

**ANTONIO MONTEJO AND CONSOLACION BIBERA,
PLAINTIFFS-APPELLANTS, VS. VICENTA UROTIA, AS HEIR OF JUANA
BIBERA, ET AL., DEFENDANTS-APPELLEES.**

G.R. No. L-27187. July 22, 1971

Ponente: CONCEPCION, C.J.

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CONCEPCION, C.J.:

These are appeals from orders of dismissal for failure to prosecute. Inasmuch as the issues therein are substantially the same, these nine (9) cases are herein decided jointly.

L-27187. In their complaint, filed with the Court of First Instance of Leyte, on July 2, 1962, plaintiffs Antonio Montejo and Consolacion Bibera seek: a) to prevent the foreclosure of a mort-gage on several parcels of land they claim to own in common with the defendants, as well as on several personal properties allegedly belonging exclusively to plaintiff Antonio Montejo; b) to have said parcels of land partitioned among its co-owners; c) the release, from the aforementioned mortgage, of the said personal proper-ties and of plaintiffs' shares in said land; and d) the collection of certain sums of money allegedly due from the defendants to plaintiff Antonio Montejo. There were 24 defendants under the original complaint, which was amended to include 20 additional defendants. Inasmuch as 17 defendants had not been summoned as of September 27, 1963, said court then issued an order, inter alia, directing the plaintiffs to exert efforts to cause said defendants to be summoned. Over two years later, or on October 25, 1965, the court dismissed the case for failure of the plaintiffs to comply with said order.

L-29098. This case, for the collection of a sum of money[1] from defendants Jose Arcellana and the Capital Insurance & Surety Co., Inc.,[2] was initiated in the City Court of Manila, on April 20, 1966. Judgment for plaintiff People's Car, Inc., having been rendered, on September 7, 1967, defendant Capital Insurance & Surety Co., Inc., appealed to the Court of First Instance of Manila. On October 24, 1967, the latter issued a notice to the parties, advis-ing them that the appealed case had then been docketed in said court. Counsel for the appellant received, on December 18, 1967, notice to the effect that a pre-trial would be held on January 4, 1968. He, however, failed to appear at said pre-trial. Hence, the Court forth-with ordered the appeal dismissed and the judgment appealed from revived, for failure to prosecute on the part of said appellant.

L-29373. In this action, commenced on October 28, 1965, for the recovery of a sum of money[3] from defendants Isabelo Bandyrel and Daniel Boquer, the latter was declared in default, whereas Ban-dayrel and plaintiff Bolivar submitted a written "stipulation of facts and compromise agreement," in pursuance of which, on June 21, 1966, the City Court of Manila rendered judgment for Bolivar. On August 12, 1966, defendant Bandyrel "appealed" to the Court of First Ins-tance of Manila, which thereafter set the case for pre-trial on Feb-ruary 22, 1967. On motion of both parties, upon the ground that they were "exploiting the feasibility of settling the case amicably," the court issued, on February 5, 1968, an order granting them up to Feb-ruary 29, 1968, "within which to submit their amicable settlement or a negative manifestation," and, "in the event of the latter," resetting the case for hearing on April 8, 1968. On this date, both parties ap-peared before the court. Upon inquiry by the same about

the "status of the amicable settlement, (c)ounsel for the plaintiff-appellee mani-fested that the defendants have not submitted any proposed settlement terms" and moved that the appeal be dismissed, which was granted immediately.

L-29454. This action was filed with the Court of First Instance of Zamboanga, on October 11, 1960, to restrain the defendants "from performing any and all acts which will tend to prejudice" the alleged rights of plaintiff Pagadian Iron Mines over a given iron lode claim in the barrio of Midsalip, municipality of Liargao, Zamboanga del Sur, as well as to recover damages. After the issues were joined, the case was set for trial on March 24, 1961. This was cancelled on March 18, 1961, on motion of both parties, who alleged that "there are negotia-tions for the amicable settlement" of the case. The same was several times, thereafter, set for hearing, which was, just as often, post-poned, mostly upon the same ground. After thirteen (13) such postponements, the case was, on September 8, 1966, set for hearing on December 8, 1966, which both parties moved again to be postponed for the reason "that the parties are still exploring the possibility of settling this case amicably." Considering, however, that the case had been pending for over six (6) years, the court ordered the case dismissed "for failure to prosecute." A reconsideration of this order was later denied.

