

RUFINO KABILING, PETITIONER, VS. EMILIO PEÑA, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, THE SHERIFF OF MANILA, AND ROSA NITORREDA, RESPONDENTS.

G.R. No. L-1268. September 30, 1947

Ponente: HILADO, J.

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HILADO, J.:

Asserting a better right to occupy stalls Nos. 250 to 253 of the Quinta Market, than respondent Rosa Nitorreda, petitioner Rufino Kabling, as plaintiff in civil case No. 312 of the Court of First Instance of Manila, filed an injunction suit (pet., paragraph 2) against said respondent, as defendant therein, and against the Mayor of Manila and other city officials therein named, concerning said stalls. He prayed for and obtained a writ of preliminary injunction restraining the defendants therein from ejecting him from the said stalls.

After hearing the evidence of both parties, said court, the Honorable Emilio Peña presiding, rendered its decision (Annex A) wherein it adjudged that the therein defendant Rosa Nitorreda was the lawful occupant of the above-mentioned stalls of the Quinta Market and sentenced the therein plaintiff (now petitioner) to pay to said Nitorreda as damages the sum of P5 daily from August 10, 1946, "up to the date he vacates said stalls," with costs. The preliminary injunction theretofore issued was set aside. Although the dispositive part of said decision employed the phrase "lawful occupant" in referring to Nitorreda, and to the stalls above mentioned, it is clear from the context that the court's meaning is that Nitorreda was lawfully entitled to occupy them.

That decision was dated December 11, 1946. Thirteen days thereafter, Nitorreda, through counsel, filed an urgent motion for execution of said judgment (Annex B), to which motion the therein plaintiff, now petitioner, filed his written opposition (Annex C). Judge Peña, by an order dated January 3, 1947, (Annex D) granted the motion and decreed that execution issue in the case.

In his present petition petitioner asks us to annul the order for the issuance of the writ of execution as well as the orders of Judge Peña denying his petition to dismiss the "injunction case" (said case No. 312 of the Court of First Instance of Manila), and for general relief.

Petitioner contends that there was no special reason justifying the immediate execution of the judgment of the Court of First Instance pending the appeal to the Court of Appeals, and in view of the fact that he was willing to post a bond "to answer for whatever damages the respondent, Rosa E. Nitorreda may suffer by reason of the appeal" (Petition, paragraph 5), and in view of Republic Act No. 37 having been enacted and supplemented by Department Order No. 32 of the Department of Finance, petitioner asserts (petition, paragraphs 6-9) that said case No. 312 should have been dismissed, and that the respondent judge Honorable Emilio Peña acted "without and in excess of jurisdiction and with grave abuse of discretion" in denying his petition to dismiss said "injunction case" and in issuing the aforesaid writ of execution.

Petitioner himself calls civil case No. 312 of the Court of First Instance an "injunction case" (petition, paragraph 7 and prayer), and his own evidence tended not to establish a legal and permanent adjudication of the stalls to him,

but merely actual occupancy based upon a sort of provisional or conventional permission of the market master, in which occupancy he wished to be protected through the special remedy of injunction. Consequently, Rule 39, section 4, should be applied. By virtue of this provision, "unless otherwise ordered by the court"—which is not the case here—"a judgment in an action for injunction * * * shall not be stayed after its rendition and before an appeal is taken or during the pendency of appeal."

As for Republic Act No. 37 and Department Order No. 32 of the Department of Finance, as already stated in our decision in *Co Chiong and Lim Chiu Guan vs. Dinglasan* (p. 122, ante), the Secretary of Finance has suspended *motu proprio* the operation of said Department Order, and without it or some other similar order or regulation, Republic Act No. 37 is not susceptible of execution.

For all the foregoing, the petition is hereby dismissed, with costs. So ordered.

Moran, C.J., Paras, Feria, Pablo, Bengzon, Briones, Padilla, and Tuason, JJ., concur.

DISSENTING

PERFECTO, J.:

The order of respondent judge dated January 3, 1943, providing for the issuance of a writ of execution in civil case No. 312 of the Court of First Instance of Manila, *Rufino Kabiling vs. Honorable Valeriano Fugoso et al.*, must be set aside and to said effect the petition must be granted.

