2 Phil. 321

[G.R. No. 1027. May 19, 1903]

RAMON DEL ROSAHIO, PLAINTIFF AND APPELLEE, VS. CLEMENTE DEL ROSARIO, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

I. Don Nicolas del Rosario died in this city on July 14, 1897, leaving a last will, the eighth, ninth, eleventh, and eighteenth clauses of which are as follows:

> "Eighth. The testator declares that the 5,000 pesos which he brought to his marriage he hereby bequeathes to his nephews Enrique Gloria y Rosario and Ramon del Rosario, natural children of his brother Clemente del Rosario, notwithstanding the fact that they purport to be the issue of the marriage of Escolastico Gloria and Rosendo del Rosario, successively.
>
> "Ninth. The testator declares that the said sum of 5,000 pesos is to be divided, 3,000 pesos for the first named and 2,000 pesos for the second named, the delivery of the said sums to be effected by the wife of the testator, provided that these young men behave themselves as they have done up to the present time, and do not cease to study until taking the degree of bachelor of arts, and then take a business course, if their health will permit, their support to be paid out of the testamentary estate and they to live in the house of the widow.
>
> "Eleventh. The testator declares that in case the said young men should be still engaged in study at the time of the death of the testator's wife, they shall continue to be mipported at the expense of the testamentary estate., without deducting such expenses from their legacies, if they should desire to continue the same studies.

> "Eighteenth. The testator further states that although his wife is at the present time fifty-five years of age, and consequently is not likely to marry again, as she herself says, nevertheless it is possible that the opposite of what she asserts might occur, and, if so, then it is to be regarded as sufficient reason to authorize the young men Ramon and Enrique, so often referred to, to separate from their aunt, in which event they are to be supported by the testamentary estate on a small allowance of twenty-five pesos per month, provided that they continue their studies or should be in poor health, this without in any respect reducing the amount of their shares."

Don Ramon del Rosario, one of the persons mentioned in these clauses, brought this action in 1902 against Don Olemente del Rosario, the then executor, asking, among other things, that the said executor pay him an allowance from the death of the widow of the testator at the rate of 75 pesos a month, and that the executor allow him to live in the house in which the widow was living at that time.

The widow of the testator, Dona Honorata Valdez, died on July 7,1900.

The court below ordered judgment in respect to this allowance, and the right to live in the house as prayed for by the plaintiff. In this we think that the court erred.

While by the eighth clause the support of the plaintiff and of Don Enrique Gloria is charged against the estate, yet the eleventh clause makes it plain that this unconditional right was to last only during the lifetime of the widow. After her death the right to this allowance is made to depend on the continuance of their studies. That this is the correct construction of the will is made more plain by the eighteenth clause above quoted. In the case of their separation from their aunt by her remarriage, they were entitled to the specified allowance of 25 pesos a month only on condition that they were pursuing their studies or were in poor health.

The court did not find that the plaintiff was still pursuing his studies. On the contrary, he found that the plaintiff had fulfilled the condition by obtaining the degree of bachelor of arts in 1898.

The right to live in the house of the widow terminated at her death.

II. The seventh clause of the will of Don Nicolas is as follows:

> "Seventh. The testator states that in the present condition of his affairs he has acquired, during his married life, some tens of thousands of dollars, of which one-half belongs to his wife as her share of the profits of the conjugal partnership, and the other half belongs to him as his share of such profits; but, in view of the agreement entered into between the two spouses,, the property will not be partitioned, and upon the death of the testator all the said property will pass to his wife, in order that she may enjoy the revenue therefrom during her lifetime, but without authority to convoy any of such property, inasmuch as she, being grateful for the benefit resulting to her, binds herself in turn to deliver said property at her death to the testator's brothers, Don Clemente del Rosario and Don Rosendo del Rosario, and his sister, Dona Luisa del Rosario, who shall enjoy the revenue from the said property during their respective lives, and shall then, in turn, transmit the same to their male children, both those born in wedlock and natural children who may be known."

This was later modified by a codicil, as follows:

> "That in the seventh clause of said testament he desires and wills that in the distribution of his property and that of his Avife among the male children of his brothers, Clemente and Rosendo del Rosario, and those of his sister, Luisa del Rosario, in such distribution his nephews Enrique Gloria and Ramon del Rosario must be understood to be included, in addition to the legacies mentioned in his said testament."

