

GENOVEVA LIGOT SEMPIO AND HEIRS OF BERNARDO SEMPIO, PETITIONERS, VS. COURT OF APPEALS AND DEVELOPMENT BANK OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 115953. October 28, 1996

Ponente: BELLOSILLO, J.

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BELLOSILLO, J.:

The spouses Bernardo Sempio and Genoveva Ligot owned a parcel of land situated in San Miguel, Bulacan, containing an area of 3,192 square meters and covered by Transfer Certificate of Title No. T-6263, which they mortgaged to respondent Development Bank of the Philippines (DBP) to secure a loan of P116,700.00.[1] upon failure of the spouses to meet their loan obligation DBP extrajudicially foreclosed the mortgage. At the public auction sale, DBP emerged as the highest bidder and was correspondingly issued a Certificate of Sale.[2]

On 8 March 1990 the Sempio spouses filed a complaint for Annulment of Foreclosure, Reconveyance of Title and Damages[3] contending that they were not notified of the foreclosure sale as DBP failed to comply with the requirements of Act No. 3135, particularly on notice, posting and publication. They also alleged that the auction sale was null and void as it was held in a place other than that agreed upon by the parties and was supervised by the Provincial Sheriff of Nueva Ecija instead of the Provincial Sheriff of Bulacan where the property is situated as required under the same Act. No. 3135.

In its Answer[4] DBP maintained that legal notices were actually made and that the Sempio spouses were already estopped to question the situs of the auction sale since they already knew of such fact prior to the auction sale as they even sought its postponement.

Pending litigation, Bernardo Sempio died hence his substitution by his heirs.

The pre-trial conference was set on 21 May 1990 but was reset to 1 June 1990 upon failure of counsel for DBP to appear. On 1 June 1990 counsel for DBP again failed to appear. Thus at the instance of DBP the pre-trial was reset to 19 June 1990. Again counsel for DBP failed to appear. Instead, he sent a telegram requesting for resetting to 10 July 1990. However, counsel for DBP again failed to appear hence the court was constrained to declare DBP as in default and the Sempios were allowed to present their evidence *ex parte*. [5] As the records show, the pre-trial conference was scheduled for four times but counsel for DBP repeatedly failed to appear. This despite due notice and the fact that he himself requested for the re-settings of the conference as well as the hearing for the reception of the evidence of respondent DBP as shown hereunder.

On 27 July 1990 DBP filed a Motion to Set Aside Order of Default,[6] which the court granted in its order of 16 August 1990.[7] On the same date counsel for DBP appeared but only to ask that he be allowed to present evidence on 17 September 1990. Again the court below acquiesced to the request. Consequently, as requested, DBP was allowed to present its evidence on 17 September 1990. On said date counsel for DBP again failed to appear. Thus, on the basis of petitioners' evidence, the court *a quo* rendered its decision of 24 September 1990[8] holding that -

The mortgage contract executed by the plaintiffs with defendant bank expressly provides under paragraph 14 thereof that 'in case of foreclosure under Act No. 3135, as amended, the auction sale shall take place in the city or capital of the province where the mortgaged property is situated.' It is evident that the auction sale of plaintiffs' property was conducted by the Deputy Sheriff at Baliuag, Bulacan as evidenced by Sheriff's Certificate of Sale (Exh. B) in clear violation of the plaintiffs' mortgage contract. The terms/conditions of the mortgage contract should be strictly complied with for purposes of the validity of the foreclosure proceedings as the terms and conditions thereof are the law between the parties. The public auction sale of plaintiffs' property in a place other than that as stipulated in the mortgage contract is violative of Sec. 2 of Act No. 3135, as amended, which in part reads:

Said sale cannot be made legally outside of the province in which the property sold is situated; and in case the place within said province in which the sale is to be made is the subject of stipulation, such sale shall be made in said place x x x x (underscoring supplied).

