

FROILAN C. GANDIONCO, PETITIONER, VS. HON. SENEN C. PENARANDA, AS PRESIDING JUDGE OF THE REGIONAL TRIAL COURT OF MISAMIS ORIENTAL, BRANCH 18, CAGAYAN DE ORO CITY, AND TERESITA S...

G.R. No. 79284. November 27, 1987

Ponente: PADILLA, J.

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PADILLA, J.:

A special civil action for certiorari, with application for injunction, to annul (1) the Order of the respondent Judge, dated 10 December 1986, ordering petitioner to pay support pendente lite to private respondent (his wife) and their child, and (2) the Order of the same respondent Judge, dated 5 August 1987, denying petitioner's motion to suspend hearings in the action for legal separation filed against him by private respondent as well as his motion to inhibit respondent Judge from further hearing and trying the case.

On 29 May 1986, private respondent, the legal wife of the petitioner, filed with the Regional Trial Court of Misamis Oriental, 10th Judicial District, Branch 18, in Cagayan de Oro City, presided over by respondent Judge, a complaint against petitioner for legal separation, on the ground of concubinage, with a petition for support and payment of damages. This case was docketed as Civil Case No. 10636. On 13 October 1986, private respondent also filed with the Municipal Trial Court, General Santos City, a complaint against petitioner for concubinage, which was docketed on 23 October 1986 as Criminal Case No. 15437-111. On 14 November 1986, application for the provisional remedy of support pendente lite, pending a decision in the action for legal separation, was filed by private respondent in the civil case for legal separation. The respondent judge, as already stated, on 10 December 1986, ordered the payment of support pendente lite.

In this recourse, petitioner contends that the civil action for legal separation and the incidents consequent thereto, such as, the application for support pendente lite, should be suspended in view of the criminal case for concubinage filed against him by the private respondent. In support of his contention, petitioner cites Art. 111, Sec. 3 of the 1985 Rules on Criminal Procedure, which states:

"SEC. 3. Other civil actions arising from offenses. - Whenever the offended party shall have instituted the civil action to enforce the civil liability arising from the offense, as contemplated in the first paragraph of Section 1 hereof, the following rules shall be observed:

(a) After a criminal action has been commenced, the pending civil action arising from the same offense shall be suspended, in whatever stage it may be found, until final judgment in the criminal proceeding has been rendered. x x x"

The civil action for legal separation, grounded as it is on concubinage, it is petitioner's position that such civil action arises from, or is inextricably tied to the criminal action for concubinage, so that all proceedings related to legal separation will have to be suspended to await conviction or acquittal for concubinage in the criminal case. Authority for this position is this Court's decision in the case of *Jerusalem vs. Hon. Roberto Zurbano*[1].

Petitioner's contention is not correct.

In Jerusalem, the Court's statement to the effect that suspension of an action for legal separation would be proper if an allegation of concubinage is made therein, relied solely on Sec. 1 of Rule 107 of the then provisions of the Rules of Court on criminal procedure, to wit:

"Sec. 1. Rules governing civil actions arising from offenses. - Except as otherwise provided by law, the following rules shall be observed:

(a) When a criminal action is instituted, the civil action for recovery of civil liability arising from the offense charged is impliedly instituted with the criminal action, unless the offended party expressly waives the civil action or reserves his right to institute it separately;

(b) Criminal and civil actions arising from the same offense may be instituted separately, but after the criminal action has been commenced the civil action can not be instituted until final judgment has been rendered in the criminal action;

(c) After a criminal action has been commenced, no civil action arising from the same offense can be prosecuted; and the same shall be suspended, in whatever stage it may be found, until proceeding has been rendered; x x x"(Emphasis supplied)

The provisions last quoted did not clearly state, as the 1985 Rules do, that the civil action to be suspended, with or upon the filing of a criminal action, is one which is "to enforce the civil liability arising from the offense". In other words, in view of the amendment under the 1985 Rules on Criminal Procedure, a civil action for legal separation, based on concubinage, may proceed ahead of, or simultaneously with, a criminal action for concubinage, because said civil action is not one "to enforce the civil liability arising from the offense" even if both the civil and criminal actions arise from or are related to the same offense. Such civil action is one intended to obtain the right to live separately, with the legal consequences thereof, such as, the dissolution of the conjugal partnership of gains, custody of offsprings, support, and disqualification from inheriting from the innocent spouse, among others. As correctly pointed out by the respondent Judge in his Order dated 5 August 1987:

"The unreported case of JERUSALEM vs. Hon. Roberto Zurbano, Judge of CFI of Antique, et al., L-11935, April 24, 1959 (105 Phil. 1277) is not controlling. It applied paragraph C of Sec. 1, of then Rule 107 of the Rules of Court, which reads:

"After a criminal action has been commenced, no civil action arising from the same offense can be prosecuted and the same shall be suspended, in whatever stage it may be found, until final judgment in the criminal proceeding has been rendered." (underlining supplied)

The governing rule is now Sec. 3, Rule 111, 1985 Rules on Criminal Procedure which refers to "civil actions to enforce the civil liability arising from the offense" as contemplated in the first paragraph of Section 1 of Rule 111 - which is a civil action "for recovery of civil liability arising from the offense charged". Sec. 1, Rule 111, (1985) is specific that it refers to civil action for the recovery of civil liability arising from the offense charged. Whereas, the old Sec. 1 (c), Rule 107 simply referred to "Civil action arising from the same offense."

