

MAGIN VELEZ AND LUCY VELEZ, PETITIONERS, VS. COURT OF APPEALS, (THROUGH ITS SPECIAL FIFTH DIVISION COMPOSED OF EDMUNDO PICCIO, HERMOGENES CONCEPCION, JR., AND ANTONIO CAÑIZARES,...*G.R. No. L-24703. July 31, 1970*

Ponente: MAKALINTAL, J.

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This present special civil action for certiorari, prohibition and mandamus is directed against certain resolutions of the Court of Appeals in CA - G. R. No. 35867-R, in connection with proceedings in the Court of First Instance of Cebu after judgment was rendered in its Civil Case No. 7950. That case, instituted by the spouses Magin and Lucy Velez, now petitioners, against Uldarico Bacay, now one of the respondents, the Social Security System and the Home Financing Com-mission, was for rescission of a deed of absolute sale of a house and lot, with assumption of mortgage, executed by the said spouses in favor of Bacay on January 15, 1962. The judgment, rendered on February 25, 1965, declared the sale with assumption of mortgage resolved and rescinded and, among other dispositions, ordered Bacay to make certain money payments to the plaintiffs and to restore to them the possession of the property subject of the sale. At the same time the cross-claims of the Social Security System and the Home Financing Commission against their co-defendant Bacay were dismissed.

Bacay received a copy of the decision on March 2, 1965. On the following March 31 he filed a notice of appeal and a record on appeal, consideration of which was, upon his request, set for April 15, 1965. On May 12, 1965, however, upon motion of the plaintiffs the Court of First Instance disapproved the record on appeal on the ground that the appeal bond, which had been filed only on April 26, 1965, was out of time. Bacay moved to reconsider but was turned down; and on May 18, 1965, upon motion of the plaintiffs the court ordered execution. The corresponding writ was issued on May 25, 1965; Bacay moved on the same date that it be quashed; and the plain-tiffs in turn moved that Bacay be declared in contempt of court.

On June 4, 1965 both motions were resolved: the motion to quash was denied and Bacay was ordered "to vacate the house and lot in question... and deliver the possession of the same to the plaintiffs through the intervention of the Sheriff within a period of five days from today, under pain of contempt of court and arrest and confinement in jail until he complies."

On June 5, 1965 Bacay filed a notice of appeal, to the Court of Appeals from the aforesaid order of June 4, and asked the trial court to fix a bond for the stay of its execution.

In the meantime - on June 1, 1965 - Bacay filed a petition for relief from the order of May 12 denying his appeal from the decision of February 25, 1965. And on June 8 he filed a special civil action for certiorari and prohibition in the Court of Appeals against the Velez spouses, the presiding Judge of the trial court (Hon. Modesto R. Ramolete) and the sheriff of the City of Cebu, praying that the order of June 4, 1965 be set aside; that execution of the judgment be stayed; that the respondents be enjoined not to disturb the petitioner's possession of the party in

question; and that the trial court be ordered to act on the petition for relief. It appears, however, that this petition for relief was denied in an order dated June 7, 1965, although Bacay had not yet been notified of the denial when he went on certiorari and prohibition to the Court of Appeals.

On June 9, 1965 the sheriff of the City of Cebu implemented the writ of execution and delivered the pro-property to the Velez spouses. This was at 1:45 in the afternoon. Meanwhile Bacay's petition for certiorari and prohibition had been given due course in the Court of Appeals; and pursuant to the prayer for preliminary injunction therein the said Court issued the writ ex-parte, also on June 9, 1965, of which Judge Ramolete was notified at 9:10 and the sheriff at 9:30, both in the evening of the same day.

The plaintiff-spouses offered to post a counterbond to lift the writ of preliminary injunction, but the same was denied on June 14, 1965. On June 23, the Court of Appeals issued another order, directing the provincial sheriff, herein respondent Vicente Miranda, to "maintain petitioner's possession of the premises, ousting respondents therefrom," and requiring the City sheriff as well as the Velez spouses to show cause why they should not be cited for contempt of court.

The provincial sheriff filed his return of service on June 25, 1965, informing the Court of Appeals that the writ of preliminary injunction could not be enforced because the respondent spouses refused to vacate the pre-mises and had all the doors of the house locked.

The Velez spouses filed their answer, dated July 1, 1965, to the petition for certiorari, and prohibition, denying the substantial averments therein and pleading by way of defense that petitioner Bacay had not exhausted his remedies in the trial court since he had not yet received the order denying his petition for relief when he filed his petition before the Court of Appeals, and that in fact he filed a motion for reconsideration of the said order on June 18, 1965.

