

C.K. VASWANI, ETC., PLAINTIFF AND APPELLEE VS. P. TARACHAND BROS., DEFENDANT AND APPELLANT.*G.R. No. L-15800. December 29, 1960*

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

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On January 2, 1958, C. K. Vaswani filed Civil Case No. 34725 against P. Tarachand Bros, in the Court of First Instance of Manila to recover the amount of P2,160.00, the value of merchandise allegedly sold on thirty days' credit and delivered to defendant from June to November, 1956, plus legal interests and 25% of the principal amount due as attorney's fees. On January 21, 1958, defendant answered the complaint, claiming that plaintiff had also purchased from it various merchandise on an open account basis, the value of which amounts to no less than plaintiff's claim; and that before the accounting of the parties' respective purchases from each other is completed, neither party has any valid claim against the other. Defendant likewise counterclaimed for damages and attorney's fees.

Issues having been joined, trial was set for March 14, 1958. Two days before the hearing, or on March 12, 1958, counsel for defendant moved to postpone the trial on the ground that his client was in Legaspi City attending to some important business transactions and would not be back until the end of the month; and that furthermore, defendant had already submitted the case to the Indian Chamber of Commerce in Manila for arbitration, as is customarily done by Indian nationals in the Philippines. Having thus filed said motion, neither defendant nor counsel appeared in court on March 14, 1958. In view of; plaintiff's vigorous opposition to the motion for postponement, however, the court denied the same and forthwith received the evidence for the plaintiff. The day following, March 15, 1958, the court promulgated its decision in the case,

"ordering the defendant to pay to the plaintiff the sum of P2,160.00 with interest at 1% per annum from December 9, 1956, thirty (30) days after the date of the last invoice, up to the date of full payment, plus an amount equivalent to 25% of the said sum of P2,160.00, and the costs of the action."

Notified of the judgment, defendant, on April 7, 1958, moved for a new trial, claiming that its failure to attend the hearing was due to unavoidable circumstances, namely, that partner C. Tarachand was delayed in Naga City and Was not able to return to Manila in time for the hearing; and that defendant had in its possession records that would off-set plaintiff's claims. To the motion was attached an affidavit of C. Tarachand attesting to the facts asserted in the motion for new trial. Opposed by plaintiff as being pro forma and not alleging sufficient grounds to constitute excusable mistake or negligence, the motion was, on April 19, 1958, denied for lack of merit. Whereupon, on May 7, 1958, defendant filed a second motion for new trial, alleging for the first time that the obligation sued upon had already been settled or paid; and attaching thereto an affidavit of C. Tarachand swearing to such payment, as well 'jas copies of certain entries in defendant's books of account supposedly showing the payments made. Before this second motion for new trial could be acted upon, however, defendant, on May 10, 1958, perfected an appeal to the Court of Appeals from the decision in the case as well as the court's order denying its first motion for new trial. On July 27, 1958, the appeal was forwarded to as by the Court of Appeals

on the ground that it raises purely questions of law.

Appellant claims that the court a quo erred (1) in denying its motion for postponement; (2) in denying its first and second motions for new trial; (3) in rendering a void judgment; and (4) in finding appellants evidence sufficient to justify the decision. We find no merit in all these claims.

As to the denial of appellant's motion for postponement, it is settled that such motions are addressed to the sound discretion of the court, which discretion will not be interfered with unless it has been abused.[1] And equally settled is the rule that a party moving for postponement must be in court on the day set for trial so that if his motion is denied, he can proceed with the hearing, and that he has no right to presume that his motion would be granted or to rely on the court's liberality or the generosity of the adverse party[2], especially on less than three days' notice.[3]

We find no abuse of discretion in the lower court's denial of appellant's motion to postpone. The parties had been notified of hearing as early as February 3 1958, almost one and a half months before the date set; consequently, appellant had more than ample time to adjust its business affairs so that any of its representatives could be in court on the scheduled hearing. As its motion for postponement reveals, partner C. Tarachand of the defendant firm was not called to Legaspi City unexpectedly or for some urgent reason, it having been alleged in the motion "that the defendant is now in Legaspi City attending on some important business transaction and wouldn't be back until the end of this month" (R.A., p. 6). But even if Tarachand's trip were unavoidable, counsel should have been in court at the date of the hearing, considering that less than three days' notice of the motion for continuance was given to the adverse party. Defendant having thus taken the risk of a denial of its motion to postpone, it can not later be heard to complain that it was deprived of its day in court when trial was had in its absence.

As for the allegation that defendant had already handed the case to the president of the Indian Chamber of Commerce in Manila for arbitration, we do not think that the same, even if true, would have justified a continuance of the trial of the case, considering that plaintiff does not appear to have agreed to or concurred in the proposal to submit the case to arbitration. Besides, appellant had all the time between the filing of the case and the day set for the trial to propose arbitration by the Indian Chamber of Commerce if it really wanted to settle the matter out of court. Article 2030 of the Civil Code does not include offers to arbitrate but only refers to compromise, upon terms that the Court can ascertain and determine if they are reasonable. A compromise could dispense with a trial; but an arbitration would merely prolong the case, since the arbiter's decision would remain appealable to the Courts.

