

SPOUSES ALVARO PASTOR, JR. AND MA. ELENA ACHAVAL DE PASTOR, PETITIONERS, VS. THE COURT OF APPEALS, JUAN Y. REYES, JUDGE OF BRANCH I, COURT OF FIRST INSTANCE OF CEBU AND LEWELLYN...

G.R. No. 56340. June 24, 1983

Ponente: PLANA, J.

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PLANA, J.:

I. FACTS:

This is a case of hereditary succession.

Alvaro Pastor, Sr. (PASTOR, SR.), a Spanish subject, died in Cebu City on June 5, 1966, survived by his Spanish wife Sofia Bossio (who also died on October 21, 1966), their two legitimate children Alvaro Pastor, Jr. (PASTOR, JR.) and Sofia Pastor de Midgely (SOFIA), and an illegitimate child, not natural, by the name of Lewellyn Barlito Quemada (QUEMADA). PASTOR, JR. is a Philippine citizen, having been naturalized in 1936. SOFIA is a Spanish subject. QUEMADA is a Filipino by his mother's citizenship.

On November 13, 1970, QUEMADA filed a petition for the probate and allowance of an alleged holographic will of PASTOR, SR. with the Court of First Instance of Cebu, Branch I (PROBATE COURT), docketed as SP No. 3128-R. The will contained only one testamentary disposition: a legacy in favor of QUEMADA consisting of 30% of PASTOR, SR.'s 42% share in the operation by Atlas Consolidated Mining and Development Corporation (ATLAS) of some mining claims in Piña-Barot, Cebu.

On November 21, 1970, the PROBATE COURT, upon motion of QUEMADA and after an ex parte hearing, appointed him special administrator of the entire estate of PASTOR, SR., whether or not covered or affected by the holographic will. He assumed office as such on December 4, 1970 after filing a bond of P5,000.00.

On December 7, 1970, QUEMADA as special administrator, instituted against PASTOR, JR. and his wife an action for reconveyance of alleged properties of the estate, which included the properties subject of the legacy and which were in the names of the spouses PASTOR, JR. and his wife, Maria Elena Achaval de Pastor, who claimed to be the owners thereof in their own rights, and not by inheritance. The action, docketed as Civil Case No. 274-R, was filed with the Court of First Instance of Cebu, Branch IX.

On February 2, 1971, PASTOR, JR. and his sister SOFIA filed their opposition to the petition for probate and the order appointing QUEMADA as special administrator.

On December 5, 1972, the PROBATE COURT issued an order allowing the will to probate. Appealed to the Court of Appeals in CA-G.R. No. 52961-R, the order was affirmed in a decision dated May 9, 1977. On petition for review, the Supreme Court in G.R. No. L-46645 dismissed the petition in a minute resolution dated November 1, 1977 and remanded the same to the PROBATE COURT after denying reconsideration on January 11, 1978.

For two years after remand of the case to the PROBATE COURT, QUEMADA filed pleading after pleading asking for payment of his legacy and seizure of the properties subject of said legacy. PASTOR, JR. and SOFIA opposed these pleadings on the ground of pendency of the reconveyance suit with another branch of the Cebu Court of First Instance. All pleadings remained unacted upon by the PROBATE COURT.

On March 5, 1980, the PROBATE COURT set the hearing on the intrinsic validity of the will for March 25, 1980, but upon objection of PASTOR, JR. and SOFIA on the same ground of pendency of the reconveyance suit, no hearing was held on March 25. Instead, the PROBATE COURT required the parties to submit their respective position papers as to how much inheritance QUEMADA was entitled to receive under the will. Pursuant thereto, PASTOR, JR. and SOFIA submitted their Memorandum of authorities dated April 10, which in effect showed that determination of how much QUEMADA should receive was still premature. QUEMADA submitted his Position Paper dated April 20, 1980. ATLAS, upon order of the Court, submitted a sworn statement of royalties paid to the Pastor Group of claimants from June 1966 (when Pastor, Sr. died) to February 1980. The statement revealed that of the mining claims being operated by ATLAS, 60% pertained to the Pastor Group distributed as follows:

1. A. Pastor, Jr.

40.5%

2. E. Pelaez, Sr.

15.0%

3. B. Quemada

4.5%

On August 20, 1980, while the reconveyance suit was still being litigated in Branch IX of the Court of First Instance of Cebu, the PROBATE COURT issued the now assailed Order of Execution and Garnishment, resolving the question of ownership of the royalties payable by ATLAS and ruling in effect that the legacy to QUEMADA was not inofficious. [There was absolutely no statement or claim in the Order that the Probate Order of December 5, 1972 had previously resolved the issue of ownership of the mining rights or royalties thereon, nor the intrinsic validity of the holographic will.]

