4 Phil. 722

[G.R. No. 1837. September 05, 1905]

ESTEBAN QUIROS, PLAINTIFF AND APPELLANT, VS. D. M. CARMAN, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

It was the practice of the Quartermaster's Department of the United States Army in Manila in the years 1899 and 1900 to solicit proposals for the furnishing of cascoes and lorchas of which it had need and to make a contract with the best bidder for such number of cascoes and lorchas as it might require for a period of six months.

Pursuant to this practice, prior to the 1st day of July, 1900, it solicited proposals, and the defendant submitted the best proposition. His bid was accepted, and on the 7th of July, 1900, a contract was made between him and the Quartermaster's Department for the furnishing of four lorchas and sixty cascoes, the Quartermaster's Department having the right to increase the number by 30 per cent upon twenty-four hours' notice. The price to be paid for the rent of the cascoes and lorchas was stated in the contract, and it was provided as follows:

> "Y cualquier averia que ocurriese durante el servicio del Departamento del Quartermaster E. U. A. sin culpa del dueno o de su propietario, seran reparados a cuenta de los Estados Unidos (exceptuando la accion de los elementos) durante el tiempo que la embarcacion estuviese en reparacion, se abonara la mitad del precio del contrato, entendiendose que a este precio arriba marcado incluye todos los gastos de la tripulacion, etc."

The defendant for some time prior to July, 1900, had furnished cascoes and lorchas to the Government under similar contracts. He did not himself own the cascoes and lorchas which he so furnished, but it was his custom to get them from different persons who owned them, and turn them over to the Government. The plaintiff was the owner of casco No. 1931, which on the 5th day of September, 1900, he turned over to the defendant, and the defendant placed it in the service of the Government under his aforesaid contract. On the 31st day of October of the same year the casco was lost in the bay during a typhoon, and this action is brought to recover its value.

The question in this case is, What was the contract between the plaintiff and the defendant, under which plaintiff turned the casco over to defendant? The plaintiff alleged in his complaint that on the 5th day of September he made a verbal contract with the defendant by the terms of which defendant expressly agreed to pay any damages which the casco might suffer while in his possession, and he testified at the trial that such a contract was made. He also produced two witnesses in support of his testimony. The defendant denied that he had made any such contract with the plaintiff in reference to this particular casco. The first witness for the plaintiff upon cross-examination testified that he was not present when the alleged contract was made between the plaintiff and the defendant, but was in an adjoining room. He testified that he knew that the defendant made the same contract with the plaintiff that he made with “all the rest of us.” We think it apparent that the testimony of this witness is of no value, for witnesses were produced by both parties who were owners of cascoes, and who had turned them over to the defendant in the same way that the plaintiff turned over his, and they differed radically as to what the exact contract between them and the defendant was. The other witness who supported the claim of the plaintiff that there was a special contract in regard to this particular casco testified that he heard the conversation between the plaintiff and the defendant, and that it was carried on in Spanish. It appears that the plaintiff speaks English, and at the time in question was acting as English and Spanish interpreter in the office of the quartermaster who had charge of these cascoes and lorchas, and the

defendant testified that he never conversed with the plaintiff in Spanish, but always in English.

It appeared in the evidence that it was the custom of the principal owners of cascoes and lorchas to meet in the office of the defendant prior to the time of submitting bids, and agree upon the price which the defendant was to offer. It also appears that the defendant paid to the owners of the cascoes the amount which he received from the Government, less a certain sum which, with the total amount paid by the Government, depended upon the tonnage of the casco. The contract between the defendant and the Government provided that the latter should pay 13.90 pesos daily for cascoes of from 20 to 30 tons, and 24.60 pesos for those of from 30 to 45 tons. The casco of the plaintiff came within the latter class, and the Government paid to the defendant for its use 24.60 pesos daily, and he paid to the plaintiff 23 pesos. When the casco was being repaired by the Government, defendant received 80 cents daily of the amount paid by the Government. As has been said, the plaintiff during the time in question was employed in the office of the quartermaster, and was thoroughly informed of the contract between the defendant and the Government, and when he turned over his casco to the defendant he knew that it was to be placed by the defendant in the service of the Government under the contract in question.

We are satisfied that there was no express contract whatever between the parties, and the claim of the plaintiff to the contrary is not supported by the evidence. The defendant's claim is that he acted as mere agent for the owners of the cascoes—as an intermediary between them and the Government, and for his services in so acting received this commission which has been above mentioned. This, perhaps, was the real nature of his undertaking, but the evidence shows that as between himself and the Government he was an independent contractor, and the Government had no dealings whatever with the owners of the cascoes. We think, also, that the contract between the defendant and the owners of the cascoes was also one of hiring, but the question still remains, What were the terms of that contract?

After a consideration of all the evidence in the case and of all the

circumstances which surrounded the transaction, we hold that the plaintiff and other owners of cascoes, in their tacit contract with the defendant, adopted the terms of the contract between the defendant and the Government, and that the only element in the contract between the defendant and the plaintiff which did not appear in the contract between the defendant and the Government was the amount which the defendant was to receive from the sum paid by the Government. In all other respects the evidence shows that the contract between the defendant and the plaintiff was exactly the same as the contract between the defendant and the Government. For example, when the casco was in process of repair, the plaintiff received one-half of the total rental, instead of the whole, and yet it is not claimed by the plaintiff that there was any special contract between himself and the defendant which provided for this arrangement. It is reasonable to believe that as to the loss of the casco the parties adopted the provisions of the contract between the defendant and the Government. It appears that the plaintiff was bound to and did furnish the crew of the casco. The plaintiff knew that the casco was to be placed in the service of the Government under this contract. If the casco was lost or damaged, the plaintiff knew that the loss would be caused either by the fault of his own crew or by fault of the Government. He knew that in no event could it be lost by the fault of the defendant. It appeared in evidence that after the casco was turned over by the defendant to the Government, the defendant had no control over it. He had no right to interfere in its management. The plaintiff testified that on the day on which the casco was lost the third typhoon signal had been hoisted, and that he went to the defendant and asked him to send a launch into the bay to bring the casco into the river, and that the defendant promised to do so. The defendant testified that he had no recollection of any such conversation and was satisfied that it did not take place, because he had no right to interfere in the management of the casco; that it was under the control of the Government and plaintiffs crew, and he was powerless to act.

The appellant presents another question concerning a default judgment entered against the defendant, which was afterwards vacated,

and claims that the vacating of this default judgment, and allowing the defendant to answer, was error. It appears that summons was legally served upon the defendant, and that he did not answer within the time required by law. It appears by the affidavit of the defendant that he never received the summons, and knew nothing at all about the suit until just prior to the time when he made the application for leave to answer. Both of these statements may be true, for by the provisions of section 396, paragraph 6, of the Code of Civil Procedure, a summons may be served upon the defendant by leaving a copy at his usual place of residence, in the hands of some person resident therein of sufficient discretion to receive the same. The bill of exceptions does not show how the summons was served in this case, whether upon the defendant personally or by leaving it at his house. If in the latter way it may never have come to his attention, and if it did not, as his affidavit shows that it did not, it made a proper case for the opening of the default and the presentation of an answer.

The judgment of the court below is affirmed, with the costs of this instance against the appellant, and after the expiration of twenty days, judgment will be entered in accordance herewith, and the case remanded to the court below for execution of said judgment.

Arellano, C. J., Torres and *Carson, JJ.,* concur.
Johnson, J., dissents.

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