

INTER-ISLAND GAS SERVICE, INC., PLAINTIFF-APPELLEE, VS. BRIGIDO DE LA CERNA, DEFENDANT-APPELLANT.

G. R. No. L-17631. October 19, 1966

Ponente: REGALA, J.

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REGALA, J.:

This is an appeal from the orders of the Court of First Instance of Cebu in Civil Case No. R-3163 dismissing the herein appellant's petition for relief and denying his motions for reconsideration and reinstatement of the case. At first this appeal was made to the Court of Appeals but it was forwarded to Us on certification by the said court that no question of fact is involved.

In a complaint filed in the Municipal Court of Cebu City by the Inter-Island Gas Service, Inc. against Brigido de la Cerna, the former sought, among other things, the ejectment of the latter from a certain portion of a lot said to be the property of the plaintiff.

When de la Cerna was duly summoned, a motion to dismiss the complaint was filed by his counsel on the ground that the municipal court had no jurisdiction. When said motion was called for hearing, plaintiff or his counsel did not appear. Under the circumstances, the defendant's counsel manifested that the consideration of the motion be postponed to another date of which transfer counsel for plaintiff was duly notified.

Acting upon the motion to dismiss, the municipal court denied the same and set the case for trial on March 30, 1953.

As de la Cerna or his counsel did not appear at the trial notwithstanding that notice thereof was duly served upon them, plaintiff was allowed to present his evidence *ex parte*. Upon the evidence thus introduced, decision was rendered sentencing the defendant to pay the plaintiff the amount of P1,305.99 representing rentals in arrears corresponding to the previous months up to the end of March, 1953; to vacate the premises in question and to restore the possession thereof to said plaintiff; to pay the amount of P29.00 as monthly rental for the premises from April 1, 1953 until the same is vacated and delivered to plaintiff; and to pay the costs.

The losing party (de la Cerna) filed motions for reconsideration and new trial but these were denied by the municipal Court.

On May 22, 1953, de la Cerna filed with the Court of First Instance petitions for relief of judgment and a writ of preliminary injunction. On the same day a preliminary injunctive writ was issued upon his filing of a bond.

Answering the petition for relief of judgment, the aforementioned plaintiff and now respondent asked that the same be dismissed. Similarly, a motion to lift the preliminary injunction was filed.

On June 16, 1956, the Court of First Instance issued the following order:

"It appearing that the petition for relief of judgment was filed as early as May 22, 1953; that issues thereon were joined by the filing of respondent's answer on 24 December 1953 without plaintiff having moved for trial,

as prayed for by defendant in its motion of 14 June 1956 this case is hereby ordered dismissed for failure of petitioner to prosecute, and the writ of preliminary injunction heretofore issued lifted without any special pronouncement as to costs."

Consequently, petitioner filed on June 27, 1956 a motion for reconsideration and for reinstatement of the case to which motion an opposition was filed. This was denied by order of June 30, 1956.

On July 17, 1956, petitioner again filed an urgent motion for reconsideration of the order of June 30, 1956 which was also denied. It is from the orders of June 16, June 30 and July 17, 1956 that the petitioner has appealed.

In his brief, the appellant has assigned the following errors as the bases of his arguments:

"THE MUNICIPAL COURT HAS NO JURISDICTION TO TRY THE CASE. "THAT THE PARTY PLAINTIFF IS NOT THE PARTY IN INTEREST TO PROSECUTE THE CASE.

"THAT THE MUNICIPAL COURT IN ALLOWING PLAINTIFF TO PRESENT ITS EVIDENCE IN EX PARTE TRIAL COMMITTED A GRAVE ABUSE OF DISCRETION.

"THAT THE COURT OF FIRST INSTANCE IN DISMISSING THE CASE EX PARTE THROUGH AN ALLEGED TECHNICAL NEGLECT, INSPITE OF DEFENDANT'S STRONG, MERITORIOUS AND VALID OPPOSITION AGAINST SAID DISMISSAL COMMITTED ALSO A GRAVE ABUSE OF DISCRETION."

This being an appeal from the order dismissing the petition for relief and the orders denying reconsideration thereof, the only question properly for determination is whether or not the Court of First Instance committed reversible error in issuing these orders. There is no point in discussing the first three of the assigned errors as they clearly pertain to the proceedings held before the municipal court.

As to the fourth error, Section 3, Rule 17 of the Rules of Court provides:

"Failure to Prosecute. - If plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise provided by the Court."

Under this provision (section 3, Rule 30 of the former Rules), it has been held that where the petitioner in a petition for a writ of preliminary injunction failed to ask the court to set it for hearing within one year, four months and four days from the date the respondent filed his answer, the petitioner may be said to have failed to prosecute his action for an unreasonable length of time because he was not prosecuting an ordinary action but a provisional remedy (*Chuan v. de la Fuente*, G. R. No. L-4070, February 26, 1962, 90 Phil. 813). Likewise, in the recent case of *Villanueva v. Secretary of Public Works and Communications, et al.*, G.R. No. L-21043, March 30, 1966, the petition for injunction was dismissed for failure of the petitioner to take any step towards the hearing of the case on the merits for one and a half years which "not only shows lack of interest but also gives ground for this Court to believe that the petitioner himself does not believe in his alleged cause of action." Similarly, the petitioner in this case did not ask for relief for about three years since the joining of the issues.

By way of justifying the long delay in the prosecution of his case, the herein appellant alleged in his motion for reconsideration in the court below that the court branch then presided over by the Hon. Ignacio Debuque had several pending cases and as a matter of fact, he (the petitioner-appellant) had to contact with the deputy clerk several times to find out if there was any chance at all for the inclusion of the said case in the calendar, but he was always told that the old cases would be given preference. Apparently, this excuse was not accepted by the trial judge, who was in a better position to know the truth, for he denied reconsideration of his order of dismissal. As

far as the record shows, it does not appear that the appellant has made a diligent effort to expedite the disposition of his petition. There is, therefore, no justification for Us to pronounce that the trial court abused its discretion in ordering its dismissal.

The dismissal of an action for failure to prosecute pursuant to section 3 of Rule 17 rests upon the sound discretion of the court and will not be reversed upon appeal in the absence of abuse. The burden of showing abuse of judicial discretion is upon the appellant since every presumption is in favor of the correctness of the court's action. (Adorable v. Bonifacio, G. R. No. L-10698, April 22, 1959; Flores v. Phil. Alien Property Administration, G.R. No. L-12741, April 28, 1960)

IN VIEW OF THE FOREGOING, the orders appealed from are hereby affirmed. Triple costs against the appellant.

Concepcion, C.J., Reyes, J. B. L., Dizon, Makalintal, Bengzon, J. P., Zaldivar, Sanchez and Ruiz Castro. JJ., concur.

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