

IN THE MATTER OF THE TESTATE ESTATE OF DR. MAXIMO BORROMEO. JOHANNA HOFER BORROMEO, WIDOW AND APPELLEE, VS. CANUTO O. BORROMEO, EXECUTOR AND APPELLANT.

G.R. No. L-6363. September 15, 1955

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BENGZON, ACTING C.J:

In July 1948, Dr. Maximo Borrromeo, a resident of Cebu City, died without ascendants or descendants, but leaving his widow Johanna Hofer Borrromeo, and a will wherein he designated the Borrromeo Bros. Estate Inc. as his sole heir, even as he named his brother Canuto O. Borrromeo as the executor. The said corporation is owned entirely by the deceased and his brothers and sisters.

Proceedings having been instituted, the court of first instance of that province probated the will in due course, and granted letters testamentary to Canuto O. Borrromeo, who duly qualified as such executor.

Thereafter, on July 11, 1949, the attorneys for the widow submitted an "Urgent Motion" whereby they prayed for the removal of the executor on the grounds of negligence in the performance of his duties and unfitness to continue discharging the powers of the office.

This motion was scheduled to be heard on July 13, 1949 but it was postponed upon representations by the executor of possible amicable settlement between the opposing parties. No settlement was carried out nor even attempted. However, taking advantage of the postponement and after a subpoena had been served on the Bank of the Philippine Islands seeking information on the cash deposits therein of the deceased Maximo Borrromeo, the executor withdrew, without authority from the court, the total amount of P23,930.39 from a joint current account, in said Bank, of Canuto Borrromeo and Maximo Borrromeo, and then deposited P22,244.39 of the sum thus withdrawn in the joint account of said Canuto Borrromeo and his brother Exequiel.

In time the petition was heard, and voluminous evidence, oral and documentary, was submitted. Thereafter on February 21, 1951 the Honorable Edmundo Piccio, Judge, for several reasons, one of them the above withdrawal of funds, decreed the removal of the executor. On motion for reconsideration the executor's attorney prayed that the order be revoked or that at least, the executor be permitted to resign. (Record on Appeal p. 251.)

On March 29, 1951 obviously to accommodate the executor—there being no practical difference between removal and resignation—His Honor modified his order in the sense that said executor was "relieved of (instead of removed from) his commitments as such executor". Notwithstanding such modification the executor appealed, contending that the modified order should be revoked.

There is no question that an order removing the executor or administrator is appealable.[1] But we fail to perceive the utility of the instant appeal,[2] inasmuch as the executor begged to be permitted to resign and the court all but granted his request explaining, specifically, that the executor was not removed but only relieved of his commitment—which is one way of accepting the proffered resignation. The executor got substantially what he wanted.

Granting that the modified order was not literally what he desired, still the error, if any, did not affect his substantial rights, and could not justify reversal under the Rules, (cf. Rule 53 sec. 3.)

In any event, supposing he was removed, there were in our opinion sufficient grounds therefor. Take the matter of withdrawals above described. Attempting to justify his attitude, the executor points out that, according to the joint deposit agreement Exhibit H signed by Canuto and Maximo Borromeo.

"We, the undersigned, agree with one another and with the Bank of the Philippine Islands hereinafter called the Bank, that all moneys heretofore, now, or hereafter deposited, by us, or any of us, to the credit of this Saving Account or Current Account, are and shall be received and held by the Bank with 'the understanding, and upon the condition that said money deposited, without reference to previous ownerships, and all interest, dividends and credits thereon shall be the property of all of us as joint owners and shall be payable to and collectible by anyone of us, during our lifetimes and after the death of any one of us shall be the sole property of and payable to the survivors, or survivor, provided that this last disposition is not contrary to provisions of laws now in force or may hereafter be in force in the Philippine Islands.'" (Italics ours.)

He claims, in effect, that the money deposited was his at the time he withdrew it. But would the Bank have allowed him to withdraw the whole amount if he were not the executor? He got it then as executor, and should have kept it in his account as executor. Instead, he deposited it in a joint account with his brother Exequiel, thereby placing it at the latter's disposal, and hiding it from the widow.

