

**SIMPROSA VDA. DE ESPINA, RECAREDO ESPINA, TIMOTEO ESPINA,
CELIA ESPINA, GAUDIOSA ESPINA AND NECIFORA ESPINA,
PETITIONERS, VS. THE HON. OTILIO ABAYA AND SOFIA ESPINA AND
JOSE ESP...**

G.R. No. L-45142. April 26, 1991

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

This is a petition for certiorari with prayer for the issuance of a writ of preliminary injunction seeking the nullification of the orders issued by the respondent Judge Otilio Abaya, in his capacity as the presiding judge of the Court of First Instance of Surigao del Sur, Branch II, Lianga, Surigao del Sur in Civil Case No. L-108, entitled "Simprosa Vda. de Espina, et. al. v. Sofia Espina, et. al." dated May 9, 1975 dismissing the complaint for partition; July 25, 1975 denying the motion for reconsideration; August 13, 1975 denying the second motion for reconsideration and March 15, 1976 denying plaintiffs' notice of appeal.

The antecedent facts are as follows:

Marcos Espina died on February 14, 1953 and was survived by his spouse, Simprosa Vda. de Espina and their children namely, Recaredo, Timoteo, Celia, Gaudiosa, Necifora, Sofia and Jose, all surnamed Espina. Decedent's estate comprises of four (4) parcels of land located at the Municipality of Barobo, Province of Surigao del Sur.

On August 23, 1973 an action for partition of the aforementioned parcels of land was filed by petitioners Simprosa and her children Recaredo, Timoteo, Celia, Gaudencia and Necifora.

The complaint alleges that parcel no. 1 is the exclusive property of the deceased, hence the same is owned in common by petitioners and private respondents in eight (8) equal parts, while the other three (3) parcels of land being conjugal properties, are also owned in common, one-half (1/2) belongs to the widow Simprosa and the other half is owned by her and her children in eight (8) equal parts.

It also alleges that parcel no. 1 has been subdivided into two lots. Lot no. 994 PL8-44 is covered by Original Certificate of Title No. 5570 in the name of one of the heirs, Sofia Espina, who acquired the title as a trustee for the beneficiaries or heirs of Marcos Espina, while lot no. 1329 PCS-44 is covered by Original Certificate of Title No. 3732 issued in the name of one of the heirs, Jose Espina as trustee for the heirs of Marcos Espina. Said parcel of land is in the possession of petitioners and private respondents who have their respective houses thereon.

Simprosa presently occupies parcel no. 2 while parcel no. 3 is occupied by Timoteo, although the same is actually titled in the name of Sofia. Parcel no. 4 is occupied by Recaredo.

Petitioners have several times demanded the partition of the afore-mentioned properties, but notwithstanding such demands, private respondents refused to accede.

Private respondents allege in their answer that in or about April, 1951, the late Marcos Espina and his widow,

Simprosa, together with their children made a temporary verbal division and assignment of shares among their children. After the death of Marcos, the temporary division was finalized by the heirs. Thereafter the heirs took immediate possession of their respective shares on April 20, 1952. Private respondents took actual physical possession of their respective shares including the portions ceded to them by Simprosa upon their payment of P50.00 each per quarter starting April, 1952 until the latter's death pursuant to their contract of cession. The assignment of shares was as follows:

"(a) To the surviving spouses, (sic) Simprosa Vda. de Espina, herein plaintiff, one-half (1/2) of the parcel of land adjudicated to each of said plaintiffs-heirs and defendants;

(b) To each of the following compulsory heirs, to wit:

1. To Recarida (sic) Espina, one-half (1/2) portion which contains an area of one and three-fourths (1 3/4) hectares and which forms part of Parcel 4 whose description is given in paragraph III of the complaint, the said Parcel IV has been in the possession of both Recaredo Espina and plaintiff Simprosa Vda. de Espina from April 20, 1952 until the present time;

