44 Phil. 186

[G. R. No. 19003. December 13, 1922]

ROSA. CABARDO, ASSISTED BY HER HUSBAND APOLINARIO ZALAMEDA, PLAINTIFF AND APPELLEE, VS. FRANCISCO VILLANUEVA, INDIVIDUALLY, AND IN HIS CAPACITY AS ADMINISTRATOR OF THE ESTATE OF LORENZO ABORDO, DECEASED, DEFENDANT AND APPELLANT.

D E C I S I O N

STREET, J.:

This action was instituted on September 3, 1921, in the Court of First Instance of the Province of Laguna, by Rosa Cabardo (with whom is joined her husband, Apolinario Zalameda) to establish her right as reservee, under article 811 of the Civil Code, to certain property of considerable value, chiefly real property, now in the possession of the defendant, Francisco Villanueva, executor of the estate of Lorenzo Abordo, deceased. The trial judge having determined the case favorably to the plaintiff, the defendant appealed.

It appears that the last owner of the property in question *who held by descent* was one Cornelia Abordo, resident of Pagsanjan, in the Province of Laguna, who died on October 30, 1918, intestate and without issue. Her mother, Basilia Cabardo, died as far back as in February, of the year 1899; and as Cornelia left no brothers or sisters, the nearest living person qualified to take by inheritance from her was her own father, Lorenzo Abordo, who accordingly succeeded to all of Cornelia's property.

The estate possessed by Cornelia at the time of her death, and which thus passed to her father, Lorenzo Abordo, was derived by inheritance from two sources, that is, in part from her mother Basilia Cabardo, and in part from Isabel Macaraya, the mother of Basilia Cabardo (and therefore grandmother of Cornelia), who died in November, 1912. Lorenzo Abordo, the father, having thus succeeded to the property aforesaid by inheritance from his daughter, himself died in December, 1920. The present claimant and plaintiff in this case, Rosa Cabardo, was a sister to Basilia Cabardo in life, and therefore aunt to Cornelia Abordo. Rosa Cabardo had no brothers or sisters living at the time of the death of Cornelia Abordo,

though formerly there were two, namely, Juan Cabardo and Guadalupe Cabardo, both of whom left children who are still alive.

Upon the facts above stated, it is evident that the properties in question were, upon the decease of Cornelia Abordo, impressed with the reservable character in the hands of Lorenzo Abordo, and that upon his death the plaintiff was entitled to succeed thereto, she being the only living person within the limits of the third degree belonging to. the line from which the property came. The case therefore falls precisely under article 811 of the Civil Code, and the trial judge committed no error in applying that article to the case.

The appellant's attorneys in a lengthy brief have drawn in question several points which, in the light of former decisions of this court and of the supreme court of Spain, are clearly settled; and a few words of passing comment will suffice to dispose of these contentions.

In the first place, it is evident that the property which Cornelia Abordo acquired from her mother, Basilia Cabardo, upon the death of the latter in 1899, became impressed with the character of reservable property in the hands of Lorenzo Abordo when he succeeded to those properties by inheritance from his daughter Cornelia; and the circumstance that said property originally pertained to the conjugal partnership composed of Basilia Cabardo and Lorenzo Abordo is immaterial. It is sufficient that Cornelia acquired it by inheritance from her mother, there being no difference in this respect between property owned by the ancestor as member of conjugal partnership and property owned by such ancestor in separate right.

