

SOFIA PASTOR DE MIDGELY, PETITIONER VS. THE HONORABLE PIO B. FERANDOS, JUDGE OF THE COURT OF FIRST INSTANCE OF CEBU, BRANCH IX AND LEWELYN BARLITO QUEMADA, SPECIAL ADMINISTRATOR...*G.R. No. L-34314. May 13, 1975*

Ponente: AQUINO, J.

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Sofia Pastor de Midgely, a British subject residing at Cura Planelles, 10 Cura Jardin, Alicante, Spain, filed this special civil action of certiorari against Judge Pio B. Ferandos and Lewelyn Barlito Quemada in order to set aside the Judge's order dated May 8, 1971 which denies her motion to dismiss based on lack of jurisdiction and on article 222 of the Civil Code.

She prays for a declaration that the Court of First Instance of Cebu, Toledo City, Branch IX has no jurisdiction over her person and properties and for the dismissal of the complaint against her in Civil Case No. 274-T of that court. The ultimate facts found in the prolix pleadings are as follows:

Alvaro Pastor, Sr., a Spanish citizen, was allegedly the owner of properties and rights in mining claims located in Cebu and supposedly held in trust by his son, Alvaro Pastor, Jr., and his daughter-in-law, Maria Elena Achaval-Pastor. Pastor, Sr. died on June 5, 1966. He was survived by his wife, Sofia Pastor y Bossio (who died on October 21, 1966) and by his two legitimate children, Mrs. Midgely and Alvaro Pastor, Jr. Respondent Quemada claims to be his illegitimate child.

Alvaro Pastor, Sr. in his supposed holographic will dated July 31, 1961 devised to Lewelyn Barlito Quemada thirty percent of his forty-two percent share in certain mining claims and real properties. In 1970 the alleged will was presented for probate in Special Proceedings No. 3128-R assigned to Branch I in Cebu City of the Court of First Instance of Cebu. Quemada was appointed special administrator of the decedent's estate.

As such administrator and as heir of Alvaro Pastor, Sr., Quemada filed in the Court of First Instance of Cebu at Toledo City a complaint dated December 7, 1970 against the spouses Alvaro Pastor, Jr. and Maria Elena Achaval, Mrs. Midgely, Atlas Consolidated Mining and Development Corporation and Caltex (Philippines), Inc. to settle the question of ownership over certain real properties and the rights in some mining claims, to obtain an accounting and payment of the royalties and income thereof and for the payment of damages amounting to P25,000. Quemada's theory is that those properties and income belong to the estate of Alvaro Pastor, Sr.

Allegedly without complying with the requirements of Rule 14 of the Rules of Court, Quemada caused extraterritorial service of summons to be made in that case through the Department of Foreign Affairs and the Philippine Embassy in Madrid, Spain, which effected the service of the summons by registered mail upon Mrs. Midgely and the Pastor, Jr. spouses at their respective addresses in Alicante and Barcelona, Spain.

Alvaro Pastor, Jr. and Mrs. Midgely, in their respective letters to the Philippine Embassy dated February 11 and

12, 1971, acknowledged the service of summons but reserved the right to contest the court's jurisdiction over their persons. The Minister-Counselor of the Embassy forwarded those letters to the Clerk of Court and apprised him of the manner the summons was served.

Through counsel, Mrs. Midgely and the Pastor, Jr. spouses entered a special appearance and filed a motion to dismiss on the ground of lack of jurisdiction. They contended that as non-residents they could be summoned only with leave of court and that the requirements laid down in section 17 of Rule 14 should have been observed. As additional ground, they alleged that the complaint does not show that earnest efforts toward a compromise have been made, as required in article 222 of the Civil Code in suits between members of the same family (Sec. sec. 1[j], Rule 16, Rules of Court). Quemada opposed the motion to dismiss.

As already stated, Judge Ferandos denied the motion. He ruled that Mrs. Midgely and the Pastor, Jr. spouses had been properly summoned. He opined that article 222 was inapplicable to the case because Quemada's civil status was involved and article 2035 of the Civil Code prohibits a compromise on a person's civil status. He gave Mrs. Midgely and the Pastor, Jr. spouses seventy days from February 12, 1971 within which to file their answer, deducting from that period the time from March 10 to May 8, 1971 when their motion to dismiss was pending.