L-29542. On August 28, 1963, Jose O. Maderazo brought this action, in the Pasay City Court, to recover a sum of money[4] from defendant Lim Lian Khoan alias Khoan Limsico. Said court having rendered judgment, on September 29, 1964, dismissing the case, Maderazo appealed to the Court of First Instance of Rizal, which, on November 13, 1964, notified the parties that the appeal had been docketed with said court and that the period to file plead-ings would commence from receipt of said notice. On October 30, 1965, the case was ordered dismissed "(f)or failure to prosecute for an unreasonable length of time."

L-30711. This action, instituted, on October 3, 1964, in the Municipal Court of General Santos, Cotabato, is for the recovery from Antonio Buhat of a sum of money lent to him in 1946. The case having been dismissed upon the ground of pres-cription, plaintiff, Republic of the Philippines, appealed to the Court of First Instance. Both parties were, on August 8, 1966, notified that the record of the case had been received by the latter court, which, on January 30, 1969, dismissed it upon the ground of failure of the plaintiff to prosecute the same for an unreasonable length of time.

L-30744. In her complaint, filed, with the Court of First Instance of South Cotabato, on July 19, 1967, plaintiff Nora D. Santos seeks to recover, from defendant Aladino Taniongong, the possession of a parcel of land in Barrio Cebuano, Tupi, South Cotabato, as well as damages. Defendant filed, on August 3, 1967, his answer with a counterclaim, to which plaintiff replied, on August 14, 1967, with an answer to the counterclaim. On January 23, 1969, the case was dismissed for failure to prosecute, plaintiff having done nothing in the meantime.

L-30933. The complaint for reconveyance in this case, filed on October 5, 1960, with the Court of First Instance of Zamboanga del Sur, having been dismissed for lack of cause of action, plaintiffs Brigido Gudmalin and Monica Sabijon filed, on March 31, 1962, their notice of appeal, appeal bond and record on appeal. When the latter was considered for approval, on April 14, 1962, counsel for the defendants pointed out that its caption did not set forth the full names of all parties. Thereupon, the Judge who presided over the court stated: "(w)ith (that) modification, the court will approve the record on appeal." Plaintiffs claim to have later amended the same "by inclusion of all parties in hand-writing duly initialed" in the original Record on Appeal, on file in the Office of the Clerk of Court, although without giving respond-ents the notice required in Section 7 of Rule 41 of the Rules of Court. Over five (5) years later, or on August 11, 1967, the appeal was dismissed for failure of the plaintiffs to submit an amended record on appeal, in accordance with said provision of the Rules of Court, or to apprise the defendants and the court of the handwritten cor-rection made in the original record on appeal.

L-31072. This is a special civil action for certiorari, prohibition and mandamus, filed, with the Court of First Instance of Manila, on September 2, 1967, to annul and set aside a decision of respondent Conrado F. Estrella, as Governor of the Land Authority, approving the sale of a parcel of land in the District of Paco, Manila, to private respondent Teodoro Nocon, after said lot had been allegedly sold to petitioner Henry Olilang, and to re-quire said Governor Estrella to allocate the disputed land to Olilang. On December 17, 1968, the court issued an order setting the case for hearing on February 6, 1969, but, despite notice given to counsel for Olilang, he did not appear before the court on that date. Thereupon, the case was dismissed. On February 11, 1969, Olilang's counsel filed a motion for Relief or Reconsideration upon the ground that, in making the memorandum of said hearing, in his new pocket calendar, his office secretary had erroneously made the corresponding entry in the space for February 11, 1969, instead of February 6, 1969. This motion was denied.

Section 3 of Rule 17 of the present Rules of Court, which is a reproduction of Section 3 of Rule 30 of the Rules of Court effective July 1, 1940, reads:

"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 court."

Construing this provision, it was held in *Smith Bell & Co. v. American President Lines, Ltd.*,^[5] and this view was reiterated in subsequent cases,^[6] that "x x x (t)he dismissal of an action pursuant to this rule rests upon the sound discretion of the court x x x."

As to what constitutes an "unreasonable length of time," within the purview of the above-quoted provision, We have ruled that it "depends upon the circumstances of each particular case," that "the sound discretion of the court" in the determination of said question "will not be disturbed, in the absence of patent abuse"; and that "the burden of showing abuse of judicial discretion is upon appellant since every presumption is in favor of the correctness of the court's action."^[7]

Thus, this Court refused to disturb orders of dismissal for failure of the plaintiffs to prosecute for a period of four (4) years,^[8] about three (3) years,^[9] over a year,^[10] less than a year,^[11] and even less than three (3) months,^[12] as well as for failure of the plaintiffs to comply, for less than two (2) months, with an order directing him to file a bill of particulars.^[13]

Let us now examine the cases under consideration, in the light of the foregoing precedents.

