

**MARIANO ANDAL, ASSISTED BY HIS MOTHER MARIA DUENAS AS
GUARDIAN AD LITEM, AND MARIA DUESAS, PLAINTIFFS VS.
EDUVIGIS MACARAIG, DEFENDANT.**

G. R. No. L-2474. May 30, 1951

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

Mariano Andal, a minor, assisted by his mother Maria Duenas, as guardian ad litem, brought an action in the Court of First Instance of Camarines Sur for the recovery of the ownership and possession of a parcel of land situated in the barrio of Talacop, Calabanga, Camarines Sur.

The complaint alleges that Mariano Andal is the surviving son of Emiliano Andal and Maria Duenas; that Emiliano Andal died on September 24, 1942; that Emiliano Andal was the owner of the parcel of land in question having acquired it from his mother Eduvigis Macaraig by virtue of a donation propter nuptias executed by the latter in favor of the former; that Emiliano Andal had been in possession of the land from 1938 up to 1942, when Eduvigis Macaraig, taking advantage of the abnormal situation then prevailing, entered the land in question.

The lower court rendered judgment in favor of the plaintiffs (a) declaring Mariano Andal the legitimate son of Emiliano Andal and as such entitled to inherit the land in question; (6) declaring Mariano Andal owner of said land; and (c) ordering the defendant to pay the costs of suit. Defendant took the case to this Court upon the plea that only questions of law are involved.

It appears undisputed that the land in question was given by Eduvigis Macaraig to her son Emiliano Andal by virtue of a donation propter nuptias she has executed in his favor on the occasion of his marriage to Maria DueNas. If the son born to the couple is deemed legitimate, then he is entitled to inherit the land in question. If otherwise, then the land should revert back to Eduvigis Macaraig as the next of kin entitled to succeed him under the law. The main issue, therefore, to be determined hinges on the legitimacy of Mariano Andal in so far as his relation to Emiliano Andal is concerned. The determination of this issue much depends upon the relationship ; that had existed between Emiliano Andal and his wife

during the period of conception of the child up to the date of his birth in connection with the death of the alleged father Emiliano Andal.

The following facts appear to have been proven: Emiliano Andal became sick of tuberculosis in January Sometime thereafter, his brother, Felix, went to live in his house to help him work his farm. His sickness became worse that on or about September 10, 1942, he became so weak that he could hardly move and get up from his bed. On September 10, 1946,9'Maria Duenas, his wife, eloped with Felix, and both went to live in the house of Maria's father, until the middle of 1943.Since May, 1942, Felix and Maria had sexual intercourse and treated each other as husband and wife. On January 1, 1943, Emiliano died without the presence of his wife,who did not even attend his funeral. On June 17, 1943, Maria J Duenas gave birth to a boy, who was given the name of Mariano Andal. Under these facts, can the child be considered as the legitimate son of Emiliano?

Article 108 of the Civil Code provides:

"Children born after the one hundred and eighty days next following that of the celebration of marriage or within the three hundred days next following its dissolution or the separation of the spouses shall be presumed to be legitimate.

"This presumption may be rebutted only by proof that it was physically impossible for the husband to have had access to his wife during the first one hundred and twenty days of the three hundred next preceding the birth of the child."

Since the boy was born on June 17, 1943, and Emiliano Andal died on January 1, 1943, that boy is presumed to be the legitimate son of Emiliano and his wife, he having been born within three hundred (300) days following the dissolution of the marriage. This presumption can only be rebutted by proof that it was physically impossible for the husband to have had access to his wife during the first 120 days of the 300 next preceding the birth of the child. Is there any evidence to prove that it was physically impossible for Emiliano to have such access? Is the fact that Emiliano was sick of tuberculosis and was so weak that he could hardly move and get up from his bed sufficient to overcome this presumption?

Manresa on this point says:

"Impossibility of access by husband to wife would include (1) absence during the initial period of conception, (2) impotence which is patent, continuing and incurable, and (3) imprisonment, unless it can be shown that cohabitation took place through corrupt violation of prison regulations." Manresa, 492-500, Vol. I, cited by Dr. Arturo Tolentino in his book "Commentaries and Jurisprudence on the Civil Code, Vol. 1, p. 90)."

There was no evidence presented that Emiliano Andal was absent during the initial period of conception, specially during the period comprised between August 21, 1942 and September 10, 1942, which is included in the 120 days of the 300 next preceding the birth of the child Mariano Andal. On the contrary, there is enough evidence to show that during that initial period, Emiliano Andal and his wife were still living under the marital roof. Even if Felix, the brother, was living in the same house, and he and the wife were indulging in illicit intercourse since May, 1942, that does not preclude cohabitation between Emiliano and his wife. We admit that Emiliano was already suffering from tuberculosis and his condition then was so serious that he could hardly move and get up from his bed, his feet were swollen and his voice hoarse. But experience shows that this does not prevent carnal intercourse. There are cases where persons suffering from this sickness can do the carnal act even in the most crucial stage because they are more inclined to sexual intercourse. As an author has said, "the reputation of the tuberculous towards eroticism (sexual propensity) is probably dependent more upon confinement to bed than the consequences of the disease." (An Integrated Practice of Medicine, by Hyman, Vol. 3, p. 2202). There is neither evidence to show that Emiliano was suffering from impotency, patent, continuous and incurable, nor was there evidence that he was imprisoned. The presumption of legitimacy under the Civil Code in favor of the child has not, therefore, been overcome.

We can obtain the same result viewing this case under section 68, par. (e) of Rule 123, of the Rules of Court, which is practically based upon the same *rai'son d'etre* underlying the Civil Code. Said section provides:

"The issue of a wife cohabiting with the husband who is not impotent, is indisputably presumed to be legitimate, if not born within one hundred eighty days immediately succeeding the marriage, or after the expiration of three hundred days following its dissolution."

We have already seen that Emiliano and his wife were living together, or at least had access one to the other, and Emiliano was not impotent, and the child was born within three hundred (300) days following the dissolution of the marriage. Under these facts no other presumption can be drawn than that the issue is legitimate. We have also

seen that this presumption can only be rebutted by clear proof that it was physically or naturally impossible for them to indulge in carnal intercourse. And here there is no such proof. The fact that Maria Duenas has committed adultery can not also overcome this presumption (Tolentino's Commentaries on the Civil Code, Vol. I, p. 92).

In view of all the foregoing, we are constrained to hold that the lower court did not err in declaring Mariano Andal as the legitimate son of the spouses Emiliano Andal and Maria Duefias.

Wherefore, the decision appealed from is affirmed, without pronouncement as to costs.

Paras, C. J., Feria, Pablo, Tuason, Montemayor, Reyes and Jugo, JJ., concur.

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