

## **BANK OF THE PHILIPPINE ISLANDS, PETITIONER, VS. THE HONORABLE JOSELITO C. VILLAROSA IN HIS CAPACITY AS PRESIDING JUDGE OF REGIONAL TRIAL COURT OF MAKATI CITY, BRANCH 66, NYX COR...**

Ponente: BRUSELAS, JR. J.

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### **BRUSELAS, JR. J.:**

This is a Petition for Certiorari that seeks to nullify the order of the trial court that allowed the plaintiffs in Civil Case No. 11-600 to present evidence ex-parte due to the failure of the defendant's counsel to appear at the preliminary conference twice.

Private respondent NYX Corporation is a client of petitioner Bank of the Philippine Islands while private respondent Emelyn Hatcho is the president of NYX Corporation. NYX Corporation maintains a dollar savings account under Account Number 0244-0138-48 with the petitioner's Pasig Boulevard Branch, City of Pasig.

On 10 June 2011, the petitioner filed an action for a sum of money with prayer for preliminary attachment against the private respondents. The case was raffled to the Regional Trial Court (RTC) of Makati City, Branch 58 and docketed as Civil Case No. 11-542.

In its Complaint,[1] the petitioner alleged that on 25 November 2008, an amount of US\$234,401.50 was manually credited to the dollar account of NYX Corporation on the basis of a remittance from one of its foreign client. On 08 December 2008, a similar amount was inadvertently credited to the same dollar account of NYX Corporation. NYX Corporation, through its president, made several withdrawals from 10 December 2008 to 13 February 2009 in the total amount of US\$234,130.00.

The petitioner discovered that it double credited with funds the dollar account of NYX Corporation arising from a singular transaction. It informed NYX Corporation of the double crediting and debited the amount of US\$31,250.07 from Account Number 0244-0138-48. Because the account had an insufficient balance, the petitioner sent letters to NYX Corporation demanding it to remit the amount of US\$203,151.07 allegedly withdrawn from its account. But, NYX Corporation refused to heed the petitioner's demand to return.

Thereafter, the RTC gave due course to the petitioner's application for the issuance of a Writ of Preliminary Attachment conditioned upon the posting of a bond by the petitioner.[2] Upon posting of a bond by the petitioner, the RTC issued a Writ of Preliminary Attachment and the corresponding summons upon the private respondents.

The private respondents filed an Extremely Urgent Motion to Dismiss with Prayer to Suspend Proceedings claiming, among others, that there was improper service. This motion was denied[3] by the RTC but we reversed the RTC in a petition for certiorari[4] filed by the private respondents.

On 27 June 2011, NYX Corporation filed an action for a sum of money against the petitioner to recover the amount of US\$31,250.07 which was debited by the latter from the former's dollar account. The case was raffled to the RTC of Makati City, Branch 143 and docketed as Civil Case No. 11-600.

Upon motion by the petitioner, Civil Case No. 11-600 and Civil Case No. 11-542 were consolidated.[5] After NYX Corporation's motion for reconsideration was denied, the consolidated cases were submitted for a judicial dispute resolution but no settlement was reached by the parties. The consolidated cases were thereafter set for preliminary conference on 19 March 2013 but the same was reset to 18 April 2013 due to the unavailability of the branch clerk of court. On the new schedule, the petitioner's counsel failed to appear. The preliminary conference was moved to 06 May 2013 but still the petitioner's counsel failed to attend.

In an Order[6] dated 06 May 2013, the RTC declared the petitioner in default in Civil Case No. 11-600 and dismissed Civil Case No. 11-542, thus:

“During the preliminary conference, only Atty. Paul E. Chavez was present and moved for the application of Section 5 of Rule 18 of the Rules of Court for both Civil Cases No. 11-600 and 11-542. In view of the continued absence of herein party Bank of the Philippine Islands, in the above mentioned cases, the same are declared to be in default in Civil Case No. 11-600 and Civil Case No. 11-542 is hereby DISMISSED.

Accordingly, plaintiff is directed to present its evidence ex-parte in Civil Case No. 11-600 on June 6, 2013 at 2:00 in the afternoon.

SO ORDERED.”[7]

The petitioner sought reconsideration but the RTC affirmed[8] its earlier order and held that:

“Acting on the Motion for Reconsideration filed by Defendant Bank of the Philippines Island (Civil Case no. 11-600) and finding the said motion not to be impressed with merit; the same is hereby DENIED. The Court affirms its Order dated May 6, 2013 for the Rules of Court was formulated not without a purpose. The application of the liberal construction of the rules is wanting in the case at hand.