The order of August 20, 1980 found that as per the holographic will and a written acknowledgment of PASTOR, JR. dated June 17, 1962, of the above 60% interest in the mining claims belonging to the Pastor Group, 42% belonged to PASTOR, SR. and only 33% belonged to PASTOR, JR. The remaining 25% belonged to E. Pelaez, also of the Pastor Group. The PROBATE COURT thus directed ATLAS to remit directly to QUEMADA the 42% royalties due decedent's estate, of which QUEMADA was authorized to retain 75% for himself as legatee and to deposit 25% with a reputable banking institution for payment of the estate taxes and other obligations of the estate. The 33% share of PASTOR, JR. and/or his assignees was ordered garnished to answer for the accumulated legacy of QUEMADA from the time of PASTOR, SR.'s death, which amounted to over two million pesos.

The order being "immediately executory", QUEMADA succeeded in obtaining a Writ of Execution and Garnishment on September 4, 1980, and in serving the same on ATLAS on the same day. Notified of the Order on September 6, 1980, the oppositors sought reconsideration thereof on the same date primarily on the ground that

the PROBATE COURT gravely abused its discretion when it resolved the question of ownership of the royalties and ordered the payment of QUEMADA's legacy after prematurely passing upon the intrinsic validity of the will. In the meantime, the PROBATE COURT ordered suspension of payment of all royalties due PASTOR, JR. and/or his assignees until after resolution of oppositors' motion for reconsideration.

Before the Motion for Reconsideration could be resolved, however, PASTOR, JR., this time joined by his wife Ma. ELENA ACHAVAL DE PASTOR, filed with the Court of Appeals a Petition for Certiorari and Prohibition with a prayer for writ of preliminary injunction (CA-G.R. No. SP-11373-R). They assailed the Order dated August 20, 1980 and the writ of execution and garnishment issued pursuant thereto. The petition was denied on November 18, 1980 on the grounds (1) that its filing was premature because the Motion for Reconsideration of the questioned Order was still pending determination by the PROBATE COURT; and (2) that although "the rule that a motion for reconsideration is prerequisite for an action for certiorari is never an absolute rule," the Order assailed is "legally valid."

On December 9, 1980, PASTOR, JR. and his wife moved for reconsideration of the Court of Appeal's decision of November 18, 1980, calling the attention of the appellate court to another order of the Probate Court dated November 11, 1980 (i.e., while their petition for certiorari was pending decision in the appellate court), by which the oppositors' motion for reconsideration of the Probate Court's Order of August 20, 1980 was denied. [The November 11 Order declared that the questions of intrinsic validity of the will and of ownership over the mining claims (not the royalties alone) had been finally adjudicated by the final and executory Order of December 5, 1972, as affirmed by the Court of Appeals and the Supreme Court, thereby rendering moot and academic the suit for reconveyance then pending in the Court of First Instance of Cebu, Branch IX. It clarified that only the 33% share of PASTOR, JR. in the royalties (less the 7.5% share which he had assigned to QUEMADA before PASTOR, SR. died) was to be garnished and that as regards PASTOR, SR.'s 42% share, what was ordered was just the transfer of its possession to the custody of the PROBATE COURT through the special administrator. Further, the Order granted QUEMADA 6% interest on his unpaid legacy from August 1980 until fully paid.] Nonetheless, the Court of Appeals denied reconsideration.

Hence, this Petition for Review by certiorari with prayer for a writ of preliminary injunction, assailing the decision of the Court of Appeals dated November 18, 1980 as well as the orders of the Probate Court dated August 20, 1980, November 11, 1980 and December 17, 1980, filed by petitioners on March 26, 1981, followed by a Supplemental Petition with Urgent Prayer for Restraining Order.

