REPUBLIC OF THE PHILIPPINES, PETITIONER, VS. THE HON. COURT OF APPEALS (TWENTIETH DIVISION), HON. PRESIDING JUDGE FORTUNITO L. MADRONA, RTC-BR. 35 AND APOLINARIA MALINAO JOMOC, ...

G.R. NO. 163604. May 06, 2005

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CARPIO-MORALES, J

In "In the Matter of Declaration of Presumptive Death of Absentee Spouse Clemente P. Jomoc, Apolinaria Malinao Jomoc, petitioner," the Ormoc City, Regional Trial Court, Branch 35, by Order of September 29, 1999,[1] granted the petition on the basis of the Commissioner's Report[2] and accordingly declared the absentee spouse, who had left his petitioner-wife nine years earlier, presumptively dead.

In granting the petition, the trial judge, Judge Fortunito L. Madrona, cited Article 41, par. 2 of the Family Code. Said article provides that for the purpose of contracting a valid subsequent marriage during the subsistence of a previous marriage where the prior spouse had been absent for four consecutive years, the spouse present must institute summary proceedings for the declaration of presumptive death of the absentee spouse, without prejudice to the effect of the reappearance of the absent spouse.

The Republic, through the Office of the Solicitor General, sought to appeal the trial court's order by filing a Notice of Appeal.[3]

By Order of November 22, 1999s,[4] the trial court, noting that no record of appeal was filed and served "as required by and pursuant to Sec. 2(a), Rule 41 of the 1997 Rules of Civil Procedure, the present case being a special proceeding," disapproved the Notice of Appeal.

The Republic's Motion for Reconsideration of the trial court's order of disapproval having been denied by Order of January 13, 2000,[5] it filed a Petition for Certiorari[6] before the Court of Appeals, it contending that the declaration of presumptive death of a person under Article 41 of the Family Code is not a special proceeding or a case of multiple or separate appeals requiring a record on appeal.

By Decision of May 5, 2004,[7] the Court of Appeals denied the Republic's petition on procedural and substantive grounds in this wise:

> At the outset, it must be stressed that the petition is not sufficient in form. It failed to attach to its petition a certified true copy of the assailed Order dated January 13, 2000 [denying its Motion for Reconsideration of the November 22, 1999 Order disapproving its Notice of Appeal]. Moreover, the petition questioned the [trial court's] Order dated August 15, 1999, which declared Clemente Jomoc presumptively dead, likewise for having been issued with grave abuse of discretion amounting to lack of jurisdiction, yet, not even a copy could be found in the records. On this score alone, the petition should have been dismissed outright in accordance with Sec. 3, Rule 46 of the Rules of Court.
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> However, despite the procedural lapses, the Court resolves to delve deeper into the substantive issue of the

validity/nullity of the assailed order.

The principal issue in this case is whether a petition for declaration of the presumptive death of a person is in the nature of a special proceeding. If it is, the period to appeal is 30 days and the party appealing must, in addition to a notice of appeal, file with the trial court a record on appeal to perfect its appeal. Otherwise, if the petition is an ordinary action, the period to appeal is 15 days from notice or decision or final order appealed from and the appeal is perfected by filing a notice of appeal (Section 3, Rule 41, Rules of Court).

As defined in Section 3(a), Rule 1 of the Rules of Court, "a civil action is one by which a party sues another for the enforcement or protection of a right, or the prevention of redress of a wrong" while a special proceeding under Section 3(c) of the same rule is defined as "a remedy by which a party seeks to establish a status, a right or a particular fact (Heirs of Yaptinchay, et al. v. Del Rosario, et al., G.R. No. 124320, March 2, 1999).

Considering the aforementioned distinction, this Court finds that the instant petition is in the nature of a special proceeding and not an ordinary action. The petition merely seeks for a declaration by the trial court of the presumptive death of absentee spouse Clemente Jomoc. It does not seek the enforcement or protection of a right or the prevention or redress of a wrong. Neither does it involve a demand of right or a cause of action that can be enforced against any person.

On the basis of the foregoing discussion, the subject Order dated January 13, 2000 denying OSG's Motion for Reconsideration of the Order dated November 22, 1999 disapproving its Notice of Appeal was correctly issued. The instant petition, being in the nature of a special proceeding, OSG should have filed, in addition to its Notice of Appeal, a record on appeal in accordance with Section 19 of the Interim Rules and Guidelines to Implement BP Blg. 129 and Section 2(a), Rule 41 of the Rules of Court . . . (Emphasis and underscoring supplied)

The Republic (petitioner) insists that the declaration of presumptive death under Article 41 of the Family Code is not a special proceeding involving multiple or separate appeals where a record on appeal shall be filed and served in like manner.

Petitioner cites Rule 109 of the Revised Rules of Court which enumerates the cases wherein multiple appeals are allowed and a record on appeal is required for an appeal to be perfected. The petition for the declaration of presumptive death of an absent spouse not being included in the enumeration, petitioner contends that a mere notice of appeal suffices.

By Resolution of December 15, 2004,[8] this Court, noting that copy of the September 27, 2004 Resolution[9] requiring respondent to file her comment on the petition was returned unserved with postmaster's notation "Party refused," Resolved to consider that copy deemed served upon her.

