G.R. No. L-6354

**[ G.R. No. L-6354. June 26, 1954 ]**

**EPIFANIO FARRALES, PETITIONER VS. ANTONIO FUENTECILLA, JUSTICE OF THE PEACE OF SAN NARCISO, ZAMBALES, QUIRINO DUMLAO AND JESUS AMON, EX OFICIO PROVINCIAL SHERIFF OF ZAMBALES, RESPONDENTS.**

**D E C I S I O N**

**BAUTISTA ANGELO, J.:**

Epifanio Farrales has come to this court by way of certiorari seeking to set aside the order issued on September 29, 1952 by respondent Justice of the Peace dissolving the preliminary mandatory injunction previously issued by him on the ground that said order is illegal it having been issued without notice and hearing.

On February 16, 1952, Epif anio Farrales, petitioner herein, filed an action for forcible entry before the Justice of the Peace Court of San Narciso, Zambales, relative to certain lands situated in barrio Paete of said municipality against Quirino Dumlao and several other persons.

On February 26, 1952, petitioner filed a motion for the issuance of a writ of preliminary mandatory injunction under article 539 of the new Civil Code, which was granted after due notice and hearing, and as a result, the sheriff placed petitioner in possession of the lands in litigation.

In the meantime, the case was heard on May 3, 6, and 8, 1952, but thereafter further proceedings were discontinued apparently for the reason that respondent Justice of the Peace seldom came to his office or ceased to act in San Narciso, Zambales. Then, suddenly, about five months after the last hearing on the main case, respondent Justice of

the Peace issued an order on September 29, 1952 dissolving the preliminary injunction issued by him on March 25, 1952.

Considering that this order is illegal because it was issued *ex parte* or without giving petitioner an opportunity to be heard, he filed the present petition imputing grave abuse of discretion to respondent Justice of the Peace.

In his answer, respondent Justice of the Peace denies the imputation that he committed certain irregularities in the performance of his official duties and alleges that when he issued the order dissolving the preliminary injunction he merely acted in accordance with the rules of court considering the great damage that would be caused to the defendants and the fact that petitioner can be fully compensated for the damage he may suffer by the counterbond posted by the defendants.

The law governing the power of the court to dissolve a preliminary injunction is section 6, Rule 60, of the Rules of Court. This rule grants the court authority to dissolve a preliminary injunction if in its opinion its continuance may cause great damage to the defendant provided the latter posts a bond in an amount to be fixed by the court, but is silent as to the procedure to be followed in granting the relief. It does not say whether it may be granted *ex parte*, or only after notice and hearing. Apparently, the rule gives to the court ample discretion to act on the matter provided that in doing so the substance of the rule is observed. That such is the case is apparent in a number of cases decided by this court. Thus, it was held that "* * * At any rate, as already stated, the respondent judge was not even required to hear the parties, if the record convinced him that the writ of preliminary injunction should be dissolved. (Ong Su Han *vs.* Gutierrez David,[1] 43 Off. Gaz., 95). Specifically, it has been held that, *in dissolving an injunction* already issued the court cannot be considered as having acted *without jurisdiction or with excess of jurisdiction,* even if the dissolution has been made without previous notice to the adverse party, and without a hearing" (Italics ours) (Caluya *vs.* Ramos,[2] 45 Off. Gaz., No. 5, 2075.) And in case of Clarke *vs.* Phil. Ready Mix Concrete Co. Inc., et al., 88 Phil., 460, this court made a summary of

the ruling on this matter:

> "The issues in the present case may be briefly stated as follows:
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> "(1) May a writ of preliminary injunction granted by a trial court after a hearing, be dissolved upon an *ex parte* application by defendant?
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> "The question involved in the first part has already been passed upon by this court in the case of Caluya *vs.* Ramos, G. R. No. L-1307, 45 Off. Gaz., No. 5, p. 2075, where we said:
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> " '* * * Specifically, it has been held that, *in dissolving an injunction* already issued the court cannot be considered as having acted *without jurisdiction or with excess of jurisdiction,* even if the dissolution has been made without previous notice to the adverse party, and without a hearing.' (Italics ours.)"
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> "Again in the case of Cine Ligaya *vs.* the Court of First Instance of Laguna, et al., 66 Phil., 659, this court held:
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> "* * * Nevertheless, even if a previous notice were required and *even if there had been no hearing on the petition to lift or dissolve the injunction* granted, it cannot be said for that reason that the court dissolving the injunction thus issued, acted *without or in excess of jurisdiction*. * * * The failure to send a notice or to hold a hearing as required by section 169 aforecited of Act No. 190 *is not in any way jurisdictional* so as to invalidate the proceedings of the court on the ground of lack or excess of jurisdiction.'
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> "Also in the case of Jaranillo *vs.* Jacinto et al.,

> 43 Phil., 588, this court held that 'failure to give such notice is merely an irregularity in the proceedings which do not go to the jurisdiction of the court and cannot be corrected by certiorari.'
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> "And,
> in the case of So Chu et al. *vs.* Nepomuceno, Judge of the Court of First Instance of Manila, 29 Phil., 208, it was held that 'where court has jurisdiction over the person and subject matter of the action, a failure to give notice of subsequent steps in the action or proceeding is not jurisdictional and does not render an order without notice void."

It is thus seen that notice and hearing are not necessary in order that the court may act on. a motion for dissolution of an injunction previously issued. The court can act *ex parte* and if it does so it cannot be deemed as having acted without or in excess of its jurisdiction. Such is the predicament of respondent Justice of the Peace. He acted substantially in accordance with the rules of court. Nor can it be said that he acted with abuse of discretion because, according to him, he dissolved the injunction after considering the great damage that would be caused to defendants and the fact that petitioner can be fully compensated for the damage he may suffer by the counter-bond posted by defendants. This appears to be substantiated by the record.

With regard to the claim of petitioner that respondents Justice of the Peace has committed certain irregularities in the performance of his official duties, aside from the fact that such imputation has been denied, we are of the opinion that this is not the place where it should be aired. The matter may be brought to the Judge of the Court of First Instance who has supervision over the Justice of the Peace or to the Secretary of Justice. (Sections 96-97, Judiciary Act of 1948.)

The petition is dismissed, without pronouncement as to costs.

*Paras, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Jugo* and *Reyes, J. B. L., JJ.,* concur.

[1] 76 Phil., 546

[2] 79 Phil., 640

**CONCURRING**

**CONCEPCION, J.:**

Whenever a judicial power is granted, the assumption should be that previous notice and hearing are due to the party who may be adversely affected by its exercise. Otherwise, the action of the court, if taken ex-parte, may constitute a denial of the due process guaranteed in the Bill of Rights.

> "No rule is better established under the due-process-of-law provision of the organic law of the land, than the one which requires notice and an opportunity to be heard before any citizen of the state can be deprived of his rights. That is the rule, whether the action is *in personam* or *in rem*, with the exception that in an action in rent substituted service may be had," (Pennoyer *vs.* Noff., 9 U. S., 714; Kilbourn *vs.* Thompson, 103 U. S., 168.) (Lopez vs Director of Lands, 47 Phil., 23, 32 [Constitution of the Philippines by Tanada and Fernando, Rev. ed., p. 43.]