Mrs. Midgely's motion for reconsideration of the order denying her motion to dismiss was denied by Judge Ferandos in his order of September 27, 1971 wherein he ruled that the action filed by Quemada was for the recovery of real properties and real rights. He gave Mrs. Midgely and the Pastor, Jr. spouses sixty days from notice within which to answer the complaint and directed that a copy of his order be sent to them through the Philippine Embassy in Madrid. The petition for certiorari herein was filed on November 3, 1971.

It was given due course. Respondent Quemada in his answer alleged that inasmuch as his action against Mrs. Midgely concerns property located here in which she claims an interest, it is not necessary that jurisdiction over her person be acquired. The service of summons upon her was not for the purpose of acquiring jurisdiction over her person but merely as a matter of due process.

Quemada alleged that as administrator he has been in actual possession of two parcels of land owned by Alvaro Pastor, Jr. located at Biga, Toledo City with areas of 55.3 hectares and 5,225 square meters, respectively. They were included in the inventory submitted by him to the probate court in the testate proceeding for his putative father's estate. His answer contains annexes attesting to his efforts to recover possession of the other properties of the decedent.

In the meantime the spouses Alvaro Pastor, Jr. and Maria Elena Achaval filed a verified answer to the complaint in Civil Case No. 274-T dated December 5, 1971. Their answer was filed through the same counsel who has been representing Mrs. Midgely. The said spouses alleged that they were not waiving their defense of lack of jurisdiction over their persons and over the subject matter of the action. They claimed to be the owners of the properties described in the complaint.

It should be noted that in the testate proceeding Mrs. Midgely and Alvaro Pastor, Jr. had filed a verified opposition dated January 26, 1971. They prayed for the dismissal of the proceeding. (The holographic will was probated in the lower court's order of December 5, 1972 which was appealed to the Court of Appeals by Mrs. Midgely and Alvaro Pastor, Jr., CA-G.R. No. 52961-R).

On May 10, 1972, this Court issued a writ of preliminary injunction suspending all proceedings in Civil Case No. 274-T.

Contempt incident. — That writ of preliminary injunction spawned the contempt incident in this case. Mrs. Midgely in a motion dated March 26, 1974 charged that Quemada committed "unlawful interference of the case

under injunction" and tried to circumvent the writ (1) by taking possession of two parcels of land in Toledo City and (2) by asking the probate court to stop Atlas Consolidated Mining and Development Corporation from remitting to Mrs. Midgely and the Pastor, Jr. spouses the landowner's share of the income from the Toledo City properties, with the result that the probate court ordered the payment of said income to Quemada.

Quemada in his opposition to the motion countered that he had maintained the status quo in Civil Case No. 274-T, as decreed in the writ of preliminary injunction; that the overseer delivered in 1971 the possession of the two parcels of land to him in his capacity as administrator or before the issuance of the writ, and that the order of Judge Juan Y. Reyes in Special Proceedings. No. 3128-R did not constitute an interference with Civil Case No. 274-T which was assigned to Judge Ferandos.

Quemada through counsel filed a counter-charge for contempt against Abelardo Cecilio, the counsel of Mrs. Midgely, for having made false and malicious statements in his motion to declare Quemada in contempt of court. Quemada was referring to Atty. Cecilio's allegations that the writ of preliminary injunction was intended to prevent Quemada from taking possession of the properties involved in Civil Case No. 274-T and that, notwithstanding the writ, he took possession of the aforementioned two parcels of land. Quemada in his memorandum further charged Cecilio with purporting to represent Alvaro Pastor, Jr. in this case although the latter is not a party herein.

Quemada branded the acts of Cecilio as misbehavior of an officer of the court and as improper conduct tending to degrade and obstruct the administration of justice. Quemada later manifested that he had turned over to Atty. Cecilio the two checks for the landowner's share of the income from the Toledo City properties.

The contempt charges were investigated by the Legal Officer of this Court. After going over the record, we find that both contempt charges are devoid of merit.

The writ issued by this Court enjoined Judge Ferandos and Quemada "from holding hearings, trial and proceedings and/or from further proceeding with Civil Case No. 274-T". It froze that case. It was a preventive injunction.

