

**BENJAMIN PANGANIBAN AND MARIA CASTOR,
PLAINTIFFS-APPELLANTS, VS. ARACELI VDA. DE STA. MARIA AND
FEDERICO STO. TOMAS, DEFENDANTS-APPELLEES.**

G.R. No. L-25529. February 22, 1968

Ponente: BENGZON, J.P., J.

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BENGZON, J.P., J.:

The antecedent facts alleged in this appeal from an order of dismissal of the Court of First Instance of Pam-panga, are as follows:

On May 1, 1961, Benjamin Panganiban and Maria Castor entered into a Contract of Lease (Exh. "A" of the Complaint) over a piece of land located in Dulong Ilog, Paligui, Candaba, Pampanga, containing more or less 950,000 square meters.[1]

By letter dated February 5, 1964[2] of the Acting Di-rector of Public Works, Panganiban and Castor were in-formed that they were granted water rights on January 17, 1964 by the Secretary of Public Works, after due hearing and as recommended by the Bureau of Public Works, enabling them to draw water from the Maasim River, otherwise known as the Bahay Pare River, which is adjacent to the above mentioned property. And for this purpose they were autho-rized to construct the necessary structures, including an earth dam.[3] Pursuant to this authority, Panganiban and Castor caused the construction of an earth dam across said river in order to impound sufficient water to enable them to plant and irrigate the plants and crops in said land.

On February 9, 1964, Araceli Vda. de Sta. Maria and Federico Sto. Tomas caused the construction of another earth dam across the Maasim River about a kilometer up-stream from the dam constructed by Panganiban and Castor and adjacent to the latter's property.

Panganiban and Castor on September 8, 1964 filed a complaint for actual, moral and exemplary damages, 6% in-terest thereon, and 20% of the sum due as attorney's fees, alleging that despite their repeated demands Sta. Maria and Sto. Tomas refused and failed to remove said erected dam nor to release any water from said river. The alleged actual damages suffered by Panganiban total P28,984.00.[4]

On September 28, 1964, defendants filed a motion to dismiss, and after its denial, they filed their answer with counterclaim on October 15, 1964. Plaintiffs filed their answer to the counterclaim on October 26, 1964.

On November 3, 1964, plaintiffs filed a request for admission addressed to defendants thru the latter's coun-sel. This was opposed by defendants with general and un-specific denials on November 14, 1964.

The lower court on November 23, 1964 issued an order denying plaintiffs' request for admission and setting the case for hearing on December 29, 1964. On December 8, 1964, plaintiffs filed a motion for reconsideration of said order and for the postponement of the scheduled hear-ing.

On December 14, 1964, the lower court issued an order reconsidering its order of November 23, 1964, and

decree-ing that the request for admission and opposition thereto be retained in the record.

Plaintiffs on January 27, 1965 filed a motion for summary judgment. This was opposed by defendants on February 5, 1965.

On March 16, 1965, the lower court issued an order denying the plaintiffs' motion for summary judgment. Plaintiffs moved to reconsider this order on March 31, 1965, but the lower court denied said motion on April 29, 1965 and set the case for hearing on the merits on May 31, 1965.

Plaintiffs Panganiban and Castor elevated the matter to this Court in a petition for certiorari and prohibition with prayer for preliminary injunction. On May 31, 1965 We dismissed the petition on the ground that appeal in due time was the proper remedy.[5] Plaintiffs' motion for reconsideration in said case was likewise denied by Us.

On July 3, 1965, plaintiffs' counsel, with the conformity of defendants' counsel, moved for the postponement of the hearing scheduled for July 7, 1965 on the ground that he was scheduled to leave for abroad on July 3, 1965 and would not be back until July 10, 1965.

On July 7, 1965, the lower court ordered the dismissal of the complaint as well as defendants' counterclaim for failure to prosecute, without pronouncement as to costs, on the ground that when the case was called in the morning of that date neither the parties nor their respective counsel appeared, notwithstanding notice to them.

Plaintiffs' motion to reconsider on the above order was denied by the lower court in its order of August 3, 1965.

Plaintiffs appealed. Appellants in their brief would raise two points: (1) Did the lower court err in denying plaintiffs' motion for summary judgment? (2) Did the lower court err in dismissing the suit for failure to prosecute?

Appellants cannot properly raise the first point, for their failure to state in their notice of appeal that they are likewise appealing from the order of March 16, 1965 denying their motion for summary judgment.

Section 4, Rule 41 of the Rules of Court provides that: "The notice of appeal shall specify the parties to the appeal; shall designate the judgment or, order or part, thereof, appealed from, and shall specify the court to which appeal is taken." (Underscoring supplied) It is to be noted that the word shall is used thrice, obviously to lend emphasis to the mandatory nature of the provision. And this is as it should be. For otherwise, if the party appealing is free to question on appeal even orders not included in the notice of appeal, the parties and the court a quo would be at a loss in determining which orders are appealed and which are not, for purposes of execution of orders not included in the appeal.

As to the other point, however, plaintiffs-appellants seasonably filed a motion for postponement which was received by the clerk of the lower court four (4) days before the scheduled hearing. Defendants-appellees' counsel agreed to said postponement, as evidenced by his conforme appearing at the foot of said motion.[6] And it was plaintiffs' first motion exclusively for postponement, because their two other motions for postponement, filed on December 8, 1964 and April 23, 1965, were incidental to their request for admission and their motion for summary judgment respectively. Furthermore, said motion for postponement had an impelling reason, plaintiffs' counsel had to go, and did go abroad, in his professional capacity. It was not filed to delay or gain time.

Moreover, it is not entirely the parties' fault that the case was not earlier set for hearing, because the lower court *motu proprio* cancelled the hearing on January 29, 1965 in order to attend the convention of all judges held in the City of Manila. Besides, the plaintiffs-appellants had only one counsel and therefore the absence of their lawyer left them without counsel in the case.

It is true that the allowance or denial of petitions for postponement and the setting aside of orders previously

issued, rest principally upon the sound discretion of the judge to whom they are addressed, but always predicated on the consideration that more than the mere convenience of the courts or of the parties of the case, the ends of justice and fairness would be served thereby.[7] When no substantial rights are affected and the intention to delay is not manifest, the corresponding motion to transfer the hearing having been filed accordingly, it is sound judicial discretion to allow them.[8]

Defendants-appellees, through counsel, having given their conformity to the postponement asked for by the appellants, it is safe to assume that no damage or prejudice would be suffered by them because of said postponement. As a matter of fact, neither they nor their counsel likewise appeared on the date set for trial.

WHEREFORE, the order appealed from is hereby reversed and set aside and the case is remanded to the court a quo for further proceedings. No pronouncement as to costs.

SO ORDERED.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Sanchez, Ruiz Castro, Angeles, and Fernando, JJ., concur.

[1] Record on Appeal, pp. 18-21.

[2] Record on Appeal, pp. 21-23.

[3] Record on Appeal, p. 13.

[4] Record on Appeal, p. 17.

[5] Resolution in L-24567 (Panganiban v. Romero).

[6] Record on Appeal, p. 43.

[7] Camara Vda. de Zubiri v. Zubiri, et al., L-16745, December 17, 1966.

[8] Rexwell Corporation v. Canlas, L-16746, December 30, 1961.

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