

JOWEL SALES, PETITIONER, VS. CYRIL A. SABINO, RESPONDENT

G.R. NO. 133154. December 09, 2005

Ponente: GARCIA, J.

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GARCIA, J.:

Assailed and sought to be set aside in this petition for review on certiorari under Rule 45 of the Rules of Court are the following issuances of the Court of Appeals (CA) in CA-G.R. SP No. 44078, to wit:

- Decision[1] dated January 20, 1998, affirming an earlier order of the Regional Trial Court, Branch 152, National Capital Judicial Region, which admitted the deposition of one Buaneres Corral as part of respondent's evidence in an action for damages; and
- Resolution[2] dated March 22, 1998, denying petitioner's motion for reconsideration.

Briefly, the facts may be stated as follows:

On February 20, 1995, in the Regional Trial Court (RTC) at Pasig City, Metro Manila, herein respondent Cyril A. Sabino filed an amended complaint[3] for damages against, among others, herein petitioner Jowel Sales, driver of the vehicle involved in the accident which ultimately caused the death of respondent's son, Elbert.

Before any responsive pleading could be filed, respondent, as plaintiff a quo, notified the defendants that he will take the deposition of one Buaneres Corral before the Clerk of Court, RTC- Pasig City.

On December 27, 1995 and resumed on January 3, 1996, the deposition on oral examination of Buaneres Corral was taken before the Clerk of Court of Pasig, in the presence and with the active participation of petitioner's counsel, Atty. Roldan Villacorta, who even lengthily cross-examined the deponent. In the course of trial, respondent had the deposition of Buaneres Corral marked as her Exhibits "DD"[4] and "EE"[5], with submarkings.

Upon conclusion of her evidentiary presentation, respondent made a Formal Offer of Exhibits,[6] among which are Exhibits "DD" and "EE". Likewise offered in evidence as Exhibit "BB"[7] is a certification from the Bureau of Immigration attesting to the May 28, 1996 departure for abroad of Buaneres Corral via Flight No. PR 658.

Petitioner opposed the admission of Exhs. "DD" and "EE" and even asked that they be expunged from the records on the ground that the jurisdictional requirements for their admission under Section 4, Rule 23 of the Rules of Court, *infra*, were not complied with. He also downplayed the evidentiary value of Exhibit "BB" for reasons he would repeat in this petition.

In its order of February 3, 1997,[8] the trial court admitted, among other evidence, respondent's Exhibits "DD", "EE" and "BB". With his motion for reconsideration[9] having been denied by the court in its subsequent order of March 25, 1997,[10] petitioner went on certiorari to the Court of Appeals in CA-G.R. SP No. 44078, imputing grave abuse of discretion on the part of the trial court in admitting in evidence the deposition in question (Exhibits "DD" and "EE").

As stated at the threshold hereof, the appellate court, in the herein assailed decision dated January 20, 1998,[11] upheld the trial court and effectively denied due course to and dismissed petitioner's recourse, explaining, *inter alia*, that petitioner's active participation, through counsel, during the taking of subject deposition and adopting it as his own exhibits, has thereby estopped him from assailing the admissibility thereof as part of respondent's evidence. His motion for reconsideration having been denied by the appellate court in its equally assailed resolution of March 22, 1998, petitioner is now with us via the instant petition, raising the following issues of his own formulation:

- Whether or not the requirements of Section 4, Rule 24 (now Section 3) of the Revised Rules of Court were satisfied by the respondent when it presented a certification attesting to the fact that deponent has left the country but silent as to whether or not at the time his deposition was offered in evidence is in the Philippines
- Whether or not the petitioner in cross-examining the deponent during the taking of his deposition waived any and all objections in connection therewith.[12]

The petition lacks merit.

Section 4, Rule 23[13] of the Rules of Court, upon which petitioner mounts his challenge to the admission in evidence of the subject deposition, pertinently reads:

SEC. 4. Use of depositions.- At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

xxx xxx xxx

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (1) that the witness is dead; or (2) that the witness resides at a distance more than one hundred (100) kilometers from the place of trial or hearing, or is out of the Philippines, unless it appears that his absence was procured by the party offering the deposition; or (3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (5) upon application and notice, that such exception circumstances exist and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. (Emphasis supplied).

It is petitioner's posture that none of the above conditions exists in this case to justify the admission in evidence of respondent's Exhibits "DD" and "EE". Hence, it was error for the appellate court to have upheld the admission thereof by the trial court. Discounting the probative value of the certification from the Bureau of Immigration (Exh. "BB") that deponent Buaneres Corral departed for abroad on May 28, 1996, petitioner argues that said certification merely proves the fact of Corral having left the country on the date therein mentioned. It does not, however, establish that he has not returned since then and is unavailable to be present in court to personally testify.