In April 1981, the Court (First Division) issued a writ of preliminary injunction, the lifting of which was denied in the Resolution of the same Division dated October 18, 1982, although the bond of petitioners was increased from P50,000.00 to P100,000.00.

Between December 21, 1981 and October 12, 1982, private respondent filed seven successive motions for early resolution. Five of these motions expressly prayed for the resolution of the question as to whether or not the petition should be given due course.

On October 18, 1982, the Court (First Division) adopted a resolution stating that "the petition in fact and in effect was given due course when this case was heard on the merits on September 7, (should be October 21, 1981) and concise memoranda in amplification of their oral arguments on the merits of the case were filed by the parties pursuant to the resolution of October 21, 1981. . ." and denied in a resolution dated December 13, 1982, private respondent's "Omnibus motion to set aside resolution dated October 18, 1982 and to submit the matter of due course to the present membership of the Division; and to reassign the case to another ponente."

Upon Motion for Reconsideration of the October 18, 1982 and December 13, 1982 Resolutions, the Court en banc

resolved to CONFIRM the questioned resolutions insofar as they resolved that the petition in fact and in effect had been given due course.

II. ISSUES:

Assailed by the petitioners in these proceedings is the validity of the Order of execution and garnishment dated August 20, 1980 as well as the Orders subsequently issued allegedly to implement the Probate Order of December 5, 1972, to wit: the Order of November 11, 1980 declaring that the Probate Order of 1972 indeed resolved the issues of ownership and intrinsic validity of the will, and reiterating the Order of Execution dated August 20, 1980; and the Order of December 17, 1980 reducing to P2,251,516.74 the amount payable to QUEMADA representing the royalties he should have received from the death of PASTOR, SR. in 1966 up to February 1980.

The Probate Order itself, insofar as it merely allowed the holographic will in probate, is not questioned. But petitioners denounce the Probate Court for having acted beyond its jurisdiction or with grave abuse of discretion when it issued the assailed Orders. Their argument runs this way: Before the provisions of the holographic will can be implemented, the questions of ownership of the mining properties and the intrinsic validity of the holographic will must first be resolved with finality. Now, contrary to the position taken by the Probate Court in 1980 — i.e., almost eight years after the probate of the will in 1972 — the Probate Order did not resolve the two said issues. Therefore, the Probate Order could not have resolved and actually did not decide QUEMADA's entitlement to the legacy. This being so, the Orders for the payment of the legacy in alleged implementation of the Probate Order of 1972 are unwarranted for lack of basis.

Closely related to the foregoing is the issue raised by QUEMADA: The Probate Order of 1972 having become final and executory, how can its implementation (payment of legacy) be restrained? Of course, the question assumes that QUEMADA's entitlement to the legacy was finally adjudged in the Probate Order.

On the merits, therefore, the basic issue is whether the Probate Order of December 5, 1972 resolved with finality the questions of ownership and intrinsic validity. A negative finding will necessarily render moot and academic the other issues raised by the parties, such as the jurisdiction of the Probate Court to conclusively resolve title to property, and the constitutionality and repercussions of a ruling that the mining properties in dispute, although in the name of PASTOR, JR. and his wife, really belonged to the decedent despite the latter's constitutional disqualification as an alien.

On the procedural aspect, placed in issue is the propriety of certiorari as a means to assail the validity of the order of execution and the implementing writ.

III. DISCUSSION:

- Issue of Ownership—

(a) In a special proceeding for the probate of a will, the issue by and large is restricted to the extrinsic validity of the will, i.e., whether the testator, being of sound mind, freely executed the will in accordance with the formalities prescribed by law. (Rules of Court, Rule 75, Section 1; Rule 76, Section 9.) As a rule, the question of ownership is an extraneous matter which the Probate Court cannot resolve with finality. Thus, for the purpose of determining whether a certain property should or should not be included in the inventory of estate properties, the Probate Court may pass upon the title thereto, but such determination is provisional, not conclusive, and is subject to the final decision in a separate action to resolve title. [3 Moran, Comments on the Rules of Court (1980 ed.), p. 458; Valero Vda. de Rodriguez vs. Court of Appeals, 91 SCRA 540.]

