

**ALFONSO LACSON, PETITIONER, VS. CARMEN SAN JOSE-LACSON
AND THE COURT OF APPEALS, RESPONDENTS. CARMEN SAN
JOSE-LACSON, PLAINTIFF-APPELLANT, VS. ALFONSO LACSON,
DEFENDANT-APPELLEE...**

G.R. Nos. L-23482, L-23767 and L-24259. August 30, 1968

Ponente: CASTRO, J.

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CASTRO, J.:

These three cases (G. R. Nos. L-23482, L-23767 and L-24259) involving the same parties pose a common fundamental issue the resolution of which will necessarily and inescapably resolve all the other issues. Thus their joinder in this decision.

The antecedent facts are not disputed.

Alfonso Lacson (hereinafter referred to as the petitioner spouse) and Carmen San Jose-Lacson (hereinafter referred to as the respondent spouse) were married on February 14, 1953. To them were born four children, all alive.

On January 8, 1963 the respondent spouse left the conjugal home in Santa Clara Subdivision, Bacolod City, and commenced to reside in Manila. She filed on March 12, 1963 a complaint docketed as civil case E-00030 in the Juvenile and Domestic Re-lations Court of Manila (hereinafter referred to as the JDRC) for custody of all their children as well as support for them, and her-self.

However, the spouses, thru the assistance of their respec-tive attorneys, succeeded in reaching an amicable settlement res-pecting custody of the children, support, and separation of proper-ty. On April 27, 1963 they filed a joint petition dated April 21, 1963, docketed as special proceeding 6978 of the Court of First Instance of Negros Occidental (hereinafter referred to as the CFI).

The important and pertinent portions of the petition, embo-dying their amicable settlement, read as follows:

"3. Petitioners have separated last January 9, 1963 when petitioner Carmen San Jose-Lacson left their conjugal home at the Santa Clara Subdivision, Bacolod City, did not return, and decided to reside in Manila.

"4. Petitioners nave mutually agreed upon the dissolution of their conjugal partnership subject to judicial approval as required by Article 191 of the Civil-Code of the Philippines - the particular terms and conditions of their mutual agreement being as follows:

"(a) There will be separation of property - petitioner Carmen San Jose-Lacson hereby waiving any and all claims for a share in property that may be held by petitioner Alfonso Lacson since they have acquired no property of any conse-quence.

"(b) Hereafter, each of them shall own, dispose of, possess, administer and enjoy such separate estate as they may ac-quire without the consent of the other and all earnings from any profession, business or industry as may be

derived by each pe-titioner shall belong to that petitioner ex-clusively.

“(c) The custody of the two elder children named Enrique and Maria Teresa shall be awarded to petitioner Alfonso Lacson and the custody of the younger children named Gerrard and Eamon shall be awarded to petitioner Carmen San Jose-Lacson.

“(d) Petitioner Alfonso Lacson shall pay petitioner Carmen San Jose-Lacson a monthly allowance of P300.00 for the support of the children in her custody.

“(e) Each petitioner shall have reci-procal rights of visitation of the children in the custody of the other at their respec-tive residences and, during the summer months, the two children in the custody of each petitioner shall be given to the other except that, for this year’s summer months, all four children shall be delivered to and remain with petitioner Carmen San Jose-Lacson until June 15, 1963 - on which date, she shall return the two elder children Enrique and Maria Teresa to petitioner Alfonso Lacson - this judgment of course being sub-ject to enforcement by execution writ and contempt.

"5. Petitioners have no creditors.

“WHEREFORE, they respectfully pray that notice of this petition be given to creditors and third parties pursuant to Article 191 of the Civil Code of the Philippines and thereafter that the Court enter its judicial approval of the foregoing agreement for the dissolution of their conjugal partnership and for separation of property, except that the Court shall immediately approve the terms set out. In paragraph 4 above and embody the same in a judgment immediately binding on the parties hereto to the end that any non-compliance or violation of its terms by one party shall entitle the other to enforcement by execution writ and contempt even though the proceedings as to creditors have not been terminated."

