

MARY BURKE DESBARATS AND ANTONIO T. CARRASCOSO, JR., THE LATTER IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF W.J. BURKE, DECEASED, PLAINTIFF AND APPELLANTS VS. TOMAS DE VERA, DE...

G.R. No. L-2525. April 26, 1949

Ponente: PARAS, J.

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PARAS, J.:

In an ejectment case instituted in the Municipal Court of Manila, judgment was rendered on December 18, 1947, ordering the defendant to vacate the premises involved in the complaint, namely, the if story building known as the 'Burke Building,' situated at No. 133 Escolta, City of Manila; to restore the possession thereof to the plaintiffs; to "pay the plaintiffs the sum of P110,000, representing the balance of rentals from June 1 to November 30, 1947, plus legal interest, thereon from December 10, 1947, until delivery of the premises .in question to the plaintiffs, at the rate of P19,000 a month; and to pay the costs of the suit.

Upon appeal by the defendant, the Court of First Instance of Manila rendered on July 12, 1948, a decision ordering the defendant to surrender the possession of the building to the plaintiffs, and to pay to the latter the rentals from June 1, 1947, until delivery of the premises, at the rate of P10,400 a month, less the amounts collected or to be collected by the plaintiffs from the sublessees, without special pronouncement as to costs.

On July 30, 1948, the defendant addressed a letter to plaintiff Carrascoso worded as follows? "In accordance with the decision of the Court of First Instance of Manila, dated July 12, 1948, I am hereby mailing a formal delivery to-you of the Burke Building as of July 31, 1948, retaining meanwhile, pending final disposition of your appeal to the Supreme Court, a small portion thereof occupied. by my real estate office and the 'Counterkool' , the latter at the instance of its owner." In response, plaintiff Carrascoso stated that the plaintiffs would take over the building a.nd that "As regards the portion of the building occupied by you, I regret to tell you that the owners of the building will need the space occupied by you, and for this reason I request that you immediately vacate the same." (Letter of Atty. Antonio T. Carrascoso, Jr., dated July 31, 1948)

The plaintiffs appealed, from.the decision of the Court of "First Instance in so far as it reduces the rental to be paid by the defendant from P19,000 to P10,000 monthly. The defendant also appealed,"particularly with respect to certain incidental matters involved in the cane." The records on appeal of both the plaintiffs and the defendant were approved by the lower court on September 24, 1948. Even so. said. court, on September 24, 1948, issued an order allowing the defendant to retain the aforesaid portion of the "Burke Building" at a monthly rental of P2,000.

The case is now before us pending appeal. We are, however, called upon for the present to resolve the motion filed by the plaintiffs, praying for the immediate execution of the part of the appealed judgment ordering the defendant to vacate the building in question in its entirety. Our conclusion Is that said motion is well founded.

The decisive principle is not new and has already been embodied in the case of Verches vs. Rios, 48 Phil, 16, in

which this Court, quoting from *De Egana's Succession*, 18 La. Ann. 59, pointed out "that the party who voluntarily executor., either partially or in toto, the execution of that judgment, is not permitted to appeal from it," with the observation, furthermore, that "owing to the similarity of the jurisprudence of that State with the law in the Philippine Islands, the Louisiana decisions are important and should have great weight in this Court."

It should be noted that the defendant had delivered the greater portion of the property expressly "in accordance with the decision of the Court of First Instance of Manila, dated July 12, 1948, " thereby plainly acquiescing in said decision at least in so far as it orders him to surrender the possession of the building to the plaintiffs. The judgment for possession is certainly indivisible and it cannot be correct or wrong as to a part and correct or wrong as to the other part. It stands to reason that the delivery by the defendant of the greater portion of the "Burke Building" has estopped him from assailing the property of the appealed judgment as regards the matter of possession.