Furthermore, and this is important, the agreement says "provided that this last disposition is not contrary to provisions of laws now in force * * * in the P.I." The question arises: may a husband validly agree that upon his death certain conjugal money deposited in the bank shall belong to his brother, and thereby deprive his wife of her share in the conjugal partnership?

According to Art. 1413 of the Civil Code, no alienation or agreement which the husband may make with respect to conjugal property in fraud of the wife shall prejudice her or her heirs.[3]

There is at least some ground to doubt whether the stipulation could deprive the wife of her share in the conjugal assets. The validity of the agreement could properly be the subject of debate in court; yet this executor avoided or bypassed judicial adjudication by getting the money, specially at a time when his actuations were already being questioned, and his appointment as executor in danger of revocation. And his conduct is aggravated by the circumstance that he took advantage of a postponement, asked by him on the false pretense of possible amicable settlement, in order to vest in himself money on which the corporate heir and the widow might have a claim.

Another reason for the removal is the fact that in his Report for March 1949 the executor omitted to include, as income of the estate, the sum of P6,000 which he had received from Hacienda Plaridel of the decedent. This in itself might be involuntary error, as claimed by him. But considering that he received other sums of P13,010 and P10,559.40 as proceeds from the farm of the deceased, but instead of depositing them in his name as executor, placed them in his joint account with his brother Exequiel Borromeo, it is not unreasonable to suspect a plan—inconsistent with his trusteeship—to conceal the money of the deceased to back up his assertion, in objecting to the widow's allowance, that the estate had no funds.

A third reason is that the executor claimed as his own certain shares of the Interisland Gas Service, in the name of Maximo Borromeo, valued at P12,000; he asserted that Maximo was merely his "dummy". If we had any doubts about the Tightness of the trial judge's determination, this circumstance should finally tip the judicial balance on the side of removal or resignation. Conflict between the interest of the executor and the interest of the deceased is ground for removal or resignation of the former, who was thereby become unsuitable to discharge the trust (Section 2, Rule 83.)

"An executor or administrator should be removed where his personal interests conflict with his official duties, but a mere hostile feeling towards persons interested in the estate is not ground for removal unless it prevents the management of the estate according to the dictates of prudence." (33 C. J. S. P. 1036.) (Citing many cases.)

"Reasons for rule.—'An executor is a quasi trustee, who should be indifferent between the estate and claimants of the property, except to preserve it for due administration, and when his interest conflicts with such right and duty the county court, in the exercise of a sound discretion, may remove him.' (In re Manser, 60 Or. 240, 246, 118 p. 1024.)

"An executor will be removed where it appears that he asserts claims against the estate of the testator to the extent of two-thirds of the value of the estate, and such claims are disputed by the beneficiary under the will." (Henry's Est., 54 Pa. Super. 274.)

"Claim of gift from decedent,—Where an executor, in answer to a petition for his removal on the ground of maladministration in claiming property of the estate, alleged a gift by decedent to him of the property, he manifested an interest adverse to the beneficiaries, authorizing his removal; but the county court had no jurisdiction to determine the question of gift." (In re Manser, 60 Or. 240, 118 p. 1024.)

It becomes unnecessary to examine the other reasons which induced the trial court to let this executor go. The record discloses sufficient data justifying the decree of separation or vindicating the judge's exercise of discretion. This, apart from the principle supported by the weight of authorities that, "An appellate court is disinclined to interfere with the action taken by the probate court in the matter of the removal of an executor or administrator unless positive error or gross abuse of discretion is shown." (33 C. J. S. p. 1048.) (Citing many cases.)

Wherefore, the appealed order should be, as it is hereby, affirmed with double costs against appellant. It should be stated in this connection that for obvious reasons, no petition for extension of the time to file a motion for reconsideration will be favorably entertained. So ordered.

Padilla, Labrador, Jugo, Bautista Angelo, Reyes, A., Concepcion, and Reyes, J. B. L., JJ., concur.

Judgment affirmed.

[1] Cf. Del Rosario vs. Del Rosario, 70 Phil., 251; Degala vs. Ceniza, v 78 Phil., 791.

[2] Except to delay.

[3] See Bank of P.I. vs. Posadas, 56 Phil., 215, 223.

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