The undisputed fact is that in February, 1971 Quemada as administrator was already in possession of the two parcels of land located in Toledo City. The fact that he continued to remain in possession after the injunction was issued on May 10, 1972 (Exh. 16) was not a violation of the injunction which was not mandatory in character.

As to the attempt of Quemada in Special Proceeding No. 3128-R in his capacity as administrator to get hold of the landowner's share of the income derived from the properties involved in Civil Case No. 274-T, it is apparent that he did so in good faith and on the advice of his lawyer who actually filed the necessary motion.

The probate court at first upheld his right to receive that income. Later he complied with the court's order to turn over the checks to the counsel of Alvaro Pastor, Jr. Inasmuch as that incident transpired in the testamentary proceeding and as Quemada committed the alleged contemptuous act through his counsel, the same cannot be properly characterized as a willful interference with the injunction issued by this Court in Civil Case No. 274-T.

On the other hand, Atty. Cecilio's free-wheeling allegations in his motion to declare Quemada in contempt of court, which averments were tailored to support his notion that Quemada circumvented the injunction, may be viewed simply as a manifestation of a lawyer's propensity to slant the presentation of his client's case so that it would appear to be meritorious. Such a tactic is generally tolerated by understanding judges. They are not deceived by the exaggerations and distortions in a counsel's lopsided submission of his client's case especially where, as in this case, the alert opposing counsel calls the court's attention to that fact.

"Contempt of court presupposes a contumacious attitude, a flouting or arrogant belligerence, a defiance of the court" (Matutina vs. Judge Buslon and the Sheriff of Surigao, 109 Phil. 140, 142). It is an offense against the authority and dignity of the court. That is not true in this case. The contempt charges should be dismissed.

The certiorari case.— The petitioner injected into this case issues which involve the merits of Quemada's action for reconveyance of certain properties and which are not germane to the instant certiorari action. Those issues will be resolved by the lower court in the main case.

The only legal issue to be resolved is whether Judge Ferandos gravely abused his discretion in denying Mrs. Midgely's motion to dismiss based on the grounds of (a) lack of jurisdiction over her person and (b) lack of a showing that earnest efforts were exerted to effect a compromise.

The said order is interlocutory. It could eventually be reviewed in the appeal in the main case. While this Court generally does not entertain a petition for certiorari questioning the propriety of an interlocutory order, yet when a grave abuse of discretion has been patently committed, or the lower court has acted capriciously and whimsically, then it devolves upon this Court to exercise its supervisory authority and to correct the error committed (Manila Electric Co. and Sheriff of Quezon City vs. Hon. Enriquez, etc. and Espinosa, 110 Phil. 499, 503; Abad Santos vs. Province of Tarlac, 67 Phil. 480).

We are of the opinion that the lower court has acquired jurisdiction over the person of Mrs. Midgely by reason of her voluntary appearance. The reservation in her motion to dismiss that she was making a special appearance to contest the court's jurisdiction over her person may be disregarded.

It may be disregarded because it was nullified by the fact that in her motion to dismiss she relied not only on the ground of lack of jurisdiction over her person but also on the ground that there was no showing that earnest efforts were exerted to compromise the case and because she prayed "for such other relief as" may be deemed "appropriate and proper".

Thus, it was held that where the defendant corporation (which was not properly summoned because the summons was served upon its lawyer) filed a motion to dismiss on the ground of lack of jurisdiction over its person but in the same motion it prayed for the dismissal of the complaint on the ground of prescription, it was held that, by invoking prescription, it necessarily admitted the court's jurisdiction upon its person and, therefore, it was deemed to have abandoned its special appearance and voluntarily submitted itself to the court's jurisdiction (Republic vs. Ker & Co., Ltd., 64 O.G. 3761, 18 SCRA 207, 213-214 citing Flores vs. Zurbito, 37 Phil. 746 and Menghra vs. Tarachand and Rewachand, 67 Phil. 286).