Finding the foregoing joint petition to be "conformable to law," the CFI (Judge Jose F. Fernandez, presiding) issued an order on April 27, 1963, rendering judgment (hereinafter referred to as the compromise judgment) approving and incorporating in toto their compromise agreement. In compliance with para-graph 4(e) of their mutual agreement (par. 3[e] of the compromise judgment), the petitioner spouse delivered all the four children to the respondent spouse and remitted money for their support.

On May 7, 1963 the respondent spouse filed in the JDRC a motion wherein she alleged that she "entered into and signed the . . . Joint Petition as the only means by which she could have immediate custody of the . . . ; minor children who are all below the age of 7," and thereafter prayed that she "be considered relieved of the . . . agreement pertaining to the custody and visitation of her minor children . . . and that since all the children are now in her custody, the said custody in her favor he confirmed pendente lite." On May 24, 1963 the petitioner spouse opposed the said mo-tion and moved to dismiss the complaint based, among other things, on the grounds of res judicata and lis pendens. The JDRC, on May 28, 1963, issued an order which sustained the petitioner spouse's plea of bar by prior judgment and its pendens, and dis-missed the case. After the denial of her motion for reconsidera-tion, the respondent spouse interposed an appeal to the Court of Appeals (CA-G.R. No. 32608-R) wherein she raised, among others, the issue of validity or legality of the compromise agreement in connection only with the custody of their minor children. On Oc-tober 14, 1964 the Court of Appeals certified the said appeal to the Supreme Court (G.R. No. L-23767), since "no hearing on the facts was ever held in the court below - no evidence, testimonial or do-cumentary, presented - only a question or law pends resolution in the appeal."

The respondent spouse likewise filed a motion dated May 15, 1963 for reconsideration of the compromise judgment dated April 27, 1963 rendered in special proceeding 6978 of the CFI, wherein she also alleged, among others, that she entered into the joint petition as the only means by which she could have mediate custody of her minor children, and thereafter prayed the CFI to reconsider its judgment pertaining to the custody and visi-tation

of her minor children and to relieve her from the said agreement. The petitioner spouse opposed the said motion and, on June 1, 1963, filed a motion for execution of the compromise judgment and a charge for contempt. The CFI (Judge Jose R. Querubin, presiding), in its order dated June 22, 1963, denied the respondent spouse's motion for reconsideration, granted the petitioner spouse's motion for execution, and ordered that upon "failure on the part of Carmen San Jose-Lacson to deliver the said children [i. e., to return the two older children Enrique and Maria Teresa in accordance with her agreement with Alfonso Lacson) to the special sheriff on or before June 29, 1963, she may be held for contempt pursuant to the provisions of Rule 39 sections 9 and 10, and Rule 64 section 7 of the (old) Rules of Court." From the aforesaid compromise judgment dated April 27, 1963 and execution order dated June 22, 1963, the respondent spouse interposed an appeal to the Court of Appeals (CA.-G.R. No. 32798-R) wherein she, likewise questioned the validity or legality of her agreement with the petitioner spouse respecting custody of their children. On February 11, 1965 the Court of Appeals also certified the said appeal to the Supreme Court (G. R. No. L-24259), since "no evidence of any kind was introduced before the trial court and . . . appellant did not specifically ask to be allowed to present evidence on her behalf."

The respondent spouse also instituted certiorari proceedings before the Court of Appeals (CA-G.R. No. 32334-R), now the subject of an appeal by certiorari to this Court (G. R. No. L-23482). In her petition for certiorari dated June 27, 1963, she averred that the CFI (thru Judge Querubin) committed grave abuse of discretion and acted in excess of jurisdiction in ordering the immediate execution of the compromise judgment in its order of June 22, 1963, thus in effect depriving her of the right to appeal. She prayed for (1) the issuance of a writ of preliminary injunction enjoining the respondents therein and any person acting under them from enforcing, by contempt proceedings and other means, the writ of execution issued pursuant to the order of the respondent Judge Querubin dated June 22, 1963 in special proceeding 6978 of the CFI, (2) the setting aside, after hearing, of the compromise judgment dated April 27, 1963 and the order dated June 22, 1963, and (3) the awarding of the custody of Enrique and Maria Teresa to her, their mother. As prayed for, the Court of Appeals issued ex parte a writ of preliminary injunction enjoining the enforcement of the order dated June 22, 1963 for execution of the compromise judgment rendered in special proceeding 6978. The petitioner spouse filed an urgent motion dated July 5, 1963 for the dissolution of the writ of preliminary injunction ex parte, which urgent motion was denied by the Court of Appeals in its resolution dated July 9, 1963. The petitioner spouse likewise filed his answer. After hearing, the Court of Appeals on May 11, 1964 promulgated in said certiorari case (CA-G.R. No. 32384-R) its decision granting the petition for certiorari and declaring null and void both (a) the compromise judgment dated April 27, 1963 in so far as it relates to the custody and right of visitation over the two children, Enrique and Teresa, and (b) the order dated June 22, 1963 for execution of said judgment. The petitioner spouse moved to reconsider, but his motion for reconsideration was denied by the Court of Appeals in its resolution dated July 31, 1964. From the decision dated May 11, 1964 and the resolution dated July 31, 1964, the petitioner spouse interposed an appeal to this Court, as abovestated, and assigned the following errors:

1. The Court of Appeals erred in annulling thru certiorari the lower court's order of execution of the compromise judgment.
2. The Court of Appeals erred in resolving in the certiorari case the issue of the legality of the compromise judgment which is involved in two appeals, instead of the issue of grave abuse of discretion by ordering its execution.
3. The Court of Appeals erred in ruling that the compromise agreement upon which the judgment is based violates article 363 of the Civil Code.

As heretofore adverted, the aforecited three appeals converge on one focal issue; whether the compromise agreement entered into by the parties and the judgment of the CFI grounded on the said agreement, are

conformable to law.

We hold that the compromise agreement and the judgment of the CFI grounded on the said agreement are valid with respect to the separation of property of the spouses and the dissolution of the conjugal partnership.

The law allows separation of property of the spouses and the dissolution of their conjugal partnership provided judicial sanction is secured beforehand. Thus the new Civil Code pro-vides:

"In the absence of an express declaration in the marriage settlements, the separation property between spouses during the marriage shall not take place save in virtue of a judicial it order." (Art. 190, emphasis supplied)

"The husband and the wife may agree upon the dissolution of the conjugal partnership during marriage, subject to judicial approval. All the creditors of the husband and of the wife, as well as of the conjugal partnership, shall be notified any petition for judicial approval of the voluntary dissolution of the conjugal partnership, so that any such creditors may appear at the hearing to safeguard his interests. Upon approval of the petition for dissolution of the conjugal partnership, the court shall take such measures as may protect the creditors and other third persons." (Art. 191, par. 4, underscoring supplied)

In the case at bar, the spouses obtained judicial imprimatur of their separation of property and the dissolution of their conjugal partnership. It does not appear that they have creditors who will be prejudiced by the said arrangements.

It is likewise undisputed that the couple have been separated in fact for at least five years - the wife's residence being in Manila, and the husband's in the conjugal home in Bacolod City. Therefore, inasmuch as a lengthy separation has supervened between them, the propriety of severing their financial and proprietary interests is manifest.

Besides, this Court cannot constrain the spouses to live together, as

"[It] not within the province of the courts of this country to attempt to compel one of the spouses to cohabit with, and render conjugal rights to, the other. * * * At best such an order can be effective for no other purpose than to compel the spouses to live under the same roof; and the experience of those countries where the courts of justice have assumed to compel the cohabitation of married couple shows that the policy of the practice is extremely questionable." (Arroyo v. Vasquez de Arroyo, 42 Phil. 54, 60)

However, in so approving the regime of separation of property of the spouses and the dissolution of their conjugal partnership, this Court does not thereby accord recognition to nor legalize the de facto separation of the spouses, which again in the language of Arroyo v. Vasquez de Arroyo, supra - is a "state which is abnormal and fraught with grave danger to all concerned." We would like to douse the momentary seething emotions of couples who, at the slightest ruffling of domestic tranquility - brought about by "mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion" without more - would be minded to separate from each other. In this jurisdiction, the husband and the wife are obliged to live together, observe mutual respect and fidelity, and render mutual help and support (art. 109, new Civil Code). There is, therefore, virtue in making it as difficult as possible for married couples - impelled by no better cause than their whims and caprices - to abandon each other's company.