The defendant, however, invokes the order of the Court of First Instance issued on September 24, 1948, allowing him to occupy the portion he is actually holding, at a rental of P2,000. Said order is conspicuously null and void, having been entered after the records on appeal had been, approved and, accordingly, after the Court of First Instance had lost jurisdiction over the case, (Section 9, Rule of Court No. 41) It cannot of course be pretended that said order was merely for the protection and preservation, of the rights of the parties which do not involve any matter litigated by the appeal. The Court is unanimous on this point. But it is contended by the dissenting Justice that the order in question cannot be set aside because the lower court is not a party herein, and that the proper remedy should, have been a special civil action for certiorari. This contention would be meritorious if the main case is not before us on appeal, and if said order is not void ab initio. Certiorari may be availed of when there is no "plain, speedy, and adequate remedy in the ordinary course of law" (section 1, Rule of Court No. 67); and the procedure adopted by the plaintiffs certainly falls within the category of a plain, speedy, and adequate remedy, not to mention the fact that it has thereby avoided multiplicity of suits. Moreover, a void order may be attacked collaterally, (*Gomez vs. Concepcion*, 47 Phil. 717; *Caluag et al. vs. Pecson*, 82 Phil. 8.) In the latter case, Mr. Justice Feria, speaking for the Court, held that "a wrong, or for that matter a correct decision is void, and may be set aside either directly or collaterally, where the court exceeds its jurisdiction and power in rendering it."

The defendant argues that the plaintiffs cannot now rely on the partial delivery of the premises in question, because they had voluntarily accepted, the same. To this it is sufficient to answer that the acceptance was made with the protest and demand of Atty, Carrascoso "that you immediately vacate the Same" (referring to the portion retained, by the "defendant").

The equitable aspect of the situation also inclines on the side of the plaintiffs. It appears that the contract of lease in favor of the defendant admittedly expired on December 31, 1948; and there seems to be absolutely no reason for conceding to the defendant any extension, especially in view of the circumstance that he had delivered the greater portion of the building "in accordance with the decision of the Court of First Instance," something obviously inconsistent with any pretense that the defendant would seek in this appeal an extension of his lease, which covers the entire "Burke Building." In his notice of appeal, the defendant furthermore particularized "certain incidental matters involved in the case," It is needless to state that his ejection from, the building, to which he had already voluntarily conformed, is of course not a more incidental matter.

Without deciding other issues that may properly be raised in the present appeal as well by the plaintiffs as by the defendant, we hereby grant the plaintiffs' motion for immediate execution of the appealed judgment of the Court of First Instance of Manila, dated July 12, 1948, In so far only as it orders the defendant to surrender to the plaintiffs the possession of the "Burke Building" in its entirety. So ordered.

Pablo, Perfecto, Tuason, Montemayor, and Reyes, JJ., concur.

Moran, C.J., concur in the result.

DISSENTING

FERIA, J.,

I dissent from the resolution. It is contrary to law and equity, and the pertinent decisions of this Court. The undisputed facts material to this incident are briefly the following:

In an action of illegal detainer instituted by the plaintiffs-appellants against defendant-appellant, the Municipal Court of Manila rendered a judgment on December 18, 1947, ordering the defendant to vacate and restore the possession of the leased premises to the plaintiffs, and to pay the latter the sum of P110,000 for rentals due on the leased building from June 1, to November 30, 1947, and to pay likewise the rental accruing at the rate of P19,000 a month from December 1, 1947, until the premises have been actually vacated and surrendered to the plaintiff, plus the costs.

On appeal, the Court of First Instance of Manila rendered a judgment, on July 12, 1948, the pertinent portion of which reads as follows:

"No se discute por las partes el hecho de que el demandado ha gastado, por lo menos, el tercio medio del caloulo de ambas (165,000), por las mejoras que ha puesto en el edificio, para ponerlo, del mal estado en que se hallaba, en condiciones de ser habilitado para oficinas y establecimientos comerciales, para el beneficio mutuo de ambas partes. El demandado ya no podría recobrar su capital invertido en dichas mejoras, por que, segun el contrato, las mismas pasaran a ser de la propiedad de los demandantes. Desde luego es de presumir que el, demandado, cuando entro en esta transaccion, esperaba ganar la diferencia entre los alquileres de los subarrendatarios y los alquileres que se obligo a pagar a los demandantes. Cuando el demandado asumió esta obligacion, tenia en la mente la idea de que con el servicio de ascensor en el edificio, cuya instalacion el demandante Sr. Cgrrascoso le aseguro conseguir de sus representantes, el podría cutaplr dicha obligacion y obtener un margen de ganancia para el. Esto era lo mas natural. Cuanto debia ser este margen? Desde luego no seria menos de lo que los demandantes ganarian con el edificio en mal estado y el solar correspondiente y con el capital invertido por el demandado. Pero si, por la falta de ascensor, con cuya instalacion los demandantes no se conformaron, no obstante su necesidad y conveniencia, el demandado no ha conseguido subarrendar todos los cuartos del edificio, el Juzgado entiendo que no seria justo ni equitativo el que, mientras los demandantes ganen los 185,000 en mejoras, mas el alquiler de 119,000 mensuales (P228,000 al año), con el estado malísimo del edificio, el demandado, despues de perder los 185,000 en mejoras, todavia tenga que perder o no ganar nada, en alquileres.

