44 Phil. 755

[G.R. No. 19893. March 31, 1923]

ARNALDO F. DE SILVA, PLAINTIFF AND APPELLANT, VS. ABOITIZ & COMPANY, INC., DEFENDANT AND APPELLEE.

D E C I S I O N

ARAULLO, C.J.:

The plaintiff subscribed for 650 shares of stock of the defendant corporation of the value of P500 each, of which he has paid only the total value of 200 shares, there remaining 450 shares unpaid, for which he was indebted to the corporation in the sum of P225,000, the value thereof. On April 22, 1922, he was notified by the secretary of the corporation of a resolution adopted by the board of directors of the corporation on the preceding day, declaring the unpaid subscriptions to the capital stock of the corporation to have become due and payable on the following May 31st at the office thereof, the payment to be made to the treasurer, and stating that all such shares as may have not been paid then, with the accrued interest up to that date, will be declared delinquent, advertised for sale at public auction, and sold on the following June 16th, for the purpose of paying up the amount of the subscription and accrued interest, with the expenses of the advertisement and sale, unless said payment was made before. The proper advertisement having been published, as announced in the aforesaid notice, the plaintiff filed a complaint in the Court of First Instance of Cebu on May 5th of the same year against the said corporation, wherein, after relating the above-mentioned facts, he prayed for a judgment in his favor, decreeing that, in prescribing another method of paying the subscription to the capital stock different from that provided in article 46 of its by-laws, in declaring the aforesaid 450 shares delinquent, and in directing the sale thereof, as advertised, the corporation had exceeded its executive authority, and as a consequence thereof he asked that a writ of injunction be issued against the said defendant, enjoining it from taking any further action of

whatever nature in connection with the acts complained of and that it pay the costs of this suit.

The plaintiff alleged as the grounds of his petition: (1) That, according to aforesaid article 46 of the by-laws of the corporation, which was inserted in the complaint, all the shares subscribed to by the incorporators that were not paid for at the time of the incorporation, shall be paid out of the 70 per cent of the profit obtained, the same to be distributed among the subscribers, who shall not receive any dividend until said shares were paid in full; (2) that in declaring the plaintiff's unpaid subscription to the capital stock to have become due and payable on May 31st, and in publishing the aforesaid notice declaring his unpaid shares delinquent, the defendant corporation has violated the aforesaid article, which prescribes an operative method of paying for the shares continuously until their full amortization, thus violating and disregarding a right of the plaintiff vested under the said by-laws; (3) that the aforesaid acts of the defendant corporation were in excess of its powers and executive authority and the plaintiff had no other plain, speedy and adequate remedy in the ordinary course of law than that prayed for in the said complaint, to prevent the defendant from taking any further action in connection with the sale and alienation of the said shares.

A preliminary injunction having been issued against the defendant, as prayed for by the plaintiff, upon the giving of the proper bond, and the defendant having been summoned, the latter filed a demurrer to the complaint on the ground that the facts alleged therein did not constitute a cause of action, and that even supposing the plaintiff to have any lawful claim against the defendant corporation, the special remedy applied for by the plaintiff was not the most adequate and speedy.

Hearing having been had, the court below by an order dated September 21, 1922, sustained the aforesaid demurrer on the first ground, giving the plaintiff five days within which to amend his complaint, but the said period having elapsed without the plaintiff having amended his complaint, upon motion of the defendant, that court, by an order dated the 2d of the following month of October, dismissed the complaint and ordered the dissolution of the preliminary injunction previously issued, with costs, to which orders the plaintiff excepted, asking at the same time for the annulment thereof and a new hearing,

which motion was denied by the lower court. To that ruling the plaintiff also excepted, and brought the case to this court by the proper bill of exceptions.

Assuming the truth of the facts alleged in the complaint filed against the herein defendant, as the filing of a demurrer to a complaint is made on that assumption, the question to be decided reduces itself to determining whether or not, under the provision of article 46 of the by-laws of the defendant corporation, the latter may declare the unpaid shares delinquent, or collect their value by another method different from that prescribed in the aforecited article.

Said article reads thus:

> "ART. 46. The net profit resulting from the annual liquidation shall be distributed as follows: Ten per cent (10%) for the Board of Directors and in the manner prescribed in article twenty-six (26) of these by-laws; ten per cent (10%) for the general manager; ten per cent (10%) for the reserve fund, and seventy per cent (70%) for the shareholders in equal parts; *Provided, however,* That from this seventy per cent dividend the Board of Directors *may deduct* such amount as it may deem fit for the payment of the unpaid subscriptions to the capital stock and not pay any dividend to the holders of the said unpaid shares until they are fully paid: *Provided, further,* That when all the shares have been paid in full *as provided in the preceding paragraph*, the Board of Directors *may also deduct* such amount as it may deem fit for the creation of an emergency special fund, or extraordinary reserve fund when in its judgment the same may be convenient for the development
> of the business of the corporation or for meeting any such contingencies as may arise from its operation, whenever the distributable dividend is found, after the foregoing deduction, to be not less than ten per cent (10%) of, the paid up capital stock.
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> "No dividend shall be declared or paid, except when there remains a net profit after the payment of all the expenses incurred, or allowances made, by the corporation to carry out the operation of its business; so that no such

> dividend may be declared as may affect the capital of the corporation."