Moreover, the manifestation filed by NYX Corporation and Evelyn Hatcho last April 15, 2014 is hereby NOTED. Accordingly Civil Case No. 11-542 is hereby DISMISSED pursuant to the decision of the Honorable Court of Appeals Sixth (6<sup>th</sup>) Division in CA G.R. SP. No. 12-4695.

WHEREFORE, premises considered, Civil Case No. 11-600 is set on June 4, 2014 at 2:00 in the afternoon for plaintiffs' ex-parte presentation.

SO ORDERED.”[9]

The petitioner filed the instant petition for certiorari to nullify that portion of the 06 May 2013 and 30 April 2014 Orders of the RTC that allowed the private respondents to present evidence ex-parte in Civil Case No. 11-600. It contends that the RTC committed grave abuse of discretion in making such order because it had actively participated in the proceedings below and the non-appearance of its counsel during the preliminary conference was due to inadvertence and miscommunication, which was explained in this manner:

“4. Undersigned informed Atty. Sarcida about the next schedule and said counsel undertook to inform the counsel to whom this case was assigned about the resetting. Due to Atty. Sarcida's preparations for his retirement, he failed to relay the said information to the counsel assigned to this case. As such, no one from the undersigned law office was able to attend the April 18, 2013 preliminary conference. The preliminary conference was reset to May 6, 2013.

5. Due to inadvertence, however, the Notice of Hearing for May 6, 2013 was not forwarded to the handling counsel. While the Notice of Hearing was attached to the folder of this case, the folder for this case was not forwarded to the handling counsel as the staff of undersigned law firm were not informed to whom the case was re-assigned. In fact, the folder remained in the cubicle of Atty. Sarcida.”[10]

The petitioner insists that the absence of its counsel in the preliminary conference is not sufficient to preclude it

from prosecuting its cause and setting forth its defenses in the case filed against it by the private respondents. It therefore submits that technicalities should not prevail over substantial justice because a liberal construction of the Rules of Court has always been favored.

In their Comment/Opposition,[11] the private respondents maintain that the failure on the part of Atty. Sarcida to relay the information about the preliminary conference and the Notice of Hearing to the assigned lawyer is not a valid excuse. They also assert that the act of not attending the preliminary conference twice constitutes a violation of the Code of Professional Responsibility. Furthermore, they posit that the mistake of the petitioner's counsel binds the petitioner.

We find no merit in the instant petition for certiorari.

Section 4, Rule 18 of the Revised Rules of Court provides that it is the duty of the parties and their counsel to appear at the pre-trial. The effect of their failure to do so is provided in Section 5 of Rule 18, particularly:

Sec. 5. Effect of failure to appear. – The failure of the plaintiff to appear when so required pursuant to the next preceding section shall be cause for dismissal of the action. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the part of the defendant shall be cause to allow the plaintiff to present his evidence ex parte and the court to render judgment on the basis thereof. (Bold supplied)

From the foregoing, it is clear that the failure of a party to appear at the pre-trial has adverse consequences. If the absent party is the plaintiff, then his case shall be dismissed. If it is the defendant who fails to appear, then the plaintiff is allowed to present his evidence ex-parte and the court shall render judgment on the basis thereof. Accordingly, the plaintiff is given the privilege to present his evidence without objection from the defendant, the likelihood being that the court will decide in favor of the plaintiff, the defendant having forfeited the opportunity to rebut or present its own evidence.[12]

It is a basic rule in legal construction that where words of command such as “shall,” “must,” or “ought” are employed, they are generally and ordinarily regarded as mandatory. Thus, where, as in Rule 18, Sections 5 and 6 of the Rules of Court, the word “shall” is used, a mandatory duty is imposed, which the courts ought to enforce.[13]

Section 4 of Rule 18 of the Revised Rules of Court explicitly provides that both parties and their counsel are mandated to appear at the pre-trial. Undeniably, the petitioner's counsel failed to appear at the preliminary conference not only once but twice despite due notice. This negligence of the petitioner's counsel was compounded by the absence of the petitioner itself. Thus, the RTC clearly had a valid basis when it allowed the private respondents to present their evidence ex-parte in Civil Case No. 11-600.

