

## PAZ DE SANTOS, CONSUELO DE SANTOS AND JOSE MARIANO DE SANTOS, PETITIONERS AND APPELLANTS, VS. BANK OF THE PHILIPPINE ISLANDS, OPPOSITOR AND APPELLEE.

*G.R. No. 38544. November 18, 1933*

Ponente: VILLA-REAL, J.

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### VILLA-REAL, J.:

This is an appeal taken by the petitioners herein Paz, Consuelo and Jose Mariano de Santos, from the order of the Court of First Instance of Manila, which reads as follows:

"Upon consideration of the petition filed by Paz, Consuelo and Jose Mariano de Santos praying that this court order the cancellation of the lien annotated on their certificates of title consisting in the preliminary attachment of the properties described therein, in favor of the Bank of the Philippine Islands; it appearing that this same motion had already been previously filed, that is on July 6, 1931, and denied by this same court; it appearing, likewise, that a similar petition had been filed in civil case No. 39435 of the Court of First Instance of Manila, entitled 'Bank of the Philippine Islands vs. Isidoro de Santos et al.', which petition was also denied by the said court which heard the motion in question on September 30, 1931; and it appearing further that said orders have not been appealed from and have therefore become final on the ground that the period fixed by law within which they might have been again considered by this court has elapsed; and it appearing furthermore that the provisions of the Civil Code and of the Code of Civil Procedure cited by the petitioners in their motion under consideration by this court are not applicable to nor can serve as a ground for the aforesaid motion filed by them, inasmuch as they contain nothing with reference to liens in favor of third persons who are not a party to the partition in question;

"Wherefore, the petition of the aforesaid petitioners herein is hereby denied. It is so ordered."

In support of their appeal, the petitioner-appellants assign the following alleged errors in the decision of the court a quo, to wit:

- "1. In not ordering the cancellation of the preliminary attachments noted at the back of the new certificates of title Nos. 39885, 39879 and 39880 issued respectively to each of the three herein appellants for their respective shares in the community property.
- "2. In holding the orders of the court of July 31, and of September 30, 1931 mentioned in the appealed order, as binding and conclusive in the instant case.
- "3. In ordering the appellants to include in their bill of exceptions the aforementioned order of September 30, 1931, which was issued in the case of the Bank of the Philippine Islands vs. Isidoro de Santos et al., No. 39435, by a judge of the Sala other than the one in which the present case was heard."

The following pertinent facts are necessary for the solution of the questions raised in this appeal:

The petitioner-appellants herein Paz, Consuelo and Jose Mariano de Santos, together with their brothers Felipe and Isidoro de Santos, were owners pro indiviso of nine parcels of land described in the transfer certificates of

title Nos. 34394, 34395, 34396, 34397, 34398, 34399, 34400, 34403 and 34530.

On March 26, 1930, Isidoro de Santos and Paulino Candelaria executed jointly and severally in favor of the herein oppositor-appellee, Bank of the Philippine Islands, a promissory note for the sum of P45,000 payable within ninety days with interest at the rate of 9 per cent per annum, delivering the promissory note in question (Appendix B) to the aforesaid bank.

Inasmuch as Isidoro de Santos and Paulino Candelaria failed to pay the amount of the said promissory note upon maturity and after demand had been made upon them therefore the aforesaid oppositor-appellee, Bank of the Philippine Islands, on April 18, 1931, filed a complaint against Isidoro de Santos and Paulino Candelaria with the Court of First Instance of Manila, praying for the issuance of a writ of preliminary attachment against their properties, which was issued and annotated on the back of each and every one of the transfer certificates of title hereinbefore enumerated.

Three days after the issuance of the said writ of attachment and the annotation thereof on the back of the aforesaid transfer certificates of title, that is on April 21, 1931, the herein petitioner-appellants, together with Isidoro and Felipe de Santos executed an extra judicial partition of the parcels of land in question.