It is likewise significant to note that the said property subject of mortgage was sold by the Provincial Sheriff of Nueva Ecija thru Deputy Sheriff Felixberto Samonte per Sheriff's Certificate of Sale dated March 1, 1982. The property is situated at San Miguel, Bulacan and the conduct of auction sale thereof falls within the competence of the Provincial Sheriff of Bulacan and not of Nueva Ecija. This finds support under Section 4, *supra*, which insofar as pertinent, likewise provides:

The sale shall be made at public auction between the hours of 9:00 in the morning and 4:00 in the afternoon, and shall be under the direction of the sheriff of the province x x x (underscoring supplied).

The sale of the plaintiffs' property being effected by the Provincial Sheriff of Nueva Ecija and not of the provincial Sheriff of Bulacan in clear violation of the aforecited legal authority, is legally assailable. A sheriff of a certain province cannot act as such in another province. The sale thus made is null and void. (*Macondray and Co, v. Coletto*, 61 Phil. 73).

x x x x

WHEREFORE, judgment is hereby rendered in favor of plaintiff Genoveva Ligot and the substituted plaintiffs against the defendant bank ordering the following:

- a) The extrajudicial foreclosure of the real estate mortgage, the Sheriff's Certificate of Sale, and all consequent proceedings thereafter over a parcel of land subject of mortgage and covered by TCT No. T-6263 of the Registry of Deeds of Bulacan in the names of plaintiffs Bernardo Sempio and Genoveva Ligot are hereby declared null and void and of no legal effect.
- b) Plaintiff Genoveva Ligot vda. de Sempio and the substituted plaintiffs are hereby ordered to pay the defendant bank the amount of P119,320.00 with legal rate of interest effective March 1, 1982 minus the amount of P30,301.00 paid for by the plaintiffs after the public auction sale;
- c) Defendant bank is hereby ordered to execute the release and/or cancellation of the mortgage upon full payment of plaintiffs' obligations; and
- d) Defendant bank is hereby ordered to pay P5,000.00 as and for attorney's fees.

x x x x

The court *a quo* concluded that the plaintiffs were not even aware of the extrajudicial foreclosure proceedings as, in fact, they continued to pay their loan obligations even after the auction sale. Their payments were also accepted by the bank as evidenced by its official Receipts Nos. 138033 and 138109.

The bid of DBP to reconsider the above decision was rejected by the trial court. It ruled that the repeated and chronic failure of defendant and its counsel to appear during the scheduled pre-trials and hearings despite due

notice was without justifiable cause. DBP gravely abused the accommodations so generously granted to it by the court. It further declared that the Agreement to Postpone the holding of the auction sale was not even duly signed by mortgagor Bernardo Sempio. The letter offering to repurchase the property was likewise not signed by Bernardo Sempio and Genoveva Ligot nor by any of the substituted plaintiffs but by one Adela Sempio de la Cruz who was not one of them.

DBP then sought relief from respondent Court of Appeals by filing a Petition for Certiorari, Prohibition and Mandamus which, at first, was denied by the Court of Appeals[9]-

First, the respondent court, under the facts, has jurisdiction over the case and authority to issue the questioned decision and the order denying the motion for reconsideration. It had been stated over and over again that the functions of both writs of certiorari and prohibition are to keep an inferior court within the bounds of its jurisdiction or to prevent it from committing grave abuse of discretion amounting to excess of jurisdiction. Where there is jurisdiction over the subject matter the decision or order on all other questions arising in the case is but an exercise of that jurisdiction (*Herrera v. Baretto, et al.*, 85 Phil. 245; *Commodity Financing Company v. Jimenez*, L-31384, June 29, 1979). Not every error in the proceeding or every erroneous conclusion of law or of facts may be considered an abuse of discretion (*Villa Rey Transit v. Bello*, No. L-18957, April 23, 1963). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty as where the power is exercised in a despotic manner by reason of passion or personal hostility (*Luna v. Nable*, 67 Phil. 340; *Alafriz v. Nable*, 72 Phil. 278).