On December 11, 1946, respondent judge rendered decision in the case above-mentioned providing as follows:

"In view of all the foregoing, judgment is hereby rendered in favor of the defendant Rosa E. Nitorreda, and against the plaintiff, declaring the former the lawful occupant of stalls Nos. 250-253 of the Quinta Market, and sentencing him to pay her as damages the sum of P5 daily from August 10, 1946 up to the date he vacates said stalls, the costs of the proceedings. The preliminary injunction issued is hereby set aside."

On December 24, 1946, Rosa E. Nitorreda filed an urgent motion for execution alleging:

"That on December 11, 1946, this Honorable Court rendered judgment in the above entitled case sentencing plaintiff to vacate stalls Nos. 250-253 of the Quinta Market and to pay damages and costs;

"That to this date, plaintiff has not perfected his appeal nor served notice of intention to appeal;

"That even if he perfects an appeal, execution of the judgment rendered in the above entitled case shall not be stayed.

"Wherefore, it is respectfully prayed of this Honorable Court to cause the issuance of the corresponding writ of execution."

Petitioner Kabiling objected to the motion alleging the following:

"Comes now the plaintiff thru counsel in the above-entitled case, and in opposing the urgent motion for execution of the decision dated December 11, 1946, unto this Honorable Court respectfully alleges:

"1. The Rule of Court invoked by the movant in his urgent motion for execution requires for special reasons to exist in order that the court in the exercise of its judicial discretion may issue an execution pending the appeal of a case. Such special reasons do not appear in the motion, thus,

" 'The requirement as to special reasons is one the importance of which trial courts must not overlook. If the judgment is executed, and, on appeal, the same is reversed, although there are provisions for restitution,

oftentimes damages may arise which cannot be fully compensated. Accordingly, execution should be granted only upon these considerations and clearly outweighed by superior circumstances demanding urgency, and the above provision requires a statement of those circumstances as a security for their existence.' (Monteverde versus Jaranilla, 60 Phil., 768, cited in Moran's Rules of Court.)

"2. The plaintiff, pending the appeal of this case is willing to file a bond, as fixed by this Honorable Court to answer for whatever damages the appeal might occasion to the defendant, Rosa E. Nitorreda,

"Wherefore, it is respectfully prayed that the urgent motion be denied for lack of merits."

The opposition appears to be well-founded on the authority of section 2 of Rule 39:

"Execution discretionary.—Before the expiration of the time to appeal, execution may issue, in the discretion of the court, on motion of the prevailing party with notice to the adverse party, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the special order shall be included therein. Execution issued before the expiration of the time to appeal may be stayed upon the approval by the court of a sufficient supersedeas bond filed by the appellant, conditioned for the performance of the judgment or order appealed from in case it be affirmed wholly or in part."

Nitorreda's allegation to the effect that Kabiling has not yet perfected his appeal and, even if he perfects an appeal, execution of the judgment shall not be stayed, is not supported by any law, authority, or reason. Therefore, under section 2 of Rule 39, the respondent judge must have denied the motion for the issuance of a writ of execution. Furthermore, the fact that Kabiling expressed his willingness to file a bond to answer for whatever damages the appeal may occasion to Nitorreda, serves to strengthen the opposition to Nitorreda's motion. The filing of said bond is authorized by section 2 of Rule 39. Respondent judge, notwithstanding, issued the following order on January 3, 1947:

"As prayed for by the attorney for Rosa Nitorreda in his motion filed on December 27, 1946, and in accordance with section 4 of Rule 39 of the Rules of Court, let an order of execution issue in this case. So ordered."

On its very face, the order appears to be violative of section 2 of Rule 39, as in said order no reason at all, whether general or special, is advanced in support of the issuance of a writ of execution.

Here there is a clear case of violation of the law. Petitioner Kabiling, the aggrieved party, is entitled to relief. We are of opinion that the relief must not be denied by this court.

For all the foregoing, we vote that the petition should be granted in the sense that the order of respondent judge dated January 3, 1947, should be set aside.

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