On July 6, 1931, Felipe de Santos filed a motion in Cadastral Case No. 3 and others, G. L. R. O. Record No. 63 and others, of the Court of First Instance of Manila, praying, among other things, (1) that the aforesaid extrajudicial partition be approved by the court, and (2) that the preliminary attachment of the interest of Isidoro de Santos in each and every one of the nine parcels of land described in the transfer certificates of title hereinbefore enumerated, be consolidated into the parcels of land adjudicated to him by virtue of the aforesaid extrajudicial partition.

Although the petitioner-appellants herein and Isidoro de Santos were duly notified of the hearing of the aforesaid motion which was set for July 14, 1931, as evidenced by the notice and the note of Attorney Javier appearing at the foot thereof, none of them appeared at the hearing.

On July 31, 1931, the Court of First Instance of Manila, in deciding the aforesaid motion of Felipe de Santos, stated the following:

"The petition is hereby denied with respect to the properties described in the transfer certificates of title Nos. 34396, 34398 and 34403, on the ground that the first two properties are mortgaged to Luis Mirasol and the last to the Philippine Guaranty Co., Inc., inasmuch as the mortgage constituted thereon is subscribed to jointly and severally by all the coowners thereof. The motion to the effect that all the attachments issued against Isidoro de Santos be consolidated exclusively on the properties adjudicated to him by virtue of the aforesaid deed of partition is, likewise hereby denied."

Neither the petitioner Felipe de Santos nor the herein petitioner-appellants Paz, Consuelo and Jose Mariano de Santos, nor Isidoro de Santos excepted to nor appealed from the order above-mentioned.

On September 30, 1931, the Court of First Instance of Manila denied the motion filed by Felipe de Santos in civil case No. 39435 of the said court, wherein he prayed, among other things, that the said court order the register of deeds of the City of Manila to note on the back of transfer certificates of title Nos. 34397 and 34530 the preliminary attachment in favor of the Bank of the Philippine Islands, referring to that portion of the property described in subdivision plan Psd 7299, and to cancel the preliminary attachments noted on the back of transfer certificates of title Nos. 34394, 34395, 34396, 34398, 34399, 34400 and 34403, and on the back of transfer certificate of title No. 34530 with respect to that portion of the property described therein, which was adjudicated to the said petitioner. The court based its aforesaid decision on the ground that neither the said petitioner Felipe de

Santos nor the defendant therein, Isidoro de Santos, has the right to compel the plaintiff Bank of the Philippine Islands to conform to the attachment of only those properties adjudicated to the said defendant Isidoro de Santos by virtue of the deed of partition, in lieu of his right to an undivided one-fifth of each of the nine parcels of land hereinbefore enumerated.

Neither the petitioner Felipe de Santos nor the defendant therein, Isidoro de Santos, appealed from the above order.

On August 3, 1932, one year after the motion of Felipe de Santos was filed in the said civil case No. 39435, the herein petitioner-appellants filed a motion in the cadastral cases aforementioned, praying for the cancellation of the annotation of the preliminary attachments levied on the interest of Isidoro de Santos before the partition, appearing on the back of the new transfer certificates of title issued in their name after the partition, said annotation having been made pursuant to the order of the court issued in said cadastral cases on July 31, 1931.

On September 17, 1932, the court denied the motion in question by the aforesaid order from which this appeal was taken.

It being procedural in nature, we shall first pass upon the question raised in the second assignment of error, to wit: that the trial court erred in holding the orders of the court of July 31, and of September 30, 1931, as binding and conclusive in the instant case.

It can be inferred from the order of September 17, 1932, appealed from, that in denying the motion for the cancellation of the preliminary attachments filed by the herein petitioner-appellants on August 5, 1932, the court a quo based its decision on the ground that a similar motion for the cancellation of the preliminary attachments in question had already been filed in the said case on July 6, 1931, and denied by the order of July 31, 1931; and another in civil case No. 39435 of the Court of First Instance of Manila entitled "Bank of the Philippine Islands vs. Isidoro de Santos et al.", which was likewise denied on September 30, 1931. Inasmuch as the orders denying the aforesaid motions have not been appealed from, they have therefore become final and conclusive.

