

FRUCTUOSO ALQUESA, ET AL., PETITIONERS AND APPELLANTS, VS. BLAS G. CAVADA, JR., JUSTICE OF THE PEACE OF PINAMUNGAHAN, CEBU, AND VENANCIO L. DAGALA, RESPONDENTS AND APPELLEES.*G.R. No. L-16735. October 31, 1961*

Ponente: CONCEPCION, J.

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Appeal from an order of the Court of First Instance of Cebu, which is before us only a question of law being raised by appellants herein.

On July 29, 1957, respondent Venancio L. Dagala filed with the Justice of the Peace Court of Pinamungajan, Cebu, presided over by respondent Bias G. Cavada, Jr., as Justice of the Peace, a complaint for forcible entry (Civil Case No. 22-RP of said court) against Fructuoso Alquesa and the nineteen (19) other persons who are petitioners herein. Judgment was rendered in said Case No. 22-RP, on August 24, 1957, against the twenty (20) defendants therein—petitioners herein—who, on September 3, 1957, filed with said court a motion to set aside the judgment for alleged lack of jurisdiction by reason of "fraud, accident, mistake or excusable negligence", because of which the movants had, allegedly "been deprived unjustly" of their "day in court" (according to the allegations of the petition in this case). Soon later, or on September 10, 1957, said defendants (petitioners herein) withdrew their motion to set aside the judgment, and sought an extension of time within which to appeal therefrom, which was granted by respondent justice of the peace. On the same date, said defendants (petitioners herein) filed a notice of appeal and, after the perfection thereof, respondent justice of the peace forwarded the record of said Case No. 22-RP to the Court of First Instance of Cebu, where it was docketed as Civil Case No. R-5254 thereof.

On October 7, 1957 said defendants (petitioners herein), with the approval of the court of first instance, then presided over by Hon. Jose Rodriguez, Judge, withdrew their aforementioned appeal, and the next day, October 8, 1957, they filed, with the same court of first instance and in the same Case No. R-5254, a petition to set aside the judgment of respondent Justice of the Peace, relying upon the provisions of Rule 38 of the Rules of Court. By an order, dated November 10, 1957, this last petition to set aside was denied by the aforementioned court of first instance, then presided over by Hon. Edmundo S. Piccio, Judge, upon the ground that said Rule is inapplicable to the case, the decision of the Justice of the Peace Court being appealable and an appeal having been actually interposed therefrom, although the appeal was subsequently withdrawn by the aforementioned defendants (petitioners herein). Hence, this appeal by the latter from said order of November 10, 1957, upon the theory that the court of first instance should have set aside the decision of the Justice of the Peace Court, for the same had not acquired jurisdiction over some of petitioners herein, it being claimed that not all of them had been summoned in the Justice of the Peace Court.

The record before us is not sufficient to permit a determination of the truth of this allegation of fact. It is not necessary, however, to pass upon this point, for the order appealed from was based upon a procedural ground, namely, that the relief provided in Rule 38 of the Rules of Court is not available to petitioners herein because the

judgment of the Justice of the Peace Court was appealable, and, in fact, petitioners had appealed therefrom, although, for reasons not stated in the record, they later withdrew the appeal. At any rate, a petition for relief from judgment under said Rule must, pursuant to section 3 thereof, be "accompanied with affidavits showing the fraud, accident, mistake or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be, which he may prove if his petition be granted. In the case at bar, the affidavit attached to the petition for relief dated October 8, 1957, merely states the facts allegedly constituting fraud, accident, mistake or excusable negligence. It says absolutely nothing about "the facts constituting petitioner's good and substantial cause of action or defense".

The case at bar is analogous to that of *Fajardo vs. Bayona*, 98 Phil., 695; 52 Off. Gaz., [4] 1937, in which, speaking thru Mr. Justice Labrador, we held:

"* * * with these principles and provisions in mind one can not fail to understand that in the case at bar the presentation of the petition for relief under Rule 38, * * * should not be allowed petitioner again because he already had the opportunity to prosecute or compel the allowance of his appeal from the judgment * * *. This ruling is supported by competent authority.

'Except where such remedies are cumulative under the governing statutes, a motion to vacate or set aside a judgment will not be entertained when the proper remedy of the party aggrieved if by appeal, error, or certiorari, * * *.' (49 C.J.S. p. 511.)

"The remedy first pursued by petitioner when he tried to have his appeal admitted was a remedy at law. That which he subsequently pursued when he sought relief against the judgment because of excusable negligence was a remedy in equity. It has been held a vicious practice indeed for a party first to pursue a legal remedy and later abandon it and prosecute that in equity (*Mellerio vs. Freeman*, 211 Pa. 202, 60 Atl. 735). There will be no end to litigation were parties allowed to avail of all remedies one after another; As we said the remedy under Rule 38 is to be availed of only in exceptional cases, and where there is other remedy at law, it should not be allowed to be used (*Palomares vs. Jimenez*, supra).

"But there is another potent reason why the appeal must be denied and the other appealed) from affirmed. Appellant *Fajardo* would not profit by the allowance of his appeal, even if his appeal against the order were allowed. His motion for relief is accompanied by an affidavit which counsel gave the title of 'affidavit of merit'. Upon examining this affidavit, one will find that it is not the affidavit of merits that Rule 38 requires. It is an affidavit supporting counsel's excusable negligence, not an affidavit that petitioner *Fajardo* has a meritorious cause of action. As a matter of fact, neither his petition in the court below nor his petition in this Court contains any allegation or claim that he has a good or meritorious cause of action against the respondent. Neither is his complaint attached to his petition in the court below or in this Court. In *Paner vs. Yatco, et al.*, 87 Phil., 271; 48 Off. Gaz., 59, We held thru Mr. Justice Montemayor:

"* * * but when it is very evident as shown by the facts of the case that the granting of the writ would not profit the petitioner to obtain said remedy, for like a mirage it would merely raise false hopes and in the end avail the petitioner nothing, said petition for mandamus will be dismissed.'" (Italics supplied.)

This was a substantial reiteration of our view in *Santos vs. Manila Electric Co.*, G. R. No. L-7735 (December 29, 1955).

Hence, the petition for relief in the case at bar is patently untenable and the order appealed from should be, as it is herein, affirmed, with costs against petitioners-appellants. It is so ordered.

Bengzon, C.J., Padilla, Bautista Angelo, Labrador, Reyes, J.B. L., Paredes, Dizon, and De Leon, JJ., concur.

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