x x x x

Second, under Section 1, Rule 65 of the Rules of Court, for the writs of certiorari and prohibition to issue, there is no appeal nor plain, speedy and adequate remedy in the ordinary course of law (*Roque v. Court of Appeals*, 93 SCRA 540, 547). Here appeal is available. And if by now there is no appeal, it is because the petitioner simply did not avail of it. The rule is that the writ of certiorari or prohibition may not be availed of to make up for the loss, through omission or oversight of the right to appeal. But petitioner was not denied that right to appeal. Petitions for certiorari to annul a decision or order which could have been appealed, but have not been appealed, should be dismissed (*Lobete v. Sundiam*, 123 SCRA 95).

It is true that although appeal is available, certiorari may still lie if the appeal does not prove to be a speedy and adequate remedy (*Valdez v. Querubin*, 37 Phil. 774; *Saludes v. Pajarillo*, 78 Phil. 775). But the petition has not shown why appeal is not speedy and adequate under the circumstances.[10]

Undaunted, DBP filed a Motion for Reconsideration,[11] Supplemental Motion for Reconsideration[12] and Additional Argument in Support of the Motion for Reconsideration & Supplemental Motion.[13] On 15 February 1994 the Court of Appeals granted DBP's motion for reconsideration.[14] It ruled -

Petitioner apparently has meritorious defenses, in that it has all the documents to show that it has complied with the legal requirements in the extrajudicial foreclosure of mortgage it undertook in the case; that private respondents may have been estopped from questioning the validity of the auction sale on grounds of i.e., lack of notice and publication because they had even asked for the postponement of the auction sale from October 12, 1981 to March 1, 1982 to which petitioner had agreed and thus the postponement of the sale (Rollo, pp. 20-22 and 113-114).

Under the circumstances, petitioner's loss of its property because of the gross negligence of its counsel may, in a definite sense, constitute a miscarriage of justice.[15]

Their Motion for Reconsideration of Decision[16] having been denied,[17] Genoveva Ligot Sempio and the heirs of her husband now come to us through the instant petition for review on certiorari. They contend that respondent Court of Appeals erred when it reversed its earlier ruling that certiorari would not lie if appeal was available.

We reverse the Court of Appeals. Sec. 1, Rule 65, of the Rules of Court provides -

When any tribunal, board, or officer exercising judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion and there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings, as the law requires, of such tribunal, board or officer (underscoring supplied).

To avail of the special civil action of certiorari it is necessary to allege in a verified petition with the proper court that (a) the tribunal, board or officer exercising judicial functions has acted without or in excess of jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction, and (b) there is no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law for the purpose of annulling or modifying the proceeding. A tribunal, board or officer acts without jurisdiction if it/he does not have the legal power to determine the case. There is excess of jurisdiction where, being clothed with the power to determine the case, the tribunal, board or officer oversteps its/his authority as determined by law. And there is grave abuse of discretion where the tribunal, board or officer acts in a capricious, whimsical, arbitrary or despotic manner in the exercise of his judgment as to be said to be equivalent to lack of jurisdiction.[18] Certiorari is often resorted to in order to correct errors of jurisdiction. Where the error is one of law or of fact, which is a mistake of judgment, appeal is the remedy.[19]

In the present case, it cannot be said that the trial court committed an error of jurisdiction; that it acted without or in excess of jurisdiction, or with grave abuse of discretion. On the contrary, it manifested a tremendous amount of tolerance by acceding to the setting and re-setting of the pre-trial conference several times to accommodate DBP and its counsel. Unfortunately, these accommodations were reciprocated only by the indifference and lethargy of DBP. The representative of DBP, if any, and its counsel never attended the pre-trial conference hence the trial court perforce declared DBP as in default and allowed herein petitioners to present their evidence ex-parte. The default order was readily lifted upon motion of DBP, so we can only conclude that, far from the imputation of abuse of discretion, the court below was too liberal in refusing earlier to declare the bank as in default; neither did it exercise its judgment in a capricious and whimsical manner amounting to grave abuse of discretion.