"* * * For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it

imposes * * *.' (Evans vs. Evans, 1 Hag. Con., 35; 161 Eng. Reprint, 466, 467.)" (Arroyo vs. Vasquez de Arroyo, Id., pp. 58-59)

We now come to the question of the custody and support of the children.

It is not disputed that it was the JDRC which first acquired jurisdiction over the matter of custody and support, of the children. The complaint docketed as civil case E-00030 in the JDRC was filed by the respondent spouse on March 12, 1963, whereas the joint petition of the parties docketed as special proceedings 6978 in the CFI was filed on April 27, 1963. However, when the respondent spouse signed the joint petition on the same matter of custody and support of the children and filed the same with the CFI of Negros Occidental, she in effect abandoned her action in the JDRC. The petitioner spouse - who could have raised the issue of *lis pendens* in abatement of the case filed in the CFI, but did not do so - had the right, therefore, to cite the decision of the CFI and to ask for the dismissal of the action filed by the respondent spouse in the JDRC, on the grounds of *lis pendens* and *lis pendens*. And she acted correctly and justifiably in dismissing the case for custody and support of the children based on those grounds. For it is no defense against the dismissal of the action that the case before the CFI was filed later than the action before the JDRC, considering

"* * * [That the Rules do not require as a ground for dismissal of a complaint that there is a prior pending action. They provide only that there is a pending action, not a pending prior action.]"[1]

We agree with the Court of Appeals, however, that the CFI erred in depriving the mother, the respondent spouse, of the custody of the two older children (both then below the age of 7).

The Civil Code specifically commands in the second sentence of its article 363 that "No mother shall be separated from her child under seven years of age, unless the court finds compelling reasons for such measure." The rationale of this new provision was explained by the Code Commission, thus:

"The general rule is recommended in order to avoid many a tragedy where a mother has seen her baby torn away from her. No man can sound the deep sorrows of a mother who is deprived of her child of tender age. The exception allowed by the rule has to be for 'compelling reasons for the good of the child: those cases must indeed be rare, if the mother's heart is not to be unduly hurt. If she has erred, as in cases of adultery, the penalty of imprisonment and the (relative) divorce decree will ordinarily be sufficient punishment for her. Moreover, her moral dereliction will not have any effect upon the baby who is as yet unable to understand the situation." (Report of the Code Commission, p. 12)

The use of the word shall[2] in article 363 of the Civil Code, Coupled with the observations made by the Code Commission in respect to the said legal provision, underscores its mandatory character. It prohibits in no uncertain terms the separation of a mother and her child below seven years, unless such separation is grounded upon compelling reasons as determined by a court.

The order dated April 27, 1963 of the CFI, in so far as it awarded custody of the two older children who were 6 and 5 years old, respectively, to the father, in effect sought to separate them from their mother. To that extent therefore, it was null and void because clearly violative of article 363 of the Civil Code.

Neither does the said award of custody fall within the exception because the record is bereft of any compelling reason to support the lower court's order the wife of her minor children's company. True, the stated in its order dated June 22, 1963, denying the respondent spouse's motion for reconsideration of its order dated April 27, 1963, that

"* * * If the parties have agreed to file a joint petition, it was because they wanted to avoid the exposure of the bitter truths which serve as succulent morsel for scandal mongers and idle gossipers and to save their children from embarrassment and inferiority complex which may inevitably stain their lives. * * * If the parties agreed

to submit the matter of custody of the minor children to the Court for incorporation in the final judgment, they purposefully suppressed the 'compelling reasons for such measure' from appearing in the public records. This is for the sake and for the welfare of the minor children."

But the foregoing statement is at best a mere hint that there were compelling reasons. The lower court's order is eloquently silent on what these compelling reasons are. Needless to state, courts cannot proceed on mere insinuations; they must be confronted with facts before they can properly adjudicate.

It might be argued - and correctly - that since five years have elapsed since the filing of these cases in 1963, the ages of the four children should now be as follows: Enrique - 11, Maria Teresa - 10, Gerrard - 9, and Ramon - 5. Therefore, the issue regarding the award of the custody of Enrique and Maria Teresa to the petitioner spouse has become moot and academic. The passage of time has removed the prop which supports the respondent spouse's position.

