

**ROSARIO MATUTE, PETITIONER, VS. HON. HIGINIO B. MACADAEG,
AS JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, BRANCH
X, AND ARMANDO MEDEL, RESPONDENTS.***G.R. No. L-9325. May 30, 1956*

Ponente: CONCEPCION, J.

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In an action for legal separation brought by Armando Medel against Rosario Matute, upon the ground of adultery committed with his brother and her brother-in-law, Ernesto Medel—which action was docketed as civil case No. 14190 of the Court of First Instance of Manila—decision was, on November 6, 1952 rendered by the latter, finding Rosario guilty of the charge against her, decreeing said legal separation, and awarding to Armando the custody of their four (4) minor children, Florencia, Manuel, Carmelita and Benito, all surnamed Medel, then 12, 10, 8 and 4 years of age, respectively. Thereafter, Armando went to the United States, leaving the children in the City of Davao under the care of his sister Pilar Medel, in whose house Rosario subsequently lived in order to be with her offspring. Armando returned to the Philippines late in 1954. At the close of the then current school year, during which the children were enrolled in a school in Davao, or in March, 1955, they joined their father in Cebu. With his permission, Rosario brought the children to Manila in April, 1955, to attend the funeral of her father. Armando alleges that he consented thereto on condition that she would return the children to him within two (2) weeks. However, Rosario did not do so. Instead, on June 10, 1955, she filed, in said civil case No. 14190, a motion the prayer of which is of the following tenor:

"Wherefore, movant respectfully prays this Honorable Court, after due hearing:

"(1) to issue an order awarding the custody of the above-named children to the herein movant, their mother, in deference to the preference expressed by the children (Sec. 6, Rule 100, Rules of Court); and

"(2) to order Armando Medel, father of the said minor children, to support said children by paying their school fees and giving them a reasonable allowance both items in an amount not less than P200 a month."

Said motion was based upon the ground that the children—three (3) of whom, namely, Florencia, Manuel and Carmelita, were then 16, 14 and 12 years of age, respectively—do not want to go back to their father, because he "is living with a woman other than" their mother. Armando opposed this motion and countered with a petition to declare and punish Rosario for contempt of court, in view of her failure and alleged refusal to restore the custody of their children to him. After due hearing the Court of First Instance of Manila, presided over by Hon. Higinio B. Macadaeg, Judge, issued an order, dated June 29, 1955, absolving Rosario from the charge of contempt of court, she having secured Armando's consent before bringing the children to Manila, but denying her motion for their custody and ordering her to deliver them to Armando within twenty-four (24) hours from notice. The dispositive part of said order reads:

"In view of the foregoing, motion for the custody of the minor children, Florencia, Manuel, Carmelita, and Benito, all surnamed Medel, is hereby denied. Rosario Matute is hereby ordered to deliver to Armando Medel

the persons of the said minor children, within twenty-four (24) hours from receipt of copy of this Order. "Let copies of this Order be served immediately by the Sheriff of this Court, not only on the lawyers appearing in this case, but also on the parties themselves."

Thereupon, Rosario instituted, against Armando and Judge Maeadaeg, the present action for certiorari and prohibition with preliminary injunction, upon the ground that said order of June 29, 1955, had been issued with grave abuse of discretion, and that there is no other plain, adequate and speedy remedy in the ordinary course of law. The prayer in her petition, is as follows;

"Wherefore, petitioner respectfully prays this Honorable Court to issue a writ of preliminary injunction upon petitioner's filing a bond in such sum as this Honorable Court may fix, ordering respondents, their attorneys, agents and other persons acting by and under their orders to cease and desist from enforcing in any way the order of the respondent Court dated June 29, 1955, and after hearing, to annul the said Order and to award the custody of the children to your petitioner.

"Petitioner likewise prays for such other or further relief as may be just and equitable, without costs."

Upon the filing of the petition, we issued the writ of preliminary injunction therein prayed for, without bond. Briefly stated, petitioner herein maintains that the children should be under her custody, because: (1) she is their legitimate mother and they wish to stay with her, not their father Armando Medel; (2) three (3) of the children are over ten (10) years of age, and, hence, their aforementioned wish must, pursuant to Rule 100, section 6, of the Rules of Court, be heeded, unless "the parent so chosen be unfit to take charge" of them "by reason of moral depravity, habitual drunkenness, incapacity or poverty"; (3) the act of infidelity of which she had been found guilty in the decision of November 6, 1952, does not involve "moral depravity"; (4) in any event, it is a thing of the past, not a present reality; (5) respondent Armando Medel is now unfit to have the children under his care, for he is living maritally with a woman by the name of Paz Jesusa Concepcion; and (6) although he had married the latter, after securing in the United States a decree of divorce dissolving his marriage with petitioner herein, said decree is null and void and, accordingly, he is guilty of bigamy.

