

FLORENCIO GORDILLO AND ISIDRO MARTINEZ, PLAINTIFFS, VS. SIMPLICIO DEL ROSARIO, ONE OF THE JUDGES OF THE COURT OF FIRST INSTANCE OF MANILA, EDUARDO GUTIERREZ REPIDE, FRANCISCO GU...*G.R. No. 15117. March 28, 1919*

Ponente: STREET, J.

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For a number of years past there has existed in the city of Manila a limited partnership, under the style of "Gutierrez, Gordillo, Salgado y Martinez," engaged in general merchandise business and conducting the establishments, on the Escolta, known as the "New York-Paris-Manila" and "St. Louis Dry Goods Store." The resident managers of this business during the period of the transactions which gave rise to this litigation were Florencio Gordillo Ortiz and Isidro Martinez Garcia, petitioners in the present proceeding. Other collective members of the firm were Rafael Gutierrez Rabago, Justo Salgado Bozano, Francisco Gutierrez Garcia—residents of Spain—and Eduardo Gutierrez Repide, resident of the city of Manila.

Upon January 14, 1919, an action was instituted on behalf of the partners Francisco Gutierrez Garcia, Rafael Gutierrez Rabago, Justo Salgado Bozano, and Eduardo Gutierrez Repide, against Florencio Gordillo and Isidoro Martinez, the two resident managers then in charge of the business. In this complaint it was alleged that the defendants, in the abuse of their authority as managers, had unlawfully diverted large sums of money from the legitimate uses of the firm and had appropriated the same to their own use in violation of law and the articles of partnership. For this reason the plaintiffs prayed that the court should decree a partial rescission of the articles of partnership; that the defendants, Gordillo and Martinez, should be required to restore to the firm all of the money improperly withdrawn by them from its resources; that they be required to bring into the common fund all profits of the operations conducted by them with partnership capital; and that they be required further to indemnify the firm in the sum of P75,000 as compensation for damage inflicted by them upon the business.

On February 1, 1919, and before the complaint in the cause just mentioned had been answered, the period fixed in the articles of partnership expired; and as the life of the firm had not been extended by mutual consent, it became necessary for the firm to be liquidated. Gordillo and Martinez, then in possession as managers, insisted that liquidation should be effected, in accordance with paragraph 13 of the articles of partnership, upon their inventory and under their supervision as liquidators. Said articles in the part here material to be noted, reads as follows:

"On the expiration of the term fixed for the duration of the present partnership, if all the partners in common accord do not extend the term, the liquidation shall be effected upon preparation of a general inventory of all the stock on hand, and, when made and approved, the following procedure shall be followed: On the tenth day, counting from the date of the approval of the said general inventory of the partnership property, and after a call for a meeting made in writing by the managers who should fix the time therein, all the partners shall meet, in person or by proxy, in the firm's domicile, and, in the presence of one or more notaries public of the city of Manila, if they so desire, the latter shall open the proposals for the purchase of the business which the partners

may deem proper to present in sealed envelopes, on that occasion. After the envelopes shall have been opened and the offers made known, the business shall be awarded to the partner or partners, general or limited, who should offer the highest bid. The deed of conveyance of the business must be executed within the first three days immediately following the meeting. If, in said meeting, no offer is made by the partners, the sale shall be advertised to take place at public auction, and if then no advantageous bid is tendered, a liquidation shall immediately be had in the best manner possible, and if this cannot be carried into effect, then the stock and credits shall be distributed among the partners in proportion to the capital which each one of them may have in the partnership."

The other parties in interest, being the plaintiffs in the action then pending in the Court of First Instance, did not acquiesce in the proposal of Gordillo and Martinez to serve as liquidators; and a general meeting of the partners was accordingly convoked, due notice of which was served on the managers, for the purpose of electing a liquidator, in conformity with the provisions of article 229 of the Code of Commerce. This meeting was held on February 10, 1919, and Francisco Gutierrez Repide was there chosen liquidator by interest representing a majority of the capital invested in the business. Gordillo and Martinez abstained from attending and subsequently refused to surrender the possession of the firm properties to the liquidator who had been thus chosen. The parties who were interested in sustaining the liquidator thereupon filed a supplemental complaint in the action already instituted by them in the Court of First Instance and alleged (1) that the period fixed for the duration of the partnership had expired on February 1, 1919; (2) that a general meeting of the partners had been convoked and a liquidator elected as above stated; and (3) that the defendants, Gordillo and Martinez, had refused to surrender possession of the goods and properties of the company to said liquidator and refused to permit him to exercise the functions of his office. They accordingly prayed for a peremptory writ of injunction directed against the defendants, commanding them to abstain during the pendency of the action from doing any act tending to obstruct the liquidator in taking possession of properties pertaining to the firm.