Nonetheless, this Court is loath to uphold the couple's agreement regarding the custody of the children.

Article 356 of the new Civil Code provides:

"Every child:

- (1) Is entitled to parental care;
- (2) Shall receive at least elementary education;
- (3) Shall be given moral and civic training by the parents or guardian;
- (4) Has a right to live in an atmosphere conducive to his physical, moral and intellectual development."

It is clear that the abovequoted legal provision grants to every child rights which are not and should not be dependent solely on the wishes, much less the whims and caprices, of his parents. His welfare should not be subject to the parents' say-so or mutual agreement alone. Where, as in this case, the parents are already separated in fact, the courts must step in to determine in whose custody the child can better be assured the rights granted to him by law. The need, therefore, to present evidence regarding this matter, becomes imperative. A careful scrutiny of the records reveals that no such evidence was introduced in the CFI. This latter court relied merely on the mutual agreement of the spouses-parents. To be sure, this was not a sufficient basis to determine the fitness of each parent to be the custodian of the children.

Besides, at least one of the children - Enrique, the eldest - is now eleven years of age and should be given the choice of the parent he wishes to live with. This is the clear mandate of sec. 6, Rule 99 of the Rules of Court which states, *inter alia*:

"* * * When husband and wife are divorced or living separately and apart, from each other, and the question as to the care, custody, and control of a child or children of their marriage is brought before a Court of First Instance by petition or as an incident to any other proceeding, the court, upon hearing testimony as may be pertinent, shall award the care, custody, and control of each such child as will be for its best interests, permitting the child to choose which parent it prefers to live with if it be over ten years of age, unless the parent so chosen be until to take charge of the child by reason of moral depravity, habitual drunkenness or poverty. * * *" (emphasis supplied)

One last point regarding the matter of support for the children - assuming that the custody of any or more of the children will be finally awarded to the mother. Although the spouses have agreed upon the monthly support P150 to be given by the petitioner spouse for each child, still this Court must speak out its mind on the insufficiency of this amount. We take judicial notice of the devaluation of the peso in 1962 and the steady skyrocketing of prices

of all commodities, goods, and services, not to mention the fact that all the children are already of school age. We believe, there-fore, that the CFI may increase this amount of P150 according to the needs of each child.

With the view that we take of this case, we find it unnecessary to pass upon the other errors assigned in the three appeals.

ACCORDINGLY, the decision dated May 11, 1964 and the resolution dated July 31, 1964 of the Court of Appeals in CA -G.R. 32384-R (subject-matter of G.R. L-23482), and the orders dated May 28, 1963 and June 24, 1963 of the Juvenile and Domestic Relations Court (subject-matter of G.R. L-23767) are affirmed. G. R. L-24259 is hereby remanded to the Court of First Instance of Negros Occidental for further proceedings in accordance with this decision. No pronouncement as to costs.

Concepcion, C.J., Reyes, Dizon, Makalintal, Zaldivar and Angeles, JJ., concur.
Sanchez and Fernando, JJ., did not take part.

[1] Teodoro vs. Mirasol, 99 Phil. 150, 153.

[2] "In common or ordinary parlance and in its ordinary significance, the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning, and it is generally imperative or mandatory. It has the invariable significance of operating to impose a duty which may be enforced, particularly if policy is in favor of this meaning or when public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. *People v. O'Rourke*, 13 P. 2d. 939, 992, 124 Cal. App. 752, (30 Words and Phrases, Permanent Ed., p. 90)

"The presumption is that the word 'shall' in a statute is used in an imperative, and not in a directory, sense. If a different interpretation is sought, it must rest upon something in the character of the legislation or in the context which will justify a different meaning. *Haythron v. Van Keuren & Son*, 74 A. 502, 504, 79 N.J.L. 101; *Board of Finance of School City of Aurora v. People's Nat. bank of Lawrenceburg*, 89, N.E. 904, 905, 44 Ind. App. 578. (39 Words and Phrases, Permanent Ed., p. 93.)" *Diokno v. Rehabilitation Finance Corporation*, G.R. No. L-4712, July 11, 1952, 91 Phil. 608) (emphasis supplied).

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