

SMITH BELL & CO., LTD., AND INSURANCE COMPANY OF NORTH AMERICA, ET AL., PLAINTIFFS AND APPELLANTS VS. AMERICAN PRESIDENT LINES, LTD., AND/OR MANILA TERMINAL CO., INC., ET AL., D...*G.R. Nos. L-5304 to L-5324. April 30, 1954*

Ponente: REYES, J.

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These cases are before this Court on appeal from an order of dismissal for failure to prosecute.

The cases seek recovery of indemnity for cargo lost or damaged. Commenced in the Court of First Instance of Manila in 1947, they there lay idle for an unreasonable length of time and were for that reason ordered dismissed on August 14, 1951, pursuant to section 3 of Rule 30, Rules of Court. Plaintiffs asked for a reconsideration. But reconsideration was denied. Hence this appeal.

The pertinent portion of the Rule cited says that "when plaintiff * * * fails to prosecute his action for an unreasonable length of time, * * * the action may be dismissed upon motion of the defendant or upon the court's own motion." The dismissal of an action pursuant to this rule rests upon the sound discretion of the court and will not be reversed on appeal in the absence of abuse. 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.

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.

By way of justifying the long delay in the prosecution of these cases, appellants alleged in their motion for reconsideration in the court below that there were more than 500 of these cases and that the attorneys for plaintiffs had been endeavoring to have their trial by making proper representations to the different judges to which the cases were assigned; that they also sought an understanding with defendants' counsel to have a few of those cases considered as test cases; that trial of those test cases was begun but was not finished because of the pendency of many treason cases and the promotion of Judge Dionisio de Leon, who was trying the said cases, to the Court of Appeals; and that it was only recently that all these cases were assigned to Branch C of the court and that the deputy clerk of court has *motu proprio* been setting the more than 500 cases every Tuesday and Thursday at the rate of 4 cases a day at the beginning and later at the rate of two a day, so that there was no longer need for plaintiffs to file any motion to set the cases for trial. Apparently these excuses were not believed by the trial

Judge, who was in a position to know the truth, for he refused to reconsider his order of dismissal. Moreover, explanations are refuted by counsel for the appellee steamship companies, who state in their brief that there never was any test case in the court below for the steamship companies refused to agree to have a test case to determine their liability in all the other cases because the facts and points of law involved in said cases were not squarely identical; that the delay in terminating the trial of those alleged test cases (Civil Cases Nos. 2934 and 3496) could not have been due to the promotion of Judge De Leon to the Court of Appeals because the trial was resumed on August 9, 1950, before the successor of Judge De Leon, which was long before the dismissal of the present cases; that the pendency of many treason cases was no impediment for the prosecution of the civil cases; and that the fact that the clerk of court had begun setting the cases since August 1, 1951, can be no justification for plaintiff's failure to ask for trial long before that time.

The record before us does not clearly show that plaintiffs have made a diligent and persistent effort to expedite the disposition of these suits to a degree sufficient to justify a pronouncement on our part that the trial court abused its discretion in ordering their dismissal and in not granting plaintiffs' motion for reconsideration of that order. And plaintiffs' last minute attempt to place the cases on the trial calendar three or four years after issues had been joined and on or near the date the order of dismissal was handed down, in no way strengthens their position.

The order of dismissal is therefore, affirmed, with costs against the appellants.

Paras, C. J., Pablo, Bengzon, Montemayor, Jugo, Bautista Angelo, Labrador, and Concepcion, JJ., concur.

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