

FELISA OSORIO AND DANIEL TIRONA, PLAINTIFFS AND APPELLANTS, VS. CHAS. R. BENNET, DISTRICT ENGINEER OF CAVITE, AND THE PROVINCIAL BOARD OF CAVITE, DEFENDANTS AND APPELLEES.

G. R. No. 14539. December 18, 1920

Ponente: AVANCEÑA, J.

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AVANCEÑA, J.:

The plaintiffs are owners of a parcel of registered land used as a fishery which is described in paragraph two of the amended complaint. They purchased it from Sidney D. Sugar, the person who secured its original registration in accordance with the Land Registration Law. About the month of September, 1916, the defendants occupied, somewhere in the western part, a portion of this land of an area of 13,000 square meters in order to convert it into a provincial road.

The plaintiffs bring this action to recover of the defendants the value of this piece of land at the rate of one peso (P1) per square meter, and the value of another portion of 2,380 square meters, which was rendered useless, as a fishery because of the construction of the road. According to the plaintiffs, the defendants, in the construction thereof, removed part of the fishery's dyke, as a result of which about 40,000 fish valued at P4,000 escaped from it. They, therefore, also ask judgment against the defendants for this sum. Lastly, they ask that judgment be rendered, granting them an indemnification, for the profits they failed to receive, in the sum of P200 for each month that had elapsed since September, 1916.

The court absolved the defendants from the complaint and the plaintiffs appealed.

It appears from the evidence, and it is admitted by the parties, that a part of the Cavite-Noveleta provincial road in the Province of Cavite, which was constructed in 1916, occupied a portion of land included in the title of the plaintiffs, situated somewhere in the western part, and having an area of 13,000 square meters, and that the defendants occupied it because the plaintiffs ceded it to them under certain conditions.

According to the plaintiffs, the most important of these conditions was that the defendants, in filling up the new road, should use the mud which must be taken from the high part of the fishery until its bottom should be on a level with the rest. As stated by the plaintiffs and as the fact seems to be, this condition was the only compensation for the cession of their land, because by this excavation the part dug up would become an enlargement of the fishery already existing. The defendants state that this condition was imposed by the plaintiffs after the construction was commenced and not at the time of making the cession. After an examination of the evidence we reach the conclusion that this condition was imposed from the beginning.

We note immediately that the defendants in their last amended answer make this allegation:

"* * * by virtue of this gratuitous verbal concession, the province took possession of the lands of the plaintiffs, with their knowledge, and consent, and without any objection on their part, said plaintiffs having imposed the

conditions necessary for filling up the road, which condition was that the higher parts of the lands shall be dug up. This has been done by the defendants for the benefit of the plaintiffs and resulted in the construction of one hectare more or less of new fishery, land having been taken from the higher portions and used to fill up the road."

It appears that after the commencement of the work the plaintiff, Felisa Osorio, observed that the conditions imposed by them in making the cession were not complied with, and she wrote a letter (Exhibit C) to the defendant Chas. R. Bennet, district engineer of the Province of Cavite, demanding compliance with them. The defendant Mr. Bennet answered by letter dated October 3, 1916 (Exhibit E), from which it may be inferred that this condition was imposed when the cession was made. Referring to the condition relating to the taking out of mud in the higher part of the plaintiffs' fishery, Mr. Bennet stated in this letter, as if to make it understood that he was fulfilling the condition, that there were fourteen bancas that were carrying away the mud from the higher part of the fishery and from other parts designated by the caretaker of the plaintiffs. In this letter he further made the assurance that the provincial board would approve the contract submitted by the plaintiffs and would authorize him to sign it. The contract referred to was a memorandum of a contract which the plaintiff Mrs. Felisa Osorio had attached to said letter for the defendants to sign; and this memorandum stated that one of the conditions of the cession was that the new road should be filled up with mud from the higher part of the fishery. The defendant, Mr. Bennet, declaring as a witness, himself admitted having agreed with plaintiff Mr. Tirona that he would take out mud from the higher part of the fishery, although he stated that it was to be used in a certain part of the road to secure more economy in the construction thereof.

As to all other points, the plaintiffs proved, and it is inferred from the evidence of the defendants, that at least they did not fully comply with these conditions. The filling up of the road was to a great extent made with mud taken from nearby lands instead of mud taken from the higher part of the fishery.

There was another condition which the defendants also failed to fulfill. For the construction of the road it was necessary to construct two lateral walls and fill up the intervening space which would be the road. The plaintiffs agreed that the wall of the fishery should be used as one of the walls on condition that the defendants should pay its value. Thus it was necessary to build only one wall. It was agreed that the value of the plaintiffs' wall would be the same as the cost of the other wall which the defendants would construct, giving it the same form and dimensions. It is admitted that the defendants did not pay the plaintiffs any sum for the value of their wall. It also appears that the new wall which the defendants built was narrower, and this results in the impossibility of determining the value which the defendants should pay for the plaintiffs' wall.