"When the appearance is by motion for the purpose of objecting to the jurisdiction of the court over the person, it must be for the sole and separate purpose of objecting to the jurisdiction of the court. If his motion is for any other purpose than to object to the jurisdiction of the court over his person, he thereby submits himself to the jurisdiction of the court. A special appearance by motion made for the purpose of objecting to the jurisdiction of the court over the person will be held to be a general appearance, if the party in said motion should, for example, ask for a dismissal of the action upon the further ground that the court had no jurisdiction over the subject matter." (Syllabus, Flores vs. Zurbito, supra, at page 751. That rule was followed in Ocampo vs. Mina and Arejola, 41 Phil. 308).

Where the defendant contended that the court did not acquire jurisdiction over his person by means of the publication of the corresponding summons in Hawaii, where he was residing, because the action did not relate to personal or real properties situated in the Philippines in which the defendant had or claimed a lien or interest, actual or contingent, it was held that the said defendant nevertheless submitted to the court's jurisdiction when he

filed a motion wherein he contested the court's jurisdiction over his person and at the same time prayed that he be relieved from the effects of the judgment by default, attaching to his motion an affidavit of merits. "He thereby impliedly waived his special appearance assailing the jurisdiction of the court over his person, and voluntarily submitted to the jurisdiction of said court." (*Menghra vs. Tarachand and Rewachand*, supra. See *Tenchavez vs. Escano*, L-19671, September 14, 1966, 17 SCRA 684 and *Sharruf vs. Bubla*, L-17029, September 30, 1964, 12 SCRA 79 where it was held that a nonresident alien, by filing his complaint in a Philippine court, submits thereby to its jurisdiction and the court acquires jurisdiction over him even if as a matter of fact he had never been able to enter the Philippines).

Having shown that Mrs. Midgely had voluntarily submitted to the lower court's jurisdiction when she filed her motion to dismiss (see sec. 23, Rule 14, Rules of Court), the inevitable conclusion is that it did not commit any grave abuse of discretion in denying her motion to dismiss.

In petitioner's lengthy memorandum and reply she confined her arguments to the jurisdictional issue. She even argued that the lower court does not have jurisdiction over the res, a contention that is palpably baseless.

She did not discuss the second ground of her motion to dismiss, which is noncompliance with the requirement of article 222 of the Civil Code on compromise of intra-family disputes. She was presumably convinced by the lower court's argument that such a compromise would violate the prohibition in article 2035 of the Civil Code against compromise on a person's civil status (See *De Raquiza vs. Castellvi*, L-17630, October 31, 1963, 9 SCRA 395).

The case may be viewed from another angle. Supposing *arguendo* that the lower court did not acquire jurisdiction over the person of Mrs. Midgely, still her motion to dismiss was properly denied because Quemada's action against her may be regarded as a quasi in rem action where jurisdiction over the person of the nonresident defendant is not necessary and where service of summons is required only for the purpose of complying with the requirement of due process (*Perkins vs. Dizon*, 69 Phil. 186; *Banco Espanol-Filipino vs. Palanca*, 37 Phil. 291; *Mabanag vs. Gallemore*, 81 Phil. 254).

An action quasi in rem is an action between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein (1 Am Jur 2nd 574; *State ex rel South Brevard Drainage Dist. vs. Smith*, 170 So. 440, 126 Fla. 72). Quemada's action falls within that category.

With respect to the extraterritorial service of summons to a nonresident defendant like Mrs. Midgely, Rule 14 of the Rules of Court provides:

"SEC. 17. Extraterritorial service. — When the defendant does not reside and is not found in the Philippines and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 7; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) days after notice, within which the defendant must answer."

Under section 17, extraterritorial service of summons is proper (1) when the action affects the personal status of the plaintiff; (2) when the action relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent; (3) when the relief demanded in such an action consists, wholly or in part, in excluding the defendant from any interest in property located in the Philippines, and

(4) when defendant nonresident's property has been attached within the Philippines (Sec. 17, Rule 14, Rules of Court).

In any of such four cases, the service of summons may, with leave of court, be effected out of the Philippines in three ways: (1) by personal service; (2) by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court should be sent by registered mail to the last known address of the defendant, and (3) service of summons may be effected in any other manner which the court may deem sufficient. That third mode of extraterritorial service of summons was substantially complied with in this case.