(b) The rule is that execution of a judgment must conform to that decreed in the dispositive part of the decision.

(Philippine-American Insurance Co. vs. Honorable Flores, 97 SCRA 811.) However, in case of ambiguity or uncertainty, the body of the decision may be scanned for guidance in construing the judgment. (Heirs of Presto vs. Galang, 78 SCRA 534; Fabular vs. Court of Appeals, 119 SCRA 329; Robles vs. Timario, 107 Phil. 809.)

The Order sought to be executed by the assailed Order of execution is the Probate Order of December 5, 1972 which allegedly resolved the question of ownership of the disputed mining properties. The said Probate Order enumerated the issues before the Probate Court, thus:

"Unmistakably, there are three aspects in these proceedings: (1) the probate of the holographic will; (2) the intestate estate aspect; and (3) the administration proceedings for the purported estate of the decedent in the Philippines.

"In its broad and total perspective, the whole proceedings are being impugned by the oppositors on jurisdictional grounds, i.e., that the fact of the decedent's residence and existence of properties in the Philippines have not been established.

"Specifically placed in issue with respect to the probate proceedings are: (a) whether or not the holographic will (Exhibit "J") has lost its efficacy as the last will and testament upon the death of Alvaro Pastor, Sr. on June 5, 1966, in Cebu City, Philippines; (b) Whether or not the said will has been executed with all the formalities required by law; and (c) Did the late presentation of the holographic will affect the validity of the same?

"Issues In the Administration Proceedings are as follows: (1) Was the ex-parte appointment of the petitioner as special administrator valid and proper? (2) Is there any indispensable necessity for the estate of the decedent to be placed under administration? (3) Whether or not petitioner is qualified to be a special administrator of the estate; and (4) Whether or not the properties listed in the inventory (submitted by the special administrator but not approved by the Probate Court) are to be excluded."

Then came what purports to be the dispositive portion:

"Upon the foregoing premises, this Court rules on and resolves some of the problems and issues presented in these proceedings, as follows:

"(a) The Court has acquired jurisdiction over the probate proceedings as it hereby allows and approves the so-called holographic will of testator Alvaro Pastor, Sr., executed on July 31, 1961 with respect to its extrinsic validity, the same having been duly authenticated pursuant to the requisites or solemnities prescribed by law. Let, therefore, a certificate of its allowance be prepared by the Branch Clerk of this Court to be signed by this Presiding Judge, and attested by the seal of the Court, and thereafter attached to the will, and the will and certificate filed and recorded by the clerk. Let attested copies of the will and of the certificate of allowance thereof be sent to Atlas Consolidated Mining & Development Corporation, Goodrich Bldg., Cebu City, and the Register of Deeds of Cebu or of Toledo City, as the case may be, for recording.

"(b) There was a delay in the granting of the letters testamentary or of administration—for as a matter of fact, no regular executor and/or administrator has been appointed up to this time—and the appointment of a special administrator was, and still is, justified under the circumstances to take possession and charge of the estate of the deceased in the Philippines (particularly in Cebu) until the problems causing the delay are decided and the regular executor and/or administrator appointed.

"(c) There is a necessity and propriety of a special administrator and later on an executor and/or administrator in these proceedings, in spite of this Court's declaration that the oppositors are the forced heirs and the petitioner is merely vested with the character of a voluntary heir to the extent of the bounty given to him (under) the will insofar as the same will not prejudice the legitimes of the oppositors, for the following reasons:

- To submit a complete inventory of the estate of the decedent-testator Alvaro Pastor, Sr.;

- To administer and to continue to put to prolific utilization of the properties of the decedent;
- To keep and maintain the houses and other structures and fences belonging to the estate, since the forced heirs are residing in Spain, and prepare them for delivery to the heirs in good order after partition and when directed by the Court, but only after the payment of estate and inheritance taxes;

"(d) Subject to the outcome of the suit for reconveyance of ownership and possession of real and personal properties in Civil Case No. 274-T before Branch IX of the Court of First Instance of Cebu, the intestate estate administration aspect must proceed, unless, however, it is duly proven by the oppositors that debts of the decedent have already been paid, that there had been an extra-judicial partition or summary one between the forced heirs, that the legacy to be given and delivered to the petitioner does not exceed the free portion of the estate of the testator, that the respective shares of the forced heirs have been fairly apportioned, distributed and delivered to the two forced heirs of Alvaro Pastor, Sr., after deducting the property willed to the petitioner, and the estate and inheritance taxes have already been paid to the Government thru the Bureau of Internal Revenue.

