

VICTORIANO GAMIS, PETITIONER, VS. THE COURT OF APPEALS, ET AL., RESPONDENTS.

G.R. No. 10732. May 23, 1959

Ponente: PADILLA, J.

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PADILLA, J.:

Appeal by certiorari under Rule 46 of the Rules from a judgment rendered by the Court of Appeals which modified that of the Court of First Instance of Sorsogon in a partition suit (civil No. 120).

On September 1946 in the Court of First Instance of Sorsogon Gerarda Gamis and her husband Sebastian Imperial commenced suit against her father Victoriano Gamis and brother Macario Gamis for partition of several parcels of land (A to C) claimed to be paraphernal of the late Ciriaca Giro, mother of the plaintiff Gerarda Gamis, and those numbered 1 to 19, in the second amended complaint dated 4 September 1950, to be conjugal of the spouses Victoriano Gamis and Ciriaca Giro.

After hearing, on 30 September 1954 the Court rendered judgment the dispositive part of which is as follows:

Por tanto, el Juzgado declara las Parcelas A y B la porcion equivalente a 2/3 partes de la Parcela C como bienes parafernales de la finada Ciriaca Giro que deben ser divididas en partes iguales entre la demandante Gerarda Gamis y el demandado Macario Gamis. En cuanto a las Parcelas 1 al 19, se declaran bienes de Ciriaca Giro y Victoriano Gamis las Parcelas 1 y 2, las porciones cubiertas por las hojas declaratorias Exhibits K-2 y K-3 de la Parcela 5, la Parcela 9, la porcion cubierta por la hoja declaratoria Exhibit 1-4 de la Parcela 10, y las Parcelas 11 y 19, y se ordena que las mismas sean adjudicadas y divididas en la forma siguiente: una mitad a favor del demandado Victoriano Gamis y la otra mitad en partes iguales entre la demandante Gerarda Gamis y el demandado Macario Gamis. Se condena al demandado Victoriano Gamis a pagar a la demandante la suma de P2,000.00 en concepto de danos y perjuicios. SE SOBREESEE la demanda en cuanto a las Parcelas 3, 4, 6, 7, 12, 13, 14, 15, 16, 17 y 18. SE CONCEDE a las partes una plazo de treinta (30) dias para que presenten al Juzgado un proyecto de particion de conformidad con esta decision en la inteligencia de que no hacerlo dentro de dicho plazo, el Juzgado nombrara, a petici6n de cualquiera de las partes, tres comisionados que verificaran la particion ordenada en la presente decision.

No se hace ningun pronunciamiento especial en cuanto a las costas. (pp. 85, 104-105, Rec. on App.)

Victoriano Gamis appealed to the Court of Appeals and there assigned as committed by the trial court the following errors:

1. The trial court erred in holding that parcels A, B and C, as described in the complaint, are paraphernal property of Ciriaca Giro,
2. The trial court erred in finding parcels 1, 2, 9, 11 and 19 as conjugal property of the spouses Victoriano Gamis and Ciriaca Giro.
3. The trial court erred in condemning appellant to pay plaintiff Gerarda Gamis two thousand pesos as damages.

4. The trial court erred in not declaring appellant forced heir of Ciriaca Giro, assuming that parcels A, B and C are her paraphernal property,

On 11 April 1956 the Court of Appeals affirmed the judgment of the lower court with a slight modification as to the remaining one-third undivided share of parcel of land lettered C, described in paragraph 3 of the second amended complaint, which was declared to belong to Gerarda Gamis and Macario Gamis share and share alike, said one-third undivided share having been inherited by them from their deceased uncle Anastacio Giro. In the judgment of the Court of Appeals the following pronouncement is made:

Finally counsel for appellant contends that the lower court failed to declare appellant forced heir of Ciriaca Giro according to Article 834 of the old Civil Code which provides that a widower or widow who, on the death of his or her spouse is not divorced, or should be so by the fault of the deceased, shall be entitled to a portion in usufruct equal to that corresponding by way of legitime to each of the legitimate children or descendants who have not received any betterment. This is the first time this question is raised by appellant. He failed altogether to call the attention of the lower court to this question and hence it should be understood to have been waived according to a long line of decisions of our Supreme Court. Moreover, the lower court must have taken this fact into consideration when it awarded a nominal damage in the sum of P2,000 to the plaintiffs. (P. 13, Annex A.)

A motion for reconsideration of the foregoing pronouncement was denied. Hence this appeal by certiorari.

In his brief the petitioner Victoriano Gamis assigns only one error as committed by the Court of Appeals, to wit:

The Honorable Court of Appeals erred in affirming the decision of the Court of First Instance of Sorsogon in Civil Case No. 120, in so far as it held that parcels A, B and C should be divided equally between Gerarda Gamis and Macario Gamis.

And after making a short statement of facts under the heading "Discussion" contends that—

* * * the Court of Appeals violated Article 834 of the Old Civil Code when it decided to partition equally between Gerarda Gamis and Macario Gamis Parcels A, B and C, ignoring altogether the usufructuary rights of petitioner Victoriano Gamis as surviving spouse of his deceased wife, Ciriaca Giro.

In support of the contention he invoices article 834 of the old Civil Code, the law applicable because the deceased spouse died on 17 January 1909, which provides:

A widower or widow who, on the death of his or her spouse, is not divorced, or should be so by the fault of the deceased, shall be entitled to apportion in usufruct equal to that corresponding by way of legitime to each of the legitimate children or descendants who have not received any betterment.

Under articles 807 and 834 of the old Civil Code the surviving spouse is a forced heir and entitled to a share in usufruct in the estate of the deceased spouse equal to that which by way of legitime corresponds or belongs to each of the legitimate children or descendants who have not been bettered or have not received any share in the one-third share destined for betterment. The right of the surviving spouse to have a share in usufruct in the estate of the deceased spouse is provided by law of which such spouse cannot be deprived and which cannot be ignored. Of course, the spouse may waive it but the waiver must be express.

True, in his answer filed in the Court of First Instance of Sorsogon the petitioner did not claim that he was a forced heir as surviving spouse and as such entitled to a share in usufruct in the estate of his deceased wife, but the assertion of his usufructuary right as surviving spouse in the estate of his deceased wife would have been inconsistent with his claim that the parcels of land sought to be partitioned were not paraphernal, the main controversy being whether the parcels of land sought to be partitioned were paraphernal of the deceased first

spouse, conjugal, exclusive of the surviving spouse, or conjugal of the surviving spouse with his deceased second wife and third wife. And after the Court of First Instance of Sorsogon had rendered its judgment that the first (A), second (B) and 2/3 of the third (C) parcels of land were paraphernal he lost no time in asserting his usufructuary right as surviving spouse in the estate of his deceased first wife and praying that he be so held and declared in his brief submitted to the Court of Appeals, without waiving his right to claim and contend that the parcels of land just referred to were not paraphernal of his deceased first wife but otherwise. Under these circumstances the petitioner cannot be held to have waived his usufructuary right or share in usufruct as surviving spouse in the estate of his deceased wife Ciriaca Giro.

The judgment of the Court of Appeals under review is modified in the sense that under articles 807 and 834 of the old Civil Code the petitioner is entitled to a share in usufruct in the estate of the late Ciriaca Giro, without pronouncement as to costs.

Paras, C. J., Bengzon, Montemayor, Reyes, A., Bautista Angelo, Labrador, Concepcion, and Endencia, JJ., concur.

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