In Civil Case No. 274-T the subject matter of the action for reconveyance consists of properties of Alvaro Pastor, Sr. which are located in Cebu. Mrs. Midgely claims an actual interest in those properties. She has been receiving a share of the income therefrom. Therefore, the extraterritorial service of summons upon her was proper. As already noted, the action against her is quasi in rem. (See *Brown vs. Brown*, 113 Phil. 442).

The record does not show whether Judge Ferandos was consulted by the Clerk of Court and by Quemada's counsel when the service of summons was effected through the Philippine Embassy in Madrid. But although there was no court order allowing service in that manner, that mode of service was later sanctioned or ratified by Judge Ferandos in his order of May 8, 1971. In another order he corrected the defect in the summons by giving Mrs. Midgely the sixty-day reglementary period for answering the complaint.

In the *Banco Español-Filipino* case, supra, the failure of the clerk of court, in a case of foreclosure of a mortgage executed by a nonresident defendant (which is an action quasi in rem) to mail to the defendant's last place of residence copies of the summons and complaint, as required in section 399 of Act 190 (now section 17 of Rule 14) was held not to have affected the court's jurisdiction over the res.

In the *Perkins* case, supra, Eugene Arthur Perkins sued in the Court of First Instance of Manila the Benguet Consolidated Mining Company, a domestic firm, together with Idonah Slade Perkins and George Engelhard, two nonresidents, who were summoned by publication. The service of summons was based on section 398 of Act 190 (from which section 17 of Rule 14 was partly taken) which provides that service of summons by publication may be made on a nonresident in "an action which relates to, or the subject of which is, real or personal property within the Islands, in which such person defendant or foreign corporation defendant, has or claims a lien or interest, actual or contingent, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein."

Eugene Arthur Perkins in his complaint prayed that Engelhard and Idonah Slade Perkins, "be adjudged without interest" in certain shares of stock of the Benguet Consolidated Mining Company and be excluded from any claim involving such shares.

Idonah Slade Perkins challenged the court's jurisdiction over her person. Judge Arsenio P. Dizon overruled her objection. She filed in this Court a certiorari proceeding wherein she prayed that the summons by publication issued against her be declared void and that Judge Dizon be permanently prohibited from taking any action in the case.

This Court held that the action filed by Eugene Arthur Perkins against the two nonresidents was a quasi in rem action and not an action in personam. In that action plaintiff Perkins sought to exclude Idonah Slade Perkins from any interest in property located in the Philippines consisting shares of stock in a domestic sociedad anomina.

This Court clarified that in a quasi in rem action jurisdiction over the person of the nonresident defendant is not essential. The service of summons by publication is required "merely to satisfy the constitutional requirement of

due process". The judgment of the court in the case would settle the title to the shares of stock and to that extent it partakes of the nature of a judgment in rem. Consequently, the lower court had jurisdiction to try the case even if it had not acquired jurisdiction over the person of Idonah Slade Perkins. The judgment would be confined to the res. No personal judgment could be rendered against the nonresident.

Other considerations may be adduced to indicate the frivolous character of Mrs. Midgely's petition for certiorari. There is the circumstance that she actually received the summons and a copy of the complaint. Thus, she cannot complain that she was unaware of the action against her. The requirement of due process has been satisfied. She is cognizant not only of Quemada's complaint in Civil Case No. 274-T in Branch IX of the Court of First Instance of Cebu at Toledo City but also of the testamentary proceeding instituted earlier by Quemada for the settlement of the estate of Alvaro Pastor, Sr. in the Cebu City Branch I of the Court of First Instance of Cebu. In that proceeding she and her brother, Alvaro Pastor, Jr., through her counsel in this case, submitted to the court's jurisdiction by filing an opposition to Quemada's petition.

It should be noted that Civil Case No. 274-T is related to the testamentary proceeding (which is a proceeding in rem par excellence) because the former case was filed by Quemada for the purpose of recovering the properties which, according to his understanding belong to the estate of Alvaro Pastor, Sr. and which are held by Mrs. Midgely and the spouses Alvaro Pastor, Jr. and Maria Elena Achaval.

WHEREFORE, the contempt charges and the petition for certiorari are dismissed. Costs against the petitioner. So ordered.

Fernando, (Chairman), Barredo, Antonio, and Concepcion, Jr., JJ., concur.

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