Neither do we see any error in the lower court's denial of appellant's first and second motions for new trial. The first motion was correctly denied because it was not supported by any affidavit of merit showing any valid defenses appellant might have against the complaint that might change the result of the case.[4] The general allegation in Tarachand's affidavit that he had records in his possession that would offset plaintiff's claim can not take the place of the affidavit of merit prescribed by law, since it is required that such affidavit must state facts, not mere conclusions or opinions, or it will not be considered valid.[5] As for Tarachand's supposed excusable failure to return to Manila in time for the trial, allegedly due to some unavoidable and compelling reasons, the allegation is contradicted by appellant's own motion for postponement averring that Tarachand planned to stay in Legaspi until the end of March, 1958; which shows that he had no intention whatever to return earlier to Manila, much less on the day of the trial on March 14, 1958.

Appellant's second motion for new trial was likewise rightly denied. In the first place, the grounds alleged were already available to appellant at the time of the filing of first motion for new trial, and consequently, such grounds are deemed waived and can not be entertained in a second motion.[6] What is more, appellant, obviously realizing

that its second motion for new trial could not have interrupted the period for appeal, perfected its appeal even before the lower court could act on its second motion, thereby abandoning the same, since by the perfection of the appeal, the trial court lost jurisdiction over its judgment and could no longer vacate or modify the same.[7]

Appellant also claims that the judgment promulgated in its absence by the court below is void because it was deprived of its day in court. It is only when movant is deprived of his day in court through no fault or negligence on his part, as when he is declared in default before his time to answer has expired, that the judgment rendered in his absence would be considered void and a new trial is demandable as of right.[8]

Appellant finally argues that the evidence presented by plaintiff does not justify the judgment in his favor. We do not think so. That there is unpaid merchandise obtained by appellant from plaintiff during the period from June to November, 1956, is admitted in appellant's answer, the only defense asserted therein being that plaintiff also purchased from defendant various merchandise on an open account basis, which were still unpaid for, and the value of which would offset plaintiff's claim (par. 2, Answer, Rec. on App., p. 4). That defendant still has an unpaid account with plaintiff is also supported by the letters Exhibits C-1 and C-3 written by its counsel to plaintiff before this action was filed, in answer to demands for payment by plaintiff's counsel. If it is true, as appellant now alleges, that it has already paid for all the merchandise sued upon by plaintiff, it would certainly have asserted such payment in the letter Exhibits C-1 to C-3, as well as in its answer to plaintiff's complaint. That the invoices Exhibits A, A-1 to A-4 presented by plaintiff are unsigned, does not prove that they have been paid. Appellant's very failure to attach the originals to its first or second motion for new trial disproves its claim that they had been surrendered to it by plaintiff because they have already been paid.

Wherefore, the judgment appealed from is affirmed, with costs against appellant P. Tarachand Bros.

Paras, C.J., Bengzon, Padilla, Bautista Angelo, Labrador, Concepcion, Barrera, Gutierrez David, Paredes, and Dizon, JJ., concur.

Judgment affirmed.

[1] Adan, et al. vs. Pantalla, 105 Phil., 921; Galanara vs. Gangcayco, 104 Phil., 418; 56 Off. Gaz., [13] 2799; Arcache vs. B. S. Chainani, 99 Phil., 170; 53 Off. Gaz., No. 1, 105; Salva vs. Palacio, 90 Phil., 731; 53 Off. Gaz., No. 10, 3089; I Moran, Comments on the Rules of Court, 1857 Ed., pp. 439-440.

[2] Wack Wack Golf & Country Club, Inc. vs. C. A., 106 Phil., 501; 59 Off. Gaz., (34) 5501; Montelibano vs. Benares, 103 Phil., 106; 54 Off. Gaz. (12) 3787; Parina vs. Cabangbang, L-8398, March 21, 1956; Dimayuga vs. Dimayuga, 96 Phil., 859; 51 Off. Gaz., (5) 2397; Sarreal vs. Tan, 92 Phil., 689; 49 Off. Gaz., No. 2, 499; Siojo vs. Tecson, 88 Phil., 531.

[3] Bautista vs. Mun. Council of Mandaluyong, Rizal, 98 Phil., 409; 52 Off. Gaz., No. 2, 759.

[4] Sec. 2, Rule 37, Rules of Court; I Moran, 1957 Ed., pp. 514-515 and authorities cited therein; Valdez vs. Paras, 105 Phil., 698; 56 Off. Gaz. (38) 5875.

[5] Estrella vs. Zamora, 5 Phil., 415; Phil. Engineering Co. vs. Argosino, 49 Phil., 983; Coombs vs. Santos, 24 Phil., 446; Cortes vs. Co Bun Kim, 90 Phil., 167.

[6] Sec. 4, Rule 37; Moran, supra, p. 518; Rili vs. Chunaco, 87 Phil., 545; 48 Off. Gaz., 614; Mallare vs. Panahon, 98 Phil., 154; 52 Off. Gaz., 219; Ronquillo vs. Rafael, 97 Phil., 38.

[7] Ayllon vs. Siojo, 26 Phil., 195; Gov't. vs. Mendoza, 51 Phil., 403; Valdez vs. Ct., 88 Phil., 585.

[8] I Moran, *ibid*, p. 515; *Navarro vs. Bello*, 102 Phil., 1019; 54 Off. Gaz. (26) 6588; *Gattoc vs. Sarenas*, 104 Phil., 221; 55 Off. Gaz., (30) 5763.

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