The thirteenth-clause of his will was as follows:

> "The testator declares that in case Doiia Luisa del Rosario. should die before or after the wife of the testator, then the legacy due her by virtue of this will shall not pass in its entirety to her male children, except as to the sum of 1,000 pesos, the remainder to pass to Don Enrique Gloria Rosario and Don Ramon del Rosario, natural sons of Don Clemente del Rosario, as already stated."

This was modified by the codicil as follows:

> "That in the thirteenth clause the testator provided that upon the death of his sister, Luisa del Rosario, her male children were to inherit from her up to the sum of 1,000 pesos, and this he rectifies, for better understanding, to the effect that it is his will that the remainder of all her portion should be divided into equal parts, one-third to go to his brother Don Clemente del Rosario and the other two-thirds to be divided equally among his said nephews, Enrique Gloria and Ramon del Rosario."

Dona Honorata Valdez made her will three days after that of her husband. The seventh clause is as follows:

> "The testatrix declares that she institutes her beloved husband, Don Nicolas del Rosario y Alejo, as her heir to all the property which she may have at her death, and in the unexpected case of the death of her said husband then she institutes as heirs her brothers-in-law, Don Rosendo and Don Clemen te del Rosario y Alejo, and her sister-in-law, Dona Luisa del Rosario, who shall enjoy the usufruct during their lifetime of all the revenue of the said property. Upon the death of any of them, then the property shall pass to the male children of her said brothers-in-law and sister-in-law, the issue of lawful marriage or natural children who may be known; but upon the death of her sister-in-law, Dona Luisa, then her share shall not pass in its entirety to her male children, except the sum of 1,000 pesos, and the remainder shall be paid to her nephews, Don Enrique Gloria and Don Ramon del Rosario, natural children of her brother-in-law Don Clemen te del Rosario."

Dona Luisa died one year after Don Nicolas and two years before the death of Dona Honorata, which, as has been said, occurred on July 7, 1900.

Don Enrique Gloria died on July 6, 1900.

Don Ramon del Rosario claims in this action that he is now entitled, by virtue of both wills, to a certain part of the share of the estates left to said Doiia Luisa during her life, and he asks that the defendant be directed to render accounts and to proceed to the partition of the said estates. The controversy between the parties upon this branch of the case is as follows:

The defendant claims that the plaintiff is entitled to nothing under the wills, because the gift to him was conditional, the condition being that he should be the natural son of Don

Ciemente, recognized by the latter as such in one of the ways pointed out by the Civil Code; that he can not prove such recognition, the parol evidence presented at the trial being prohibited by said Code, and that he has therefore not complied with the condition.

The plaintiff claims that such evidence was proper, that both wills state that Don Ramon del Rosario is the natural son of Don Clemente, and that in any event the bequests are made to the plaintiff by name.

The court below, holding the parol evidence immaterial, ordered judgment for the plaintiff as prayed for.

(1) So far as the disposition of that part of the inheritance left in the aunt's will to Dona Luisa for life is concerned, the question is free from doubt. It is distinctly declared that Ramon del Rosario and Enrique Gloria shall take certain parts of it after 1,000 pesos have been deducted. They are pointed out by name as the legatees. It is true that they are called the natural sons of Don Clemente. But this is merely a further description of persons already well identified, and, if false, can be rejected in accordance with the provision of article 773 of the Civil Code, whirl) by article 789 is applicable to legatees.

(2) The ninth clause of the will of Dona Honorata is as follows:

> "The testatrix bequeaths the sum of 3,000 pesos to her nephews Enrique Gloria and Ramon del Rosario in equal parts—that is, 1,500 pesos each."

The plaintiff was entitled to one-half of this legacy in his own right. This has been paid to him. Don Enrique Gloria died before the testatrix. By the provisions of articles 982 and 983 of the Civil Code the right of accretion exists as to the other half in favor of the plaintiff and he is entitled to have it paid to him.

(3) The will of Dona Honorata plainly declares that, on the death of any one of the life tenants, the male children of such tenant shall inherit, and in respect to Dona Luisa it is expressly declared that this shall take place whether she dies before or after the testatrix. The *derecho de acrecer* did not therefore exist in favor of the other two life tenants, Don Clemente and Don Rosendo. "En la sucesion testa da es ley preferente la voluntad del testador, de modo que este prohibiendo expresamente el derecho de acrecer, nombrando sustitutos, o marcando el destino especial de cada porcion vacante, excluye la aplicacion de los articulos que vamos a examinar." (7 Manresa, Comentarios al Codigo Civil, p. 276.)

This right does, however, exist in the share of Dona Luisa in favor of the plaintiff, for the reasons stated in connection with the legacy of 3,000 pesos.