2. To Timoteo Espina, one-half (1/2) portion which contains an area of not less than one-half (1/2) hectare and which forms part of Parcel 3 whose description is given in paragraph III of the complaint, the said Parcel III was originally assigned by Marcos Espina who thereupon obtained an Original Certificate of Title in her (sic) name but was finally adjudicated to said Timoteo Espina in April, 1952, the other half (1/2) portion of which parcel III was the share of the surviving spouses (sic), Simprosa Vda. de Espina, and said Parcel III has been in the possession of said Timoteo Espina and Simprosa Vda. de Espina from April, 1952 until the present time as their share;

3. To Cecilia (sic) Espina, Gaudiosa Espina and Necifora Espina, one-half (1/2) portion, share and share alike which contains two (2) hectares and which forms part of Parcel II whose description is given in paragraph III of the complaint, the other half (1/2) of said Parcel III (sic) is the share of the surviving spouses (sic) Simprosa Vda. de Espina, and said Parcel III (sic) has been in the possession of said Cecilia (sic) Espina, Gaudiosa Espina and Necifora Espina and Simprosa Vda. de Espina from April, 1952 until the present time;

4. To Sofia Espina, one-half (1/2) portion of the parcel of land included in the description of Parcel 1 in paragraph III of the complaint, the other half (1/2) of said parcel being the share of the surviving spouses (sic) Simprosa Vda. de Espina and having been ceded by said Simprosa Vda. de Espina to said Sofia Espina for a valuable consideration payable quarterly at the rate of P50.00 beginning April, 1952 until her death, and said Sofia Espina has been regularly paying to said Simprosa Vda. de Espina quarterly from April, 1952 the said amount of P50.00 until the present time, and by virtue of said agreement, Sofia Espina obtained Original Certificate of Title in her name of said parcel of land which is included in the description of said parcel 1, as her exclusive property;

5. To Jose Espina, one-half (1/2) portion of the other parcel of land included in the description of Parcel 1 in paragraph 1 of the complaint, the other half (1/2) of said parcel being the share of the surviving spouses (sic) Simprosa Vda. de Espina and having been coded (sic) by said Simprosa Vda. de Espina to said Jose Espina for a valuable consideration payable quarterly at the rate of P50.00 beginning April, 1952 until her death, and said Jose Espina has been regularly quarterly paying to said Simprosa Vda. de Espina from April, 1952 until the present time, the said amount of P50.00, and by virtue of said agreement, Jose Espina obtained Original Certificate of Title in his name of said parcel of land which is included in the description of said Parcel 1 as his exclusive property. (Rollo, pp. 27-28)

On February 13, 1974 private respondents filed a motion to dismiss the complaint alleging the following grounds, to wit:

"I

"THAT THE FACTS ALLEGED IN THE COMPLAINT FAIL TO CONFER UPON THE COURT COMPLETE AND LAWFUL JURISDICTION OVER THE CASE FOR NON-COMPLIANCE WITH THE CONDITION SINE QUA NON CONCERNING SUIT BETWEEN MEMBERS OF THE SAME FAMILY.

"X X X X X X X X

"II

"THAT THE CAUSE OF ACTION IS BARRED BY X X X STATUTE OF LIMITATIONS.

"X X X X X X X X

"III

"THAT THE PLAINTIFFS HAS NO LEGAL CAPACITY TO SUE. (Motion to Dismiss Complaint, pp. 1-5; Rollo, pp. 34-38)

"X X X X X X X X

On May 9, 1975 the trial court granted the motion and thereafter dismissed the complaint.

On May 23, 1975 petitioners filed a motion for reconsideration on the following grounds, to wit:

"1. THAT THE ORDER OF DISMISSAL HAS NO LEGAL BASIS IN FACT AND IN LAW.

"2. THAT THE STATUTE OF LIMITATIONS IS NOT APPLICABLE IN THE CASE AT BAR." (Rollo, p. 50)

However, petitioners' motion was denied in an order dated July 23, 1975. On August 11, 1975 petitioners filed another motion for reconsideration stressing that they were denied due process when their motion was not heard. Again said motion was denied on August 13, 1975.

