

PATRICIO ESTRELLA, PETITIONER, VS. THE COURT OF FIRST INSTANCE OF MANILA AND LEOCADIA BATU, RESPONDENTS.*G.R. No. 44541. October 26, 1935*

Ponente: IMPERIAL, J.

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The petitioner asks in his petition that the respondent judge be enjoined from enforcing the judgment rendered on July 8, 1930, in civil case No. 36254 of the Court of First Instance of Manila, entitled *Patricio Estrella vs. Leocadia Batu*, and that during the pendency of the petition and upon filing a bond, a writ of preliminary injunction be issued restraining the respondent judge from requiring the petitioner to continue giving allowance to his children at the rate of P60 a month.

After the said civil case No. 36254 was heard, judgment was rendered for the petitioner, annulling his marriage with the respondent. The parties had agreed that their two minor children, Victor and Nicolas, should remain under the care and custody of the respondent and that the petitioner would give the former a monthly allowance of P60 for the support of the children. Acting in accordance with this agreement, the judge ordered that the petitioner should make said allowance by delivering the said sum monthly to the respondent. It seems that the petitioner was complying with the order, but at the same time he was presenting motions calculated to relieve him from paying the allowance, all of which motions were denied. On August 26, 1935, after the lapse of five years from the promulgation of the judgment in the civil case, the petitioner again filed another motion praying that he be released from the payment of the allowance on the following grounds: (1) That the judgment had already lapsed under section 443 of the Code of Civil Procedure and (2) that the respondent, who had been appointed guardian of the minors, has an income from her own property sufficient for their subsistence and education. In the motion for a new trial and reconsideration filed by him he alleged, further, that under article 149 of the Civil Code he is entitled to support his two children in his own home, instead of continuing to pay the allowance, but the respondent refuses to deliver the minors to him. These petitions were likewise denied by the court.

We believe that the petition in question has neither merit nor prima facie facts warranting that it be answered and heard. We hold that the order in question does not fall under the purview of section 443 of the Code of Civil Procedure because it is of such a nature that it does not lapse by the mere expiration of the five years, but continues in effect until the minors who were granted the allowance are of legal age (19 C. J., p. 360, sec. 822). True, the allowance may be reduced or discontinued for cause, but this is another question which must be raised in and resolved by the court which issued the order.

As to the right invoked by the petitioner to support his minor children in his own home, instead of continuing to pay the allowance, we hold that he expressly waived said right when he agreed with the respondent that the latter should have the custody and care of the minors, voluntarily binding himself to pay the monthly allowance.

In view of the foregoing, the writ of preliminary injunction prayed for is denied, and the petition is dismissed, without costs. So ordered.

Malcolm, Villa-Real, Butte, and Goddard, JJ., concur.

Writ denied and vetition dismissed.

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