The order of the court a quo denying the motions in question is based, therefore, on the assumption that the question regarding the cancellation of the preliminary attachment sought by the petitioner-appellants has become *res judicata*. This court has constantly held that in order that *res judicata* may exist, it is necessary that there be identity of parties, of grounds or causes of action and of things or subject matter under litigation (*Aquino vs. Director of Lands*, 39 Phil., 850; *Isaac vs. Padilla*, 31 Phil., 469; *Donato vs. Mendoza*, 25 Phil., 57; *Roman Catholic Archbishop of Manila vs. Director of Lands*, 35 Phil., 339).

The motion for cancellation dated July 6, 1931, was filed by Felipe de Santos alone, and the fact that the herein petitioner-appellants were notified thereof has not made them parties to the said motion, inasmuch as they were not included in the motion in question in accordance with section 114 of the Code of Civil Procedure.

Neither were the herein petitioner-appellants made parties to the motion for cancellation of the preliminary attachment filed by Felipe de Santos in civil case No. 39435 of the Court of First Instance of Manila, on August 5, 1931, wherein the Bank of the Philippine Islands was plaintiff and Isidoro de Santos et al. were defendants.

In the motion under consideration, the denial of which is the subject matter of this appeal, Felipe de Santos is not a party-petitioner. Therefore, there is no identity between the petitioner in the motions of July 6, and of August 5, 1931, respectively, and the parties to the motion under consideration.

In the two motions of July 6, and of August 5, 1931, mentioned above, wherein Felipe de Santos alone was the petitioner, the subject matter thereof could not be other than the properties adjudicated to him by virtue of the

deed of partition, which properties he wished to free from the attachment, inasmuch as he neither acted nor could act in representation of his coowners for the reason that he was not authorized to do so. In the motion under consideration, the petitioner-appellants pray for the cancellation of the annotation of the preliminary attachment on the back of the new transfer certificates of title issued in their respective names, by virtue of the order of the court in the cadastral case, on July 31, 1931. If the properties which Felipe de Santos sought to free from the preliminary attachment in his motions of July 6, and of August 5, 1931, were those which had been adjudicated to him by virtue of the partition, and the properties which the herein petitioner-appellants seek to free from the same attachment in their, motion to that effect are those which corresponded to them by virtue of the aforesaid partition, which properties are separate and distinct from those adjudicated to Felipe de Santos, neither is there identity of subject matter under litigation herein. The only point where there is identity is in the cause or ground of action for cancellation, which is the same in the aforesaid motions of July 6, and of August 5, 1931, as well as in the motion under consideration, which ground consists in the partition of the properties owned in common.

Therefore, there being no identity either of parties, or of subject matter or thing under litigation, there is no *res judicata*.

The second question to decide in this appeal, which is raised in the first assignment of error, is whether or not it is proper to order the cancellation of the preliminary attachment annotated on the back of the new transfer certificates of title Nos. 39885, 39879 and 39880, issued respectively in the names of the herein petitioner-appellants for their respective shares in the community property.

Inasmuch as article 403 of the Civil Code authorizes creditors to contest a partition already made in case of fraud, or when it has been made to the prejudice of existing rights and interests, and inasmuch as the oppositor-appellee herein, Bank of the Philippine Islands, was not notified of the partition made among the herein petitioner-appellants and their coowners Felipe de Santos and Isidoro de Santos, and was not given an opportunity to contest the partition already made, nor the approval thereof by the cadastral court, the case should be remanded to the court *a quo* in order to permit the said oppositor-appellee, Bank of the Philippine Islands, to file the objections it may deem convenient, in accordance with the provisions of article 403 of the Civil Code cited above.

In view of the foregoing considerations, we are of the opinion and so hold that inasmuch as the partition of the properties held under title of common ownership was made without notifying the creditors thereof, said creditors may contest the partition in question in case of fraud, or when it has been made to the prejudice of existing rights or interests.

Wherefore, the order appealed from is hereby reversed and the case ordered remanded to the court *a quo* in order to give the herein oppositor-appellee, Bank of the Philippine Islands, an opportunity to contest the partition in accordance with the provisions of article 403 of the Civil Code, without special pronouncement as to costs. So ordered.

Avanceña, C.J., Malcolm, Hull, and Imperial JJ., concur.

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