Thereafter, petitioners filed their notice of appeal on September 11, 1975 and a motion for extension of time to file their Record on Appeal on September 18, 1975.

On March 15, 1976, the respondent judge disapproved petitioners' Record on Appeal and appeal bond on the ground that the notice of appeal was filed out of time.

Hence, this petition.

The petitioners raised four (4) assignment of errors:

"1. Whether or not an action for partition among co-heirs prescribes.

"2 Whether of not an oral partition among co-heirs is valid.

"3. Whether not a hearing on a motion for reconsideration is indispensable the lack of which is a denial of due process.

"4. Whether or not the second motion for reconsideration is pro forma. (Rollo, p. 10)

Petitioners maintain that the present action is not for reconveyance but one for partition. Hence, the rule insisted by the private respondents on prescriptibility of an action for reconveyance of real property based on an implied trust is not applicable in the case at bar. In addition, petitioners argue that private respondents cannot set up the defense of prescription or laches because their possession of the property no matter how long cannot ripen into ownership. (Memorandum for Petitioners, p. 7)

However, the private respondents stress that "any supposed right of the petitioners to demand a new division or partition of said estate of Marcos Espina has long been barred by the Statute of Limitations and has long prescribed." (Memorandum for Private Respondents, p. 5)

The petitioners claim that the alleged oral partition is invalid and strictly under the coverage of the Statute of Frauds on two grounds, to wit:

Firstly, parcel no. 1 being an exclusive property of the deceased should have been divided into eight (8) equal parts. Therefore, Simprosa could only cede her share of the land which is 1/8 portion thereof and cannot validly cede the shares of her then minor children without being duly appointed as guardian.

Secondly, under Article 1358 of the New Civil Code, Simprosa could not have ceded her right and that of her other children except by a public document. (Memorandum of Petitioners, pp. 8-9)

On the other hand, private respondents insist that the oral partition is valid and binding and does not fall under the coverage of the Statute of Frauds.

Petitioners claim that they were denied due process when the motion for reconsideration was denied without any hearing.

However, private respondents maintain that the hearing of a motion for reconsideration in oral argument is a matter which rests upon the sound discretion of the Court.

Finally, petitioners stress that the second motion for reconsideration is not pro forma, thus, it suspends the running of the period of appeal. Hence, the notice of appeal was timely filed.

On this point, private respondents maintain that the order of respondent judge dated March 15, 1976 disapproving petitioners' Record on Appeal and appeal bond may not properly be a subject of a petition for certiorari. (Memorandum of Private Respondents, p. 13)

We find the petition devoid of merit.

We already ruled in *Lebrilla, et. al. v. Intermediate Appellate Court* (G.R. No. 72623, December 18, 1989, 180 SCRA 188; 192) that an action for partition is imprescriptible. However, an action for partition among co-heirs ceases to be such, and becomes one for title where the defendants allege exclusive ownership.

In the case at bar, the imprescriptibility of the action for partition cannot be invoked because two of the co-heirs, namely private respondents Sofia and Jose Espina possessed the property as exclusive owners and their possession for a period of twenty one (21) years is sufficient to acquire it by prescription. Hence, from the moment these co-heirs claim that they are the absolute and exclusive owners of the properties and deny the others any share therein, the question involved is no longer one of partition but of ownership.

