

FERMIN JALOVER, PETITIONER, VS. PORFERIO YTORIAGA, CONSOLACION LOPEZ AND HON. VENICIO ESCOLIN, IN HIS CAPACITY AS PRESIDING JUDGE, BRANCH V, COURT OF FIRST INSTANCE OF ILOILO, R...*G.R. No. L-35989. October 28, 1977*

Ponente: CASTRO, C.J.

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This is an original action for certiorari, with prayer for a writ of preliminary injunction, asking this Court to declare null and void the Orders dated August 24, 1972 and November 10, 1972, issued by the respondent Judge in civil case No. 5429 of the Court of First Instance of Iloilo, Branch V. On December 27, 1972, a temporary restraining order was issued by this Court.

Sometime in April, 1960, private respondents Porferio Ytoriaga and Consolacion Lopez filed against Ana Hedriana and petitioner Fermin Jalover a complaint dated April 6, 1960, in the Court of First Instance of Iloilo (Civil Case No. 5429), alleging, inter alia, that they are owners pro indiviso of Lot No. 2255 of the Cadastral Survey of Jaro, covered by TCT No. 6738 and containing an area of 8,153 square meters; that the said parcel of land is bounded on the southwest by the Salog River; that as of January, 1958, by virtue of the effects of the current of the river, there was a gradual increase of the land on its southwestern portion of around 900 square meters; that since before the war, the plaintiffs have been in continuous possession of the increased portion of the land, which, under the principle of alluvion, automatically belongs to them; that sometime in January, 1958, the defendants had the land increase surveyed, placed concrete monuments thereon and took possession thereof, without the knowledge and consent of the plaintiffs; and that the defendants, who destroyed plants standing on the land in question which belong to the plaintiffs, have remained in possession of the land in spite of repeated demands made by the latter for them to return the said possession. The plaintiffs prayed that they be declared the owners of the increased portion of the land, and that the defendants be ordered to vacate the premises and restore their possession to the plaintiffs, to pay the plaintiffs the sum of P147.00 as actual damages, the sum of P300.00 as attorney's fees, and the sum of P200.00 annually from the time the plaintiffs were deprived of possession up to the time the said possession shall have been restored, and to pay the costs of suit.

In his answer dated April 21, 1960, petitioner Fermin Jalover, as a defendant, alleged, inter alia, that his mother and co-defendant, Ana Hedriana, died on July 21, 1959; that the land in question was formerly a river bed, which, less than 10 years before, was abandoned through the natural change in the course of the waters; that the said land rightfully belongs to the defendant as sole heir of his mother, who owned the land pursuant to Article 461 of the Civil Code of the Philippines; that it is not true that the plaintiffs were ever in possession of the land, or that they had made demands upon the defendant to vacate the land; that the plaintiffs had filed an ejectment suit against the defendant with the Municipal Court of Iloilo City on March 12, 1958, and the same was decided against the plaintiffs; and that by virtue of the malicious filing of the complaint, the defendant suffered damages and had to hire the services of counsel. The defendant prayed the court to dismiss the complaint with costs against the

plaintiffs and to order the plaintiffs to pay the defendant the sum of P1,000.00 as damages and the sum of P300.00 by way of attorney's fees.

Issues having been joined, the case was set for trial. On September 4, 1963, private respondents, as plaintiffs, formally offered documentary evidence, and upon the admission thereof, they rested their case; whereupon, continuation of trial was ordered transferred until further assignment. Trial was postponed many times stretching to a period of more than 6 years, until January 26, 1970, when the case was called for trial, and then Presiding Judge Ramon Blanco dismissed the case, for failure of private respondents to appear in court, in an order which reads:

"The complaint was filed on April 6, 1960. Up to the present the trial of the case has not been finished. The counsel of record for the plaintiff is Atty. Amado Atol who since several years ago has been appointed Chief of the Secret Service of the Iloilo City Police Department. Plaintiff did not take the necessary steps to engage the service of another lawyer in lieu of Atty. Atol.

