

AUGUSTO ONGSIAKO, PLAINTIFF AND APPELLEE, VS. JUDGE FELIPE NATIVIDAD, DEFENDANT AND APPELLANT.*G.R. No. L-1371. August 05, 1947*

Ponente: MORAN, C.J.

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On May 22, 1944, Anselmo V. Tolentino filed an action in the Court of First Instance of Manila to compel Augusto V. Ongsiako, to execute a deed of reconveyance of a house and lot situated in Manila. On September 6, 1944, after trial, judgment was rendered as prayed for in the complaint. It is now alleged that on September 23, 1944, defendant Ongsiako filed his intention to appeal, record on appeal and an appeal bond, but Manila was bombed and the record on appeal was not acted upon by the court. On June 19, 1945, Anselmo V. Tolentino filed a petition for reconstitution of the case. After reconstitution, upon motion of Tolentino, the lower court issued an order of execution, it appearing from the record thus reconstituted that no appeal bond had ever been filed within the time provided by the Rules. Ongsiako sought the reconsideration of this order, but his motion to that effect was denied.

Ongsiako, petitioner in certiorari, now prays for the annulment of the lower court's order declaring said case reconstituted and the order of execution issued on December 16, 1948, on the ground that he was not duly notified of (a) the petition for reconstitution, (b) the order declaring said case reconstituted, and (c) the motion for execution.

At the outset, it must be stated that the petition for certiorari is not proper. The proper remedy would have been a petition before the respondent court for relief under Rule 38 of the Rules of Court, wherein evidence of lack of notice should have been offered, and appeal taken if petition were denied. Under such procedure, evidence would have been orderly offered by both parties and such evidence would now be complete before the appellate court thus enabling the settlement upon clear grounds of the issues raised in the petition, and such appellate court would properly have been the Court of Appeals, and not this court the question involved being mainly one of fact.

But petitioner chose not to follow the proper procedure, and instead filed before us a petition for certiorari which should have been filed with the Court of Appeals for it is a remedy in aid of its appellate jurisdiction over the principal case. And in said petition for certiorari, petitioner, instead of adducing specific evidence of the lack of notice pleaded by him, wishes to refer this court to the reconstituted record of the principal case to search for such evidence. The petition would have been dismissed for the reasons above stated had it not already been extensively argued before us and had we not found that the issues are so groundless as to deserve no further consideration by other courts.

Petitioner alleges that he was not notified of the petition for reconstitution. In the reconstituted record, there appears a statement at the end of said petition that a copy thereof was sent by ordinary mail to petitioner's attorneys, Gallego and De los Reyes. Although this statement is not sufficient proof of service, nevertheless, since the petition for reconstitution was acted upon by the court, it is presumed that the proceeding was regular and that

all the steps required by law to be taken before the court could validly act thereon, had been so taken, and one of them being the service of notice upon opposing counsel. In the record of the case, there is absolutely nothing to show that service has not actually been made. The presumption then stands.

Petitioner further alleges that he was not duly notified of the order of June 25, 1945, declaring the case reconstituted. The records show that the sheriff's return with his certification that a copy of said order was duly served by leaving the same at the office of petitioner with an employee having charge thereof. Petitioner claims that such service should have been made on his attorneys and not on him. But these attorneys failed to appear when they were notified of the petition for reconstitution. Moreover, notice upon a party is also valid if ordered by the court (Rule 27, section 2) and there is nothing to show that there has been no such order, hence, regularity of procedure is presumed.

Petitioner also alleges that he received no copy of the motion for execution. The records contain as exhibit the registry return card showing that a copy of said motion was sent to petitioner's attorneys of record, and that the same was duly received. In attempting to refute this particular service on his attorneys, petitioner claims that the law firm had been dissolved. Yet, as to the order declaring the case reconstituted served upon him personally, he claims that service should have been made on his attorneys. And again, as to the petition for reconstitution served by ordinary mail upon his attorneys, petitioner claims that service was neither made on him or his attorneys. This inconsistent stand, together with his actual knowledge of the reconstitution of the case at least from the service on him of the order declaring the case reconstituted, substantially dilutes petitioner's good faith in the premises.

