

RAFAEL P. MASCARIÑAS, PETITIONER AND APPELLANT, VS. MONEBRIO F. ABELLANA, RESPONDENT AND APPELLEE.

G. R. No. L-21767. December 17, 1965

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Petitioner Mascariñas has appealed on questions of law from a decision of the Court of First Instance of Davao (in its Case No. 3785) dismissing his petition for a writ of Quo Warranto against respondent Abellana.

The case, submitted to the court below upon a stipulation of facts, may be briefly summarized as follows: Respondent Monebrio F. Abellana had been nominated as Chief of Police of Davao City by the President of the Philippines, on 17 February 1955, and on 18 May 1955 his nomination was confirmed by the Commission on Appointments. But on 31 July 1957 the President designated herein petitioner-appellant Rafael P. Mascariñas to be "Acting Chief of Police of Davao City". Said appellant took his oath of office on 5 August 1957 and informed the Civil Service Commissioner of his assumption of office on 28 August 1957. Two days previously, however, Abellana had informed the Davao City mayor that he was not vacating the office.

On 19 September 1957, the Armed Forces of the Philippines issued Special Order No. 64, calling Abellana to active military duty and placed him on detached service with the Office of the President. On 15 October 1957, Abellana wired the mayor of Davao City: "Am already on active duty effective sixteenth stop Mascarinas can assume. (Sgd.) Abellana". Opposition to appellant Mascariñas was, therefore, withdrawn and the latter assumed office as Acting Chief of Police.

Abellana served as Adviser on Police Matters in the Office of the President, and, with the approval of the Auditor General, collected, from 15 October 1957 to 28 February 1958, the difference between his army pay and that of Chief of Police of Davao.

On 21 May 1958, Mascariñas was in turn nominated by the President, and the next day he was confirmed as Chief of Police of Davao City. In July, 1959, Abellana instituted against Mascariñas Special Civil Case No. 3040 for quo warranto in the Davao Court of First Instance. The action was, on 1 August 1959, dismissed for lack of cause of action, and the dismissal became final.

Reverted to inactive status effective 15 April 1962, Abellana advised the Davao mayor of his intention to reassume the office of Police Chief, heretofore occupied by Mascariñas and as the Secretary of Justice opined in Abellana's favor and the Executive Secretary, on 27 June 1962, instructed that he be installed, the City Mayor notified Mascariñas to vacate and allowed Abellana to enter into the performance of his duties.

Mascariñas, who had been acting as Chief of Police until 29 June 1962, instituted the present quo warranto proceedings. The court below ruled in favor of Abellana, and Mascariñas appealed, contending that Abellana lost his right to the office by staying on military duty from 1957 to 1962; that his service in the office of the President was acceptance of an incompatible office that extinguished his right to his former position; that Abellana's failure

to protest appellant's nomination and confirmation as Police Chief and failure to appeal the dismissal of his quo warranto suit against Mascariñas in 1959 barred Abellana from claiming the position of Davao City Chief of Police.

In support of his first contention, Mascariñas invokes our ruling in *Maddumba vs. Ozaeta*, 82 Phil., 345, to the effect that section 49 of the National Defense Act (C.A. No. 1), protecting government employees in their positions when called into service as trainees, or called (for 30 days) for training as reservists, has no application to those who join the armed forces or the constabulary as regular members for a long period of time.

It is well" to observe, however, that the *Maddumba* case was decided on the basis of section 49 of Commonwealth Act No. 1, in its original form, that prescribed as follows:

"SEC. 49. Any employee of the Government called for trainee instruction, or for regular annual active duty training, shall not be compelled to lose his position or to suffer a loss of pay due to his absence in the fulfillment of his military obligations."