(4) We have passed upon the rights of the plaintiff to the share of Dona Luisa under the will of Dona Honorata, because the interest is expressly left to him (en concepto de legado) as a legacy. This is controlling. (5 Manresa, 315.)

These or equivalent words are wanting in the will of Don Nicolas. Applying article 668 of the Civil Code, we must hold that any interest which the plaintiff may have taken in the share of Doiia Luisa under the will of Don Nicolas he took as an heir and not as a legatee.

The distinction between the two is constantly maintained throughout the Code, and their rights and obligations differ materially. (Arts. 660, 668, 768, 790, 858, 891, 1003.)

(5) The legatee can demand his legacy from the heir or from the executor, when the latter is authorized to give it. (Art. 885.) The powers given to the executors by the will of Dona Honorata are contained in the fourteenth clause, which is as follows:

> "The testatrix appoints as the executors of her will, in the first place, her beloved husband, Nicolas del Rosario y Alejo, in the second place her brother-in-law Clemente del Rosario, in the third place her brother-in-law Rosendo del Rosario, in the fourth place Don Ramon del Rosario when he shall attain his majority, all of them without bond and free from the obligation of terminating the administration within the legal term. At her death they shall take possession of all such goods and things as may be her property, and are hereby authorized fully and as required by law to prepare an inventory of said property, and to effect the division and partition of the estate among her heirs. She also authorizes them to execute and sign deeds of partition, sales with a resolutory condition, cancellations, receipts, acquittances, and such other documents as may be necessary."

The twenty-first clause of the will of Don Nicolas is substantially the same. Each will prohibited any judicial intervention in the settlement of the estates.

The clause in the will of Dona Honorata which is a copy of that in the will of Don Nicolas is as follows:

> "The testatrix declares that she expressly prohibits any judicial intervention in this her will, although minors, absentees, or persons under disability be interested therein, as it is her wish and will that all the proceedings be conducted extraiudieiallv, and in case a family council should be necessary, she designates the persons who, in accordance with the provisions of the Civil Code now in force, should form such council, or else leaves their appointment to the discretion of her executors."

If the executor was not authorized to pay these legacies, the heirs must pay them.

The life tenants and the heirs who take the remainder under these wills are numerous. If they did uot pay the legacies and did not agree upon an administrator, judicial intervention would be necessary, the very thing which the testators had expressly prohibited. The important power of making the partition was attempted to be given to the. executors. In view of these considerations and a study of the whole will, we hold that the executors are given power to pay the legacies. The action, therefore, was properly directed against the executor so far as it related to the allowance and the legacy of 3,000 pesos. As to these legacies, the action may be supported also under article 902, 2, which allows executors to pay money legacies.

It was also properly directed against him, so far as it related to the share to which the plaintiff is entitled under the will of Dona Honorata in the portion left, to Dona Luisa for life.

The provisions of articles 1025-1027 are no obstacle to this suit. That an inventory is being formed, or that the creditors have not been paid, is a matter of defense which should have been set up in the answer.

It was not properly directed against him in so far as it related to the similar share left to him bv the will of Don Nicolas. He took that as heir and not aw legatee, and the heir can maintain no such action against the executor.

The fact that the plaintiff under the will of Dona Honorata is a legatee of an aliquot part of the estate, having become entitled to receive one-third of it on the death of Dona Luisa, does not prevent him from maintaining this action against the executor. Though such a legatee closely resembles an heir, yet, like all other legatees, he must seek his share from the heir or executor. (6 Manresa, 561.)

(6) While in this action he has a right to have his interest as legatee declared, yet it can not be delivered to him without a partition of the estate.

It remains to be considered whether the executor has power to make the partition. Such power is expressly given by the will. This provision is, however, void under the terms of article 1057 of the Civil Code, which is as follows:

> "The testator may, by.an act inter civos or causa mortis, intrust the mere power of making the division after his death to any person who is not one of the coheirs.
>
> "The provisions of this and the foregoing articles shall be observed even should there be a minor or a person subject to guardianship among the coheirs; but the trustee must in such case make an inventory of the property of the inheritance, citing the coheirs, the creditors, and the legatees."

Don Clemente, the executor, against whom the action was directed, was not only an heir as a life tenant but also in fee after the death of Don Rosendo if the latter died without issue. Upon the death of the widow, Dona Luisa then being dead, it became his duty to divide the estate into three parts, or at least to set off the third, which was to pass to the plaintiff by the death of the widow and Dona Luisa. In this partition he was directly interested, for, with his brother Don Rosendo, he had a life interest in the part of the estate not set off to the plaintiff. Article 1057 prohibited an heir from being *contador* for this very reason, namely, that the partition should be made impartially.