We stress that in a special civil action for certiorari, the petitioner carries the burden of proving not merely reversible error, but grave abuse of discretion amounting to lack or excess of jurisdiction, on the part of the public respondent for his issuance of the impugned order.[14] Grave abuse of discretion is present “when there is a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.”[15] Otherwise stated, the public respondent must have issued the assailed decision, order or resolution in a capricious or despotic manner. Here, the petitioner failed to discharge that burden because the RTC did not whimsically or capriciously issue the assailed orders. It did not hastily issue the assailed orders without any basis. That it was not swayed by the explanation of the petitioner's counsel does not necessarily mean that it acted arbitrarily, capriciously or whimsically to constitute grave abuse of discretion. Besides, not even abuse of discretion can be ascribed to the RTC that acted in accordance with the Rules.

True, in not a few instances, the Supreme Court relaxed the rigid application of the rules of procedure to afford the parties the opportunity to fully ventilate their cases on the merit. This is in line with the time-honored principle that cases should be decided only after giving all parties the chance to argue their causes and defenses.[16] In *Sanchez v. Court of Appeals*,[17] the Supreme Court restated the reasons that may provide justification for a court to suspend a strict adherence to procedural rules, such as: (a) matters of life, liberty, honor or property; (b) the existence of special or compelling circumstances; (c) the merits of the case; (d) a cause not entirely attributable to the fault or negligence of the party favored by the suspension of the rules; (e) a lack of any showing that the review sought is merely frivolous and dilatory; and (f) the fact that the other party will not be unjustly prejudiced thereby.

It is our considered view, however, that the facts of the case do not warrant a liberal construction of the rules. For one, except for the petitioner's insistence on being deprived of its day in court, it did not bother to cite any of the circumstances in *Sanchez v. Court of Appeals* that would have warranted the relaxation of the rules. For another, the only explanation proffered by the petitioner's counsel for not having been able to appear at the preliminary conference was the failure of Atty. Sarcida to relay to the assigned lawyer the 18 April 2013 preliminary conference and the Notice of Hearing for the 06 May 2013 preliminary conference. As with the RTC, we do not find this excuse sufficient to justify the non-appearance of petitioner's counsel at the preliminary conference. If in *Olave v. Mistas*,[18] "heavy pressures of work" was not considered as sufficient justification for the failure of a party's counsel to timely move for pre-trial, what more for a mere allegation of inadvertence and miscommunication which is hard to believe and can easily be concocted.

Accordingly, for not having been able to demonstrate grave abuse of discretion on the part of the RTC that allowed the private respondents to present evidence ex parte in Civil Case No. 11-600, no writ of certiorari may be issued.

WHEREFORE, the instant petition for certiorari is DENIED DUE COURSE and consequently DISMISSED.

**IT IS SO ORDERED.**

Reyes, Jr., P.J., (Chairperson) and Gaerlan, JJ., concur.

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[1] Annex "C" of the petition, Rollo, pp. 23-31.

[2] In an Order issued by Presiding Judge Eugene C. Paras of the Regional Trial Court of Makati City, Branch 58, Annex "D," Rollo, pp. 48-52.

[3] In an Order dated 26 December 2011 also issued by Presiding Judge Eugene C. Paras of the Regional Trial Court of Makati City, Branch 58, Annex "E," Rollo, pp. 53-57.

[4] CA-G.R. SP No. 124695, 31 March 2014, decided by the 6th Division (Js. Abdulwahid, Barza & Cruz)

[5] In an Order dated 18 April 2012 issued by Acting Presiding Judge Rommel O. Baybay of the Regional Trial Court of Makati City, Branch 143, Annex "L," Rollo, pp. 102-103.

[6] Issued by Judge Joselito C. Villarosa of the RTC of Makati City, Branch 66, Rollo, p. 21.

[7] Rollo, p. 21.

[8] In Order also issued by Presiding Judge Joselito C. Villarosa of the RTC of Makati City, Branch 66, on 30 April 2014, Rollo, p. 22.

[9] Rollo, p. 22.

[10] As alleged in the petitioner's Motion for Reconsideration and re-cited in the instant petition for certiorari, Rollo, p. 11.

[11] Rollo, pp. 142-153.

[12] Benavidez v. Salvador, G.R. No. 173331, 11 December 2013.

[13] Bank of the Philippines Islands, v. Dando, G.R. No. 177456, 04 September 2009.

[14] Gravides v. Commission on Elections, G.R. No. 199433, 13 November 2012.

[15] Id.

[16] Bank of the Philippines Islands, v. Dando, supra.

[17] G.R. No. 152766, 20 June 2003.

[18] G.R. No. 155193, 26 November 2004, 444 SCRA 479.

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