El Juzgado cree que los intereses de la justicia estarian mejor servidos, equiparendo a las partes, sin permitir que mientras una de ellas gane, la otra pierda en una transaccion que, como se ha dicho arriba, se ha celebrado con la mejor buena fe del mundo, con miras de ganar para su mutuo beneficio, sin el menor animo de tomar la ventaja sobre la otra.

De las pruebas obrantes en autos se desprende que los alquileres que pagan los subarrendatarios por los respectivos locales que ocupan ascienden alrededor de P10,400 mensuales, poco mas o menos. El demandado ocupa una porcion en el piso bajo del edificio, dos veces mas grande que la porcion ocupada por cada uno de los indios que le pagan a P2,000 cada uno de alquiler mensual, para su oficina y un establecimiento de negocio. Teniendo en cuenta todas las circunstancias del caso y el hecho de que el demandado ha puesto en el edificio mejoras que ascienden poco mas o menos a 185,000, sin las cuales no

hubiera sido posible el alquiler que se percibe actualmente, el Juzgado cree que el demandado debe pagar a los demandantes, oomo alquiler del edificio en ouestion, la oantidad de 110,400 inensuales, a partir desde el l.o de Junio de 1947 hasta que desaloje la finoa.

* * * * *

Habiendo el demandante Sr. Carrascoso requerido a los subarrendatarios del edificio a pagarle aJftl directaraente los alquileres de los respectivos locales que ocupan (exhibit "G"), con arreglo a las disposiciones del articulo 1552 del Godigo Civil, oon la conformidad del demandado (exhibit "23"), el Juzgado autoriza al demandante Sr. Garraseoso a cobrar de dichos subarrendatarios los respectivos alquileres que deben, aplicandolos a favor del demandado.

* * * * *

POR TOD1S las consideraciones expuestas, el Juzgado dicta sentencia , ordenando al demandado a desalo^ar y entregar la posesion de la finoa en question a los demandantes, y a pagar a estos los alquileres debidos desde el l.o de Junio de 1947 hasta que desaloje la finoa, a razon de P10,400 mensuales, deduciendo del importe de los mismos las cantidades cobradas o que se cobran por el demandante Sr. Carrascoso de los subarrendatarios mensuales. Ho se hace especial pronunciaiaiento en cuanto a las costas."

Both parties filed notice of appeal, and the records on appeal filed by the plaintiffs and by the defendant -were approved by the court below on September 23, 1948.

On November 10, 1948, the plaintiffs-appellants filed with this Court a motion to dismiss the appeal of the defendant-appellant on the ground that the defendant did not file his record on appeal within the period prescribed by the rules of court, and (2) that he waived his right of appeal by partially complying with the decision of the lower court. The first ground is unfounded and for that reason is not taken up by the majority in its resolution, and the second is reiterated as second ground in the motion for immediate execution of the judgment filed by the plaintiffs-appellants on December 17, 1948, which will be discussed hereinafter. This motion f or execution of the judgment are predicated on the following grounds:

Firstly. That the defendant, by delivering the greater portion of the building to the plaintiff in accordance -with the decision of the Court of First Instance, waived his right of appeal as regards that part of the judgment requiring him to vacate the leased premises.

Secondly. That the defendant, instead of complying with the obligation to pay to the plaintiff or into the court the sum. of 110,400 as monthly rentals due from time to time from August 1943 to subsequent months, in order to stay the execution of the judgment, has been depositing P3,000 only a month.