In the second place, it is no less evident that the property acquired by Cornelia Abordo from her grandmother, Isabel Macaraya, upon the death of the latter in 1912—whether by testate or intestate succession is immaterial—also pertains to the reservable estate, notwithstanding the fact that a division of Isabel Macaraya's estate was effected by a partition deed executed by the persons in interest. It is sufficient that the property descended to Cornelia Abordo from her grandmother by gratuitous title (*por titulo lucrativo*), the meaning of which expression is explained by the commentator Manresa as follows:

> "The transmission is gratuitous or by gratuitous title when the recipient does not give anything in return. It matters not whether the property transmitted be or be not subject to any prior charges; what is essential is that the transmission be made gratuitously, or by an act of mere liberality of the person making it, without

> imposing any obligation on the part of the recipient; and that the person receiving the property transmitted deliver, give or do nothing in return.
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> "The typical gratuitous titles, to which all imaginable sorts are reducible, are donation and testate and intestate succession, which are specified as such in article 968.
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> "In a case where the questions raised were as to the rights of a minor to the inheritance of his grandmother, and which questions were settled by a compromise, in a decision rendered November 8, 1894, the Supreme Court held that it was not the document of compromise that determined the character of the title by virtue of which the minor got the amounts awarded to him, but the thing which was the subject-matter of the compromise, namely the hereditary rights, which import a gratuitous title, and that, therefore, when said minor inherited the property from his father, he was under obligation to reserve such as was included in the document, in favor of the relatives of the line whence it came." (6 Manresa, 285, 3d ed.)

The third point drawn in question by the attorneys for the appellant is whether the plaintiff is within the third degree belonging to the line from which the property was derived; and in this connection it is suggested that Lorenzo Abordo should be treated as the *propositus* or person from whom the degrees are to be reckoned, with the consequence that the plaintiff would be in the fourth degree reckoning through Cornelia Abordo, Basilia Cabardo, and Isabel Macaraya, successively, to the plaintiff.

This contention is in our opinion likewise untenable, as the person from whom the degrees should here be reckoned is clearly Cornelia Abordo herself, since she was at the end of the line from which the property came and the person upon whom the property last devolved by descent. Lorenzo Abordo was a stranger to that line and not related by blood to those for whom the property is reserved. That the degrees are to be thus reckoned is understood by Manresa; and our own decisions, as well as those of the supreme court of Spain, are accordant. (Manresa, Civ. Code, 3d ed., vol. 6, p. 252; Florentino vs. Florentino, 40 Phil., 480.)

Still another point urged against the appealed judgment is the error supposed to have been committed by the trial court in permitting this reivindicatory action to be maintained against the defendant Francisco Villanueva in his capacity as administrator; and it is

insisted that an executor or administrator is not subject to be sued with respect to the property which pertains to the estate in his possession. The reply to this is, that, supposing the property in question to be of a reservable character, all interest on the part of Lorenzo Abordo and his heirs therein terminated with his death. Said property therefore does not pertain to his estate at all, and his administrator is wrongfully withholding possession from the plaintiff. In this connection the last clause of section 699 of the Code of Civil Procedure is pertinent, where it is expressly declared that actions to recover the seisin and possession of real estate and personal chattels claimed by the estate may be maintained against the executor or administrator. In other words, the property here in question is not, properly speaking, a part of the estate in administration at all.

Various other considerations impugning the appealed judgment are adduced in the appellant's brief, but apparently they are not such as to require refutation at our hands.

Upon one additional point only will a few words be added, namely, with reference to the action of the trial judge in reserving to the plaintiff the future right to require the defendant to account for the rents and profits of the property during the time the same has been in his charge. As to this we note that the petitory part of the complaint contains no prayer either for an award of damages or for an accounting for rents and profits. It follows that the right to recover damages, or rents and profits, was never legitimately in issue in this action; and it was undoubtedly an act of supererogation on the part of his Honor to reserve to the plaintiff the right to require an accounting for rents and profits in another action. Whether such an accounting can be had is a question that must be determined by the proper tribunal when occasion arises, and no pronouncement thereon is here necessary except to say that, so far as concerns the appealed judgment, the reservation therein contained is mere surplusage.

With this explanation the judgment is affirmed; and it is so ordered with costs against the appellant.

Araullo, C. J., Johnson, Malcolm, Avanceña, Villamor, Ostrand, Johns, and *Romualdez, JJ.,* concur.

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