As will be seen from the context of the said article, its first part specifies the manner in which the net profit resulting from the annual liquidation should be distributed, fixing a certain per cent for the board of directors; another for the general manager; another for the reserve fund, and the remaining 70 per cent to be distributed in equal parts among the shareholders. But it authorizes or empowers the board of directors to collect the value of the shares subscribed to and not fully paid by deducting from the 70 per cent, distributable in equal parts among the shareholders, such amount as may be deemed convenient, to be applied on the payment of the said shares, and not to pay the subscriber until the same are fully paid up. In no other way can the words "Provided, however, that from this seventy per cent dividend the board of directors *may deduct* such amount as it may deem fit for the payment, etc." And this is so clear that in that same article the board of directors is also authorized to create a special emergency fund or extraordinary reserve fund, when, in its judgment, and in case all the shares subscribed to have been fully paid, the same is convenient for the development of the business of the corporation or for meeting any such contingencies as may arise from its operation, applying said 70 per cent of the profit on the payment of the shares that may have not been fully paid, provided that the distributable dividend remaining after the deduction to be made for the creation of the said special emergency fund or extraordinary reserve fund is not less than 10 per cent of the capital actually paid. So that it is discretionary on the part of the board of directors to do whatever is provided in the said article relative to the application of a part of the 70 per cent of the profit distributable in equal parts on the payment of the shares subscribed to and not fully paid, and to the creation of a special emergency fund or extraordinary reserve fund; and the fact itself that said special fund may not be created when the dividend appearing to be distributable, after deducting from the said 70 per cent the amount to be applied on the payment of the unpaid subscriptions, is less than 10 per cent of the capital actually paid, shows that it is the board of directors and not the delinquent subscriber that may and must judge and decide whether or not such value must be paid out of a part of the 70 per cent of the profit distributable in equal parts among the shareholders, as provided in the first part of the said

article. It lies, therefore, within the discretion of the board of directors to make use of such authority.

If the board of directors does not wish to make, or does not make, use of said authority it has two other remedies for accomplishing the same purpose. As was said by this court in the case of Velasco *vs*. Poizat (37 Phil., 802):

> "The first and most special remedy given by the statute consists in permitting the corporation to put up the unpaid stock for sale and dispose of it for the account of the delinquent subscriber. In this case the provisions of sections 38 to 48, inclusive, of the Corporation Law are applicable and must be followed. The other remedy is by action in court, concerning which we find in section 49 the following provision:
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> > " 'Nothing in this Act shall prevent the directors from collecting, by action
> > in any court of proper jurisdiction, the amount due on any unpaid subscription,
> > together with accrued interest and costs and expenses incurred.'
> > "

In the instant case the board of directors of the defendant corporation elected to avail itself of the first of said two remedies, and, complying strictly with the provisions of sections 37 to 49, inclusive, of the aforesaid Corporation Law, which is binding upon it and its stockholders, it being an artificial entity created by virtue of that same law (sec. 2), the board of directors made use of the discretionary power granted to it by that law and declared that payment of plaintiff's subscription to 450 shares which had not been paid by him was due, and that said shares were delinquent, and performed all the other acts subsequent to said declaration that are mentioned in the complaint, as it did not deem it advantageous to the corporation to apply on the payment of said shares, as was authorized by the by-laws, a part of the profit that was, or might have been realized, and was distributable among the

stockholders in equal parts, as to the existence of which profit no allegation is made in the complaint, or to enforce payment of such shares by bringing in court the proper action against the debtor or delinquent stockholder. It is, however, alleged by the appellant that the by-laws of the corporation being of the nature of a contract between it and its stockholders or members, and article 46 of the by-laws of the said corporation providing an operative method for the payment of stack subscriptions continuously until the full amortization thereof, application cannot be made in the present case of the provisions above cited of the Corporation Law for the purposes contemplated by the defendant, as the provision of said article must prevail against that law.

Admitting that the provision of article 46 of the said by-laws may be regarded as a contract between the defendant corporation and its stockholders, yet as it is only to the board of directors of the corporation that said article gives the authority or right to apply on the payment of unpaid subscriptions such amount of the 70 per cent of the profit distributable among the shareholders in equal parts as may be deemed fit, it cannot be maintained that said article has prescribed an operative method for the payment of said subscriptions continuously until their full amortization, or, what would be the same thing, that said article has prescribed that sole and exclusive method for that purpose, for, in the first place, the adoption of that method for the purpose of collecting the value of subscriptions due and unpaid lies, according to said article, within the discretion of the board of directors, that is, it is subject to this condition, and this can in no way be reconciled with the idea of method, which implies something fixed as a rule or permanent standard, and not variable at the will of somebody and according to the circumstances; and, in the second place, in connection with the provision of the said article relative to the aforesaid discretionary power of the board of directors to adopt that method, there is also the discretionary power granted the same board of directors to avail itself, for the same purpose, of either of the two remedies prescribed in sections 38 to 49, inclusive, of the aforecited Corporation Law.

In the instant case, the defendant corporation, through its board of directors, made use of its discretionary power, taking advantage of the first of the two remedies provided by the aforesaid law. On the other hand, the plaintiff has no right whatsoever under the provision of the above cited article 46 of the

said by-laws to prevent the board of directors from following, for that purpose, any other method than that mentioned in the said article, for the very reason that the same does not give the stockholders any right in connection with the determination of the question whether or not there should be deducted from the 70 per cent of the profit distributable among the stockholders such amount as may be deemed fit for the payment of subscriptions due and unpaid. Therefore, it is evident that the defendant corporation has not violated, nor disregarded any right of the plaintiff recognized by the said by-laws, nor exceeded its authority in the discharge of its executive functions, nor abused its discretion when it performed the acts mentioned in the complaint as grounds therefor, and, consequently, the facts therein alleged do not constitute a cause of action.

For the foregoing, the orders appealed from are affirmed, with the costs of both instances against the appellant. So ordered.

Street, Malcolm,
Avanceña, Ostrand, Johns, and *Romualdez, JJ.,* concur.

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