Plaintiffs-appellants in L-27187 assail the order of dismissal appealed from upon the ground: a) that the duty to serve summons upon the defendants devolves upon the clerk of court, not upon the plaintiffs; and 2) that service of summons by publication is not feasible in this case. The first ground is clearly untenable. We find no cogent reason to depart from the position taken in *Smith Bell & Co. vs. American President Lines*, in which this Court ruled:

"The appellants contend that under sections 1, 2, and 3, of Rule 31, Rules of Court, it is the duty of the clerk of court and not of the plaintiff to include a case in the trial calendar after the issues are joined and that it is also the duty of the clerk of court and not the plaintiff to fix the date for trial and to cause a notice to be served upon the parties. But the duty imposed upon the clerk in these sections of the Rules does not relieve the plaintiff of his own duty to prosecute the case diligently, for the non-performance of that duty by plaintiff is by section 3 of Rule 30 made an express ground for dismissing the action. If the clerk, therefore, in the present cases had been negligent, it was plaintiff's duty to call the court's attention to that fact so that the administration of justice would not suffer delay."

The second ground did not justify plaintiffs' inaction for three (3) years. If there was no means of summoning any of the defendants, plaintiffs should have so informed the court and moved for their exclusion from the complaint, within a reasonable period of time, so that the case could be disposed of one way or another, instead of being left pending indefinitely, thus contributing to the clogging of our court dockets. Besides, plaintiffs could have asked that the defendants be summoned by publication, pursuant to sections 16 and 17 of Rule 41 of the Rules of Court, the action being one for partition of real properties in the Philippines.

Appellant in L-29098 alleges that the failure of his counsel to appear at the pre-trial, on January 4, 1968, was due to the fact that he then had to attend the trial of another case; that he had filed, on December 27, 1967, a motion for postponement of said pre-trial upon such ground; and that, although the motion was denied on December 29, 1967, notice of the order to this effect was not received by him until January 12, 1968, or eight (8) days after the scheduled pre-trial. These reasons are insufficient to warrant a reversal of the order appealed from. Appellant was represented by the "Achacoso, Ocampo and Simbulan" Law Firm, on behalf of which Atty. Sabino P. Palomares, Jr. had appeared. If Atty. Palomares had another case set for trial on January 4, 1968, any of the three (3) members of the law firm could have and should have appeared at the pre-trial of the case at bar. Moreover, in the absence of an order granting said motion for postponement, appellant's counsel was not justified in assuming that the motion would be granted.

"The fact that the plaintiffs had filed a motion for continuance x x x does not entitle the plaintiffs to presume that their motion for continuance would be granted. Motions for postponement are left to the sound discretion of the trial court and unless there be an abuse of such discretion this Court will not interfere with the exercise of that discretion. x x x." [14]

As regards L-29373, having been rendered pursuant to a compromise between plaintiff Bolivar and defendant Bandayrel, who has not assailed the validity of said compromise, the judgment of the City Court was not appealable.[15] Regardless of whether or not Bandayrel had failed to exercise reasonable diligence in the prosecution of his appeal, the same was, therefore, dismissed properly.

Considering, with respect to L-29454, that from March 24, 1961, when the case was set for trial, to December 8, 1966, when it was dismissed, over five (5) years and eight (8) months had elapsed, during which plaintiff had done nothing to prosecute the case, and that, in its order of March 17, 1964, the lower court had already warned the parties "that no further postponement shall be granted," it is clear that the order of dismissal therein appealed from was fully justified.

Neither has appellant in L-29542 shown that there was a patent abuse of discretion in dismissing the case for failure on his part, as plaintiff therein, to prosecute it for over eleven (11) months, considering that the subject matter of the litigation was a small sum of money[16] and that appellant's claim therefor had been found by the city court to be groundless.[17]

In L-30711, both parties were notified, on August 8, 1966, that the record of the appeal taken by the plaintiff therein - from the judgment of dismissal rendered by the municipal court of General Santos - had been received by the Court of First Instance of Cota-bato. Yet, up to January 30, 1969, when the case was ordered dismissed, or for about two (2) years and a half, plaintiff-appellant had taken no step whatsoever to prosecute its claim. The excuse given by counsel for the plaintiff is that he was waiting for the clerk of the court of first instance to issue the proper notice of pre-trial, without which the case would not be ready for trial. This excuse is untenable. In the language of the Smith Bell case:

"x x x. (T)he duty imposed upon the clerk x x x does not relieve the plaintiff of his own duty to prosecute the case diligently, for the non-performance of that duty by plaintiff is by section 3 of Rule 30 made an express

ground for dismissing the action. If the clerk, therefore, in the present cases had been negligent, it was plaintiff's duty to call the court's attention to that fact so that the administration of justice would not suffer delay."

