

ALEX GO, PETITIONER, VS. COURT OF APPEALS, ASSOCIATED BANK AND LUCIANO MABASA, RESPONDENTS.*G.R. No. 100772. July 01, 1992*

Ponente: DAVIDE, JR., J.

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Petitioner seeks the review and reversal of the Decision[1] of 7 January 1991 and the Resolution of 27 June 1991 of the respondent Court of Appeals in C.A.-G.R. No. 17026, entitled "Alex Go versus Associated Citizens Bank and Luciano Mabasa", which, respectively, affirmed in toto the judgment of Branch 137 (Makati) of the Regional Trial Court of the National Capital Region in Civil Case No. 8920 dismissing petitioner's complaint with costs against him and denied the motion to reconsider the decision.

This Court gave due course to the petition after private respondent filed his Comment to the petition in compliance with the Resolution of 4 September 1991 and the petitioner submitted his Reply thereto.

The antecedent facts, as summarized by the trial court and quoted in the challenged decision of the respondent Court, are as follows:

"Sometime on 28 August 1978, plaintiff opened a current account with the defendant Associated Citizens Bank, Grace Park Branch, denominated as C/A No. 472-5 (Cf. Exh. 1). Pursuant to an understanding between plaintiff and defendant Luciano Mabasa, Senior Vice-President, Branches Division, of defendant bank, plaintiff was allowed to incur overdrafts (Cf. Exhs. 1-A through 1-AA), so much so that as of 2 July 1979, plaintiff's overdraft reached the amount of P856,986.38 (Cf. Exh. 1-Y). Thus, on 10 July 1979, plaintiff executed a Real Estate Mortgage (Exh. B) in favor of defendant Bank as security for the payment of the principal sum of P235,000.00. Plaintiff also signed two (2) Promissory Notes (Exhs. C or 2 and D or 3) in the amounts of P900,000.00 and P235,000.00, respectively. Said promissory notes were discounted by defendant Bank (Cf. Exhs. 2-A and 3-A), and the net proceeds thereof were credited to plaintiff's current account No. 472-5 (Cf. Exhs. 1-Y-1 and 1-Y-2), thereby extinguishing in full plaintiff's overdraft balance of P856,986.38, and resulting in creating (sic) a credit balance in plaintiff's said account in the amount of P112,832.55 (Cf. Exh. 1-Y). In view of plaintiff's failure to pay the promissory notes (Exhs. C or 2 and D or 3), the defendant Bank foreclosed on the Mortgage (Exh. B), and on 22 December 1980, the mortgaged properties were sold at public auction to defendant Bank, as the highest bidder, for the total sum of P328,748.62 (Cf. Annex 4, Answer). For failure of plaintiff to redeem said properties, the title to said properties were consolidated in the name of defendant Bank.

It is also reflected in the bank's record (Cf. Exh. 1-W) that on 21 May 1979, plaintiff's current account was credited with the total sum of P550,000.00 when he deposited three (3) checks in the respective amounts of P120,000.00, P180,000.00 and P250,000.00. However, these checks were later dishonored and returned to the defendant Bank, so the latter debited the corresponding amounts of said checks (Cf. Exh. 1-W-1). (pp. 140-141, Records)."[2]

Despite the foreclosure of the mortgage and the subsequent consolidation of the title of the properties in the name

of private respondent bank, petitioner filed on 5 November 1984 with the trial court the complaint in the abovestated Civil Case No. 8920 for a sum of money and cancellation of mortgage against the private respondents.[3] In their Answer, private respondents allege that petitioner is estopped from denying his obligation as he expressly admitted the due execution of the promissory notes; moreover, the mortgage had already been foreclosed and petitioner received a notice of the foreclosure sale which was published in a newspaper of general circulation.[4]

Private respondents were initially declared in default and the petitioner was allowed to present his evidence ex-parte before the Branch Clerk of Court. When private respondents later appeared, their evidence was likewise received by the Branch Clerk of Court.[5]

On 18 September 1987, the trial court rendered a decision adverse to the petitioner on the basis of the following findings of fact:[6]

"From the foregoing, the issues are clear and definite. First, has plaintiff received the proceeds of the promissory notes, Exhibits C and D? Second, is it true, as plaintiff claims, that defendant Bank withdrew the sum of P300,000.00 on 22 May 1979 from plaintiff's current account without his knowledge and consent?

