

JACINTO MAYOL, PETITIONER, VS. SABINA BLANCO, RESPONDENT.*G.R. No. 43700. June 27, 1935*

Ponente: DIAZ, J.

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The petitioner and the respondent are husband and wife, respectively, who for several years now, are separated by reason of conjugal misunderstanding. The petition filed by the former is apparently for a writ of certiorari but in order to be in due form, it certainly lacks the essential requisite of including as a necessary party to the proceeding the judge whose decision and order are sought to be set aside on the ground of excess or lack of jurisdiction, as claimed by said petitioner.

However, leaving aside this omission to which the respondent has failed to call our attention, it being, after all, easily corrected; and mindful only of the principal question whether or not this action lies, assuming for the moment that the judge who rendered the decision and issued the order in question is included as respondent in these proceedings for the purpose of avoiding delay which cannot but be prejudicial to the parties, we decided to study said action and the conclusion arrived at by us, after a careful consideration of the reasons alleged for and against it, is and should necessarily be adverse to the petitioner.

It is clearly inferred from the same pleadings of the parties that the order of the Court of First Instance of Cebu, which is by nature appealable, approving the project of partition submitted to it by the commissioners who were appointed for that purpose in its decision dated September 29, 1934, is not yet final nor executory on the ground that on April 10, 1935, eight days after the order in question was issued, the petitioner as defendant in the case wherein said order was entered filed a motion for reconsideration based on the following reasons: (1) That the partition made by the commissioners and approved by the Court of First Instance of Cebu is unjust and inequitable; (2) that the petitioner was not notified of said partition until after the issuance of the order the reconsideration of which is sought, and said order was issued ex-parte; and (3) that the order to the effect that the petitioner must defray all the expenses incidental to the partition including the fees of the commissioners who made it, constitutes a real outrage upon his rights. This being so, as the motion for reconsideration is a question has not yet been decided, and it being possible, on the other hand, that the resolution to be rendered in due time by the court be favorable to the petitioner, it seems clear that the action brought by said petitioner is not only premature but also does not lie.

The remedy of certiorari may be invoked only when an appeal has become impossible and when there is no other more speedy and adequate remedy available, as for example a motion for new trial or a motion for reconsideration, this last step, as above stated, having already been taken by the petitioner. (Section 217, Act No. 190.)

It cannot be said that the order in question, notwithstanding the filing of the motion for reconsideration thereof, has become final, because motions of the same nature having the effect and the same purposes of a motion for a new trial, as the one under consideration, suspend the running of the statutory period of thirty days after which the orders, decisions and judgments in connection with which said motions are filed, become final. (Pascua vs.

Ocampo, 59 Phil, 48; Blouse vs. Moreno and Garcia, 60 Phil, 741.)

We order the dismissal of the proceeding, with costs to the petitioner. So ordered.

Avanceña, C, J., Hull, Vickers, and Goddard, JJ., concur.

Petition dismissed.

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