The pertinent provisions on the General Provisions on Special Proceedings, Part II of the Revised Rules of Court entitled SPECIAL PROCEEDINGS, read:

RULE 72
SUBJECT MATTER AND APPLICABILITY
OF GENERAL RULES

Section 1. Subject matter of special proceedings. – Rules of special proceedings are provided for in the following:

(a) Settlement of estate of deceased persons;
(b) Escheat;
(c) Guardianship and custody of children;
(d) Trustees;

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(e) Adoption;
(f) Rescission and revocation of adoption;
(g) Hospitalization of insane persons;
(h) Habeas corpus;
(i) Change of name;
(j) Voluntary dissolution of corporations;
(k) Judicial approval of voluntary recognition of minor natural children;
(l) Constitution of family home;
(m) Declaration of absence and death;
(n) Cancellation or correction of entries in the civil registry.

Sec. 2. Applicability of rules of civil actions. – In the absence of special provisions, the rules provided for in ordinary actions shall be, as far as practicable, applicable in special proceedings. (Underscoring supplied)

The pertinent provision of the Civil Code on presumption of death provides:

Art. 390. After an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes, except for those of succession.

x x x (Emphasis and underscoring supplied)

Upon the other hand, Article 41 of the Family Code, upon which the trial court anchored its grant of the petition for the declaration of presumptive death of the absent spouse, provides:

Art. 41. A marriage contracted by any person during the subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouses had been absent for four consecutive years and the spouse present had a well-founded belief that the absent spouses was already dead. In case of disappearance where there is danger of death under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.

For the purpose pf contracting the subsequent marriage under the preceding paragraph, the spouses present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of a reappearance of the absent spouse. (Emphasis and underscoring supplied)

Rule 41, Section 2 of the Revised Rules of Court, on Modes of Appeal, invoked by the trial court in disapproving petitioner's Notice of Appeal, provides:

Sec. 2. Modes of appeal. -

(a) Ordinary appeal. - The appeal to the Court of Appeals in cases decided by the Regional Trial Court in the exercise of its original jurisdiction shall be taken by filing a notice of appeal with the court which rendered the judgment or final order appealed from and serving a copy thereof upon the adverse party. No record on appeal shall be required except in special proceedings and other cases of multiple or separate appeals where the law or these Rules so require. In such cases, the record on appeal shall be filed and served in like manner. (Emphasis and underscoring supplied)

x x x

By the trial court's citation of Article 41 of the Family Code, it is gathered that the petition of Apolinaria Jomoc to have her absent spouse declared presumptively dead had for its purpose her desire to contract a valid subsequent marriage. Ergo, the petition for that purpose is a "summary proceeding," following above-quoted Art. 41, paragraph 2 of the Family Code.

Since Title XI of the Family Code, entitled SUMMARY JUDICIAL PROCEEDING IN THE FAMILY LAW, contains the following provision, inter alia:

> x x x
>
> Art. 238. Unless modified by the Supreme Court, the procedural rules in this Title shall apply in all cases provided for in this Codes requiring summary court proceedings. Such cases shall be decided in an expeditious manner without regard to technical rules. (Emphasis and underscoring supplied)
>
> x x x,

there is no doubt that the petition of Apolinaria Jomoc required, and is, therefore, a summary proceeding under the Family Code, not a special proceeding under the Revised Rules of Court appeal for which calls for the filing of a Record on Appeal. It being a summary ordinary proceeding, the filing of a Notice of Appeal from the trial court's order sufficed.

That the Family Code provision on repeal, Art. 254, provides as follows:

> Art. 254. Titles III, IV, V, VI, VII, VIII, IX, XI and XV of Book I of Republic Act No. 386, otherwise known as the Civil Code of the Philippines, as amended, and Articles 17, 18, 19, 27, 28, 29, 30, 31, 39, 40, 41 and 42 of Presidential Decree No. 603, otherwise known as the Child and Youth Welfare Code, as amended, and all laws, decrees, executive orders, proclamations rules and regulations, or parts thereof, inconsistent therewith are hereby repealed, (Emphasis and underscoring supplied),

seals the case in petitioner's favor.

Finally, on the alleged procedural flaw in petitioner's petition before the appellate court. Petitioner's failure to attach to his petition before the appellate court a copy of the trial court's order denying its motion for reconsideration of the disapproval of its Notice of Appeal is not necessarily fatal, for the rules of procedure are not to be applied in a technical sense. Given the issue raised before it by petitioner, what the appellate court should have done was to direct petitioner to comply with the rule.

As for petitioner's failure to submit copy of the trial court's order granting the petition for declaration of presumptive death, contrary to the appellate court's observation that petitioner was also assailing it, petitioner's 8-page petition[10] filed in said court does not so reflect, it merely having assailed the order disapproving the Notice of Appeal.

WHEREFORE, the assailed May 5, 2004 Decision of the Court of Appeals is hereby REVERSED and SET ASIDE. Let the case be REMANDED to it for appropriate action in light of the foregoing discussion.

SO ORDERED.

Panganiban, (Chairman), Sandoval-Gutierrez, Corona, and Garcia, JJ., concur.

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[1] Annex "F" to Petition, Rollo at 47-50.

[2] Annex "E" to Petition, id. at 44-45.

[3] Annex "A" to Petition for Certiorari, CA Rollo at 11.

[4] Annex "B" to Petition, Rollo at 41.

[5] Annex "C" to Petition, id. at 42.

[6] CA Rollo at 1-8.

[7] id. at 51-54.

[8] Rollo at 100.

[9] id. at 97.

[10] Vide note 6.

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