

CONSTANTINO C. ACAIN, PETITIONER, VS. HON. INTERMEDIATE APPELLATE COURT (THIRD SPECIAL CASES DIVISION), VIRGINIA A. FERNANDEZ AND ROSA DIONGSON, RESPONDENTS.

G.R. No. 72706. October 27, 1987

Ponente: PARAS, J.

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PARAS, J.:

This is a petition for review on certiorari of the decision* of respondent Court of Appeals in AC-G.R. SP No. 05744 promulgated on August 30, 1985 (Rollo, p. 108) ordering the dismissal of the petition in Special Proceedings No. 591-A-CEB and its Resolution issued on October 23, 1985 (Rollo, p. 72) denying respondents' (petitioners herein) motion for reconsideration.

The dispositive portion of the questioned decision reads as follows:

"WHEREFORE, the petition is hereby granted and respondent Regional Trial Court of the Seventh Judicial Region, Branch XIII (Cebu City), is hereby ordered to dismiss the petition in Special Proceedings No. 591-A-CEB. No special pronouncement is made as to costs."

The antecedents of the case, based on the summary of the Intermediate Appellate Court, now Court of Appeals, (Rollo, pp. 108-109) are as follows:

On May 29, 1984 petitioner Constantino Acain filed in the Regional Trial Court of Cebu City Branch XIII, a petition for the probate of the will of the late Nemesio Acain and for the issuance to the same petitioner of letters testamentary, docketed as Special Proceedings No. 591-A-CEB (Rollo, p. 29), on the premise that Nemesio Acain died leaving a will in which petitioner and his brothers Antonio, Flores and Jose and his sisters Anita, Concepcion, Quirina and Laura were instituted as heirs. The will allegedly executed by Nemesio Acain on February 17, 1960 was written in Bisaya (Rollo, p. 27) with a translation in English (Rollo, p. 31) submitted by petitioner without objection raised by private respondents. The will contained provisions on burial rites, payment of debts, and the appointment of a certain Atty. Ignacio G. Villagonzalo as the executor of the testament. On the disposition of the testator's property, the will provided:

"THIRD: All my shares that I may receive from our properties, house, lands and money which I earned jointly with my wife Rosa Diongson shall all be given by me to my brother SEGUNDO ACAIN, Filipino, widower, of legal age and presently residing at 357-C Sanciango Street, Cebu City. In case my brother Segundo Acain predeceases me, all the money properties, lands, houses there in Bantayan and here in Cebu City which constitute my share shall be given by me to his children, namely: Anita, Constantino, Concepcion, Quirina, Laura, Flores, Antonio and Jose, all surnamed Acain."

Obviously, Segundo pre-deceased Nemesio. Thus, it is the children of Segundo who are claiming to be heirs, with Constantino as the petitioner in Special Proceedings No. 591-A-CEB.

After the petition was set for hearing in the lower court on June 25, 1984 the oppositors (respondents herein

Virginia A. Fernandez, a legally adopted daughter of the deceased and the latter's widow Rosa Diongson Vda. de Acain) filed a motion to dismiss on the following grounds: (1) the petitioner has no legal capacity to institute these proceedings; (2) he is merely a universal heir and (3) the widow and the adopted daughter have been preterited. (Rollo, p. 158). Said motion was denied by the trial judge.

After the denial of their subsequent motion for reconsideration in the lower court, respondents filed with the Supreme Court a petition for certiorari and prohibition with preliminary injunction which was subsequently referred to the Intermediate Appellate Court by Resolution of the Court dated March 11, 1985 (Memorandum for Petitioner, p. 3; Rollo, p. 159).

Respondent Intermediate Appellate Court granted private respondents' petition and ordered the trial court to dismiss the petition for the probate of the will of Nemesio Acain in Special Proceedings No. 591-A-CEB.

His motion for reconsideration having been denied, petitioner filed this present petition for the review of respondent Court's decision on December 18, 1985 (Rollo, p. 6). Respondents' Comment was filed on June 6, 1986 (Rollo, p. 146).

On August 11, 1986 the Court resolved to give due course to the petition (Rollo, p. 153). Respondents' Memorandum was filed on September 22, 1986 (Rollo, p. 157); the Memorandum for petitioner was filed on September 29, 1986 (Rollo, p. 177).