"WHEREFORE, for failure to prosecute this case is dismissed without pronouncement as to costs."

Two years later, or on January 17, 1972, private respondents' lawyer, Atty. Amado B. Atol, filed a motion for reconsideration of the order dated January 26, 1970 dismissing the case, alleging that the said respondents did not fail to prosecute because, during the times that the case was set for hearing, at least one of said respondents was always present, and the record would show that the transfers of hearing were all made at the instance of petitioner or his counsel; and, moreover, private respondents had already finished presenting their evidence. Petitioner opposed the motion on the ground that the order of dismissal issued two years before was an adjudication on the merits and had long become final. On June 23, 1972, respondent Judge Venicio Escolin, who succeeded Judge Blanco in Branch V, issued an order denying the motion for reconsideration on the ground that the order of dismissal had become final long ago and was beyond the court's power to amend or change.

Private respondents then filed a Petition for Relief from Judgment dated July 10, 1972, claiming that the order of dismissal dated January 26, 1970 was void because of lack of due process and for having been obtained thru fraud, for the petitioner had mis-represented to the court the status of the case by making Judge Blanco -- who was not the Presiding Judge when private respondents presented their evidence and rested their case in 1963 -- believe that trial had not even begun. Petitioner opposed the petition for relief, contending that private respondents were served a copy of the order of dismissal on February 5, 1970, and, therefore, pursuant to Section 3, Rule 38 of the Revised Rules of Court, the petition for relief should have been filed within 60 days from February 5, 1970, and within 6 months from January 26, 1970, when the order was issued; hence, the filing of the petition was beyond the reglementary period.

The petition for relief was given due course, and on August 24, 1972, respondent Judge issued an order setting aside the orders dated January 26, 1970 and June 23, 1972, and setting the continuation of the trial for September 15, 1972. The reasons stated by respondent Judge in support of this order are: (1) the record shows that while respondent Porferio Ytoriaga was furnished with a copy of the dismissal order dated January 26, 1970, his counsel, Atty. Atol, was never served with a copy thereof, hence, pursuant to the settled rule that where a party appears by attorney, a notice to the client and not to his attorney is not a notice in law, the said order of dismissal never became final; and (2) the order dated January 26, 1970 was without legal basis, considering that private respondents had already presented their evidence and rested their case on September 4, 1963, and the hearing scheduled for January 26, 1970 was for the reception of petitioner's evidence; consequently, the non-appearance of private respondents and their counsel at the said hearing could not mean failure to prosecute on their part, but may at worst only be construed as a waiver on private respondents' part of the right to cross-examine the witnesses whom petitioner might present and to object to the admissibility of petitioner's evidence. Petitioner, in a

motion dated October 16, 1972, moved for a reconsideration of the order dated August 24, 1972, on the grounds that the court had full authority to issue the order of dismissal, and that the said order, which had long become final, was beyond the court's power to reconsider. On November 10, 1972, respondent Judge issued an order denying the motion for reconsideration and setting the continuation of trial for December 12, 1972.

Hence, the present recourse by petitioner.

The main thrust of the petition is that respondent Judge acted without or in excess of jurisdiction or with grave abuse of discretion in setting aside the orders dated January 26, 1970 and June 23, 1972, because the said orders have long become final and executory, hence, may no longer be disturbed.

It is uncontroverted that the order of January 26, 1970, dismissing the case for private respondents' "failure to prosecute," was served upon private respondents themselves, and not upon their attorney of record, Atty. Amado B. Atol, and that there was no court order directing that the court's processes, particularly the order of January 26, 1970, should be served directly upon private respondents. It is settled that when a party is represented by counsel, notice should be made upon the counsel, and notice upon the party himself is not considered notice in law unless service upon the party is ordered by the court.[1] The term "every written notice" used in Section 2 of Rule 13 includes notice of decisions or orders.[2] Private respondents' counsel of record not having been served with notice of the order dismissing the case, the said order did not become final.

