

**DETECTIVE & PROTECTIVE BUREAU, INC., PETITIONER, VS.
THE HONORABLE GAUDENCIO CLORIBEL, IN HIS CAPACITY AS
PRESIDING JUDGE OF BRANCH VI, COURT OF FIRST INSTANCE OF
MANILA, AND FA...**

G.R. No. L-23428. November 29, 1968

Ponente: ZALDIVAR, J.

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ZALDIVAR, J.:

The complaint, in Civil Case No. 56949 of the Court of First Instance of Manila, dated May 4, 1964, filed by Detective and Protective Bureau, Inc., therein plaintiff (petitioner herein) against Fausto S. Alberto, therein defendant (respondent herein), for accounting with preliminary injunction and receivership, alleged that plaintiff was a corporation duly organized and existing under the laws of the Philippines; that defendant was managing director of plaintiff corporation from 1952 until January 14, 1964; that in June 1963, defendant illegally seized and took control of all the assets as well as the books, records, vouchers and receipts of the corporation from the accountant-cashier, concealed them illegally and refused to allow any member of the corporation to see and examine the same; that on January 14, 1964, the stockholders, in a meeting, removed defendant as managing director and elected Jose de la Rosa in his stead; that defendant not only had refused to vacate his office and to deliver the assets and books to Jose de la Rosa, but also continued to perform unauthorized acts for and in behalf of plaintiff corporation; that defendant had been required to submit a financial statement and to render an accounting of his administration from 1952 but defendant has failed to do so; that defendant, contrary to a resolution adopted by the Board of Directors on November 24, 1963, had been illegally disposing of corporate funds; that de-fendant, unless immediately restrained ex-parte, would continue discharging the functions of managing director; and that it was necessary to appoint a receiver to take charge of the assets and receive the income of the corporation. Plaintiff prayed that a preliminary injunction ex-parte be issued restraining defendant from exercising the functions of managing director and from disbursing and disposing of its funds; that Jose M. Barredo be appointed receiver; that, after judgment, the injunction be made permanent and defendant be ordered to render an accounting.

Herein respondent Judge, the Honorable Gaudencio Cloribel, set for hearing plaintiff's prayer for ancillary relief and required the parties to submit their respective memoranda. On June 18, 1964, respondent Judge granted the writ of preliminary injunction prayed for, conditioned upon plaintiff's filing a bond of P5,000.00. Plaintiff filed the bond, but while the same was pending approval defendant Fausto S. Alberto filed, on July 1, 1964, a motion to admit a counter-bond for the purpose of lifting the order granting the writ of preliminary injunction. In spite of the opposition filed by plaintiff, respondent Judge issued, on August 5, 1964, an order admitting the counter-bond and setting aside the writ of preli-minary injunction.

On the belief that the order approving the counter-bond and lifting the writ of preliminary injunction was contrary to law and the act of respondent Judge constituted a grave abuse of discretion, and that there was no plain, speedy and adequate remedy available to it, plaintiff filed with this Court the instant petition for certiorari, praying that a

writ of preliminary injunction enjoining defendant Fausto S. Alberto from exercising the functions of managing director be issued, and that the order dated August 5, 1964 of respondent Judge approving the counter-bond and lifting the writ of preliminary injunction he had previously issued be set aside and declared null and void. This Court gave due course to the petition but did not issue a preliminary injunction.

In his answer, now respondent Fausto S. Alberto traversed the material allegations of the petition, justified the order complained of, and prayed for the dismissal of the petition.

From the pleadings, it appears that the only issue to be resolved is whether the order of respondent Judge dated August 5, 1964, admitting and approving the counter-bond of P5,000 and setting aside the writ of preliminary injunction granted in his order dated June 18, 1964, was issued contrary to law and with grave abuse of discretion.

Now petitioner contends that the setting aside of the order granting the writ was contrary to law and was done with a grave abuse of discretion, because: (1) the motion to admit defendant's counter-bond was not supported by affidavits showing why the counter-bond should be admitted, as required by Section 6 of Rule 58; (2) the preliminary injunction was not issued ex-parte but after hearing, and the admission of the counter-bond rendered said writ ineffective; (3) the writ was granted in accordance with Rule 58 of the Rules of Court and established precedents; (4) public interest required that the writ be not set aside because respondent had arrogated unto himself all the powers of petitioning corporation, to the irreparable damage of the corporation; and that (5) the counter-bond could not compensate petitioner's damage.