Petitioner raises the following issues (Memorandum for Petitioner, p. 4);

- (A) The petition filed in AC-G.R. No. 05744 for certiorari and prohibition with preliminary injunction is not the proper remedy under the premises;
- (B) The authority of the probate courts is limited only to inquiring into the extrinsic validity of the will sought to be probated and it cannot pass upon the intrinsic validity thereof before it is admitted to probate;
- (C) The will of Nemesio Acain is valid and must therefore, be admitted to probate. The preterition mentioned in Article 854 of the New Civil Code refers to preterition of "compulsory heirs in the direct line," and does not apply to private respondents who are not compulsory heirs in the direct line; their omission shall not annul the institution of heirs;
- (D) DICAT TESTATOR ET ERIT LEX. What the testator says will be the law;
- (E) There may be nothing in Article 854 of the New Civil Code, that suggests that mere institution of a universal heir in the will would give the heir so instituted a share in the inheritance but there is a definite distinct intention of the testator in the case at bar, explicitly expressed in his will. This is what matters and should be inviolable.
- (F) As an instituted heir, petitioner has the legal interest and standing to file the petition in Sp. Proc. No. 591-A-CEB for probate of the will of Nemesio Acain; and
- (G) Article 854 of the New Civil Code is a bill of attainder. It is therefore unconstitutional and ineffectual.

The pivotal issue in this case is whether or not private respondents have been preterited.

Article 854 of the Civil Code provides:

"Art. 854. The preterition or omission of one, some, or all of the compulsory heirs in the direct line, whether living at the time of the execution of the will or born after the death of the testator, shall annul the institution of heir; but the devisees and legacies shall be valid insofar as they are not inofficious.

If the omitted compulsory heirs should die before the testator, the institution shall be effectual, without

prejudice to the right of representation."

Preterition consists in the omission in the testator's will of the forced heirs or anyone of them either because they are not mentioned therein, or, though mentioned, they are neither instituted as heirs nor are expressly disinherited (Nuguid v. Nuguid, 17 SCRA 450 [1966]; Maninang v. Court of Appeals, 114 SCRA [1982]. Insofar as the widow is concerned, Article 854 of the Civil Code may not apply as she does not ascend or descend from the testator, although she is a compulsory heir. Stated otherwise, even if the surviving spouse is a compulsory heir, there is no preterition even if she is omitted from the inheritance, for she is not in the direct line. (Art. 854, Civil Code). However, the same thing cannot be said of the other respondent Virginia A. Fernandez, whose legal adoption by the testator has not been questioned by petitioner (Memorandum for the Petitioner, pp. 8-9). Under Article 39 of P.D. No. 603, known as the Child and Youth Welfare Code, adoption gives to the adopted person the same rights and duties as if he were a legitimate child of the adopter and makes the adopted person a legal heir of the adopter. It cannot be denied that she was totally omitted and preterited in the will of the testator and that both adopted child and the widow were deprived of at least their legitime. Neither can it be denied that they were not expressly disinherited. Hence, this is a clear case of preterition of the legally adopted child.

Preterition annuls the institution of an heir and annulment throws open to intestate succession the entire inheritance including "la porción libre (que)no hubiese dispuesto en virtual de legado, mejora o donación" (Manresa, as cited in Nuguid v. Nuguid, supra; Maninang v. Court of Appeals, 114 SCRA [1982]). The only provisions which do not result in intestacy are the legacies and devises made in the will for they should stand valid and respected, except in so far as the legitimes are concerned.

The universal institution of petitioner together with his brothers and sisters to the entire inheritance of the testator results in totally abrogating the will because the nullification of such institution of universal heirs - without any other testamentary disposition in the will - amounts to a declaration that nothing at all was written. Carefully worded and in clear terms, Article 854 of the Civil Code offers no leeway for inferential interpretation (Nuguid v. Nuguid), supra. No legacies nor devises having been provided in the will the whole property of the deceased has been left by universal title to petitioner and his brothers and sisters. The effect of annulling the institution of heirs will be, necessarily, the opening of a total intestacy (Neri v. Akutin, 74 Phil. 185 [1943]) except that proper legacies and devises must, as already stated above, be respected.