Petitioner argues that since private respondents' counsel of record, Atty. Atol, had been appointed Chief of the Secret Service of the Iloilo City Police Department, he was not anymore allowed to practice law, hence, private respondents being no longer represented by counsel, notice to them should be deemed legally effective. The argument is not valid, for it fails to consider the need of observing a legal formality before a counsel of record may be considered relieved of his responsibility as such counsel on account of withdrawal. A lawyer's withdrawal as counsel must be made in a formal petition filed in the case, and where no such petition has been accomplished, notice of judgment rendered in the case served on the counsel of record is, for all legal purposes, notice to the client, the date of receipt of which is considered the starting point from which the period of appeal prescribed by law shall begin to run.[3] Not having withdrawn formally as counsel in the case, nor having been substituted by his clients with another lawyer, or dismissed as such counsel, Atty. Atol was, for all legal purposes, private respondents' attorney upon whom the court's processes should have been served.

It will also be noted that, as found by respondent Judge, private respondents, as plaintiffs, adduced their evidence and rested their case on September 4, 1963, or more than six years before the dismissal of the case on January 26, 1970. It was, therefore, the turn of petitioner, as defendant, to present his evidence. In the premises, private respondents could not possibly have failed to prosecute; they were already past the stage where they could still be charged with such failure. As correctly held by respondent Judge, private respondents' absence at the hearing scheduled on January 26, 1970 "can only be construed as a waiver on their part to cross-examine the witnesses that defendants might present at the continuation of trial and to object to the admissibility of the latter's evidence." The right to cross-examine petitioner's witnesses and/or object to his evidence is a right that belongs to private respondents which they can certainly waive. Such waiver could be nothing more than the "intentional relinquishment of a known right,"[4] and, as such, should not have been taken against private respondents.

To dismiss the case after private respondents had submitted their evidence and rested their case, would not only be to hold said respondents accountable for waiving a right, but also to deny them one of the cardinal primary rights of a litigant, which is, corollary to the right to adduce evidence, the right to have the said evidence considered by the court.[5] The dismissal of the case for failure to prosecute, when in truth private respondents had already presented their evidence and rested their case, and, therefore, had duly prosecuted their case, would in

effect mean a total disregard by the court of evidence presented by a party in the regular course of trial and now forming part of the record. The ends of justice would be better served if, in its deliberative function, the court would consider the said evidence together with the evidence to be adduced by petitioner.

However, we are of the view that relief from judgment under Rule 38 of the Revised Rules of Court is not the appropriate remedy. A petition for relief is available only if the judgment or order complained of has already become final and executory;^[6] but here, as earlier noted, the order of January 26, 1970 never attained finality for the reason that notice thereof was not served upon private respondents' counsel of record. The petition for relief may nevertheless be considered as a second motion for reconsideration or a motion for new trial based on fraud and lack of procedural due process.

Under the circumstances of the case, the issuance of the orders now complained of cannot be said to have been characterized with abuse of discretion.

ACCORDINGLY, the instant petition is denied. The temporary restraining order issued by this Court on December 27, 1972 is hereby dissolved. No costs.

Fernando, Antonio, Concepcion, Jr., and Santos, JJ., concur.

Barredo, J., concurs in a separate opinion.

Aquino, J., in the result.

[1] Rule 13, Section 2, Revised Rules of Court; McGrath vs. Collector of Internal Revenue, et al., L-12721, February 28, 1961, 1 SCRA 639, 643; Elli, et al. vs. Ditan, et al., L-17444, June 30, 1962, 5 SCRA 503, 506; J.M. Javier Logging Corporation vs. Mardo, etc., et al., L-28188, August 27, 1968, 24 SCRA 776, 778-779.

