

FRANCISCO CUNAAN, DEOGRACIAS ATIENZA AND FELIX ESPINO, PETITIONERS, VS. SOTERO RODAS, JUDGE OF FIRST INSTANCE OF MANILA, PILAR FARAON, AND THE SHERIFF OF CITY OF MANILA, RESPOND...*G.R. Nos. L-1400, L-1406-07. July 30, 1947*

Ponente: PARAS, J.

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The three petitioners herein, Francisco Cunaan, Deogracias Atienza and Felix Espino, are the defendants in three separate actions for ejectment instituted by the herein respondent, Pilar Faraon, in the Municipal Court of the City of Manila. The petitioners were sentenced to vacate the premises respectively occupied by them and each to pay the monthly rental of thirty pesos from November 1, 1946. The petitioners appealed to the Court of First Instance of Manila which, on March 25, 1947, entered an order directing the issuance of writs of execution, on the ground that the petitioners had failed to deposit with said court the rental fixed by the municipal court within the period specified in section 8 of Rule of Court No. 72. Said order was, of course, issued after the herein respondent Pilar Faraon had filed the corresponding motion for execution. The petitioners have now come before us for relief, through an original petition for prohibition.

We have already held that section 8 of Rule of Court No. 72, authorizing immediate execution when the defendant in an ejectment case appealed to the Court of First Instance fails to pay to the plaintiff or to the court the rents due from time to time on or before the tenth day of each calendar month, is mandatory, leaving the court without any discretion in the matter. (*Zamora vs. Dinglasan and Hilario*, 77 Phil., 46; *Caluag Domingo vs. Court of First Instance of Nueva Ecija and Roman Vda. de Moreno*, 77 Phil., 170.)

In view of petitioners' admission that they deposited the rent in question beyond the reglementary ten-day period, the question that arises is whether the petitioners may be considered as falling under the exception recognized in *Zamora vs. Dinglasan and Hilario*, supra, namely, that the delay in effecting the deposit was due to fraud, accident, mistake or excusable negligence. But said defense cannot herein be inquired into, since it was not raised and properly made the subject of proof before the respondent judge.

Neither may the petitioners invoke the Rental Law (Commonwealth Act No. 689) allowing suspension of executions, for the simple reason that said law refers to execution of final and executory judgments, and not to execution pending appeal. The respondent Pilar Faraon needs the premises in dispute for her own use. Hence Republic Act No. 66 has also no application in this case.

The petitioners are likewise not entitled to the benefit of the doctrine laid down in *Manotok vs. Legaspi and Legaspi* (77 Phil., 523), to the effect that "although under sections 8 and 9 of Rule 72, the landlord, in whose favor a decision for ejectment has been rendered by the lower court, is entitled to ask for the execution of the lower court's judgment if the tenant fails to pay or deposit, on or before the 10th day of each calendar month, the rent for the preceding month, there is nothing to preclude him from waiving his right," because in that case, unlike the

ones at bar, "it unmistakably appears that appellee had waived the right by allowing appellants to pay the rents out of time and by accepting the belated payments for the purpose of staying the execution of the judgment."

The petition is hereby dismissed, with costs against the petitioners. So ordered.

Hilado, Hontiveros, Padilla, and Tuason, JJ., concur.

CONCURRING

PERFECTO, J.:

The fact that respondent Pilar Faraon has bought the property in question to live therein, as she and her large family are living uncomfortably in a house which is not her own, appears to us to be the weightier consideration in this case, and that fact compels us to incline the balance of justice in her favor and to vote for the denial of the petition. If not for said fact, mere delay of a few days in depositing the rents would not, in our opinion, be enough for ordering the ouster of petitioners. Rule 72 has ceased to be an inflexible one. Many recent decisions of this Court have given to those provisions such pliability and resiliency that the redrafting of said rule had come to be in order, as several of its provisions have become obsolete.

DISSENTING

MORAN, C. J., with whom concur FERIA, PABLO, and BENGZON, JJ.:

I do not agree with the majority opinion which dismisses the petition mainly on the ground that petitioner, tenant in this case of ejectment, failed to deposit the rent during the pendency of the appeal within the time required by Rule 72, section 8, of the Rules of Court. It is a fact that the deposit was made not only before execution was ordered but even before the motion for execution was heard.

It is my considered opinion that section 8 of Rule 72 must be viewed in the light of Republic Act No. 66. As we held in the case of Santos vs. De Alvarez (p. 503, ante), under said Act, no tenant should be ejected for non-payment of rents, if the non-payment is not wilful or deliberate. When the deposit is actually made prior to the hearing of the motion for execution, a delay of eight days certainly cannot be considered a willful non-payment.

The monthly payments or deposits to be made by appellant during the pendency of the appeal in order to stay the execution of the judgment, are of the same character as the payments of rents which the defendant tenant has to make in order that the landlord may not file an action to oust him from the premises. The fact that in the instant case judgment has already been rendered against defendant, does not change the original status of the relation between the tenant and the landlord, since the case has not yet been finally decided, and appeal may be decided in favor of the appellant. Therefore, the pertinent provision of Commonwealth Act No. 689, as amended by Republic Act No. 66, which provides the tenant cannot be ousted for non-payment of rents except when such non-payment is willful and deliberate, is applicable to the present case.

The majority opinion also holds that respondent needs the premises for herself, hence, this case should fall under one of the exceptions given in section 2 of Republic Act No. 66. This is a statement that finds no support in the records of the case other than in the mutual assertions and denials of the parties. This is a fact that should be proven or disproven in the lower court wherein the case is pending appeal. And, furthermore, such need is not a ground for execution of judgment during the pendency of the appeal.

In view of the foregoing, the order of execution should be set aside and the appeal in the lower court should be permitted to proceed where proof and evidence may be received to support or demolish the allegation that respondent does in truth need the premises concerned for her own use.

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