5 Phil. 516

[G.R. No. 1973. January 08, 1906]

TAN DIANGSENG TAN SIU PIC, PLAINTIFF AND APPELLEE, VS. LUCIO ECHAU& TAN SIUCO, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

It appears from the bill of exceptions that the trial of this case was commenced before the court in the usual way; that the parties to the suit were Chinamen, and all the written evidence was in their language; that there was some difficulty regarding the translation of this evidence, and also in regard to the interpreting of other evidence which the parties presented in court. For this reason, after the plaintiff had practically completed the presentation of his evidence, the parties entered into an agreement that the case might be referred to a referee in accordance with the provisions of section 135 of the Code of Civil Procedure, and an order was made to that effect. The referee, a Chinaman, made his report on the 17th of December, 1903. No objection or exception of any kind was made to this report, and on the 14th day of January, 1904, the court entered judgment in accordance with the report, in favor of the plaintiff, for the amount reported by the referee. The defendant took an exception to the judgment of the court, and also made a motion for a new trial, which was denied, to which denial he excepted.

For the purposes of this appeal we will assume, as claimed by the appellant, that his motion for a new trial was based upon section 497, paragraph 3 of the Code of Civil Procedure, and that we consequently have a right to consider all of the evidence which he has caused to be brought here.

The first assignment of error relates to the legal capacity of the plaintiff to sue. It appears from the evidence taken before the judge that the plaintiff and three other persons formed a partnership in China to do business in the Philippine Islands. One of them, Yap-Jongco, was in charge of the store which the partnership maintained in Iloilo, until his death in April,

1901. Upon his death the plaintiff, by agreement with the remaining partners, took possession of and managed the business at Iloilo. He brought this action to recover of the defendant the value of goods sold to the latter by the partnership during the lifetime of Yap-Jongco.

The defendant in his answer, by & failure to deny, admitted that:

> "4. El primero de Abril de 1901 falleci6 en esta ciudad el citado Yap-Jongco, por cuyo motivo qued6 sin gerente el negocio d"e Yap-Jongco y Compafiia, por lo que se vio obligado el demandante como socio capitalista a ponerse al frente de los negocios, que antes regentara Yap-Jongco, de cuyo activo y pasivo se hizo cargo desde luego."

He alleged, however, that the plaintiff was without legal capacity to maintain this action.

It is not necessary to decide whether the partnership formed in China could have maintained an action in its own name in these Islands. It has not attempted to do so, and was, moreover, dissolved in 1901 by the death of Yap-Jongco. Upon his death the remaining partners became the only owners of the assets of the late partnership, including this debt due from the defendant. Even if it be admitted that the partnership never was a juridical person in the Philippines, and that the agreement made by the surviving partners authorizing the plaintiff to take charge of the business did not authorize him to maintain this suit without joining with him as plaintiffs his associates, the fact yet remains that the only objection available to the defendant was the objection that under section 114 of the Code of Civil Procedure the other two partners should have been joined as plaintiffs. The failure to so join them constituted not a want of capacity to sue, but a defect of parties plaintiff. This defect appeared upon the face of the complaint. It is by the Code made a ground for demurrer (sec. 91, par. 4). This ground for demurrer is distinct from that founded upon a want of legal capacity to sue, which is the second ground mentioned in said section 91. The defendant alleged in his answer that the plaintiff had not legal capacity to sue, but this defect of parties caused by the failure to join as plaintiffs the other surviving partners, the defendant did not present either by demurrer or answer. He therefore waived it (Sec. 93, Code of Civil Procedure.)

The second assignment of error relates to the sufficiency of the evidence to support the judgment. In a case tried by the inferior court unless the evidence before this court shows

that his findings are wrong, they must be sustained. The same rule should apply to the findings made by a referee appointed in accordance with said section 135, when they are approved by the court and judgment entered thereon. Section 140 provides that the court shall render judgment "as though the facts had been found by the judge himself."

At the instance of the appellant all the evidence introduced before the judge and the documentary evidence introduced before the referee has been sent to this court for its consideration. If other evidence than that remitted was introduced before the referee it was the duty of the appellant to present it here.

The fact that the report of the referee does not contain all the facts necessary to support the judgment can not avail the appellant, inasmuch as he made a motion for a new trial based upon section 497, paragraph 3, and in such a case it is our duty, by the terms of said section, to examine the proofs which the appellant presents, and render such judgment as justice and equity may require. (Benedicto *vs*. De la Kama,[1] 2 Off. Gaz., 166, Lorenzo *vs*. Navarro, No. 2021.[2]) In this case the facts which do not appear in the report do appear in the evidence. An examination of the record presented by the appellant does not show that the findings of the referee as to the amounts due by the defendant are not correct.

As to the counterclaim presented by the appellant in his answer, the evidence brought here by him does not show that he introduced any proof relating thereto, either before the judge or the referee. It was his duty to present such evidence if he did not wish to have his counterclaim considered as abandoned.

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 shall be rendered in accordance herewith and the case remanded to the court below for execution. So ordered.

Arellano, C. J., Mapa, Johnson, and *Carson, JJ.,* concur.

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[1] 3 Phil. Rep., 34.

[2] Page 505, supra.

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