"The suitability and propriety of allowing petitioner to remain as special administrator or administrator of the other properties of the estate of the decedent, which properties are not directly or indirectly affected by the provisions of the holographic will (such as bank deposits, land in Mactan, etc.), will be resolved in another order as separate incident, considering that this order should have been properly issued solely as a resolution on the issue of whether or not to allow and approve the aforestated will." (Italics supplied.)

Nowhere in the dispositive portion is there a declaration of ownership of specific properties. On the contrary, it is manifest therein that ownership was not resolved. For it confined itself to the question of extrinsic validity of the will, and the need for and propriety of appointing a special administrator. Thus it allowed and approved the holographic will "with respect to its extrinsic validity, the same having been duly authenticated pursuant to the requisites or solemnities prescribed by law." It declared that the intestate estate administration aspect must proceed "subject to the outcome of the suit for reconveyance of ownership and possession of real and personal properties in Civil Case 274-T before Branch IX of the CFI of Cebu." [Parenthetically, although the statement refers only to the "intestate" aspect, it defies understanding how ownership by the estate of some properties could be deemed finally resolved for purposes of testate administration, but not so for intestate purposes. Can the estate be the owner of a property for testate but not for intestate purposes?] Then again, the Probate Order (while indeed it does not direct the implementation of the legacy) conditionally stated that the intestate administration aspect must proceed "unless . . . it is proven . . . that the legacy to be given and delivered to the petitioner does not exceed the free portion of the estate of the testator," which clearly implies that the issue of impairment of legitime (an aspect of intrinsic validity) was in fact not resolved. Finally, the Probate Order did not rule on the propriety of allowing QUEMADA to remain as special administrator of estate properties not covered by the holographic will, "considering that this (Probate) Order should have been properly issued solely as a resolution on the issue of whether or not to allow and approve the aforestated will."

(c) That the Probate Order did not resolve the question of ownership of the properties listed in the estate inventory was appropriate, considering that the issue of ownership was the very subject of controversy in the reconveyance suit that was still pending in Branch IX of the Court of First Instance of Cebu.

(d) What, therefore, the Court of Appeals and, in effect, the Supreme Court affirmed en toto when they reviewed the Probate Order were only the matters properly adjudged in the said Order.

(e) In an attempt to justify the issuance of the Order of execution dated August 20, 1980, the Probate Court in its Order of November 11, 1980 explained that the basis for its conclusion that the question of ownership had been formally resolved by the Probate Order of 1972 are the findings in the latter Order that (1) during the lifetime of

the decedent, he was receiving royalties from ATLAS; (2) he had resided in the Philippines since pre-war days and was engaged in the mine prospecting business since 1937 particularly in the City of Toledo; and (3) PASTOR, JR. was only acting as dummy for his father because the latter was a Spaniard.

Based on the premises laid, the conclusion is obviously far-fetched.

(f) It was, therefore, error for the assailed implementing Orders to conclude that the Probate Order adjudged with finality the question of ownership of the mining properties and royalties, and that, premised on this conclusion, the dispositive portion of the said Probate Order directed the special administrator to pay the legacy in dispute.

- Issue of Intrinsic Validity of the Holographic Will—

(a) When PASTOR, SR. died in 1966, he was survived by his wife, aside from his two legitimate children and one illegitimate son. There is therefore a need to liquidate the conjugal partnership and set apart the share of PASTOR, SR.'s wife in the conjugal partnership preparatory to the administration and liquidation of the estate of PASTOR, SR. which will include, among others, the determination of the extent of the statutory usufructuary right of his wife until her death.[*] When the disputed Probate Order was issued on December 5, 1972, there had been no liquidation of the community properties of PASTOR, SR. and his wife.

