

**ALBERTO, FRANCISCO II, DAVID, MAGNO, FLORENCIO, MERCEDES,
ALL SURNAMED AÑONUEVO; FE, OSCAR, OSIAS, TEOTIMO, ALICIA
AND LETICIA, ALL SURNAMED ENCISO, PETITIONERS, VS. HON.
ROBERT...**

G.R. No. 22277. May 19, 1966

Ponente: SANCHEZ, J.

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SANCHEZ, J.:

Material to the present case[1] are the proceedings taken in Civil Case No. 1829 of the Court of First Instance of Albay (Amando Añonuevo, et al., plaintiffs, vs. Alberto Añonuevo, et al., defendants) for partition, viz:

On June 21, 1968, judgment was rendered:

"(a) Directing the plaintiffs and the defendants to partition the 6 parcels of land described in paragraph 4 of the complaint and Lots 5705, 5765 and 5805 in the proportion indicated in the counterclaim of the defendants, that is 3/4 of these parcels of land and lots should pertain to the defendants and 1/4 to the plaintiffs;

' (b) Dismissing the counterclaim as regards Lots 4318. 5094, 5881, 5907, 5945 and 0242 (should be 7242); * * *"[2]

On August 13, 1963, the Court denied plaintiffs' motion to reconsider the judgment.

On August 23, 1963, plaintiffs filed their notice of appeal from the judgment of June 21, 1963, and the order of August 13, 1963, "direct to the Supreme Court only on questions of law", and deposited their cash appeal bond.

On October 23, 1963, the Court approved plaintiffs' amended Record on Appeal. The partition case has since been elevated to this court.[3]

On October 18, 1963, plaintiffs moved for partial execution of the judgment as regards the six parcels of land described in paragraph 4 of the complaint.

On October 30, 1963, the motion was denied upon the ground that the trial court has lost jurisdiction over the case.

On November 20, 1963, the court, on plaintiffs' motion, reconsidered its October 30 order, and directed the Deputy Clerk of Court "to partition the parcels of land described in paragraph 4 of the complaint". The reasons given by the court this time is that during the trial, counsel for the parties "manifested jointly" as follows:

"1. The parties will partition the parcel of land described in paragraph 4 of the complaint in accordance with the answer submitted by the defendants;

2. With respect to the parcels of land described in the counterclaim, the parties agree to set a day for the reception of the evidence in the event that the parties will not come to terms as to the manner of partitioning them."

It was defendants' turn, on November 30, 1963, to move for a reconsideration of the order of November 20. Their reasons are that: the partition required in the decision is total, not partial; plaintiffs' notice of appeal is from the entire decision; and the court has lost its jurisdiction.

On December 17, 1963, the Court denied defendants' motion for reconsideration.

The sole question now before this Court is whether or not the trial court may issue partial execution of its judgment after appeal therefrom had been perfected.

By statute, once the appeal is perfected, "the trial court loses its jurisdiction over the case, except to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal".[4] Execution of a judgment is a proceeding affecting the rights of the parties, involving the matter litigated by the appeal. Its purpose is not to preserve and protect the subject of the (litigation. The lower court accordingly has lost its power to issue a writ of partial execution of the judgment herein.[5]

It matters not that there is no apparent dispute as to the right to partition the 6 parcels of land set forth in paragraph 4 of the complaint. The decision calls for the partition of the whole, not part, of the lands involved; it directs the division not only of the 6 lots aforesaid but also of 3 other parcels of land, Lots 5705, 5765 and 5805. We cannot at this time foresee the result of plaintiffs' appeal. Whether or not the last three—Lots 5705, 5765 and 5805—or any one or two of them will eventually be among those to be divided is still unknown. In partition, the whole of the real property subject thereof is to be considered in the allocation of the share of each. And this because, each heir is entitled to express his preference as to the portion of the real estate to be set apart to him; comparative value thereof has to be determined; consideration must be taken as to which mode of partition will be more advantageous, taking into account the improvements, situation and quality of the different parcels to be divided. Other matters, such as the advisability of assigning the property to one of the parties or the sale of part or all of the property, may conceivably crop up in the course of the partition. Indeed, partial division could be prejudicial to the rights of defendants involved in the appeal. [6] It is because of all of these, that the decision of the trial court may not be considered partially final as to the uncontested parcels, to permit partial partition thereof. The trial court, therefore, is powerless to direct partial partition, over the objection of defendants, petitioners herein.

It results from the foregoing that the order of November 20, 1963, directing partial partition, was issued without jurisdiction and is therefore null and void. In consequence, the writs of certiorari and prohibition are hereby granted. Costs against the respondents other than the respondent Judge. So ordered.

Bengzon, C.J., Bautista Angelo, Reyes, J.B.L., Dizon, Regala, Makalintal, Bengzon, J.P. and Zaldivar, JJ., concur.

Concepcion and Burrera, JJ., concur in the result:

Writs granted.

[1] Certiorari to annul the order of the lower Court of November 20, 1963, and prohibition to stop further proceedings on partial partition of the property under litigation.

[2] The counterclaim prays for the partition of these lots together with Lots 5705, 5705 and 5805.

[3] Amando Añonuevo, et al., plaintiffs-appellants, vs. Alberto Añonuevo et al., defendants-appellees, G.R. L-22269.

[4] Section 9, Rule 41, Rules of Court.

[5] Marcelo vs. Estacio, 69 Phil., 345, 148, 149, citing Syquia vs. Concepcion, et al., 60 Phil. 186, 190-191; Abrasafldo vs. Fernandez, et al. 97 Phil. 964-965.

[6] Sections 4 and 5, Rule 69, Rules of Court.

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