1. The first reason given by petitioner in support of its contention that the dissolution of the writ of preliminary injunction was contrary to law is that the motion to admit respondent's counter-bond for the dissolution of the writ was not supported by affidavits as required by section 6 of Rule 58 of the Rules of Court. The controverted motion, however, does not appear in the record. However, the record shows that respondent Alberto had filed a verified answer to the complaint and a verified opposition to the issuance of the writ of preliminary injunction.

Regarding the necessity of verification of the motion for dissolution of a writ of preliminary injunction, this Court has ruled that the requirement of verification is not absolute but is dependent on the circumstances obtaining in a particular case. In the case of *Sy Sam Bio, et al. vs. Barrios and Buyson Lampa*,^[1] the only question raised was whether the respondent Judge exceeded his jurisdiction and abused his discretion in setting aside an order directing the issuance of a writ of preliminary injunction. In maintaining the affirmative, petitioners in that case alleged that the questioned order was issued in violation of the provisions of Section 169 of Act 190 (which is one of the sources of Sec. 6 of Rule 58 of the revised Rules of Court) inasmuch as the Judge set aside said order and directed the dissolution of the preliminary injunction without any formal petition of the parties and without having followed the procedure prescribed by the statute. There was, however, a verbal application for the dissolution of the writ, based upon the ground of the insufficiency of the complaint which was the basis of the application for the issuance of said writ of preliminary injunction. This Court said:

"Section 169 of Act 190 does not prescribe the manner of filing the application to annul or modify a writ of preliminary injunction. It simply states that if a temporary injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice to the adverse party, to the judge who granted the injunction, or to the judge of the court of which the action was brought, to dissolve or modify the same."

On the strength of the decision in the above-cited case, this Court in *Caluya, et al. vs. Ramos, et al.*,^[2] said:

"Petitioners' criticism that the motion to dissolve filed by the defendants in Civil Case No. 4634 was not verified, is also groundless inasmuch as even an indirect verbal application for the dissolution of an ex parte order of preliminary injunction has been held to be a sufficient compliance with the provisions of section 6 of Rule 60 (Moran, Comments on the Rules of Court, Second Edition, Vol. II, p. 65, citing the case of *Sy Yam*

Bio v. Barrios, etc. 63 Phil. 206), the obvious reason being that said rule does not prescribe the form by which an application for the dissolution or modification of an order of preliminary injunction should be presented."

If according to the above rulings, Section 6 of Rule 60 (now sec. 6, Rule 58) of the Rules of Court did not require any form for the application for the dissolution of the writ of preliminary injunction, then respondent Fausto Alberto's motion to lift the preliminary injunction in the court below need not be verified, and much less must the motion be supported by affidavits, as urged by petitioner.

However, in Canlas, et al. vs. Aquino, et al.,[3] this Court ruled that a motion for the dissolution of a writ of preliminary injunction should be verified. In that case, respondent Tayag filed an unverified motion for the dissolution of a writ of preliminary injunction, alleging that the same "would work great damage to the defendant who had already spent a considerable sum of money" and that petitioners "can be fully compensated for any damages that they may suffer." The court granted the motion and dissolved the preliminary injunction. In an original action for a writ of certiorari filed with this Court to annul said order, this Court remarked in part:

"Petitioners herein are entitled to the writ prayed for. The motion of respondent Tayag for the dissolution of the writ of preliminary injunction issued on October 22, 1959, was unverified x x x"

From the precedents quoted above, as well as from the terminology of Section 6 of Rule 58 of the new Rules of Court, it is evident that whether the application for the dissolution of the writ of preliminary injunction must be verified or not depends upon the ground upon which such application is based. If the application is based on the insufficiency of the complaint, the motion need not be verified. If the motion is based on the ground that the injunction would cause great damage to defendant while the plaintiff can be fully compensated for such damages as he may suffer, the motion should be verified.

In the instant case, it is alleged by petitioner that the motion for the dissolution of the writ of preliminary injunction was not verified. This allegation was not denied in the answer. But because said motion does not appear in the record of the case now before this Court, We cannot determine what are the grounds for the dissolution that are alleged therein, and so We cannot rule on whether the motion should have been verified or not. This Court, therefore, has to rely on the order of respondent Judge, dated August 5, 1964, which states that "the filing of the counter-bond is in accordance with law." Consequently, the first ground alleged by petitioner must be brushed aside.