Upon due consideration and assessment, the Court finds and concludes that the evidence weighs heavily in favor of the defendant Bank. Indeed, the evidence clearly demonstrates that plaintiff has no valid cause of action against defendant Bank, much less against defendant Luciano Mabasa.

Plaintiff has not denied the authenticity and due execution of the Real Estate Mortgage and the promissory notes. However, plaintiff contends that he is not legally bound by said documents because he has not received the proceeds, or any portion thereof, of the promissory notes in question. This contention is totally devoid of merit, as it is not borne out by the Bank's records. It is incontrovertible that the net proceeds of the subject promissory notes were duly credited to plaintiff's current account (Cf. Exhs. 1-Y-1 and 1-Y-2). Considering that plaintiff had an overdraft (debit) balance of P856,989.38 when the net proceeds of the promissory notes in the respective sums of P771,074.90 (Exh. 1-Y--2) and P204,777.59 (Exh. 1-Y-1) were credited to plaintiff's current account, compensation takes place by operation of law (Art. 1286, New Civil Code), and extinguished plaintiff's overdraft balance in full (Art. 1290, id.). In other words, the proceeds of the promissory notes were applied to set-off the overdraft (debit) balance in plaintiff's account. Hence, it is not true that plaintiff did not receive any amount out of the promissory notes in question.

Regarding the alleged unauthorized withdrawal of the sum of P300,000.00 by the defendant Bank, suffice it to state that once again plaintiff's pretensions are controverted by the records of the bank. There is no denying that plaintiff deposited checks in his account, but they were all dishonored. Hence, the amount initially credited to plaintiff's account must necessarily have to be cancelled by entering the corresponding reversing entry. This is so because a check deposited does not constitute a credit account until the same is collected. Consequently, there was no amount actually withdrawn or debited from plaintiff's account, since there was no amount deposited in the first place."

Petitioner appealed the said decision to the respondent Court and, in his Appellant's Brief, alleged that the trial court erred:

"I

x x x in not holding that the promissory notes of P900,000.00 and P235,000.00 and the real estate mortgage are not valid for lack of consent and consideration;

II

x x x in not holding that the sum of P300,000.00 was illegally withdrawn by the defendants from plaintiff's current account;

III

x x x in not finding that a full-blown trial before a commissioner with both parties present, is null and void;

IV

x x x in not finding that, in any event, the foreclosure was not valid for lack of the jurisdictional requirement of publication;

V

x x x in not granting to plaintiff his counterclaims for moral damages in the amount of P700,000.00 and attorney's fees."

As to the issue of lack of publication of the notice of foreclosure of mortgage, private respondents asserted in their Appellee's Brief that this matter was raised for the first time; they further claimed that the notice was in fact published and, as proof thereof, they attached as Annex "A" of their Brief the printer's affidavit of publication.[7] In his Reply Brief, petitioner contended that the lack of publication is encompassed in the issue concerning the validity of the foreclosure and that, in any event, his case falls within the exception to the rule that bars the raising of an issue for the first time on appeal. He further declared that the affidavit of publication is false because upon investigation in the National Library, he discovered that the three (3) issues of the *Nuevo Horizonte* mentioned in the affidavit do not contain the alleged publication. He then reiterated his prayer in his Brief and further asked that the case be remanded to the trial court "for further proceedings and for new trial likewise on the ground of newly discovered evidence." [8]

On 7 January 1991, the respondent Court promulgated its decision which, as earlier adverted to, affirmed in toto the decision of the trial court on the basis of the following findings and conclusion.

"After a painstaking perusal of the case under consideration, We find no reversible error committed by the court a quo. However, anent the contention of appellant that the proceeding below before the Branch Clerk of Court who was appointed commissioner is null and void, the same deserves but scant consideration in view of the ruling of the Supreme Court in the case of *Gochangco vs. CFI Negros Occidental*, Branch IV, 157 SCRA 40 holding that a Clerk of Court is authorized to received (sic) evidence ex-parte.