Although the executor has no power to make the partition, the heirs can do so. (Arts. 1058-1060, Civil Code.)

The plaintiff is not bound to remain a coowner with the other heirs. Being a legatee of an aliquot part, he has the same right to seek a partition that an heir has. (7 Manresa, 578; art. 1051, Codigo Civil.) But in so seeking it he must make parties to his suit all persons interested in the estate (7 Manresa, 577). This he has not done in this suit, and he consequently is not entitled to the partition ordered by the court below.

(7) We have held that the only thing that can be decided in this case is the rights of the plaintiff as legatee. The court below ordered the executor to render accounts of his administration of both estates.

As to the estate of Don Nicolas, the only thing here in question is the right to the allowance. As we hold that the plaintiff is not entitled to it, he is not entitled to any statement of accounts as such pretended legatee.

As to the estate of Dona Honorata, he is entitled to be paid a legacy of 1,500 pesos. Article 907 requires the executor to render accounts to the heir, not to the legatee; and although by article 789 all of the provisions of Chapter II (in which both articles are found) relating to heirs are made applicable to legatees, we can not hold that this requires an executor to submit his accounts to one who has no interest in the estate except to a money legacy when there is no suggestion that it will not be paid when the right to it is established.

In respect to the share of Dona Luisa, there is reason for saying that a legatee of an aliquot part is entitled to an accounting. But, inasmuch as in this case there can be no final determination of the rights of the parties interested in the estate, because they are not all parties to this suit, the executor should not in this suit be ordered to submit his accounts.

(8) The plaintiff in his complaint has limited himself to claiming the allowance, his rights to the share of Dona Luisa, and the legacies left to him.
The question as to whether he would be entitled to any part of the share of Don Clemente upon the latter's death, under the seventh clause of the two wills, was not presented by the complaint nor passed upon by the court and is not before us for decision.

(9) The result of the foregoing considerations is:

1. The plaintiff is not entitled to any allowance under either will.
2. He is not entitled to live in the house No. 128 Calle Clavel.
3. He is entitled to be paid, under the ninth clause of the will of Dona Honorata, the sum of 1,500 pesos, in addition to the 1,500 pesos already received under that clause.
4. He is entitled to the share of the estate left by the will of Dona Honorata to Dona Luisa during her life, after deducting 1,000 pesos.
5. This share can not be set off to him in this suit, but only in a proceeding to which all persons interested in the estate are parties.
6. His interest in the share left to Dona Luisa during her life by the will of Don Nicojas can not be determined in this suit.
7. The executor can not be required to render in this suit his accounts as such executor.
8. The plaintiff's rights under the seventh clause of the two Avills, to the share left to Don Clemente for life are not before us for decision.

III. After judgment had been rendered in the court below and a bill of exceptions allowed, but before the record had been sent to this court, Don Clemente del Rosario, the defendant, died. After his death Don Kosendo del Rosario, who was named in both wills to succeed to the executorship on the death of Don Clemente, appeared in the court below and withdrew the appeal and bill of exceptions. Thereupon the widow of Don Clemente, for herself and in representation of the minor son of her late husband, asked and was granted leave to prosecute the appeal.

This ruling was correct. According to the Spanish authorities, anyone legally affected by the judgment might appeal. According to the American authorities, if a trustee refuses to appeal, the beneficiary may do so in his name.

That the son of Don Clemente has a direct interest in the question of the allowance of 75 pesos a month to the plaintiff is plain. We have held that in respect to this allowance the executor represents the estate and the judgment against him binds it.

It would be manifestly unjust to allow an executor, with perhaps only a slight personal interest in an estate, by withdrawing an appeal, to fasten upon the estate a claim which, as we hold, it should not bear.

IV. At the argument of this case on the merits, after the appellant had closed, the respondent made the point for the first time that the appellant's brief contained no assignment of errors.

This is true. But a full assignment of errors is found in the bill of exceptions at pages 14 and 15. The appellee answered the brief of the appellant without making any suggestion of this mistake. He has been in no way prejudiced by it, and we can not affirm the judgment on this ground.

The judgment of the court below is reversed and the case remanded with directions to the court below to enter judgment in accordance with this opinion. The costs of this instance will be equally divided between the parties. So ordered.

Arellano, C. J., Cooper, Mapa, and *Ladd, JJ.,* concur.

Torres, J., did not sit in this case.

Date created: April 15, 2014