As earlier noted this action for legal separation is not to recover civil liability, in the main, but is aimed at the conjugal rights of the spouses and their relations to each other, within the contemplation of Articles 97 to 108, of the Civil Code"[2].

Petitioner also argues that his conviction for concubinage will have to be first secured before the action for legal separation can prosper or succeed, as the basis of the action for legal separation is his alleged offense of concubinage.

Petitioner's assumption is erroneous.

A decree of legal separation, on the ground of concubinage, may be issued upon proof by preponderance of evidence in the action for legal separation[3]. No criminal proceeding or conviction is necessary. To this end, the doctrine in *Francisco vs. Tayao*[4] has been modified, as that case was decided under Act. No. 2710, when absolute divorce was then allowed and had for its grounds the same grounds for legal separation under the New Civil Code, with the requirement, under such former law, that the guilt of defendant spouse had to be established by final judgment in a criminal action. That requirement has not been reproduced or adopted by the framers of the present Civil Code, and the omission has been uniformly accepted as a modification of the stringent rule in *Francisco v. Tayao*[5].

Petitioner's attempt to resist payment of support pendente lite to his wife must also fail, as we find no proof of grave abuse of discretion on the part of the respondent Judge in ordering the same. Support pendente lite, as a remedy, can be availed of in an action for legal separation, and granted at the discretion of the judge[6]. If petitioner finds the amount of support pendente lite ordered as too onerous, he can always file a motion to modify or reduce the same[7].

Petitioner lastly seeks to have the respondent Judge disqualified from hearing the case, as the grant of support pendente lite and the denial of the motion to suspend hearings in the case, are taken by the petitioner as a disregard of applicable laws and existing doctrines, thereby showing the respondent judge's alleged manifest partiality to private respondent.

Petitioner's contention is without merit. Divergence of opinions between a judge hearing a case and a party's counsel, as to applicable laws and jurisprudence, is not a sufficient ground to disqualify the judge from hearing the case, on the ground of bias and manifest partiality. This is more so, in this case, where we find the judge's disposition of petitioner's motions to be sound and well-taken.

WHEREFORE, the instant petition is hereby DISMISSED. Costs against petitioner.

SO ORDERED.

Yap, (Chairman), Melencio-Herrera, Paras, and Sarmiento, JJ., concur.

[1] G.R. No. L-11935, 24 April 1959, 105 Phil. 1277 (1959), Unrep.

[2] Rollo at 33

[3] Petitioner himself admits this in his Rejoinder to plaintiff's Opposition to his Motion to Inhibit Respondent Judge and Motion to Suspend Hearing wherein he states, "Concubinage is the same criminal offense punishable under Art. 334 of the Revised Penal Code which, in a case for legal separation, the same may be proved based on preponderance of evidence". Rollo at 50.

[4] 50 Phil. 42 (1927)

[5] Padilla, I CIVIL CODE ANNOTATED 526 (1975); Paras, I CIVIL CODE OF THE PHILIPPINES ANNOTATED 374 (1971); Tolentino, I COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 311 (1983). Tolentino qualifies: "It is not mere sexual infidelity that constitutes the ground for legal separation. Such infidelity must constitute adultery or concubinage as defined by the Revised Penal Code." (Id at 310). Further: "There would be no more legal obstacle to a decree of legal separation at the instance of an offended wife, based on an act of infidelity for which the guilty husband has been convicted of

adultery upon the complaint of his paramour's husband so long as such act may also constitute concubinage and can be proven in the legal separation proceedings. We submit that the new Code, by omitting the requirement of criminal conviction of adultery or concubinage, as the case may be, has modified the doctrine in the case of *Francisco v. Tayao*." (Id at 311).

It may be noted that under Article 55(6) of the Family Code of the Philippines (Executive Order No. 209 as amended) soon to take effect, sexual infidelity or perversion of either spouse has replaced adultery on the part of the wife and concubinage on the part of the husband as defined by the Revised Penal Code (Art. 97, New Civil Code) as one of the grounds for legal separation.

[6] *Araneta v. Concepcion, et al.*, 99 Phil. 709 (1956)

[7] Sec. 5, Rule 61 of the Rules of Court states:

"Order. - The court shall determine provisionally the pertinent facts, and shall render such order as equity and justice may require, having due regard to the necessities of the applicant, the means of the adverse party, the probable outcome of the case, and such other circumstances as may aid in the proper elucidation of the question involved. If the application is granted, the court shall fix the amount of money to be provisionally paid, and the terms of payment. If the application is denied, the trial of the principal case on its merits shall be held as early as possible".

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