the court may order that the guilty spouse shall give support to the

innocent one, the judgment specifying the terms of such order."

It is suggested that while adultery may be a defense in an action for personal support, that is, support of the wife by the husband from his own funds, it is not a defense when the support is to be taken from the conjugal partnership property.

We do not see that the distinction is material in this case. In the first place Article 292 is not in itself the source of the legal right to receive support. It merely states that the support, not only of the spouses but also of the children, shall be taken from the conjugal property during the pendency of the legal separation proceeding. It does not preclude the loss of such right in certain cases. In the second place, the said article contemplates the pendency of a court action and, inferentially at least, a *prima facie* showing that the action will prosper. For if the action is shown to be groundless the mere filing thereof will not necessarily set Article 292 in operation. This is also the sense of Section 5 of Rule 61, *supra*, which requires, among other things, when support *pendente lite* is applied for, that the court determine provisionally "the probable outcome of the case."

Article 100 of the Civil Code provides that "the legal separation may be claimed only by the innocent spouse, provided there has been no condonation of or consent to the adultery or concubinage . . . (and) where both spouses are offenders, a legal separation cannot be claimed by either of them . . ."

In a provisional sense at least, within the meaning of Rule 61 (Section 5), the probable failure of the respondent's suit for legal separation can be foreseen since she is not an innocent spouse, having been convicted of adultery by the Court of First Instance. It is true that the judgment of conviction is on appeal in the Court of Appeals, but the same undoubtedly satisfies the standard of provisional showing set by the aforesaid Rule. If legal separation cannot be claimed by the guilty spouse in the first place, the fact that an action for that purpose is filed anyway should not be permitted to be used as a means to obtain support *pendente lite* which, without such action, would be denied on the strength of the decisions of this Court recognizing adultery as a good defense. Otherwise, as pointed out by the petitioner, all that an erring spouse has to do to circumvent such defense would be to file a suit for legal separation no matter how groundless.

The right to separate support or maintenance, even from the conjugal partnership property, presupposes the existence of a justifiable cause for the spouse claiming such right to live separately. This is implicit in Article 104 of the Civil Code, which states that after the filing of the petition for legal separation the spouses shall be entitled to live separately from each other. A petition in bad faith, such as that filed by one who is himself or herself guilty of an act which constituted a ground for legal separation at the instance of the other spouse, cannot be considered as within the intendment of the law granting separate support. In fact under Article 303 of the same Code the obligation to give support shall cease "when the recipient, be he a forced heir or not, has committed some act which gives rise to disinheritance;" and under Article 921 one of the causes for disinheriting a spouse is "when the spouse has given cause for legal separation." The loss of the substantive right to support in such a situation is incompatible with any claim for support *pendente lite*.

What has been said above, of course, is not meant to be a prejudgment of either the legal separation proceeding pending in the lower court or the criminal case for adultery pending in the Court of Appeals. It is to be understood only in the light of Rule 61, Section 5, of the Rules of Court, which specifically governs the subject of support *pendente lite*.

WHEREFORE, the resolution of respondent Court of Appeals of January 20, 1971 and the orders of respondent Juvenile and Domestic Relations Court herein complained of, dated December 24, 1969 and February 15, 1970, all are set aside and their enforcement enjoined, without prejudice to such judgment as may be rendered in the pending action for legal separation between the parties. No pronouncement as to costs.

Castro, (Chairman), Teehankee, Makasiar, and Muñoz Palma, JJ., concur.
Esguerra, J., took no part.

[1] Docketed as Civil Case No. QE-00241.

[2] Gerardo, George, Gelacio, Gilbert, Gregory and Ma. Victoria, who were 17, 16, 14, 11, 9 and 8 years old respectively at the time of the filing of the complaint.

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