Moreover, it should be noted that appellants (sic) herein, raised questions which were not raised in the lower court thus cannot (sic) be considered for the first time on appeal (*Anchuelo vs. Court of Appeals*, 147 SCRA 434)."[9]

Petitioner filed a verified "Motion for Reconsideration/New Trial".[10] The new trial aspect is based on "newly discovered evidence which shows a false affidavit on the supposed publication of the notice of foreclosure of mortgage when there is no publication at all;" this allegation is supported by the issue that the "lack of publication could not have been discovered earlier as it was cleverly hidden through a manufactured xerox copy." [11]

On 27 June 1991, the respondent Court promulgated a resolution denying, for lack of merit, the motion for reconsideration. As to the prayer for new trial, it ruled that:

"x x x this Court finds it difficult to perceive that a reputed financial institution, such as appellee bank, would resort to fabricating a notice of foreclosure of mortgage to prove publication. Moreover, even if appellee bank did

so, appellant should have questioned the defect during pendency of the case below, as the same could have been discovered even before the complaint was filed."[12]

Hence, this petition for review which focuses on the following grounds:

“- A -

THE PETITIONER DESERVES TO BE GRANTED A NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE.

- B -

THE TRIAL CONDUCTED BY A COMMISSIONER, NOT A JUDGE DULY EMPOWERED BY LAW, IS NULL AND VOID; HENCE, THE TRIAL COURT'S JUDGMENT IS CONSEQUENTLY NULL AND VOID.

- C -

THE COURT OF APPEALS DID NOT PASS UPON THE ASSIGNED ERRORS POSITED BY THE PLAINTIFF-APPELLANT IN HIS BRIEF VIOLATING THE CONSTITUTIONAL REQUIREMENT THAT A DECISION SHALL EXPRESS CLEARLY AND DISTINCTLY THE FACTS AND THE LAW ON WHICH IT IS BASED AND THE GUIDELINES SET BY JURISPRUDENCE AND SUPREME COURT CIRCULARS."[13]

After the private respondents filed their Comment[14] to the petition in compliance with the Resolution of 4 September 1991 and the petitioner submitted his Reply[15] thereto, this Court gave due course to the petition and required the parties to submit their respective Memoranda. Petitioner filed his Memorandum on 31 January 1992.[16] Private respondents earlier manifested that they were adopting their Comment and Manifestation of 13 November 1991 as their Memorandum, but reserved their right to file a "reply memorandum" should it become necessary.[17] They filed a Reply Memorandum on 5 February 1992.[18]

A meticulous study of the pleadings in this case does not sustain the petitioner's position; accordingly, for lack of merit, the petition must fail.

Indeed, as correctly held by the respondent Court, the issue of lack of publication of the notice of foreclosure of the mortgage was raised only on appeal. Petitioner does not represent that he directly attacked in his complaint in Civil Case No. 8920 the validity of the foreclosure because of such lack of notice. His own Statement of the Facts and of the Case in the instant petition makes no reference to such lack of notice as one, or even just as a basis for any, of his causes of action in the complaint. He sought the cancellation of the contract of mortgage because he allegedly never received the amounts indicated in the promissory notes. Of course, nullity of the mortgage due to absence of consideration is leagues apart from the nullity of the foreclosure of a mortgage because of non-publication of the notice of foreclosure.

Additionally, petitioner presented no evidence before the trial court to prove the absence of publication of the notice despite the fact that private respondents, in their Answer, squarely pleaded as a defense the foreclosure sale and petitioner's receipt of the "notice of the sale which was published in a newspaper of general circulation." [19] That the lack of publication of the notice of foreclosure was never raised in issue by petitioner and that it is not within the issues framed by the parties in the trial court are then too obvious.

Section 18, Rule 46 of the Rules of Court provides:

"SECTION 18. Questions that may be raised on appeal. -- Whether or not the appellant has filed a motion for new

trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties." (emphasis supplied)

The appellate court then will not consider any ground or objection other than that raised in the court below,[20] except questions on jurisdiction over the subject-matter which may be raised at any stage of the proceedings.