The defendants having failed to comply with the principal conditions imposed by the plaintiffs when the cession was made, the latter have the right to set aside the cession and recover the value of the land occupied by the defendants. The right to resolve the obligation is implied in reciprocal obligations, when one of the parties fails to comply with his part thereof. (Art. 1124, Civ. Code.)

But the defendants have also alleged, and the court found it to be proved, that the land occupied by the new provincial road and included in the plaintiffs' title was the old provincial road. If this is true, it must be considered as excluded from the plaintiffs' title and they have no right to recover anything as its value. Nevertheless, the evidence does not bear out this allegation. In order to determine this question of fact, the court made an ocular inspection of the land in the presence of the parties. The court states that he found the remains of the pavement of a bridge and two posts. Upon this bridge, which separated the old road, there was a small lodging quarter. From the shape of this pavement and the situation of the two posts the court infers that from the bridge the old road must have taken a southeastern course towards Noveleta. If, in reality, this was the course of the old road, it would run just a few meters from the bridge into which the new road runs. It seems, however, that this deduction is not

based upon proven hypothesis. There is no proof that, as the court found, the shape of the pavement is the same as when the bridge existed. Neither is there proof that the two posts, which the court described, were the only posts to be found and that there were no others the different situation of which might indicate that the old road ran in another direction. But above all, this deduction of the court is openly contrary to other evidence of the defendants themselves. The latter presented the old official plan of the old road in which appears the place where the bridge, referred to by the court, was situated. It appears in this plan that from the bridge the course of the old road was not to the southeast but to the southwest, and, taking the latter direction into account, the old road could not be where the new one is.

The claim of the plaintiffs that the land occupied by the defendants is worth P1 per square meter cannot be accepted. It appears that when the plaintiff Daniel Tirona himself was provincial assessor he assessed this land at the rate of P0.04 per square meter. It is alleged that the rise in the price of salt increased the value of fisheries because a fishery may be converted into a salt pit. But no evidence was presented as to what would be the cost of converting a fishery into a salt pit in order to determine how far the price of salt in the market may affect the value of the fishery. In any event, when the land in question was occupied by the defendants, it was a fishery and not a salt pit and we cannot give it a value not its own. We agree that the land of the plaintiffs, in the portion occupied by the defendants, was worth P0.04 per square meter.

With respect to the area of 2,300 square meters which, according to the plaintiffs, was rendered useless as a fishery, we believe that the plaintiffs are not entitled to recover anything for it, as it has not been occupied by the defendants.

Having reached this conclusion as to the value of the land, we cannot admit that the profits which the plaintiffs failed to perceive from this land was, as claimed, P200 per month. These lands, at the rate of P0.04 per square meter, would be worth P520 and the indemnity of P200 per month, which the plaintiffs claim, would clearly be disproportionate. We have no other data by which to determine the exact quantity of the damages suffered by the plaintiffs, but we believe that the same would be justly appraised at the rate of 6 per cent annual interest on the value of the land.

As to the 40,000 fish which, according to the plaintiffs, escaped from the fishery, neither is there sufficient proof. Although it is true that part of the old wall caved in, the evidence is not dear as to the loss of the fish. There is evidence to show that when the wall caved in, the old wall existed and the passage-way, where, it is said, fish passed into the sea, was closed with a wooden board, according to the plaintiffs' own witnesses. Another error which the appellants impute to the lower court is that it did not permit them to prove what it would cost to dig up the higher part of the fishery until its bottom should be at a level with the remaining part. The idea of the appellants seems to be that, by virtue of the action instituted in this case, they are entitled to recover of the defendants, as damages, the value of this work which the latter agreed but failed to perform. We have said that for the failure of the defendants to comply with this obligation, the plaintiffs have the right to ask for its performance or to resolve the cession, with indemnity for damages, in accordance with article 1124 of the Civil Code. But these remedies granted by law are alternative. They are not cumulative, because the resolution of a contract and its performance are incompatible with each other. Having elected the right to resolve, the plaintiffs cannot, at the same time, demand the fulfillment of the obligation. If in this action the plaintiffs could recover of the defendants the cost of digging up the higher portion of the fishery, that would amount indirectly to compliance by the defendants, with the obligation. In that manner the plaintiffs would, at the same time, be availing themselves of the two remedies of resolving the obligation and exacting its fulfillment.

The indemnification which the plaintiffs are entitled to recover in this action should be limited to the damages incidental to the nonfulfillment of the obligation by the defendants and not those which the defendants would

have been obliged to pay as expenses, supposing that they had complied with the obligation.

The judgment appealed from is, therefore, reversed and the defendants are sentenced to pay to the plaintiffs the sum of P520.40, which is the value of the land occupied by the provincial road of Cavite, with interest at 6 per cent per annum from September 6, 1916. The defendants are absolved from all other prayers of the complaint. No special pronouncement as to costs will be made. So ordered.

Mapa, C. J., Araullo, Street, Malcolm and Villamor, JJ., concur.

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