2. The second and third reasons alleged by petitioner in its petition for certiorari assume that a preliminary injunction issued after hearing and in accordance with Rule 58 cannot be set aside. This contention is untenable. The provision of Section 6 of Rule 58 that "the injunction may be refused, or, if granted ex parte, may be dissolved" cannot be construed as putting beyond the reach of the court the dissolution of an injunction which was granted after hearing. The reason is because a writ of preliminary injunction is an interlocutory order, and as such it is always under the control of the court before final judgment. Thus, in Caluya, et al. vs. Ramos, et al.,[4] this Court said:

"The first contention of petitioners is that, as said injunction was issued after a hearing, the same cannot be dissolved, especially on the strength of an unverified motion for dissolution and in the absence of proper evidence to support it. Reliance is placed on Section 6 of Rule 60 of the Rules of Court which provides that 'the injunction may be reduced, or, if granted ex parte, may be dissolved, thereby arguing that if an injunction is not issued ex parte the same cannot be dissolved. The contention is clearly erroneous. Although said section prescribes the grounds for objecting to, or for moving, the dissolution of, a preliminary injunction prior to its issuance or after its granting ex parte, it does not thereby outlaw a dissolution if the injunction has been issued after a hearing. This is to be so, because a writ of preliminary injunction is an interlocutory order which is always under the control of the court before final judgment (Manila Electric Company vs. Artiaga and Green, 50 Phil. 144, 147)."

This Court has also ruled that the dissolution of a writ of preliminary injunction issued after hearing, even if the dissolution is ordered without giving the other party an opportunity to be heard, does not constitute an abuse of discretion and may be cured not by certiorari but by appeal. In *Clarke vs. Philippine Ready Mix Concrete Co., Inc., et al.*,^[5] one of the issues presented was whether a writ of preliminary injunction granted the plaintiff by a trial court after hearing, might be dissolved upon an ex parte application by the defendant, and this Court ruled that:

"The action of a trial court in dissolving a writ of preliminary injunction already issued after hearing, without giving petitioner an opportunity to be heard, does not constitute lack or excess of jurisdiction or an abuse of discretion, and any irregularity committed by the trial court on this score may be cured not by certiorari but by appeal."

3. The fourth reason alleged by petitioner in support of its stand is that public interest demanded that the writ enjoining respondent Fausto Alberto from exercising the functions of managing director be maintained. Petitioner contended that respondent Alberto had arrogated to himself the powers of the Board of Directors of the corporation because he refused to vacate the office and surrender the same to Jose de la Rosa who had been elected managing director by the Board to succeed him. This assertion, however, was disputed by respondent Alberto who stated that Jose de la Rosa could not be elected managing director because he did not own any stock in the corporation.

There is in the record no showing that Jose de la Rosa owned a share of stock in the corporation. If he did not own any share of stock, certainly he could not be a director pursuant to the mandatory provision of Section 30 of the Corporation Law, which in part provides:

"Sec. 30. Every director must own in his own right at least one share of the capital stock of the stock corporation of which he is a director, which stock shall stand in his name on the books of the corporation. x x x"

If he could not be a director, he could also not be a managing director of the corporation, pursuant to Article V, Section 3 of the By-Laws of the Corporation which provides that:

"The manager shall be elected by the Board of Directors from among its members. x x x" (Record, p. 48)

If the managing director-elect was not qualified to become managing director, respondent Fausto Alberto could not be compelled to vacate his office and cede the same to the managing director-elect because the by-laws of the corporation provides in Article IV, Section 1 that "Directors shall serve until the election and qualification of their duly qualified successor."