The plea for a new trial must likewise be rejected as it was initially sought for only in the prayer of petitioner's Reply Brief. He did not pursue it any further until after the respondent Court promulgated its challenged decision. New trial before the Court of Appeals is governed by Rule 53 of the Rules of Court. Section 1 thereof reads:

"SECTION 1. Petition -- Before a final order or judgment rendered by the Court of Appeals becomes executory, a motion for a new trial may be filed on the ground of newly discovered evidence which could not have been discovered prior to the trial in the court below by the exercise of due diligence and which is of such a character as would probably change the result. The motion shall be accompanied by affidavits showing the facts constituting the grounds therefor and the newly discovered evidence."

Petitioner's Motion for Reconsideration/New Trial[21] is not accompanied by the affidavit required by the above rule. Petitioner did not even care to verify it himself. One Gloria B. Go, who describes herself as the "duly appointed and constituted attorney-in-fact by (sic) the plaintiff-appellant" made the verification. However, no copy of the power of attorney appointing her as such is attached to the motion. The alleged newly discovered evidence would show the supposed absence of publication of the notice of foreclosure which "could not have been discovered earlier as it was cleverly hidden through a manufactured xerox copy." [22] This is hollow pretense and a shallow excuse which hardly evokes the Court's sympathy. As stated earlier, private respondents explicitly alleged in their Answer the fact of foreclosure of mortgage and petitioner's receipt "of the notice of sale which was published in a newspaper of general circulation." Having been put on guard, prudence dictates that he should have wasted no time in verifying from the office of the sheriff concerned if indeed there was such a publication. In the light of his principal claim that he did not receive the consideration for the promissory notes -- a huge sum and not just a picayune amount -- which he signed together with the contract of mortgage to secure it in 1979, it is simply incredible that upon being informed of the foreclosure sale and the consolidation of the titles of the properties in the name of the highest bidder, herein private respondent bank, petitioner would simply ignore the shocking information. A person is presumed to take ordinary care of his concerns.[23] If, as petitioner suggests, the contracts unlawfully deprived him of his property rights, then his stony silence for years places a heavy burden on this Court's credulity.

Clearly, therefore, if petitioner only exercised due diligence, he would have easily discovered the absence of publication of the notice of foreclosure and the mortgage -- if such was the fact -- when the case was still pending with the trial court and, especially, immediately after his receipt of private respondents' Answer.

Petitioner's second ground is without merit. In the first place, estoppel bars him from so raising this question. His petition reveals that he did not object to the continuation of the reception of evidence before the Branch Clerk of Court after the lifting of the declaration of default. Even if indeed, as the petitioner contends, the Branch Clerk of Court acted as a commissioner in receiving the evidence, nothing seems to be irregular about it. Rule 33 of the Rules of Court allows the court, on its own motion, to direct that issues of a case be referred to a commissioner. In the second place, what actually happened in this case is that the court referred the reception of the evidence to the Branch Clerk of Court. In *Laluan vs. Malpaya*, [24] this Court ruled:

"No provision of law or principle of public policy prohibits a court from authorizing its clerk of court to receive the evidence of a party litigant. After all, the reception of evidence by the clerk of court constitutes but a ministerial task -- the taking down of the testimony of the witnesses and the marking of the pieces of documentary

evidence, if any, adduced by the party present. This task of receiving evidence precludes, on the part of the clerk of court, the exercise of judicial discretion usually called for when the other party who is present objects to questions propounded and to the admission of the documentary evidence proffered.[25] More importantly, the duty to render judgment on the merits of the case still rests with the judge who is obliged to personally and directly prepare the decision based upon the evidence reported.[26]

But where the proceedings before the clerk of court and the concomitant result thereof, i.e., the judgment rendered by the court based on the evidence presented in such limited proceedings, prejudice the substantial rights of the aggrieved party, then there exists sufficient justification to grant the latter complete opportunity to thresh out his case in court."