That there must be no appeal nor any plain, speedy and adequate remedy in the ordinary course of law, is another requisite in order to avail of the writ of certiorari. In the instant case, respondent DBP filed a Petition for Certiorari, prohibition and Mandamus within the fifteen-day period after its Motion for Reconsideration was denied. Clearly, the remedy of appeal was still available to DBP but it did not pursue this recourse. Neither did it show why appeal would be inadequate and slow in relieving it of the effects of the assailed decision. It did not cite any exception to escape from the rigid rule barring substitution of remedies. It simply contented itself in saying that "it will be further denied of its substantial rights x x x as it was already denied due process of law in the lower court because of its former counsel's gross ignorance, mistake and negligence." [20]

Gleaned from the foregoing, DBP cannot claim denial of due process as it was accorded by the trial court several opportunities to present its side. As such, it must endure the adverse consequences of its lost opportunities and for neglecting, if not trifling, with judicial processes. Our rules forbid recourse to certiorari if appeal is available as the two remedies are mutually exclusive. Certiorari cannot be used as a substitute for the lost or lapsed remedy of appeal, especially if such loss or lapse was occasioned by one's own neglect or error in the choice of remedies.[21]

In its Resolution of 15 February 1994 the Court of Appeals declared DBP to have meritorious defenses. However it failed to state those defenses and the documents, if any, that would support them. Its finding then could only be a mere conclusion bereft of any factual support. Assuming arguendo that Bernardo Sempio indeed agreed to

postpone the holding of the auction sale to a later date, it was not sufficient to rebut the allegations of petitioners that the requirements of Act No. 3135 were not complied with. In *Spouses Juan and Filomena Pulido v. Court of Appeals*[22] we said -

While it may be true that the party alleging non-compliance with the requisite publication has the burden of proof, still negative allegations need not be proved even if essential to one's cause of action or defense if they constitute a denial of the existence of a document the custody of which belongs to the other party.

But even if we consider the petition for certiorari under Rule 65 as one for review under Rule 45, the annulment of the foreclosure and auction sale of the property would still hold. Firstly, the mortgage contract provides that in case of foreclosure the auction sale shall take place in the city or capital of the province where the mortgage property is situated. In this case the auction sale was conducted in Baliuag, instead of Malolos, Bulacan, in clear violation of Sec. 2 of Act No. 3135 which, to repeat, reads in part -

Said sale cannot be made legally outside of the province in which the property sold is situated; and in case the place within said province in which the sale is to be made is the subject of stipulation, such sale shall be made in said place.

Consequently, the auction sale having been made in Baliuag and not in Malolos, the sale breached their express agreement.

Secondly, Sec. 4, of the same Act provides that the conduct of the sale shall be made under the direction of the sheriff of the province where the property is situated. Again, this requirement was not complied with by DBP as the conduct of the auction sale was directed by the provincial Sheriff of Nueva Ecija and not of Bulacan.

Thirdly, DBP contends that appeal or any other plain, speedy and adequate remedy is no longer available hence their recourse to certiorari under Rule 65. Unfortunately, we do not view it the way DBP does. The decision of the Regional Trial Court of 24 September 1990 was received by DBP on 28 September 1990. The trial court denied DBP's motion for reconsideration on 8 November 1990. The denial was received by DBP on 15 November 1990. Evidently when DBP filed its Petition for Certiorari, Prohibition and Mandamus with the Court of Appeals on 20 November 1990 its period to appeal had not yet lapsed, so that the remedy of appeal was still available to it.