Said notice and hearing may be dispensed with, however, when a valid act of Congress expressly or clearly so provides, or when otherwise sanctioned by a practice long established under the Common Law, such as that which obtains in connection with the issuance of writ of attachment or preliminary injunction or of a warrant of arrest, or the distrain of property in payment of taxes, or of the suspension of a public officer pending investigation of administrative charges

preferred against him (Cornejo *vs.* Gabriel, 41 Phil., 188, 193-194). It should be noted that, in all of these cases, the *ex parte* action taken seeks, either to preserve the *status quo*, or to prevent that the final judgment, later to be rendered, may be defeated by acts performed, in the meantime, by the party concerned. Thus, the purpose of the *ex parte* warrant of arrest is, apart from placing the accused under the jurisdiction of the court, to prevent him from evading its authority; that of a writ of attachment, o avoid that the judgment, to be rendered in due time, be frustrated by the concealment or fraudulent disposal of defendant's properties; that of distrain of personal property to insure the collection of taxes, by depriving the taxpayer of the opportunity to place his assets beyond the reach of the government; that of suspension of a public officer, pending investigation of the charges against him, to preclude the use of the power and influence of his office to intimidate or eliminate witnesses and other evidence against him some of which may be in the files or records of his own office, that obstructing said investigation or nullifying its purpose and effect. As a consequence, when the suspension is not preventive, but penal or disciplinary in nature, it cannot be imposed or decreed without previous notice and hearing.

Pursuant to section 3 of Rule 60 of the Rules of Court, a writ of preliminary injunction may be issued when, among other things, "the commission or continuance of the act complained of during the litigation would probably work injustice to the plaintiff," or when "the defendant is doing, threatens, or is about to do, or is procuring or suffering to be done, some act probably in violation of the plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual." The dissolution of such writ of preliminary injunction, would, therefore, give the defendant a free hand to *change* the *status quo* and to commit or continue the commission of Acts which would probably "work injustice to the plaintiff" or "render ineffectual" the judgment he may secure in his favor. Justice and equity demands, therefore, that the plaintiff be given, prior thereto, an opportunity, at least, to show that such would be the result of the lifting of the writ.

The necessity of a previous notice and hearing becomes more apparent when we consider that the resulting injury to the plaintiff may not be susceptible of pecuniary estimation or otherwise compensable in terms of money. Besides, even if it were, the bond to be filed by the defendant before the dissolution of the writ might not be sufficient to fully indemnify the,plaintiff. Although the court may order or require—generally, upon motion of the plaintiff, *after* the issuance of the order of dissolution cf the writ—that another bond, for a bigger amount and subject to such additional terms and conditions as may be deemed proper to protect his interests, be filed, the accomplishment of said purpose may then be impossible for, by that time, an injury beyond repair may have already been inflicted, and/or the defendant may no longer be willing or able to comply with said order or to meet said requirement. Accordingly, it is doubtful whether Congress or the Rules of Court could dispense with notice and hearing before the issuance of said order of dissolution, consistently with the due process clause of the Constitution,

At any rate, there is no provision of law or of the Rules of Court authorizing the *ex parte* dissolution of a writ of preliminary injunction. What is more, when the silence of the law on this point is contrasted with the specific grant of power to issue said writ *ex parte* (Rule 60, section 5, Rules of Court), the conclusion seems inevitable that such power was not meant to be given in connection with the dissolution of the writ, for *expressio unios est exclusio alterious*. Indeed, in order that a writ of preliminary injunction could be dissolved, it must appear that "the plaintiff can be fully compensated for such damage as he may suffer." (Section 6, Rule 60, Rules of Court.) This provision indicates clearly, to ray mind, that plaintiff must first be given an opportunity to demonstrate that said condition is not present in his case. Accordingly, I find it difficult to subscribe, without qualification, to the view that a writ of preliminary injunction may freely be dissolved *ex parte*.

In the case at bar, however, the order complained of dissolved, not a writ of preliminary injunction, but a preliminary mandatory injunction, which, instead of preserving things in the condition in

which they were at the time of the commencement of the litigation, sought to *change* the same. Conversely, the order dissolving said preliminary mandatory injunction had the effect of restoring the parties to their status qua at the time of the institution of the case. Hence, the order dissolving the preliminary mandatory injunction played the role of a writ of preliminary injunction, in that it tended to maintain said *status quo*. For this reason, I concur in the result.

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