4. The fifth reason alleged by herein petitioner in support of its contention that respondent Judge gravely abused his discretion when he lifted the preliminary injunction upon the filing of the counter-bond was that said counter-bond could not compensate for the irreparable damage that the corporation would suffer by reason of the continuance of respondent Fausto Alberto as managing director of the corporation. Respondent Alberto, on the contrary, contended that he really was the owner of the controlling interest in the business carried on in the name of the petitioner, having invested therein a total of P57,727.29 as against the sum of P4,000 only invested by one other director, Jose M. Barredo. We find that there was a question as to who own the controlling interest in the corporation. Where ownership is in dispute, the party in control or possession of the disputed interest is presumed to have the better right until the contrary is adjudged, and hence that party should not be deprived of the control or possession until the court is prepared to adjudicate the controverted right in favor of the other party.^[6]

Should it be the truth that respondent Alberto is the controlling stockholder, then the damages said respondent would suffer would be the same, if not more, as the damages that the corporation would suffer if the injunction

were maintained. If the bond of P5,000 filed by petitioner for the injunction would be sufficient to answer for the damages that would be suffered by respondent Alberto by reason of the injunction, there seems to be no reason why the same amount would not be sufficient to answer for the damages that might be suffered by the petitioning corporation by reason of the lifting of the injunction. The following ruling of this Court has a persuasive application in this case:

"The rule that a court should not, by means of a preliminary injunction, transfer property in litigation from the possession of one party to another is more particularly applicable where the legal title is in dispute and the party having possession asserts ownership in himself." [7]

Let it be stated, in relation to all the reasons given by petitioner, that it is a settled rule that the issuance of the writ of preliminary injunction as an ancillary or preventive remedy to secure the rights of a party in a pending case is entirely within the discretion of the court taking cognizance of the case -- the only limitation being that this discretion should be exercised based upon the grounds and in the manner provided by law, [8] and it is equally well settled that a wide latitude is given under Section 7 of Rule 58 of the Rules of Court to the trial court to modify or dissolve the injunction as justice may require. The court which is to exercise that discretion is the trial court, not the appellate court. [9] The exercise of sound judicial discretion by the lower court in injunctive matters should not be interfered with except in cases of manifest abuse. [10] In the instant case, We find that petitioner failed to show manifest abuse of discretion by respondent Judge in setting aside the writ of preliminary injunction.

There is, however, one vital reason why the instant petition for certiorari should be denied. And it is, that from the order dissolving the writ of preliminary injunction, the petitioner has gone directly to this Court without giving the respondent Judge (or trial court) a chance or opportunity to correct his error, if any, in an appropriate motion for reconsideration. An omission to comply with this procedural requirement justifies a denial of the writ applied for. [11]

The instant case is not one of the exceptions in the application of this rule, which are: where the question of jurisdiction has been squarely raised, argued before, submitted to, and met and decided by the respondent court; where the questioned order is a patent nullity; and where there is a deprivation of the petitioner's fundamental right to due process. [12]

It being our considered view that respondent Judge had not committed grave abuse of discretion in issuing the order dated August 5, 1964 lifting the writ of preliminary injunction which had previously been granted in the order dated June 18, 1964, and the herein petition for certiorari having been filed without previously complying with a well settled procedural requirement, there is no alternative for this Court but to order its dismissal.

WHEREFORE, the instant petition for certiorari with preliminary injunction is dismissed, with costs against the petitioner.

SO ORDERED.

Concepcion, C.J., Reyes, Dizon, Makalintal, Sanchez, Castro, Fernando, and Capistrano, JJ., concur.

[1] 63 Phil. 206.

[2] 79 Phil. 640, 643.

[3] L-16815, July 24, 1961.

[4] 79 Phil. 640, 642-643.

[5] 88 Phil. 460.

[6] Gordillo, et al. vs. Del Rosario, et al., 39 Phil. 829, 836.

[7] Gordillo, et al. vs. Del Rosario, et al., March 28, 1919, 39 Phil. 829; Rodulfa vs. Alfonso, et al., 79 Phil. 225, 231.

[8] Agno River Gold Dredging Co., Inc. vs. De Leon, et al., 61 Phil. 190.

[9] North Negros Co., Inc. vs. Hidalgo, 63 Phil. 664.

[10] Rodulfa v. Alfonso, *supra*; North Negros Sugar Co., vs. Hidalgo, *supra*.

[11] Herrera v. Barreto, et al., Phil. 245; Uy Chu v. Ibañez, et al., 83 Phil. 104; Ricafort v. Hon. Duran, 54 O.G. 2539; Cueto v. Ortiz, L-11555, May 31, 1960; Pagkakaisa Samahang Manggawa ng San Miguel Brewery v. Enriquez, L-12999, July 26, 1960; Maritime Company of the Philippines (MCP), et al. v. Paredes, et al., L-24811, March 3, 1967.

[12] Moran, Comments on the Rules of Court, 1963 ed., Vol. III, p. 154.

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