While depositions may be used as evidence in court proceedings, they are generally not meant to be a substitute for the actual testimony in open court of a party or witness. Stated a bit differently, a deposition is not to be used when the deponent is at hand.[14] Indeed, any deposition offered during a trial to prove the facts therein set out, in lieu of the actual oral testimony of the deponent in open court, may be opposed and excluded on the ground of hearsay. However, depositions may be used without the deponent being called to the witness stand by the proponent, provided the existence of certain conditions is first satisfactorily established. Five (5) exceptions for the admissibility of a deposition are listed in Section 4, Rule 23, *supra*, of the Rules of Court. Among these is when the witness is out of the Philippines.

The trial court had determined that deponent Bueneres Corral was abroad when the offer of his deposition was made. This factual finding of absence or unavailability of witness to testify deserves respect, having been adequately substantiated. As it were, the certification by the Bureau of Immigration – Exh. "BB"- provides that evidentiary support. Accordingly, the attribution of grave abuse of discretion on the part of the trial court must be struck down. It has been said to be customary for courts to accept statements of parties as to the unavailability of a witness as a predicate to the use of depositions.[15] Had deponent Bueneres Corral indeed returned to the Philippines subsequent to his departure via Flight No. PR 658, petitioner could have presented evidence to show that such was the case. As it is, however, the petitioner does not even assert the return as a fact, only offering it as a possibility since no contrary proof had been adduced.

Given the foregoing perspective, the second issue of whether or not petitioner is estopped from objecting to the use of Corral's deposition as part of respondent's evidence is really no longer determinative of the outcome of this case, and need not detain us long. Suffice it to state that, as a rule, the inadmissibility of testimony taken by deposition is anchored on the ground that such testimony is hearsay, i.e., the party against whom it is offered has no opportunity to cross-examine the deponent at the time his testimony is offered. But as jurisprudence teaches, it matters not that opportunity for cross-examination was afforded during the taking of the deposition; for normally, the opportunity for cross-examination must be accorded a party at the time the testimonial evidence is actually presented against him during the trial or hearing.[16] In fine, the act of cross-examining the deponent during the taking of the deposition cannot, without more, be considered a waiver of the right to object to its admissibility as evidence in the trial proper. In participating, therefore, in the taking of the deposition, but objecting to its admissibility in court as evidence, petitioner did not assume inconsistent positions. He is not, thus, estopped from challenging the admissibility of the deposition just because he participated in the taking thereof.

Lest it be overlooked, Section 29, Rule 23 of the Rules of Court, no less, lends support to the conclusion just made. In gist, it provides that, while errors and irregularities in depositions as to notice, qualifications of the officer conducting the deposition, and manner of taking the deposition are deemed waived if not objected to before or during the taking of the deposition, objections to the competency of a witness or the competency, relevancy, or materiality of testimony may be made for the first time at the trial and need not be made at the time of the taking of the deposition, unless they could be obviated at that point.[17]

While perhaps a bit anti-climactic to state at this point, certiorari will not lie against an order admitting or rejecting a deposition in evidence, the remedy being an appeal from the final judgment.[18] For this singular reason alone, the appellate court could have had already dismissed herein petitioner's invocation of its certiorari jurisdiction.

WHEREFORE, the instant petition is hereby DENIED.

Costs against petitioner.

SO ORDERED.

Panganiban, (Chairman), Sandoval-Gutierrez, Corona, and Carpio-Morales, JJ., concur.

[1] Penned by Associate Justice Artemon D. Luna (now ret.), with Associate Justices Portia Alino-Hormachuelos and Roberto A. Barrios, concurring; Rollo, pp. 20-22.

[2] Rollo, p.14.

[3] Ibid, pp. 32-38.

[4] Id, pp. 44-59; Annex "F", Petition.

- [5] Id., pp. 60-113; Annex "F-1", Petition.
- [6] Id., pp. 115-124; Annex "G", Petition.
- [7] Id., p. 125; Annex "I", Petition.
- [8] Id, p. 126.
- [9] Id., pp. 127-129.
- [10] Id., p. 190.
- [11] Vide Note #1, supra.
- [12] Rollo, p. 11.
- [13] Not Rule 24, as erroneously claimed by petitioner.
- [14] 23 Am Jur 2d. Depositions and Discovery, Sec. 174.
- [15] 23 Am Jur 2d, Depositions and Discovery, Sec. 181.
- [16] Dasmarinas Garments, inc. vs. Reyes, 225 SCRA 622 [1993].
- [17] Section 29, Rule 23, The Revised Rules of Court.
- [18] Dearing v. Fredwilson & Co., Inc., 98 SCRA 758 [1980].

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