In view of all the foregoing, the petition is dismissed with costs against petitioner.

Paras, Feria, Pablo, Bengzon, Briones, Padilla, and Tuason, JJ., concur.

DISSENTING

PERFECTO, J.:

Petitioner alleges under oath that on September 23, 1944, 18 days after the receipt of the decision of the Court of First Instance of Manila in a case to compel him to execute a deed of reconveyance in favor of Anselmo V. Tolentino, he filed his notice of appeal, a record on appeal, "and an appeal bond as provided for by the Rules of Court," but before the record on appeal could be approved and the case certified to the Court of Appeals, Manila was bombed and thereafter petitioner failed to receive any notice regarding the case.

On June 11, 1945, Tolentino moved for the reconstitution of the record of the case and for execution of the decision of the Court of First Instance. Neither petitioner nor his lawyer received any notice of the motion for reconstitution.

The last allegation appears to be based on fact, and is ground enough for granting the petition and for setting aside the order declaring the case reconstituted.

In the majority decision it is alleged that at the end of the petition for reconstitution "there appears a statement" that "a copy thereof was sent by ordinary mail to petitioner's attorneys." The majority admit that this statement "is not sufficient proof of service" but they add "since the petition for reconstitution was acted upon the court, it is presumed that the proceeding was regular and that all the steps required by law to be taken before the court could validly act thereon, had been so taken, and one of them being the serving of notice upon opposing counsel."

This pronouncement is untenable. It is absurd and paradoxical. It brushes aside, without any logical ground,

petitioner's averment, made under oath and uncontradicted, that neither he nor his attorneys were notified of the motion for reconstitution. The only hint against petitioner's verified statement is the statement at the end of the motion for reconstitution to the effect that copy of the motion was sent by ordinary mail to petitioner's attorneys. But the majority themselves pronounced that "this statement is not sufficient proof of service." If the only indicium of any attempt to serve notice,—the statement at the bottom of the motion for reconsideration—appears to deny that service has been made (said statement being, according to the majority, "not sufficient proof of service"), how can the majority, without losing all sense of reality and logic, presume that service of notice has in fact been made?

Petitioner is entitled to his day in court. That right has been violated when the lower court received the motion for reconstitution, proceeded to reconstitute the case, and ordered the case reconstituted, all at petitioner's back. The iniquity of the unilateral proceedings is apparent when we consider that the lower court ordered the execution of a decision against which petitioner appealed on time and in accordance with the procedure outlined by the rules. Execution was ordered upon the assumption that the decision became final, and this one upon the other assumption that petitioner's appeal has not been perfected, and this upon the third assumption that no appeal bond has been filed, because the filing of such appeal bond does not appear in the reconstituted papers. How can the appeal bond be mentioned in the reconstituted case, when the reconstitution was made *ex parte*? How could it be mentioned when petitioner was deprived of the opportunity of offering evidence that such appeal bond has in fact been filed? How can it be mentioned when he was denied all chance of being heard by the court, irretrievably sentenced to the muteness and silence of death before the laws of nature and fate had ever decreed to ostracize him from the society of the living?

The action of the lower court, as sustained by the majority decision, constitutes a travesty of the administration of justice. Petitioner is deprived of his right of property without due process of law, and is denied the equal protection of the law, both in utter disregard of the guarantees embodied in the Constitution.

It is our considered opinion that all the proceedings in the reconstituted case should be set aside and that if reconstitution is to be made, all the interested parties, without excluding petitioner, should be given full opportunity to be heard.

Lastly, it may not be amiss to state here that the resolution of dismissal of the petition for review on certiorari sought to be reconstituted, was rendered on September 6, 1944, and therefore, not by a tribunal established by the laws of the Philippines, as provided by section 1 of Article VIII of the Constitution, It cannot be executed, being null and void, as we have already explained in our opinions in *Co Kim Cham vs. Valdez Tan Keh and Dizon* (75 Phil., 113).

We vote to grant the petition, especially prayers 3 and 4 thereof.

HILADO, J.:

I concur in this dissent.

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