Thirdly. That the monthly rental, which the defendant-appellant must pay or deposit during the pendency of the appeal from the Court of First Instance to the Supreme Court, is the amount, fixed by the municipal court or P19,000 a month, and nob the sum of P10,400 determined by the Court of First Instance.

Lastly. That, according to the contract of lease of the building in question entered into between the plaintiffs and the defendant, the term of the lease expired on December 18, 1948, and therefore, regardless of the result of the appeal pending before this court, the defendantappellant has no right to continue in possession of any part of the building leased after the expiration of the lease. .

Before proceeding to discuss the grounds or reasons in support of the plaintiffs' motion, it is necessary to state that the defendant on July 30, 1948, wrote a letter to the plaintiff Atty. Antonio Carrascoso Jr. a letter of the following tenor:

"Dear Sir:

"In accordance with the decision of the Court of First Instance of Manila, dated July 15, 1948, I am hereby making a formal delivery to you of the Burke building as of July 31, 1948, retaining meanwhile, pending final disposition of your appeal to the Supreme Court, of a small portion thereof occupied by my real estate office and the 'Counterkool', the latter at the instance of its owner.

"I am enclosing herewith a copy of letter dated today addressed to one of the tenants, Mrs. Mercedes O. Fisher. Similar letters were today sent to all subtenants.

"Very truly yours,

(Sgd.) TOMAS DE VERA"

And. Atty Carrascoso sent on July 31 of the same year the following reply to defendant;

"Dear Sir:

During my absence from the city, your letter of yesterday was received in my office. Plaintiffs will take over the building today. As regards the portion of the building occupied, by the 'Counterkool', please have the owner of the business see Mr. P. M. Delaplanqua immediately at 202 Wilson Building, to settle the matter of the monthly rental, etc. As regards the portion of the building occupied by you, I regret to tell you that the owners of the building will need the space occupied by you, and for this reason I request that you immediately vacate the same.

Yours faithfully,

(SGD.) ANTONIO CARRASCOSO JR"

That pursuant to his foregoing answer plaintiff Carrascoso took possession of the greater portion of the building, has been collecting from the subleasees, by authority of the court granted in the judgment appealed from, the rents of said portion of the building which amount to about 110,400, according to the same judgment of the Court of First Instance above quoted that sentences "the defendant to pay to the plaintiff 110,400, as rent every month, deducting therefrom the amount of the monthly rents collected or which may be collected by the plaintiff Carrascoso from the subleasees;" and that as a matter of fact, without necessity of passing upon the validity of the lower court denying the plaintiffs' motion for execution, the defendant has been depositing with the court the sum of P3,000 every month up to the present in order to stay the execution of the judgment, because the plaintiff refused to accept the defendant's offer to pay it directly to them.

We shall now discuss and pass upon the grounds or reasons in support of the motion for execution filed with this Court by the plaintiffs.

As to the first ground, the delivery by the defendant to the plaintiff of the greater portion of the property leased does not constitute a waiver of the former's right of appeal as regards the judgment which requires him to vacate the whole premises. The ruling of this Court in the case of Verches v. Rios, 48 Phil. 161 and in De Agana Succession quoted in said decision, to the effect that the party who voluntarily executes the judgment appealed from, either partially or in toto, is not permitted to appeal, or continue the appeal already perfected, from said judgment, is in consonance with the well established general rule, set forth in Vol. V, Sec. 214 of American

Jurisprudence, and "Vol. 4, Sec. 212, of Corpus Juris Secundum.

"The reason for the foregoing rule is stated thus:

" x x x The reason for this rule is that a party cannot proceed to enforce and have the benefit of such portions of a judgment as are in his favor, and appeal from those against him, in other words, that the right to proceed on a judgment and enjoy its fruits and the right to appeal therefrom are totally inconsistent positions, and the election to pursue one course must be deemed an abandonment of the other."

(2 Am. Jur., Appeal and Error, Sec. 214.)"

"As a general rule, acquiescence in, or recognition of, or otherwise taking an inconsistent position with reference to, a judgment, order, or decree impliedly waives the right to have it reviewed by an appellate court.