Anent the issue of oral partition, We sustain the validity of said partition. "An agreement of partition may be made orally or in writing. An oral agreement for the partition of the property owned in common is valid and enforceable upon the parties. The Statute of Frauds has no operation in this kind of agreements, for partition is not a conveyance of property but simply a segregation and designation of that part of the property which belong to the co-owners." (Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, Vol. II, 1983 Edition, 182-183 citing *Hernandez v. Andal, et. al.*, G.R. No. L-275, March 29, 1957)

Time and again, the Court stresses that the hearing of a motion for reconsideration in oral argument is a matter which rests upon the sound discretion of the Court. Its refusal does not constitute a denial of due process in the absence of a showing of abuse of discretion. (see *Philippine Manufacturing Co. v. Ang Bisig ng PMC, et. al.*, 118

Phil 431, 434)

The absence of a formal hearing on the petitioners' motion for reconsideration is thoroughly explained in the order of the respondent judge dated August 13, 1975, which is hereunder quoted as follows:

"When the court issued its order of June 5, 1975 requiring counsel for defendants to answer plaintiffs' motion for reconsideration, the court opted to resolve plaintiffs' motion based on the pleadings of the parties, without further oral arguments. The court considered the arguments of the parties stated in their pleadings as already sufficient to apprise the court of the issues involved in said motion.

Plaintiffs' allegation that the Clerk of Court failed to calendar their motion for reconsideration for oral argument has not deprived the plaintiffs of any substantial right or his right to due process.

SO ORDERED." (Memorandum of Private Respondents, pp. 12-13)

A cursory reading of the aforequoted order will show that there was indeed no formal hearing on the motion for reconsideration. There is no question however, that the motion is grounded on the lack of basis in fact and in law of the order of dismissal and the existence or lack of it is determined by a reference to the facts alleged in the challenged pleading. The issue raised in the motion was fully discussed therein and in the opposition thereto. Under such circumstances, oral argument on the motion is reduced to an unnecessary ceremony and should be overlooked (see *Ethel Case, et. al. v. Jugo*, 77 Phil 517, 522).

We adhere to the findings of the trial court that the second motion for reconsideration dated August 11, 1975 is pro forma, to wit:

"The grounds stated in said motion being in reiteration of the same grounds alleged in his first motion, the same is pro forma." (Order dated March 15, 1976, p. 2, Rollo, p. 74)

x x x x x x x x

"Furthermore, the second motion for reconsideration has not stated new grounds considering that the alleged failure of the Clerk of Court to set plaintiffs' motion for reconsideration, although seemingly a different ground than those alleged in their first motion for reconsideration, is only incidental to the issues raised in their first motion for reconsideration, as it only refers to the right of plaintiffs' counsel to argue his motion in court just to amplify the same grounds already denied by the court." (Ibid, p. 3, Rollo, p. 75)

Therefore, it is very evident that the second motion for reconsideration being pro forma did not suspend the running of the period of appeal. Thus, the lower court committed no error when it held that the notice of appeal was filed after the lapse of thirty five (35) days, which is clearly beyond the period of thirty (30) days allowed by the rules.

Finally, it has been a basic rule that certiorari is not a substitute for appeal which had been lost. (see *Edra v. Intermediate Appellate Court*, G.R. No. 75041, November 13, 1989, 179 SCRA 344) A special civil action under Rule 65 of the Rules of Court will not be a substitute or cure for failure to file a timely petition for review on certiorari (appeal) under Rule 45 of the Rules of Court. (*Escudero v. Dulay*, G.R. No. 60578, February 23, 1988, 158 SCRA 69, 77)

The application of the abovesited rule should be relaxed where it is shown that it will result in a manifest failure or miscarriage of justice. (Ibid, p. 77) However, as emphasized earlier, the case at bar is totally devoid of merit, thus, the strict application of the said rule will not in any way override substantial justice.

Therefore, the delay of five (5) days in filing a notice of appeal and a motion for extension to file a record on appeal cannot be excused on the basis of equity.

All premises considered, the Court is convinced that the acts of respondent judge, in dismissing the action for partition and in subsequently denying the motions for reconsideration of the petitioners, does not amount to grave abuse of discretion.

ACCORDINGLY, the petition is DISMISSED.

SO ORDERED.

Narvasa, (Chairman), Cruz, Gancayco, and Griño-Aquino, JJ., concur.

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