(b) So also, as of the same date, there had been no prior definitive determination of the assets of the estate of PASTOR, SR. There was an inventory of his properties presumably prepared by the special administrator, but it does not appear that it was ever the subject of a hearing or that it was judicially approved. The reconveyance or recovery of properties allegedly owned but not in the name of PASTOR, SR. was still being litigated in another court.

(c) There was no appropriate determination, much less payment, of the debts of the decedent and his estate. Indeed, it was only in the Probate Order of December 5, 1972 where the Probate Court ordered that —

"... a notice be issued and published pursuant to the provisions of Rule 86 of the Rules of Court, requiring all persons having money claims against the decedent to file them in the office of the Branch Clerk of this Court."

(d) Nor had the estate tax been determined and paid, or at least provided for, as of December 5, 1972.

(e) The net assets of the estate not having been determined, the legitime of the forced heirs in concrete figures could not be ascertained.

(f) All the foregoing deficiencies considered, it was not possible to determine whether the legacy of QUEMADA—a fixed share in a specific property rather than an aliquot part of the entire net estate of the deceased - would produce an impairment of the legitime of the compulsory heirs.

(g) Finally, there actually was no determination of the intrinsic validity of the will in other respects. It was obviously for this reason that as late as March 5, 1980 - more than 7 years after the Probate Order was issued - the Probate Court scheduled on March 25, 1980 a hearing on the intrinsic validity of the will.

- Propriety of Certiorari -

Private respondent challenges the propriety of certiorari as a means to assail the validity of the disputed Order of execution. He contends that the error, if any, is one of judgment, not jurisdiction, and properly correctible only by appeal, not certiorari.

Under the circumstances of the case at bar, the challenge must be rejected. Grave abuse of discretion amounting to lack of jurisdiction is much too evident in the actuations of the probate court to be overlooked or condoned.

(a) Without a final, authoritative adjudication of the issue as to what properties compose the estate of PASTOR, SR. in the face of conflicting claims made by heirs and a non-heir (MA. ELENA ACHAVAL DE PASTOR) involving properties not in the name of the decedent, and in the absence of a resolution on the intrinsic validity of the will here in question, there was no basis for the Probate Court to hold in its Probate Order of 1972, which it did not, that private respondent is entitled to the payment of the questioned legacy. Therefore, the Order of Execution of August 20, 1980 and the subsequent implementing orders for the payment of QUEMADA's legacy, in alleged implementation of the dispositive part of the Probate Order of December 5, 1972, must fall for lack of basis.

(b) The ordered payment of legacy would be violative of the rule requiring prior liquidation of the estate of the deceased, i.e., the determination of the assets of the estate and payment of all debts and expenses, before apportionment and distribution of the residue among the heirs and legatees. (Bernardo vs. Court of Appeals, 7 SCRA 367.)

(c) Neither has the estate tax been paid on the estate of PASTOR, SR. Payment therefore of the legacy to QUEMADA would collide with the provision of the National Internal Revenue Code requiring payment of estate tax before delivery to any beneficiary of his distributive share of the estate (Section 107[c]).

(d) The assailed order of execution was unauthorized, having been issued purportedly under Rule 88, Section 6 of the Rules of Court which reads:

"Sec. 6. Court to fix contributive shares where devisees, legatees, or heirs have been in possession.— Where devisees, legatees, or heirs have entered into possession of portions of the estate before the debts and expenses have been settled and paid, and have become liable to contribute for the payment of such debts and expenses, the court having jurisdiction of the estate may, by order for that purpose, after hearing, settle the mount of their several liabilities, and order how much and in what manner each person shall contribute, and may issue execution as circumstances require."

The above provision clearly authorizes execution to enforce payment of debts of estate. A legacy is not a debt of the estate; indeed, legatees are among those against whom execution is authorized to be issued.

". . . there is merit in the petitioners' contention that the probate court generally cannot issue a writ of execution. It is not supposed to issue a writ of execution because its orders usually refer to the adjudication of claims against the estate which the executor or administrator may satisfy without the necessity of resorting to a writ of execution. The probate court, as such, does not render any judgment enforceable by execution.