"A party who voluntarily acquiesces in, ratifies, or recognizes the validity of, a judgment, order, or decree against him, or otherwise takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives, or is estopped to assert, his right to have such judgment, order, or decree reviewed by an appellate court, and this rule has been held to apply where the acquiescence or ratification was either partial or in toto. However, in order to be a bar of the right of appeal on the ground of acquiescence, the judgment or decree must have been rendered and entered, and the acts relied on, as a waiver or estoppel on such ground, must be such as to clearly and unmistakably show an inconsistent course of conduct or an unconditional, voluntary, and absolute acquiescence, with the intent, as has been held, to ratify or confirm the judgment as rendered, and to acquiesce and abandon the right of appeal. 'Acquiescence,' as used in this connection, implies consent and is not the same as an 'admission' of the correctness of the judgment, and in order to effect a waiver, there must be some intent to enjoy a benefit from, or base some interest on, the judgment appealed from."

(4 C.J.S., pp-596-597, Sec. 212.)

The rule is not applicable to the case at bar, even if it were not an action of illegal detainer; because the acquiescence of the defendant-appellant to execute the judgment relating to 'the possession of premises was not unconditional and absolute, but subject to the condition that he be allowed to retain a portion of the building, and as the plaintiff objected to the retention by the defendant of a portion thereof, the delivery of the possession of a greater portion of the building can not be considered as execution of the judgment to stop the defendant from continuing his appeal. Nor may such delivery be considered as partial execution of the judgment as to possession of the building, because, as the resolution of the majority admits, the judgment for the possession of a building is indivisible, since defendant can not deliver one part thereof to the plaintiff and retain the other part without the consent of the latter. A judgment may be partially executed if it is divisible and a part thereof may be performed independently from the other. Under the circumstances of the case it would be unfair, not to say unjust, to uphold the plaintiff's contention that he could accept the portion delivered and compel the defendant to deliver also the small portion occupied by the latter, on the ground that the defendant, having voluntarily executed partially the judgment, waived his appeal and, therefore, the judgment must be executed and the defendant compelled to deliver the possession of the portion he is detaining.

Besides, the rule that a party is stopped from appealing or waived his appeal already perfected if he acquiesced in, ratifies or recognizes the validity of a judgment by voluntarily executing the judgment or having it executed, partially or in toto, and obtain benefits therefrom, is not applicable to a defendant appellant in an action of illegal detainer. Because Sees. 8 and 9 of Rule 72 expressly provide that if the defendant appellant does not file a supersedeas bond, or pay to the plaintiff or into the court the rents due from time to time during the pendency of the appeal, the judgment will be executed, but his appeal may continue or proceed. Hence, even if the defendant had delivered or surrendered the possession of the whole building to the plaintiff without any condition, he could not be considered as having waived his right to appeal, and therefore the judgment could not be executed and the

defendant appellant required to satisfy the rents due and payable which he has been sentenced to pay. Under the provisions of said Secs. 8 and 9, the execution of the judgment is not only for the restoration of the possession of the premises leased, but also for the payment of the rents due and payable (Romero vs. Pecson, Judge of the Court of First Instance of Manila, G. R. No. L-2745).

Under the rule applied in the case of Verohes (*supra*) which is squarely to the appeal of the plaintiffs who seek the execution of the judgment, the appeal of the plaintiffs should necessarily be considered as waived if we grant their motion for execution, for the defendant has to vacate the premises and pay the rents determined by the Court of First Instance. The appeal of a defendant may proceed notwithstanding the execution of the judgment, because Secs. 8 and 9 of Rule 72 expressly so provide as an exception to said rule. We do not think the plaintiffs have foreseen the effect of their insistence in training the execution of the judgment.

With respect to the second ground, it appearing from the appealed judgment and the allegations or admissions of the plaintiffs in their motion for execution of said judgment, that the monthly rentals which the subleasees have been paying for the portion of the building occupied by them amount to about P10,400; that the plaintiffs have been collecting, and were authorized by the court to collect, said rentals from the sub-tenants in accordance with Art. 1552 of the Civil Code, plaintiff Carrascoso having written letters to said subleasees requiring them to pay to him the rents due or to be due from time to time, and that the defendant has been depositing P2,000 a month in addition to the said monthly rentals collected by the plaintiffs, we are of the opinion that the defendant can not be required to deposit the sum of P10,400 a month, since the deposit of P2,000 a month by him in addition to the monthly rents collected by the plaintiffs is more than sufficient security to stay the execution of the judgment during the pendency of the appeal.

