

SERAPIN SANSON, PETITIONER, VS. CONRADO BARKIOS, JUDGE OF THE COURT OF FIRST INSTANCE OF ILOILO, ALFREDO SANSON, EVA SANSON, ANTONIO YUSAY AND ISABEL ARANETA, RESPONDENTS.*G. R. No. L-45086. July 20, 1936*

Ponente: RECTO, J.

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In previous mandamus proceedings between the same parties (G. R. No. 44633 [62 Phil., 975]), entitled "Serafin Sanson vs. The Hon. Conrado Barrios, et al." this court granted the writ prayed for and directed the respondent judge to "consider and decide on its merits, in accordance with the evidence submitted by the parties, the new petition for the appointment of a receiver" filed by the plaintiff in civil case No. 9208 of the Court of First Instance of Iloilo, entitled "Serafin Sanson, plaintiff, vs. Isabel Araneta et al., defendants."

In compliance with the order of this court a hearing was held on the said petition and the same was afterwards denied by the respondent judge on the ground that the facts brought out by the evidence did not show the necessity of appointing a receiver. Now comes the petitioner with an application for a writ of mandamus alleging "that the evidence presented amply justifies the immediate appointment of a receiver; that the harvest season is in full swing and the appointment of a receiver is imperatively and absolutely necessary, to protect the interest of the petitioner" who will, otherwise, sustain "irreparable damage"; that while "the respondent judge has discretion to determine the necessity for an appointment of a receiver," nevertheless his refusal to appoint a receiver "is a gross abuse of discretion on his part and a great injustice to the herein petitioner"; and that there is no plain, speedy and adequate remedy, except the one prayed for, to correct this abuse of discretion.

The allegations contained in the petition fail, in our opinion, to make a case for the issuance of a writ of mandamus. There is no showing that the petitioner has a clear legal right to the writ demanded or that it is the imperative duty of the respondent judge, clearly and peremptorily enjoined by law, to perform the act required, which in this case is the appointment of a receiver in civil case No. 9208. There is, on the contrary, the plain admission on the part of the petitioner (see last paragraph, p. 13 of the petition) that the act for the performance of which we are asked to compel the respondent judge, falls within judicial discretion. It is suggested by the allegations of the petition that the writ of mandamus may be resorted to as a remedy by which this court may review the correctness of the action of the respondent judge in a matter falling within his discretion, and that this court may substitute its judgment for the judgment of the respondent judge as to the merits of the evidence submitted in support of the petition for the appointment of a receiver. We believe, however, that even if the action taken by the respondent judge was not justified in view of the evidence presented in the case and may therefore be reversed on appeal—should this remedy exist—nevertheless such action is not subject to review in a mandamus proceeding.

- Mandamus is the proper remedy only in cases where an inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or unlawfully excludes a person from the use and enjoyment of a right or office to

which said person is entitled and from which he is precluded by such inferior tribunal, corporation, board or person, and there is no other plain, speedy and adequate remedy in the ordinary course of law. * * * (Sec. 222, Act No. 190.) The writ will not issue to compel an officer to do anything which it is not his duty to do, or to give to the applicant anything to which he is not entitled by law. It neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed. (Gonzalez vs. Board of Pharmacy, 20 Phil., 367; Montalbo vs. Santamaria, 54 Phil., 955, 964.) It is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be. (Ex parte)

It is well established that only specific legal rights are enforceable by mandamus, that the right sought to be enforced must be certain and clear, and that the writ will not issue in cases where the right is doubtful. (Viuda e Hijos de Crispulo Zamora vs. Wright and Segado, 53 Phil., 613, 621; Gonzalez vs. Board of Pharmacy, 20 Phil., 367; Montalbo vs. Santamaria, 54 Phil., 955, 964.) It is also a fundamental principle governing the issuance of mandamus that the duties to be performed must be such as are clearly and peremptorily enjoined by law or by reason of official station. (Tabigue vs. Duvall, 16 Phil., 324; Gonzalez vs. Board of Pharmacy, supra; Montalbo vs. Santamaria, supra.) The record does not show that the right the petitioner seeks to enforce and the duty claimed to devolve upon the respondent judge are of such character. Wagner, 249 U. S., 465, 471.)

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- Under section 174 of the Code of Civil Procedure the appointment of a receiver lies within the sound discretion of the court. (Mendoza vs. Arellano and B. de Arellano, 36 Phil., 59.) In the American courts the same principle obtains. (53 C. J., 34.) It is not a matter of strict or absolute right or an imperative requirement. (Id.) Even when stipulated for by the parties the appointment of a receiver is not a matter of right. (Carolina Portland Cement Co. vs. Baumgartner, 99 Fla., 987.) Perhaps the rule, with reference to the discretion of the trial court in such matter, may be expressed more exactly by stating that when the party applying for the appointment of a receiver pending the litigation has made a showing entitling him, upon some recognized rule, to have a receiver appointed, it is then within the sound discretion of the trial court to appoint or not a receiver. In the absence of such showing, the appointment of a receiver is outside the discretion of the trial court, in excess of its power, and is an abuse of discretion reposed in him. (Jackson vs. Ward, 111 Okl., 73; 238 Pac, 429.)