"The circumstances that the Rules of Court expressly specifies that the probate court may issue execution (a) to satisfy (debts of the estate out of) the contributive shares of devisees, legatees and heirs in possession of the decedent's assets (Sec. 6, Rule 88), (b) to enforce payment of the expenses of partition (Sec. 3, Rule 90), and (c) to satisfy the costs when a person is cited for examination in probate proceedings (Sec. 13, Rule 142) may mean, under the rule of inclusion unius est exclusion alterius, that those are the only instances when it can issue a writ of execution. (Vda. de Valera vs. Ofilada, 59 SCRA 96, 108.)

(d) It is within a court's competence to order, the execution of a final judgment; but to order the execution of a final order (which is not even meant to be executed) by reading into it terms that are not there and in utter disregard of existing rules and law, is manifest grave abuse of discretion tantamount to lack of jurisdiction. Consequently, the rule that certiorari may not be invoked to defeat the right of a prevailing party to the execution of a valid and final judgment, is inapplicable. For when an order of execution is issued with grave abuse of discretion or is at variance with the judgment sought to be enforced (PVTA vs. Honorable Gonzales, 92 SCRA 172), certiorari will lie to abate the order of execution.

(e) Aside from the propriety of resorting to certiorari to assail an order of execution which varies the terms of the judgment sought to be executed or does not find support in the dispositive part of the latter, there are circumstances in the instant case which justify the remedy applied for.

Petitioner MA. ELENA ACHAVAL DE PASTOR, wife of PASTOR, JR., is the holder in her own right of three mining claims which are one of the objects of conflicting claims of ownership. She is not an heir of PASTOR, SR. and was not a party to the probate proceedings. Therefore, she could not appeal from the Order of execution issued by the Probate Court. On the other hand, after the issuance of the execution order, the urgency of the relief she and her co-petitioner husband seek in the petition for certiorari militates against requiring her to go through the cumbersome procedure of asking for leave to intervene in the probate proceedings to enable her, if leave is granted, to appeal from the challenged order of execution which has ordered the immediate transfer and/or garnishment of the royalties derived from mineral properties of which she is the duly registered owner and/or grantee together with her husband. She could not have intervened before the issuance of the assailed orders because she had no valid ground to intervene. The matter of ownership over the properties subject of the execution was then still being litigated in another court in a reconveyance suit filed by the special administrator of the estate of PASTOR, SR.

Likewise, at the time petitioner PASTOR, JR. filed the petition for certiorari with the Court of Appeals, appeal was not available to him since his motion for reconsideration of the execution order was still pending resolution by the Probate Court. But in the face of actual garnishment of their major source of income, petitioners could no longer wait for the resolution of their motion for reconsideration. They needed prompt relief from the injurious effects of the execution order. Under the circumstances, recourse to certiorari was the feasible remedy.

WHEREFORE, the decision of the Court of Appeals in CA-G.R. No SP-11373-R is reversed. The Order of execution issued by the probate Court dated August 20, 1980, as well as all the Orders issued subsequent thereto in alleged implementation of the Probate Order dated December 5, 1972, particularly the Orders dated November 11, 1980 and December 17, 1980, are hereby set aside; and this case is remanded to the appropriate Regional Trial Court for proper proceedings, subject to the judgment to be rendered in Civil Case No. 274-R.

SO ORDERED.

Teehankee (Chairman), Melencio-Herrera, Vasquez, and Relova, JJ., concur.
Gutierrez, Jr., J., took no part.

[*] Under the Civil Code, Art. 16, intestate and testamentary successions of an alien are regulated by his national law "with respect to the order of succession and to the amount of successional rights and to the intrinsic validity of testamentary provisions." The Civil Code of Spain, Art. 834, provides for the usufructuary right of the surviving spouse with respect to a portion of the decedent's estate; while Art. 1392 provides for conjugal partnership. Under the Rules of Court, Rule 73, Section 2: "When the marriage is dissolved by the death of the husband or wife, the community property shall be inventoried, administered and liquidated, and the debts thereof paid, in the testate or intestate proceedings of the deceased spouse. If both spouses have died, the conjugal partnership shall be liquidated in the testate or intestate proceedings of either."

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