Pursuant to the prayer of the complaint, as thus amended, the Honorable Simplicio del Rosario, judge of the Court of First Instance of the city of Manila, upon the execution of a bond in the sum of P20,000, issued, on February 14, 1919, an ex parte injunction, without preliminary notice to the defendants. The dispositive part of said injunction is of the following tenor:

"It is hereby ordered by the undersigned judge of this Court of First Instance that, until the issuance of a new order, you, the said Florencio Gordillo and Isidoro Martinez, and all your attorneys, representatives, agents, and other persons who may act in your behalf, desist from performing any acts whatever tending to prevent Francisco Gutierrez Repide, appointed liquidator of the dissolved partnership of Gutierrez, Gordillo, Salgado y Martinez, S. en C, from taking charge of the property, books, documents, papers, vouchers, stubbooks of cheques, of receipts or deposits, securities, funds, money, stock, and any other property of said company, and desist and abstain from preventing or hindering said liquidator from performing the acts which, in such capacity, it is incumbent upon him to perform."

The attorneys for Gordillo and Martinez at once moved the Court of First Instance to dissolve said injunction; but after a hearing, at which the respective parties presented affidavits and such oral testimony as they saw fit to adduce, the judge of first instance denied said motion, leaving the injunction in full force.

Thereupon, on February 26, 1919, the defendants, Gordillo and Martinez, as petitioners, instituted the present original proceeding in the Supreme Court wherein they apply for the writ of certiorari and ask the court to supersede, quash, and dissolve the aforesaid injunction. The grounds upon which relief is sought are that in granting said injunction the Court of First Instance acted irregularly and in excess of its jurisdiction and that the issuance of said writ constituted an abuse of discretion on the part of the judge below.

The defendants named in the petition as respondents are: Judge Simplicio del Rosario, Eduardo Gutierrez Repide,

Francisco Gutierrez Repide, Rodolfo Ortiz Arnau, and Angel Ortiz Arnau. Of these the two last named had not been named as original parties in the proceeding below but had intervened as additional parties plaintiff. The non-resident members of the firm, as will be seen, are not named as parties defendant in the present application.

The cause is now before us upon a demurrer interposed by the respondents to the petition, and the merits of the application must therefore be determined upon the allegations of the petition itself, to which is annexed a transcript of the proceedings in the court below.

A preliminary point of minor interest is presented with reference to the parties to the proceeding. In the first place it is said that the liquidator, Francisco Gutierrez Repide, is not a proper party respondent. We think this contention is not well founded. It is true he is not a formal party to the action in the court below but the injunctive order granted by that court was made for the purpose of placing him in possession of the firm property. He is manifestly interested in sustaining that order; and this is sufficient, in the language of Act No. 1159, to make him a proper party respondent in this proceeding. In the second place it is urged that this proceeding should not be entertained because of the failure of the petitioner to join the nonresident partners among the parties respondent herein. We consider this contention to be likewise untenable. All the parties immediately concerned with the operation of the injunction are before the court; and though the nonresident members might be considered proper parties if within the jurisdiction of the court, they are not necessary with respect to the relief sought in this case. The chief purpose of the law in requiring the parties in interest to be joined as respondents in such a proceeding as this is to assure that someone shall be before the court who, on account of his interest in the controversy, may be properly held liable for the costs, thereby avoiding the necessity of holding the respondent judge liable for costs in case the petition should be granted. (See Act No. 1159.)

The principal question in the case is whether the action of the Court of First Instance in granting the injunction in question was irregular and in excess of its jurisdiction in the sense necessary to justify this court in superseding said injunction upon writ of certiorari. In this connection it is insisted for the petitioners that the injunction in question is mandatory, and not merely prohibitory in its operation and that its effect is to transfer the possession of the business in question from the hands of the petitioners to those of the liquidator, contrary to the provisions of the articles of partnership. It is also said that the proper object of a preliminary injunction, whether mandatory or prohibitory in form, is to preserve the status quo until the trial, and that a judge of First Instance must not make use of the injunctive power to change such status.

It is undeniable that the injunctive power is one capable of abuse; and this Court has not infrequently been called upon to criticise the practice, formerly quite general in our Courts of First Instance, of granting preliminary injunctions for the purpose of taking property, which is the subject of litigation and as to which the legal title is in dispute, out of the possession of one person and putting it into the hands of another before the right is determined. (Devesa vs. Arbes, 13 Phil. Rep., 273; *Golding vs. Balatbat*, 36 Phil. Rep., 941.) We are also of the opinion that the action of a Court of First Instance in exercising this power may, under certain conditions, amount to an abuse of discretion and constitute an irregularity so far in excess of the proper power of the court as to give rise to a right in the injured party to have relief by the writ of certiorari. However, in the case before us we see none of the elements requisite to the granting of the relief here sought. On the contrary, we are of the opinion that the action of Judge Del Rosario in granting the injunction in question was entirely within his power and constituted a most salutary exercise thereof.