We now deal with another matter. In order that a person may be allowed to intervene in a probate proceeding he must have an interest in the estate, or in the will, or in the property to be affected by it either as executor or as a claimant of the estate and an interested party is one who would be benefited by the estate such as an heir or one who has a claim against the estate like a creditor (Sumilang v. Ramagosa, 21 SCRA 1369/1967). Petitioner is not the appointed executor, neither a devisee or a legatee there being no mention in the testamentary disposition of any gift of an individual item of personal or real property he is called upon to receive (Article 782, Civil Code). At the outset, he appears to have an interest in the will as an heir, defined under Article 782 of the Civil Code as a person called to the succession either by the provision of a will or by operation of law. However, intestacy having resulted from the preterition of respondent adopted child and the universal institution of heirs, petitioner is in effect not an heir of the testator. He has no legal standing to petition for the probate of the will left by the deceased and Special Proceedings No. 591-A-CEB must be dismissed.

As a general rule certiorari cannot be a substitute for appeal, except when the questioned order is an oppressive exercise of judicial authority (People v. Villanueva, 110 SCRA 465 [1981]; Vda. de Caldito v. Segundo, 117 SCRA 573 [1982]; Co Chuan Seng v. Court of Appeals, 128 SCRA 308 [1984]; and Bautista v. Sarmiento, 138 SCRA 587 [1985]). It is axiomatic that the remedies of certiorari and prohibition are not available where the petitioner has the remedy of appeal or some other plain, speedy and adequate remedy in the course of law (D.D.

Comendador Construction Corporation v. Sayo (118 SCRA 590 [1982]). They are, however, proper remedies to correct a grave abuse of discretion of the trial court in not dismissing a case where the dismissal is founded on valid grounds (*Vda. de Bacang v. Court of Appeals*, 125 SCRA 137 [1983]).

Special Proceedings No. 591-CEB is for the probate of a will. As stated by respondent Court, the general rule is that the probate court's authority is limited only to the extrinsic validity of the will, the due execution thereof, the testator's testamentary capacity and the compliance with the requisites or solemnities prescribed by law. The intrinsic validity of the will normally comes only after the Court has declared that the will has been duly authenticated. Said court at this stage of the proceedings is not called upon to rule on the intrinsic validity or efficacy of the provisions of the will (*Nuguid v. Nuguid*, 17 SCRA 449 [1966]; *Sumilang v. Ramagosa*, supra; *Maninang v. Court of Appeals*, 114 SCRA 478 [1982]; *Cayetano v. Leonidas*, 129 SCRA 522 [1984]; and *Nepomuceno v. Court of Appeals*, 139 SCRA 206 [1985]).

The rule, however, is not inflexible and absolute. Under exceptional circumstances, the probate court is not powerless to do what the situation constrains it to do and pass upon certain provisions of the will (*Nepomuceno v. Court of Appeals*, supra). In *Nuguid v. Nuguid* the oppositors to the probate moved to dismiss on the ground of absolute preterition. The probate court acting on the motion held that the will in question was a complete nullity and dismissed the petition without costs. On appeal the Supreme Court upheld the decision of the probate court, induced by practical considerations. The Court said:

"We pause to reflect. If the case were to be remanded for probate of the will, nothing will be gained. On the contrary, this litigation will be protracted. And for aught that appears in the record, in the event of probate or if the court rejects the will, probability exists that the case will come up once again before us on the same issue of the intrinsic validity or nullity of the will. Result: waste of time, effort, expense, plus added anxiety. These are the practical considerations that induce us to a belief that we might as well meet head-on the issue of the validity of the provisions of the will in question. After all there exists a justiciable controversy crying for solution."

In *Saguimsim v. Lindayag* (6 SCRA 874 [1962]) the motion to dismiss the petition by the surviving spouse was grounded on petitioner's lack of legal capacity to institute the proceedings which was fully substantiated by the evidence during the hearing held in connection with said motion. The Court upheld the probate court's order of dismissal.

In *Cayetano v. Leonides*, supra one of the issues raised in the motion to dismiss the petition deals with the validity of the provisions of the will. Respondent Judge allowed the probate of the will. The Court held that as on its face the will appeared to have preterited the petitioner the respondent judge should have denied its probate outright. Where circumstances demand that intrinsic validity of testamentary provisions be passed upon even before the extrinsic validity of the will is resolved, the probate court should meet the issue. (*Nepomuceno v. Court of Appeals*, supra; *Nuguid v. Nuguid*, supra).