Subsequently, by Commonwealth Act No. 569, section 15, section 49, above quoted, was amended to read:

"SEC. 49. Any employee of the Government called for trainee instruction, or for regular annual active duty training, or for extended tour of active duty, shall not lose his position or suffer a loss of pay due to his absence in the fulfillment of his military obligations. A reserve officer on extended tour of active duty, regardless of the amount of his compensation in the civil position, shall be entitled to quarters or rental allowance as may be prescribed for his grade by Army regulations." (Emphasis supplied)

The amendment includes respondent Abellana under its protective mantle, it being undisputed that he, being a reserve officer, was recalled to active duty, and not merely for training. In fact, under this amended provision, and in harmony therewith, the President issued Executive Orders No. 99, and 162 (35 Off. Gaz. 1479 and 36 Off. Gaz., 2373), providing as follows:

* * * * *

"1. No official or employee of the Government, while undergoing trainee instruction or who, upon completing thereof, shall have been selected for additional training to qualify him as a commissioned or non-commissioned officer of the Reserve Force, or who shall have been called to regular annual active duty training, or to extended tour of active duty in the Philippine Army, in case he holds a commission in the Reserve Force, shall be compelled to lose his position or to suffer any decrease of pay whatsoever due to his absence in the fulfillment of his military obligations." (Italics supplied)

"4. Upon his relief from trainee instruction or extended tour of active duty in the military service, the official or employee shall be reinstated to his position in the Government with all the rights and privileges thereof." (Philippine Annotated Laws, Vol. II, pp. 49-50) (Italics supplied)

These provisions apply to Abellana's case, and are decisive to show that his five-year absence on military duty did not work any forfeiture of his right to reoccupy the civilian position of Chief of Police of Davao City to which he had been previously appointed and confirmed. As a military officer on tour of duty, petitioner could not disobey his assignment of the office of the Executive Secretary without violating military discipline, hence his stay there can not be considered a holding of an incompatible office.

Appellant Mascariñas places much stress on Abellana's 1957 telegram to the mayor of Davao City the "Mascañas can be assume" as evidencing respondent's relinquishment of the disputed office. We see no basis for his stand. In 1957, Mascariñas was still Acting Chief of Police, and his assumption of office in such acting capacity in no way implied any derogation of Abellana's position as the true incumbent, temporarily absent on account of his recall to

active military service.

Appellant Mascariñas also pleads that if Abellana desired to retain his post, he could have claimed exemption from military duty under section 64 of the National Defense Act (CA No. 1), for it is therein provided that civilians "during their period of employment or functions may have their trainee instruction deferred for not to exceed three years." But since Abellana was not being called for trainee instruction, section 64 did not apply to him.

The respondent-appellee M.N. Abellana should not have registered any protest against the nomination of appellant and its confirmation by the Commission on Appointments is without significance, for their validity depended entirely Police. As pointed out in the appealed decision, without significance, for their validity depended entirely on the existence of a vacant office both the nomination and its confirmation for that office were null and void ab initio. And section 49 of the National Defense Act, as amended by Commonwealth Act No. 569, makes it clear the Abellana's tour of duty with the Armed Forces did not create any vacancy not lose his position—due to his absence in the fulfillment of his military obligations". Protest or no protest, Mascariñas could not be rightfully appointed to the same position that Abellana was already occupying.

Mascariñas' last argument is that the present action of Abellana is barred by the unconditional dismissal of Abellana's 1959 quo warranto suit (Case No. 3040). We agree with the lower court that this pretense is not tenable. In 1959, Abellana was still in active military service, and could not validity discharge the duties attached to his civilian office; hence the court dismissed his quo warranto for lack of cause of action. But in 1962 Abellana had reverted to inactive status; no conflicting obligations barred any longer his occupying the office of Chief of Police of Davao City and his right thereto fully accrued. The lower court correctly held that under the circumstances *res judicata* can not apply.

Wherefore, the decision appealed from, upholding the right of respondent-appellee Abellana to to office of Chief of Police of Davao City, is affirmed. Cost against petitioner-appellant Rafael F. Mascariñas.

Bengzon, C. J., Bautista Angelo, Concepcion, Barrera, Dizon, Regala, Makalintal, Bengzon, J. P., and Zaldivar, JJ., concur.

Judgment affirmed.

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