The evident reason of the law in requiring a defendant appellant to pay to the plaintiff or into the court, during the pendency of the appeal, the amount of the rents determined by the court below, is to secure the payment of the rents of the premises he is occupying during that time; for if the possession thereof has been surrendered to the plaintiff, voluntarily or by virtue of execution of the judgment, the defendant is not required to make, after the surrender, a monthly or periodical payment or deposit of the rents determined by the court. Therefore in cases, like the present, in which the defendant has surrendered the possession of a portion of the premises to the plaintiff, and the latter has accepted it and has been collecting the rents corresponding to said portion for the account of the defendant, the rents so collected must be considered as part payment of the monthly rents determined by the lower court, and the defendant has only to pay to the plaintiff or into the court during the pendency of the appeal what is necessary to complete or make up the monthly rents collected by the plaintiff. To hold otherwise would be to require the defendant appellant to pay to the plaintiff or into the court, in order to stay the execution of the judgment during the pendency of the appeal, more than the amount of monthly rental determined by the lower court.

In the present case, as the plaintiffs do not claim that they had been collecting from the subleasees less than P10,400 every month, or that the sum of P10,400 is less than the reasonable value of the monthly use and occupation of the portion of the building surrendered to and accepted by the plaintiffs, had the latter continued leasing and not reconstructed said portion of the building, the said sum of P10,400 added to the monthly deposit of P2,000 made by the defendant make a total of about P12,400, which is more than what is required by the law to be paid to the plaintiff or into the court for staying the execution of the judgment during the pendency of the appeal, to hold that the plaintiffs may retain the possession of the greater portion of the building, prevent the defendant from collecting the rents therefor amounting to about P10,400 a month, compel the defendant to pay to the plaintiffs or into the court the monthly rent determined by the court below, and obtain the execution of the judgment for defendant's failure to do so due to such retention or possession of the greater portion of the building

by the plaintiff, would be against the most rudimentary sense of justice and equity.

It may not be amiss to say, for clarity's sake, that our conclusion that the defendant has complied with the requirement of the law of paying to the plaintiffs or into the court the amount of the rents due from time to time-as determined by the Court of First Instance, does not affect the issue on the merits of the plaintiff's appeal as to the amount of the rents the defendant shall pay for the leased premises. As the defendant has retained a portion of the building without the consent and against the will of the lessors, the delivery to and acceptance by the latter of a greater portion thereof can not be considered as an execution of the judgment for the restoration of the property leased, and therefore the defendant should be held to be the lessee of the whole premises until he surrenders to the plaintiffs the portion retained by him. So should this court decide on appeal that the defendant shall pay more than 110,400 a month as rent until he vacates the premises, he shall have to pay or make up the difference in excess of said amount; and if this Court declares that he shall pay less, the difference between the rents paid by him to the plaintiffs and into the courts during the pendency of the appeal and the amount of the judgment, shall be returned to the latter,

The third ground on which the motion for execution is based does not deserve serious consideration, for it clearly appears from the provision of Sec. 9 in connection with Sec. 8 of Rule 72 that the amount to be paid or deposited by the defendant appellant from time to time during the pendency of the appeal from the judgment of the Court of First Instance to the appellate court, is the amount determined, not by the inferior court, but by the Court of First Instance, because the judgment of the inferior court has been superseded by that of the Court of First Instance and become functus officio. (Romero vs. Pecson, Judge of the Court of First Instance of Manila, G. R. No. L-2745; De la Fuente vs. Jugo, G. R. No. L-12)

And the last ground or reason relating to the expiration of the contract of lease between the plaintiffs and the defendant after the present motion had been filed with this Court, cannot be taken into consideration by us in deciding the plaintiffs motion for execution of the judgment, not only because it is immaterial, but because the question whether or not the defendant may be ousted from the premises by the plaintiffs on that ground had not and could not have been raised or submitted to and passed upon by the municipal court and the Court of First Instance of Manila.

Wherefore, plaintiff motion for execution of the judgment appealed from should be and it is hereby dismissed. So ordered.

Bengzon and Briones, JJ., concur.

Judgment affirmed.

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