In the instant case private respondents filed a motion to dismiss the petition in Sp. Proceedings No. 591-CEB of the Regional Trial Court of Cebu on the following grounds: (1) petitioner has no legal capacity to institute the proceedings; (2) he is merely a universal heir; and (3) the widow and the adopted daughter have been preterited (*Rollo*, p. 158). It was denied by the trial court in an order dated January 21, 1985 for the reason that "the grounds for the motion to dismiss are matters properly to be resolved after a hearing on the issues in the course of the trial on the merits of the case (*Rollo*, p. 32). A subsequent motion for reconsideration was denied by the trial court on February 15, 1985 (*Rollo*, p. 109).

For private respondents to have tolerated the probate of the will and allowed the case to progress when on its face the will appears to be intrinsically void as petitioner and his brothers and sisters were instituted as universal heirs

coupled with the obvious fact that one of the private respondents had been preterited would have been an exercise in futility. It would have meant a waste of time, effort, expense, plus added futility. The trial court could have denied its probate outright or could have passed upon the intrinsic validity of the testamentary provisions before the extrinsic validity of the will was resolved (*Cayetano v. Leonidas*, supra; *Nuguid v. Nuguid*, supra). The remedies of certiorari and prohibition were properly availed of by private respondents.

Thus, this Court ruled that where the grounds for dismissal are indubitable, the defendants had the right to resort to the more speedy, and adequate remedies of certiorari and prohibition to correct a grave abuse of discretion, amounting to lack of jurisdiction, committed by the trial court in not dismissing the case, (*Vda. de Bacang v. Court of Appeals*, supra) and even assuming the existence of the remedy of appeal, the Court harkens to the rule that in the broader interests of justice, a petition for certiorari may be entertained, particularly where appeal would not afford speedy and adequate relief. (*Maninang v. Court of Appeals*, supra).

PREMISES CONSIDERED, the petition is hereby DENIED for lack of merit and the questioned decision of respondent Court of Appeals promulgated on August 30, 1985 and its Resolution dated October 23, 1985 are hereby AFFIRMED.

SO ORDERED.

Teehankee, C.J., Yap, Fernan, Narvasa, Gutierrez, Jr., Cruz, Feliciano, Gancayco, Padilla, Bidin, Sarmiento, and Cortes, JJ., concur.

Herrera, J., see separate opinion.

* PENNED by Justice Jose A. R. Melo and concurred in by Justices Milagros A. German and Nathanael P. De Pano, Jr.

Acain vs Intermediate Appellate Court : 72706 : October 27, 1987 : J. Melencio-Herrera : En Banc : Concurring in the Result
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CONCURRING IN THE RESULT

MELENCIO-HERRERA, J.:

I concur in the result on the basic proposition that preterition in this case was by mistake or inadvertence.

To my mind, an important distinction has to be made as to whether the omission of a forced heir in the Will of a testator is by mistake or inadvertence, or voluntary or intentional. If by mistake or inadvertence, there is true preterition and total intestacy results. The reason for this is the "inability to determine how the testator would have distributed his estate if none of the heirs had been omitted or forgotten" (*An Outline of Civil Law*, J.B.L. Reyes and R.C. Puno, Vol. III, p. 54).

The requisites of preterition are:

- "1. The heir omitted is a forced heir (in the direct line);
- "2. The omission is by mistake or thru an oversight;

"3. The omission is complete so that the forced heir received nothing in the will." (III Padilla, Civil Code Anotated, 1973 Edition, pp. 224-225) (Parenthetical addendum supplied).

On the other hand, if the omission is intentional, the effect would be a defective disinheritance covered by Article 918 of the Civil Code in which case the institution of heir is not wholly void but only in so far as it prejudices the legitime of the person disinherited. Stated otherwise, the nullity is partial unlike in true preterition where the nullity is total.

"Preterition is presumed to be only an involuntary omission; that is, that if the testator had known of the existence of the compulsory heir at the time of the execution of the will, he would have instituted such heir. On the other hand, if the testator attempts to disinherit a compulsory heir, the presumption of the law is that he wants such heir to receive as little as possible from his estate." (III Tolentino, Civil Code, 1973 Edition, pp. 174-175).

In the case at bar, there seems to have been mistake or inadvertence in the omission of the adopted daughter, hence, my concurrence in the result that total intestacy ensued.

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