Similarly, the order of dismissal for the inaction of plaintiff in L-30744, from August 14, 1967 - when she filed her reply, with an answer to the defendant's counterclaim - to January 23, 1969 - or for over seventeen (17) months - when said order was issued - was, likewise, justified. Appellant's argument to the effect that the case was not ready for trial, no pre-trial having as yet been held, is - for the reasons adverted to in relation to L-30711 - devoid of merit.

So is the appeal in L-30933, more than five (5) years having elapsed from the submission of appellants' record on appeal on April 14, 1962, to August 11, 1967, when the appeal was dismissed. Appellants maintain that their duty to see to it that the record on appeal was transmitted and certified to the appellate court starts only from its approval. It is their duty as appellants to exercise due diligence in the prosecution of their appeal. Obviously, this duty includes that of securing the approval of the record on appeal and its transmittal to the appellate court.

Lastly, the mistake allegedly committed by the office secret-ary of appellant's counsel in L-31072, in making the entry for the hearing of the case on February 6, 1969, in the space for February 11, 1969, in his new pocket calendar, is too flimsy to warrant a reversal of the order of dismissal complained of, apart from being difficult to believe. At any rate, the sworn statement of appellant Olilang, attached, by way of affidavit of merit, to his motion for relief, does not satisfy the requirements therefor, it being no more than a general, abstract assertion of a conclusion that he has "a valid and meritorious cause of action against the respondents" therein, without any fact in support thereof.

WHEREFORE, the orders appealed from in each one of these nine (9) cases are hereby affirmed, with costs against the respective appellants, except appellant in L-30711, which is the Government.

IT IS SO ORDERED.

Reyes, J.B.L., Makalintal, Zaldivar, Fernando, Teehankee, and Villamor, JJ., concur.

Makasiar, J., did not take part.

Barredo, J., concurs except on G.R. L-29542 as to which I reiterate my views in Gonzales vs. Chua Keng Kian, G.R. No. L-26430, Mar. 11, 1969.

Dizon and Ruiz Castro, JJ., on leave.

[1] P1,737.50, with interest, plus 25% as attorney's fees.

[2] For repairs made in Arcellana's car which was insured with the company.

[3] P4,872.59.

[4] A little over P3,000.

[5] 94 Phil. 879, 880.

[6] Bautista v. Teodoro, 101 Phil. 701, 704; Montelibano v. Benares, 103 Phil. 106, 109; Flores v. Philippine Alien Property Administrator, 107 Phil. 773, 778.

[7] Brandt v. Behn, Meyer & Co., 38 Phil. 351, 354; Masig-lat v. Mayor of Pasay City, 104 Phil. 319, 322; Vernus-Sanciangco v. Sanciangco, L-16219, April 28, 1962; Smith Bell & Co. v. American President Lines,

Ltd., supra; Adorable v. Bonifacio, L-10698, April 22, 1959; Flores v. Philippine Alien Property Administrator, supra; Inter-Island Gas Service, Inc. v. De la Cerna, L-17631, October 19, 1966.

[8] E. E. Elser, Inc. v. De la Rama Steamship Co., 94 Phil. 812; Smith Bell & Co. v. American President Lines, Ltd., supra; Adorable v. Bonifacio, supra; Ventura v. Baysa, L-12960, January 31, 1962.

[9] Inter-Island Gas Service, Inc. v. De la Cerna, supra.

[10] See Chuan v. De la Fuente, 90 Phil. 813, 815; Ortega v. De Guzman, L-25758, February 18, 1967; Insurance Co. of North America v. Republic, L-26794, November 15, 1967.

[11] Flores v. Philippine Alien Property Administrator, supra, at pp. 777-778.

[12] Sunico v. Villapando, 14 Phil. 352; Masiglat v. Mayor of Pasay City, supra.

[13] Bautista v. Teodoro, supra.

[14] Montelibano v. Benares, supra, at p. 109.

[15] De los Reyes v. De Ugarte, 75 Phil. 505; Enriquez v. Padilla, 77 Phil. 373; Serrano v. Reyes, L-16153, Dec. 29, 1960.

[16] For services allegedly rendered by the plaintiff-appellant.

[17] No employer-employee relationship existed between the parties. See Masiglat v. Mayor of Pasay City, supra; Flores v. Philippine Alien Property Administrator, supra.

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