[2] Notor vs. Daza, et al., 76 Phil. 850; Chainani vs. Tancinco, etc., et al., 90 Phil. 862, 864.

[3] Damaso, et al. vs. Arrieta, etc., et al., L-18879, January 31, 1963, citing Baquiran vs. CA, et al., L-14551, July 31, 1961.

[4] Castro vs. Del Rosario, etc., et al., L-17915, January 30, 1967, 19 SCRA 196, 203.

[5] Caltex Filipino Managers and Supervisors Association vs. CIR, et al., L-30632-33, April 11, 1972, 44 SCRA 350, 366-367, citing Ang Tibay vs. CIR, et al., 69 Phil. 635; Edwards vs. McCoy, 22 Phil. 598.

[6] Anuran vs. Aquino, et al., 38 Phil. 29; Veluz vs. JP of Sariaya, etc., et al., 42 Phil. 557, 563; Punzalan vs. Papica, et al., L-13804, February 29, 1960.

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CONCURRING OPINION

BARREDO, J.:

I concur and I am writing this separate concurring opinion only to make more patent and to stress why I believe the order of dismissal had not yet become final when the trial court ordered the reopening of the case.

I fully agree with the holding in the main opinion that the dismissal of respondents' case ordered by Judge Blanco on January 26, 1970 was legally erroneous. Indeed, to my mind, it constituted grave abuse of discretion, and the contention of respondents that the situation on hand had been misrepresented by counsel for petitioner only makes it even more patent that due care was not exercised in the preparation of said order. Such being the case, there is ample warrant to disregard procedural technicalities that might stand in the way of the complete setting aside thereof to give way to substantial justice.

It is not disputed that Atty. Amado B. Atol, counsel for plaintiffs - the herein respondents - was not served with notice of such order of dismissal. Accordingly, when he filed his motion for reconsideration on January 17, 1972, the running of the period for the finality of that order had not yet started. This motion was denied on June 23, 1972. As there is no showing when Atty. Atol received copy of the order of denial, the least that can be said in his favor is that when he filed his so-called petition for relief on July 10, 1972, he still had not less than thirteen (13) days within which to perfect an appeal. Now, assuming that his petition for relief, not being the proper remedy - as held in the main opinion, which view I am also fully in accord with - should be deemed a second motion for reconsideration, the question that would arise would be whether or not such a second motion for reconsideration could be filed.

In this connection, it is to be noted that Atty. Atol's first motion for reconsideration was based on the sole ground then apparent, namely, that the order of dismissal was improper, since plaintiffs could not be considered as having failed to prosecute their case, it appearing that they had already closed their evidence and, therefore, their absence at the resumption of the trial for the reception of the evidence of the defendants could signify no more than they had waived their right to contest the admissibility of the evidence presented by said defendants. But the court, in its order of June 23, 1972, denied said first motion on a ground which had nothing to do with the issue raised in the motion. Such being the case, it was but fair and proper for the plaintiffs to be allowed to move to reconsider the order of denial before taking any remedy against it in a higher court with a view to giving the trial court an opportunity to correct itself on the new matter treated in its order. In a sense, therefore, respondents' petition for relief which the Court is treating as a second motion for reconsideration is allowable under the rules and had the effect of suspending the respondents' period to appeal. Thus, at the time the trial court gave due course to the petition for relief and granted the same on August 24, 1972 it acted within its jurisdiction.

And inasmuch as, as I have stated at the outset, there can be no doubt as to the right of respondents to the nullification of the dismissal order of January 26, 1970 as well as the subsequent order of June 23, 1972, it little matters that the trial court's order of August 24, 1972 is premised on the assumption that what was being acted upon is a petition for relief instead of on a second motion for reconsideration. What is important and decisive is that the reopening was done within the period for finality of the order of dismissal and before the trial court had lost jurisdiction over the same. The mistake of respondents in filing the wrong remedy is a matter of form which under the circumstances of this particular case could not affect the efficacy of the actual relief sought.

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