In the Supplemental Discussion[23] filed by DBP it is averred that the court below erred when it ordered the Sempios to pay P119,320.00 with legal rate of interest effective 1 March 1982 considering that the interest rate stipulated by the parties in their loan agreement was eighteen percent (18%) per annum. We agree with DBP. Consequently, under Art. 2209 of the New Civil Code, which provides that -

If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six percent per annum (underscoring supplied),[24]

the Sempios should pay DBP P119,320.00 which, as stipulated, should earn interest at the rate of eighteen percent (18%) per annum, minus the amount of P30,301.00 already paid.

WHEREFORE, the Resolution of the Court of Appeals of 15 February 1994 reversing its Decision of 19 February 1991 is REVERSED and SET ASIDE. Consequently, the Decision of the RTC - Br. 19, of Malolos, Bulacan, dated 24 September 1990 (in its Civil Case No. 181-M-90) (a) declaring null and void the extrajudicial foreclosure, the Sheriff's Certificate of Sale, and all consequent proceedings over the parcel of land covered by TCT No. T-6263 of the Registry of Deeds of Bulacan; (b) directing herein petitioners Genoveva Ligot and the Heirs of Bernardo Sempio to pay respondent Development Bank of the Philippines P119,320.00 with legal rate of interest effective 1 March 1982 minus P30,301.00; (c) ordering respondent Development Bank of the Philippines to cancel the

mortgage upon full payment of the loan; and (d) further ordering respondent Development Bank of the Philippines to pay petitioners P5,000.00 for attorney's fees, is AFFIRMED, with the MODIFICATION that the "legal rate of interest" is increased to eighteen percent (18%) per annum as stipulated by the parties.

SO ORDERED.

Padilla (Chairman), Kapunan and Hermosisima, Jr., JJ., concur.
Vitug, J., in the result.

- [1] Exh. "A," Mortgage, Original Records, p. 18.
- [2] Exh. "B," Certificate of Sale, id., p. 19.
- [3] Annex "A," Complaint, id., pp. 14-17.
- [4] Annex "B," id., pp. 20-22.
- [5] Annex "D," id., p. 24.
- [6] Annex "E," id., pp. 25-28.
- [7] Annex "G," id., p. 32.
- [8] Annex "H," id., pp. 33-38.
- [9] Decision, id., pp. 79-85.
- [10] Id., pp. 83, 85.
- [11] Motion for Reconsideration, id., pp. 87-94.
- [12] Supplemental Motion for Reconsideration, id., pp. 96-97.
- [13] Additional Argument in Support of the Motion for Reconsideration & Supplemental Motion, id., pp. 108-111.
- [14] Resolution, id., pp. 192-199.
- [15] Id., pp. 195-196.
- [16] Id., pp. 200-203.
- [17] Resolution, id., p. 215.
- [18] Regalado, Florenz D., Remedial Law Compendium, Vol. I, Fifth Rev. Ed., pp. 457-458.
- [19] *Salas v. Castro*, G.R. No. 100416, 2 December 1992, 216 SCRA 202.
- [20] Comment on the Petition for Review on Certiorari, p. 1; Rollo, p. 59.
- [21] *Fajardo v. Bautista*, G.R. No. 102193, 10 May 1994, 232 SCRA 291; *Sy v. Romero*, G.R. No. 83580, 23 September 1992, 214 SCRA 193; *Aqualyn Corporation v. Court of Appeals*, G.R. No. 99046, 28 September 1992, 214 SCRA 312; *Salas v. Castro* see Note 19; *Philippine Virginia Tobacco Administration v. Lucero*, No. L-32550, 27 October 1983, 125 SCRA 344-345; *Lobete v. Sundiam*, No. L-38278, 28 June 1983, 123 SCRA 95; *Guanzon v. Montesclaros*, G.R. No. 59330, 28 June 1983, 123 SCRA 185.
- [22] G.R. No. 109244, 29 December 1995, p. 5; citing Regalado, Florenz D., Remedial Law Compendium, Vol.

II, Fifth Rev. Ed., p. 511.

[23] Records, p. 66.

[24] The Monetary Board increased the rate of legal interest from six percent (6%) to twelve (12%) per annum.

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