One of the members of the division in the Court of Appeals which acted on the petition for certiorari and prohibition was Mr. Justice Edmundo S. Piccio. On July 1, 1965 the Velez spouses filed a motion that he disqualify himself from taking part in the consideration of the case on the ground, supported by an affidavit of Magin Velez, that he had allegedly granted private interviews with Bacay's wife before the order of June 23 was issued. The records before us do not show that this motion has been expressly resolved.

On July 14, 1965 the Court of Appeals issued an order for the arrest of Magin and Lucy Velez and their confinement in the provincial jail of Cebu until they re-linquished the possession of the disputed property to Bacay. The order was carried out and the parties were accordingly incarcerated.

On July 16, 1965 Velez spouses filed in this Court the present petition for certiorari, prohibition and mandamus. On July 20 this Court issued a restraining order to stop implementation of the resolution of the orders of the Court of Appeals of June 23 and July 14; and on July 22, this Court issued another resolution for the release of the petitioners upon a bond of P1, 000.00.

Three issues are raised in the petition before us.

1. The petitioners' first point is that the Court of Appeals acted without or in excess of jurisdiction in giving due course to Bacay's petition for certiorari and prohibition before it. In support of this averment the petitioners invoke the finality of the decision of the Court of First Instance and hence the propriety of the order of execution issued by it; claim that Bacay still had adequate remedies at law available to him, namely, stay such execution upon bond under Section 2 of Rule 39 as well as appeal from the order of the trial court denying his petition for relief. These questions, however, are precisely the questions which should be litigated and resolved in the Court of Appeals in connection with the petition before it, and which in fact had been raised by the herein petitioners in their answer thereto. There can be no doubt that the petition was properly lodged in the

said court, the writ prayed for therein being in aid of its appellate jurisdiction. We cannot preempt its authority and function by considering, in the present special civil action, the issues that it should pass upon and decide in the first instance. To say that the Court of Appeals abused its discretion in giving due course to the petition because the decision of the trial court had become final, or that the petitioner therein had other adequate remedies at law, is to beg the very questions at issue before it. We therefore refrain from ruling one way or the other on these questions despite the rather exhaustive discussion thereof indulged in by the parties.

2. The next issue refers to the petitioners' motion in the Court of Appeals to disqualify Justice Edmundo S. Piccio and his failure to resolve the said motion before taking further action in the case. It should be noted, however, that when Justice Piccio did take such action, as in the issuance of the order of arrest of herein petitioners, the motion for disqualification was impliedly denied. In any event it cannot be said that the action was an absolute nullity, because the reason adduced to disqualify him, which is nothing but an indirect imputation of partiality or bias, is not one of the grounds enumerated in the first paragraph of Section 1 of Rule 137 concerning disqualification of judges. Other than upon those grounds a judge cannot be disqualified by a litigant.[1] Insofar as further proceedings in the Court of Appeals are concerned the issue of disqualification has become moot, since death has long since removed Justice Piccio from membership in the appellate court.

3. The petitioners' last plea is against the resolution of the Court of Appeals finding them guilty of contempt for disobeying the writ of preliminary injunction and the order of June 23, 1965 for their dispossession. On this point we believe that the petitioners are entitled to the relief prayed for. The writ was prohibitory in nature, the purpose of which was to stop enforcement of the writ of execution issued by the trial court. When the injunction was served, however, the execution had already been implemented and the petitioners herein placed by the city sheriff in actual possession of the property in dispute. There was nothing more to enjoin or prohibit;^[2] and no mandatory injunction was asked for or issued subsequently to revert the parties to their former position vis-a-vis said property. And with respect to the order of June 23, 1965, it was addressed not to the herein petitioners but to the provincial sheriff, herein respondent Vicente Miranda. Under the circumstances we are not prepared to say that the act of said petitioners in remaining in possession of the property, where they had been placed by virtue of the writ of execution issued by the trial court, constituted contempt of the Court of Appeals.

WHEREFORE the writ prayed for is denied, except with respect to the order of contempt dated July 14, 1965, which is hereby set aside. No pronouncement as to costs.

Concepcion, C.J., Reyes, J.B.L., Dizon, Zaldivar, Castro, Fernando, Teehankee, Barredo, and Villamor, JJ., concur.

[1] Pimentel vs. Salonga, G. R. No. L-27934, Sept. 18, 1967; 21 SCRA 160.

[2] Aragon vs. Subido, G. R. No. L-24303, Sept. 23, 1968; 25 SCRA, 95, 101.

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