1 Phil. 271

[G.R. No. 586. April 30, 1902]

MARTINIANO VELOSO Y GREY, PLAINTIFF AND APPELLANT, VS. BENITA PACHECO, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

On September 28, 1901, the plaintiff brought an action of unlawful detainer in the Court of First Instance of Manila. On the same day the judge entered an order directing that the case be tried in accordance with the provisions of article 1571 of the Law of Civil Procedure then in force. In the course of the proceedings counsel for the defense offered the testimony of the defendant as a witness on her own behalf. The judge rejected this evidence, ruling that under the Law of Civil Procedure by which the case was being tried the parties themselves could not be witnesses. Judgment was rendered December 20, 1901, in favor of the plaintiff.

On January 4, 1902, the defendant moved for a new trial under the provisions of .articles 113 and 145 of the Code of Procedure in Civil Actions and Special Proceedings now in force. By an order of January 13 the judge granted the petition, and against this order the plaintiff appealed.

It has been noticed that this case was commenced only two days before the present Code went into effect. As a pending case on October 1 it fell within the class described in article 795, 4 thereof. The court, however, in the proceedings up to and including the judgment applied the provisions of the *Ley de Enjuiciamiento Civil*. In granting a new trial after the judgment he applied the Code now in force.

The important question in this case is this, Do the provisions of articles 113 and 145 apply to all judgments entered after October 1, 1901, or do they apply only to those judgments entered after that date in actions in which the proceedings prior to the judgment were in accordance with the present Code?

We have concluded that they apply to all judgments entered after October 1.

By the provisions of the *Ley de Enjuiciamiento Civil* a judge of the Court of First Instance after the entry of judgment had no power to set it aside or change it. (Art. 34(5.) The right to secure a new trial on the ground, for example, of newly discovered evidence did not exist in the law in force prior to October 1, 1901. Neither the Court of First Instance nor the Audiencia nor the *Tribunal Supremo* had such power. The *recurso de revision*before the *Tribunal Supremo,* denned in article 1778 *et seq.,*. was much more limited in scope than the provision of article 145, 2, of the Code now in force. In short, the latter Code gives remedies which did not exist under the former law. To our minds the question it not whether one procedure shall be followed or another. The question is whether a remedy not given by the former procedure can be added to it. It is not a case of substitution, but of addition.

Let us suppose that the former law allowed no appeal where the judgment was for less than 100 pesos. The present law allows an appeal in all.cases. It seems clear that any judgment entered after October 1, 1901, would be appealable regardless of the law under which the case was tried.

Article 795 apparently gives the courts some discretion in the matter of applying one or the other procedure to pending cases. One or the other is to be applied so far as it can conveniently be done. It could not have been intended by the legislative body that the application of article 145 should rest in the discretion of the judge. Whether that shall or shall not be applied can not be a matter of discretion. If it could be conveniently applied in any case it could in all cases. We do not think that the question is to be resolved with reference to article 795. Article 145 either is applicable by its own force or it is not. It either applies to all cases pending on October 1,1901, or it applies to none. It was not left to the discretion of the judge to hold it applicable in one case and not in another. By using the word “applicable” we, of course, do not mean to say that the court would have to grant every motion made under said article. We simply say that he would have to consider every motion and decide each one upon its own merits; in other words, that a party is entitled to the benefit of these articles if he can bring himself within their terms.

The legislative body was of opinion that after judgment a new trial should be granted for newly discovered evidence. That opinion rested upon considerations entirely apart from the particular procedure which had been followed in the case prior to the judgment. The reasons why a party who has discovered new evidence should be allowed a new trial have nothing ifco do with the fact that his case was tried with a jury or that it was tried without

one, or that the witnesses were examined in court or that they were examined before a commissioner.

Two cases are commenced on September 28 before two different judges. One of them applies the former procedure and orders judgment for the plaintiff. The other applies the present procedure and enters judgment for the plaintiff. Both defendants move for a new trial on the ground of newly discovered evidence. That the one whose case was tried in accordance with the present Oode is entitled to have his motion heard is conceded. There is no reason why the other should not have the same right. There is nothing in article 145 or in article 113 which expressly limits their operation to judgments in actions commenced after October 1, or to those commenced before that date but tried in accordance with the present Code. These sections grant new remedies not known to the former procedure, and we hold that they apply to all judgments entered after October 1, regardless of the procedure which was applied to the case in its course prior to the judgment.

This conclusion leads necessarily to the dismissal of the appeal. The court below had jurisdiction to.entertain this motion and decide it one way or the other. He decided it in favor of the defendant, set aside the judgment, and ordered the case retried. The new trial has not yet been had, and no final judgment has yet been entered.

Such a decision of the court below is not appealable.

Article 123 of the Code in force says: “Nor shall any ruling, order, or judgment be subject to appeal to the Supreme Court until final judgment is rendered for one party or the other.” Article 146 distinctly says that the decision upon a motion of this kind shall not be ground for exception.

For the reasons stated the appeal is dismissed. Neither party will be entitled to costs of this instance.

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

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