

ALTO SURETY & INS. CO., INC., PLAINTIFF-APPELLEE, VS. ANGEL AL. CALUNTAD, DEFENDANT-APPELLANT.

G.R. No. L-26402. May 31, 1979

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

In 1962, defendant Angel Al. Caluntad appealed a decision of the City Court of Manila to the Court of First Instance of Manila, Branch I, where it was docketed as Civil Case No. 51331. On May 4, 1966, an order was issued in said case which is quoted in full as follows:

"It appearing that this case has been pending for an unreasonable length of time, the Court, pursuant to Sec. 3, Rule 17 of the Rules of Court, hereby orders the appeal dismissed without pronouncement as to costs, and the case remanded to the City Court for the execution of its judgment."

Defendant filed a motion for reconsideration arguing that:

"This provision of the rules of court contemplates a case wherein the further delay of the action will work injustice to defendant. But in the instant case, the situation is different. It is the dismissal of the case which will work injustice to defendant tantamount to refusal to give defendant his right to have a day in court."

In denying the motion, the Court said in part:

"If we are going to follow the argument of the defendant in an appeal of this nature, then the defendant can sleep and take no action whatsoever on his appeal in order to avoid any liability. This, we believe, is not the spirit of the law."

From both orders, the defendant has appealed to this Court.

We deny the appeal and sustain the orders of the Court of First Instance.

The basic issue is whether or not the Court a quo erred in dismissing the appeal.

The Court relied on Rule 17, Sec. 3 of the Rules of Court which reads as follows:

"Sec. 3. Failure to prosecute. - If plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon Motion of the defendant or upon the court's own motion. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise provided by court."

Obviously, the above-quoted provision is inapplicable because it applies to prosecution of actions or of plaintiff's failure to prosecute which is not the situation in the case at bar because it is the defendant-appellant who was guilty of inaction.

Nonetheless, the questioned orders can be sustained on the basis of Rule 40, Sec. 9 which provides:

"Sec. 9. Effect of Appeals. - A perfected appeal shall operate to vacate the judgment of the municipal or city

court, and the action when duly docketed in the Court of First Instance shall stand for trial de novo upon its merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced. If the appeal is withdrawn, or dismissed for failure to prosecute, the judgment shall be deemed revived and shall forthwith be remanded to the municipal or city court for execution."

It should be noted that the first sentence had not yet been modified by Republic Act No. 6031 which took effect on August 4, 1969, so that said sentence is fully applicable to this case. And it is clear from the second sentence of the above-quoted provision that the appellate court has the power to dismiss an appeal for failure of the appellant to prosecute his appeal. This power is amply supported by jurisprudence of this Court. (See *Rosa Gonzales Vda. de Palanca, et al. vs. Chua Keng Kian, et al.*, G.R. No. L-26430, March 11, 1969; 27 SCRA 356; *Philippine National Bank vs. Pineda*, G.R. No. L-28505, August 29, 1969; 29 SCRA 290.) In the *Palanca* case, it was held that the failure of the defendant-appellant to prosecute his appeal in the Court of First Instance for a period of one year and three months warranted the dismissal of his appeal. Here the case had been pending for four (4) years to the detriment of the plaintiff-appellee before it was dismissed. As the court a quo wisely stated and we quote again: "If we are going to follow the argument of the defendant in an appeal of this nature, then the defendant can sleep and take no action whatsoever on his appeal in order to avoid any liability. This, we believe, is not the spirit of the law."

WHEREFORE, the appeal is hereby dismissed. We consider the appeal as a dilatory tactic and therefore frivolous for which we assess double costs against the appellant.

SO ORDERED.

Aquino, Concepcion, Jr., and Santos, JJ., concur.

Antonio, (Acting Chairman)*, J., concurs in a separate opinion.

* Justice Antonio P. Barredo is on leave.

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CONCURRING OPINION

ANTONIO, J.:

I concur. In *Racimo v. Diño*, 69 SCRA 421, this Court held that under section 3, Rule 17 of the Rules of Court, an action can be dismissed by the trial court on its own motion for plaintiff's failure to prosecute it for an unreasonable length of time. It was also held therein that the ruling under section 3 of Rule 17 is applicable under section 9 of Rule 40 to an appeal to the Court of First Instance from the decision of an inferior court (*People's Car, Inc. v. Arcellana*, L-29098, July 22, 1971, and *Bolivar v. Bandayrel*, L-29373, July 22, 1971, 40 SCRA, 42). In assailing the order of dismissal by the trial court, the burden of showing abuse of judicial discretion rests upon the appellant since every presumption is in favor of the correctness of the lower court's action. This doctrine was re-affirmed in *New Japan Motors, Inc. v. Perucho*, L-44387, November 5, 1976, 74 SCRA 14).

In the case at bar, I agree that the trial court did not abuse its discretion in dismissing the appeal, after the case has been pending for four (4) years, without any action on the part of appellant.

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