Gochangco vs. Court of First Instance of Negros Occidental[27] and Monserrate vs. Court of Appeals[28] reiterated this rule. Gochangco, decided by this Court, en banc, overruled the earlier contrary decision in Lim Tanhu vs. Ramolete.[29] Petitioner does not at all claim that the decision of the trial court would have been different if the reception of the evidence were made by it, or that his substantial rights were prejudiced by the assailed procedure. Thus, the contention that it abdicated its judicial responsibility or that procedural due process was violated merits scant consideration.

Finally, petitioner is not persuasive enough in his last ground. It is not true that the challenged decision violates the constitutional requirement that a decision shall expressly and distinctly state the facts and the law on which it is based. Although the respondent Court merely quotes the findings of the trial court and concludes that "[a]fter a painstaking perusal of the case" it finds "no reversible error committed by the court a quo," and such may leave much to be desired, there is no doubt in the mind of this Court that the respondent Court adopted, in effect, such findings as its own; accordingly, there was substantial compliance with the stated constitutional requirement. Section 40 of Batas Pambansa Blg. 129,[30] as amended, provides:

"SECTION 40. Form of decision of appealed cases. -- Every decision or final resolution of a court in appealed cases shall clearly and distinctly state the findings of fact and the conclusions of law on which it is based, which may be contained in the decision or final resolution itself, or adopted by reference from those set forth in the decision, order, or resolution appealed from."

The validity of this Section has been sustained in Romero vs. Court of Appeals[31] and Francisco vs. Permskul.[32] Nonetheless, even as this Court sustains the action taken by the respondent Court, it strongly urges all concerned to always bear in mind the admonition of this Court in the Romero case:

"x x x However, the authority given the appellate court to adopt by reference the findings of fact and conclusions of law from those set forth in the appealed decisions should be exercised with caution and prudence, because the tendency would be to follow the line of least resistance by just adopting the findings and conclusions of the lower court without thoroughly studying the appealed case."

WHEREFORE, finding no reversible error in the challenged decision, the instant petition is DISMISSED, with costs against petitioner.

SO ORDERED.

Gutierrez, Jr., (Chairman), Feliciano, Bidin, and Romero, JJ., concur.

[1] Per Associate Justice Manuel C. Herrera, concurred in by Associate Justices Alfredo L. Benipayo and Fortunato A. Vailoces.

- [2] Pages 1 and 2, Annex "A" of Petition; Rollo, 29-30.
- [3] Rollo, 39.
- [4] Id., 40-41.
- [5] Id., 41.
- [6] Id., 30-31.
- [7] Rollo, 62.
- [8] Rollo, 64.
- [9] Id., 32-33.
- [10] Annex "D" of Petition; Id., 68 et seq.
- [11] Paragraphs 9 and 10 of Annex "D"; Rollo, 70.
- [12] Annex "B" of Petition; Id., 34.
- [13] Rollo, 15.
- [14] Id., 85, et seq.
- [15] Id., 101, et seq.
- [16] Id., 128, et seq.
- [17] Id., 115, et seq.
- [18] Id., 152.
- [19] Rollo, 12.
- [20] MORAN, M.V., Comments on the Rules of Court, vol. II, 1979 ed., 494-495, citing *Tan Machan vs. Trinidad*, 3 Phil. 684 [1904], and many other cases.
- [21] Annex "D" of Petition; Rollo, 68-72.
- [22] Paragraph 10 of the motion; Rollo, 70.
- [23] Section 3(d), Rule 131, Rules of Court.

[24] 65 SCRA 494 [1975].

[25] Citing *Wack Wack Golf and Country Club, Inc. vs. Court of Appeals*, 106 Phil. 501 [1959].

[26] Citing *The Province of Pangasinan vs. Palisoc*, 6 SCRA 299 [1962].

[27] 157 SCRA 40 [1988].

[28] 178 SCRA 153 [1989].

[29] 66 SCRA 425 [1975], Second Division.

[30] The Judiciary Reorganization Act of 1980.

[31] 147 SCRA 183 [1987].

[32] 173 SCRA 324 [1989].

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