

ROSITA SUELO SALAZAR, PLAINTIFF AND APPELLEE, VS. IGNACIO SALAZAR, DEFENDANT AND APPELLANT.*G.R. No. L-5823. April 29, 1953*

Ponente: BAUTISTA ANGELO, J.

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This is an appeal from an order of the Court of First Instance of Iloilo which directs the defendant to give to the minor children, Reynaldo Carissimo and Maria Sylvia, a monthly allowance of P200 by way of alimony pendente lite from November 6, 1950 until the principal case has been finally decided.

This appeal was originally taken to the Court of Appeals but was later certified to this Court because it only involves questions of law.

On November 2, 1950, Rosita Suelo Salazar, plaintiff, filed an action in the Court of First Instance of Iloilo praying that Ignacio Salazar, defendant, be ordered to pay her a monthly allowance of P300 as alimony pendente lite, and that, after trial, said monthly allowance be made permanent.

Plaintiff avers that she is the lawful wife of defendant, they having been married on July 24, 1947 before the Municipal Court of Manila, and, later, they repeated the ceremony before the parish priest of Espiritu Santo Catholic Church on July 28, 1947; that out of the marital relation, two children were born, namely, Reynaldo Carissimo, 2 years and 5 months of age and Maria Sylvia, 11 months of age; that on August 9, 1950, defendant abandoned the conjugal home and refused to give support and maintenance to plaintiff and the children; that defendant is receiving a monthly salary of P600 from the Negros Navigation Company, Iloilo City, and another monthly salary of P550 from the Southern Lines Inc., also of Iloilo City, while plaintiff is without any source of income. Copies of the marriage certificates were attached to the complaint.

Defendant, in his answer, admitted the celebration of the marriage alleged in the complaint, but averred that they were sham and fictitious and were merely celebrated for reasons of convenience and to avoid scandal, the plaintiff and defendant being at the time already legally married, the plaintiff to one Ramon Perez and defendant to Maria Olea Salazar, and therefore, said marriages are null and void and of no legal effect. Defendant also admitted having had illicit relations with the plaintiff and that out of said illicit relations, the children mentioned in the complaint were born. Defendant claims that he had an arrangement with plaintiff to end their illicit relations and place the children under his custody but that plaintiff ignored this arrangement. Defendant further claims that he is still willing and ready to have the two children under his custody and to support them in his home.

On December 6, 1950, plaintiff filed an ex parte motion praying that her petition for alimony pendente lite be set for hearing, and accordingly it was set for hearing on December 9, 1950. On the latter date, the motion was argued orally by counsel of both parties, who supplemented their oral arguments with written memoranda. Thereafter, on January 26, 1951, the court issued an order awarding the two minor children a monthly allowance of P200 as stated in the early part of this decision.

His motion to set aside the order having been denied, defendant took steps to take the case on appeal to this Court. The case however, through inadvertence, was forwarded to the Court of Appeals. In due time, defendant paid the docketing fees and the cost of printing the record on appeal which amounted to P174.75, and said record on appeal was duly printed in accordance with the rules. Thereafter, or on December 28, 1951, appellee filed a motion to dismiss the appeal on the ground that the order appealed from is not appealable because it is merely interlocutory in nature. On January 7, 1952, appellant submitted his written opposition to said motion. The case was later certified to this Court on the ground that it was inadvertently forwarded to the Court of Appeals and it merely involves a question of law, but no action has been taken on the motion to dismiss.

The motion to dismiss filed by appellee during the pendency of this appeal on the ground that the order appealed from is not appealable because it is merely interlocutory, cannot be entertained. While an order denying or granting alimony pendente lite is interlocutory and consequently non-appealable (Moran, Comments on the Rules of Court, Vol. II, 1952 ed., page 120), however, if appeal is taken therefrom, and no timely objection is interposed thereto, the objection is deemed waived. Thus, when the objection is founded on the ground that the judgment appealed from is interlocutory, but the appellee, before making such objection, has allowed the record on appeal to be approved and printed, and has allowed the appellant to print his brief, such objection is too late and is deemed waived (*Slade-Perkins v. Perkins*, 57 Phil. 223, 225; *Luenvo & Martinez v. Herrero*, 17 Phil. 29; Moran, Comments on the Rules of Court, Vol. I, 1952 ed., p. 987). The motion to dismiss should therefore be denied.

In his first assignment of error, appellant questions the procedure followed by the court a quo in the determination of the alimony pendente lite. He claims that the court did not follow the procedure prescribed in Section 5, Rule 63, which, according to him, enjoins the court to determine provisionally the pertinent facts of the case, having due regard to the necessities of the applicant, the means of the adverse party, and such other circumstances as may aid in the proper elucidation of the question involved.

We find that the court has substantially complied with the prescribed rule on the matter. The rule requires that the court shall determine provisionally the pertinent facts in the same manner as is provided in connection with motions (Section 4). This means that to determine the pertinent facts there is no need of receiving oral testimony. It is enough that those facts be established by affidavits or other documentary evidence appearing in the record. In the instant case, the court has relied on the main allegations of the complaint which is verified and supported by documentary evidence. On the other hand, the main facts were not disputed especially those which refer to the illicit relations between plaintiff and defendant and the monthly earnings of the latter. Moreover, the court set the incident for hearing and the parties, as well as their counsel, were given enough opportunity to be heard.

But there is one reason which weakens the claim that the lower court did not weigh the defense that the marriages which plaintiff alleges to have been celebrated between her and the defendant were but sham and fictitious and were celebrated merely for reasons of convenience. We refer to the fact that the alimony pendente lite was granted by the court not to the plaintiff but to the two children born out of their illicit relations. The right of these children to support exists regardless of marriage under the present law. These children are entitled not only to support but also to inherit. (Art. 287, New Civil Code).

As regards the contention that the court fixed the monthly allowance of P200 without considering the necessities of the applicant, or the means of the adverse party, as required by the rules, the same is likewise untenable, for it appears from the complaint, and this is not disputed, that appellant has a monthly income of P1,150. This is a sufficient basis in determining the amount of alimony pendente lite until the contrary is shown when the case is decided on the merits.

Wherefore, the order appealed from is affirmed, without costs.

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

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