In the present action, we do not deem it necessary to pass upon the merits of such pretense. The case before us is one of certiorari and prohibition, governed by sections 1 and 2 of Rule 67 of the Rules of Court, reading:

"Section 1. Petition for certiorari.—When any tribunal, board, or officer exercising judicial functions, has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion and there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board, or officer as the law requires, with costs.

"Sec. 2. Petition for prohibition.—When the proceedings of any tribunal corporation board, or person, whether exercising functions judicial or ministerial, are without or in excess of its or his jurisdiction, or with grave abuse of discretion, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered commanding the defendant to desist from further proceedings in the action or matter specified therein, with costs."

Pursuant to these provisions, neither the writ of certiorari nor that of prohibition lies unless the act complained of has been performed "without or in excess of" jurisdiction "or with grave abuse of discretion". There is no question but that respondent Judge had jurisdiction to pass upon the issue raised by petitioner's motion of June 10, 1955, for custody of the children, and the petition of respondent Medel, dated June 22, 1955, to declare petitioner guilty of contempt of court, to wit: whether said custody should be retained by respondent Medel, as adjudged in the decision of November 6, 1952, or should be given to petitioner herein. Which ever alternative taken by respondent

Judge would not vitiate his choice as being "without or in excess" of jurisdiction. Whatever mistakes, if any, he may have committed in the appraisal of the situation—on which we do not express our view—in determining the best solution to said issue or which one of the litigants is best qualified or least disqualified to take charge of the children, would, at best, constitute "merely errors of judgment." They are not "errors of jurisdiction", but errors in the exercise of the jurisdiction which the lower court admittedly had. Such errors do not affect the legality or validity of the order complained of. They may be reviewed by appeal, not by writ of certiorari or prohibition. (Comments on the Rules of Court, by Moran, Vol. II, pp. 167 and 168).

Neither does the aforementioned order of June 29, 1955, involve a grave abuse of discretion for it merely enforces the award made in the decision of November 6, 1952, which is admittedly final and executory. It is true that, insofar as it refers to the custody of the minor children, said decision is never final, in the sense that it is subject to review at any time that the Court may deem it for the best interest of said minors. It is no less true, however, that, unless and until reviewed and modified, said award must stand. No such modification having been made, at yet, respondent Judge had, not only the authority; but, also, the duty to execute and implement said award.

Furthermore, by virtue of said decision of November 6, 1952, respondent had, admittedly, the custody of said minors. Petitioner merely obtained his permission to bring them to Manila, for the purpose of attending the funeral of their maternal grandfather, which took place in April, 1955. Thus, petitioner obtained and has the physical possession of the minors in a precarious manner. She holds it in the name, on behalf and by authority of respondent Medel, whose agent she, in effect, is. He may, therefore, demand their return at any time, and she is bound to comply immediately with such demand. She cannot even question his authority to make it, although she is free to seek a review of the order or decision awarding the custody of the minors to him, and to ask that they be placed under her charge.

Again, it is conceded that children over ten (10) years of age, whose parents are divorced or living separately, may choose which parent they prefer to live with, unless the parent chosen is unfit to take charge of their care by reason of "moral depravity, habitual drunkenness, in capacity or poverty" (Rule 100, section 6, Rules of Court). Without deciding whether the adultery committed by herein petitioner with her own brother-in-law involves moral depravity, it is clear to our mind that the affirmative assumption implicit in the order complained of cannot be characterized as an "abuse of discretion", much less a "grave" one.

Lastly; said order further declares:

* * * The facts remains that defendant-movant is without means of livelihood and, according to her own admission, she lives on the charity of her brothers. She has no home of her own to offer to her children, but only she would shelter them under the roof of her brothers."

and the substantial accuracy of this statement is not contested. We are not prepared to hold, that a grave abuse of discretion was committed when the lower court impliedly deduced, from these circumstances, that "poverty", among other causes, rendered petitioner unfit to take charge of her children or made it unwise to place them under her care.

Wherefore, without prejudice to such appropriate action as petitioner may deem fit to take for the purpose of securing a review of the order of respondent Judge of June 29, 1955, or a modification of the award made in the decision of November 6, 1952, relative to the custody of the children, or both, the petition is denied and the case dismissed. The writ of preliminary injunction heretofore issued is hereby dissolved, with costs against the petitioner. It is so ordered.

Paras, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Jugo, Bautista Angelo, Labrador, Reyes, J. B. L., and Endeneia, JJ., concur.

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