- Whenever a statute gives discretionary power to any person, to be exercised by him upon his own appreciation of certain facts, such statute constitutes him the sole judge of the existence of those facts. (Barcelon vs. Baker and Doe Thompson, 5 Phil., 87.) Discretion, when applied to public functionaries, means a power or right conferred upon them by law of acting officially, under certain circumstances, according to the dictates of their own judgments and consciences, uncontrolled by the judgments or consciences of others. A purely ministerial act or duty, in contradistinction to a discretionary act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment, upon the propriety or impropriety of the act done. If the law imposes a duty upon a public officer, and gives him the right to decide how or when the duty shall be performed, such duty is discretionary and not ministerial. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment. (Lamb vs. Phipps, 22 Phil., 456.) Mandamus will not lie to control the exercise of discretion of an inferior tribunal (Carranceja vs. Moir and Ong-Saco, 30 Phil., 392; Rural Transit Co. vs. Teodoro and Santos-Reiucio-Soriano, 57 Phil., 113; Lamb vs. Phipps, supra; Felismino vs. Gloria, 47 Phil., 967; Guanio vs. Fernandez, 55 Phil., 814; Mojitalbo vs. Santamaria, supra), when the act complained of is either judicial or quasi-judicial. (Frank & Co. vs. Clemente, 44 Phil., 30.) It is the proper remedy when the case presented is outside of the exercise of judicial discretion. (Ex parte Commonwealth of Virginia, 100 U. S., 313.)

- Mandamus is ordinarily a remedy for official inaction, and in a large number of decisions it is either held or said that mandamus is not the proper remedy to compel the undoing of acts already done or the correction of

wrongs already perpetrated, and that this is so even though the action taken was clearly illegal. (38 C. J., 592; *Guanio vs. Fernandez*, 55 Phil., 814, 815.) Ordinarily the writ will not be granted to review the action of the court in respect to the appointment and control of receivers and of the property in their custody, although its discretion in the matter has been improperly exercised. (38 G. J., 656.) It is a rule of general application that mandamus will not be granted for the purpose of review, that the writ is not available as a substitute for an appeal or writ of error, or certiorari. The statement is frequently found in the books that mandamus is not a writ to correct errors, but that its province is rather to prevent a failure of justice from delay or refusal to act. (38 C. J., p. 570, sec. 44.) Mandamus is a compulsory not a revisory writ. (*State vs. State Board of Equalization*, 56 Montana, 413.) Appeal, and not mandamus, is the proper mode of bringing up for review the correctness of the action of the court below in deciding which one of two applicants is entitled to be substituted for a deceased party to a suit. (*Ex parte Slater*, 62 Law. ed., p. 621.) But even if no appeal is given by law mandamus can not be used to review the judicial action of an inferior court. (*American Construction Co. vs. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S., 372, 379; 18 R. C. L., 297.) Mandamus is not the appropriate remedy to review the action of a tribunal in any matter involving the examination of evidence and the decision of questions of law and fact, since such a duty is not ministerial. In other words, mandamus is not the proper remedy by which to correct or reverse erroneous rulings of inferior tribunals, whether interlocutory or final. "* * * we are not aware of any case"—said Chief Justice Taney in *Ex parte Secombe* (19 How., p. 13)—"where a mandamus has issued to an inferior tribunal commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion."

- The appointment of a receiver during the pendency of the litigation is an interlocutory matter (see sec. 123 and 174, Code of Civil Procedure). Mandamus does not issue to review a ruling or interlocutory order made in the progress of a cause. (18 R. C. L., 299.) It may not be resorted to for the purpose of controlling minor orders made in the conduct of judicial proceedings. (*Ex parte Wagner*, 249 U. S., 465, 471.)

- It is true that if there is an arbitrary abuse of discretion the courts recognize that this is an exception to the general rule, and mandamus may issue if there is no other adequate remedy, though the result is that the court will be called upon to review the exercise of a discretionary power. (18 R. C. L., p. 126.) Such review is allowed because the power of discretion is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility. (*Ex parte Secombe*, 19 How., 13; *Ex parte Bradley*, 19 U. S. [Law. ed.], 214, 219.) But this abuse of discretion must be so gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined, or to act at all, in contemplation of law. (18 R. C. L., p. 126.) That is far, however, from being the case in the proceedings now before us. Here, there has been no violation of the rules of practice, the petitioner had his day in court, his petition to appoint a receiver was duly heard, evidence presented by him was duly received and considered, and lengthy arguments were made by counsel for both parties. The resulting order must, therefore, be regarded as a decision upon the merits in accordance with the views of the court below. The respondent judge might have erred in his appreciation of the facts as borne out by the evidence presented, but if there be such error the same cannot be controlled by mandamus. (*Castro Revilla vs. Garduno*, 53 Phil., 934, 936.)

The petition for a writ of mandamus is, therefore, dismissed, with costs against the petitioner.

Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Diaz, and Laurel, JJ., concur.

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