It is admitted that when the injunction was applied for the period prescribed for the duration of the partnership had passed. The parties in interest were, therefore, confronted with the necessity of liquidating the business. Whether this process should be accomplished in conformity with the provisions of paragraph 13 of the articles of partnership or in accordance with law regardless of those provisions, it was necessary that the business should be

confided to the care of a liquidator. As the respondents in the present petition —plaintiffs in the action below—would not consent for Gordillo and Martinez to continue in charge as liquidators, it was necessary to proceed to the election of a liquidator in conformity with article 229 of the Code of Commerce. There is absolutely nothing in the articles of partnership which excludes the operation of said article, and in fact this legal provision, allowing the election of a liquidator, must be taken to be supplemental to the articles of partnership, so far as concerns the situation which presented itself when the term of the partnership in question expired.

This is not a case, such as is supposed in the argument for the petitioners, where a person in possession claiming to be owner in his own right has been turned out of possession merely that the property may be turned over to his adversary pending the determination of the question of ownership. It is the case of agents who, by reason of their alleged lack of fidelity to the interests of their principal, have demonstrated their unfitness to retain possession of the business, which had been entrusted to their management. The allegations of the complaint are to the effect that the defendants petitioners here—have violated their trust as managers of the business in question and have misapplied or misappropriated nearly P300,000 of the firm assets. If this be true they are not suitable persons longer to remain in possession either as managers or liquidators.

The cases relied upon by the petitioners, wherein this court has had occasion to condemn or criticize the practice of using the preliminary injunction to transfer possession of the property in controversy from one person to another, before the right is determined, all have reference to the situation where there is a dispute as to ownership. In such case the party in possession is presumed to have the better right until the contrary is adjudged, and hence he should not be turned out until the court is prepared to adjudicate the right of ownership to the other. In the present case it is not pretended that the petitioners are owners. They are admittedly agents holding for others, and of course, upon a complaint showing that they have been unfaithful, the court has power to divest possession out of them and transfer it to a properly chosen liquidator.

A liquidator, it is to be noted, exercises a function similar to that of the receiver of a court of equity; and if no statutory provision had been made for the election of a liquidator, it would undoubtedly have been appropriate for the lower court, upon the complaint there filed, to have appointed a receiver in conformity with section 174 of the Code of Civil Procedure. That a court of equity has power to clothe a receiver appointed by it with the possession of the property which is the subject of contention is a matter that does not admit of the slightest doubt. The mere appointment of a receiver carries with it, by implication, the duty on his part of taking possession, and the further duty on the part of those in possession of yielding up such possession to him. The court, therefore, necessarily has authority to put him in possession. The same is true of a liquidator.

It should not pass unobserved that the authority of the Court of First Instance to grant the injunction with which we are here concerned rests primarily on the fact that the complaint which was addressed to that court seeks relief of such a character that the injunction was a proper auxiliary remedy to be applied in connection with the principal relief. The plaintiffs in the action pending in the court below alleges facts which, if true, entitle them to a judgment declaring a partial rescission of the contract of partnership, excluding the defendants from the partnership and requiring them to account to the firm for any money or property misapplied or misappropriated by them (arts. 218, 219, Code of Commerce). The allegations on which that relief is sought, taken in connection with the effluxion of the period fixed for the life of the partnership, constitute in our opinion a proper basis for the injunction which was granted. The preliminary injunction is essentially an auxiliary remedy, and it cannot properly be issued where no ulterior relief is sought.

We note that the complaint referred to does not ask that the firm be liquidated under judicial supervision, either in conformity with the articles of partnership or otherwise. Other relief is, however, sought to which the granting of the preliminary injunction is properly incident, and this is sufficient. If the petitioners herein wish to have the firm

liquidated under paragraph 13 of the articles of partnership, we see nothing which would prevent them from asking for such relief in their answer, though of course we do not mean here to express any opinion upon the right thereto.

For the reasons stated we are of the opinion that the petition is without merit. The demurrer must, therefore, be sustained; and inasmuch as it is obvious from the complete transcript before us that the facts of the opinion are not amendable, judgment absolute will be here entered, denying the petition, with costs. So ordered.

Arellano, C.J., Torres, Johnson, Araullo, Malcolm, Avanceña, and Moir, JJ., concur.

Writ denied.

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