

**HON. FRANCISCO JOSE, IN HIS CAPACITY AS FORMER JUDGE,
COURT OF FIRST INSTANCE OF MANILA, GEORGE EDWARD KOSTER,
INC., REPRESENTED BY MR. J.A. WOLFSON, LIQUIDATOR, MACARIO
OFILADA...**

G.R. No. 16598. May 31, 1961

Ponente: BARRERA, J.

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BARRERA, J.:

This is a petition to review by certiorari the decision of the Court of Appeals (in CA-G. R. No. 24738-R), setting aside the alias writ of execution issued by the Court of First Instance of Manila in Civil Case No. 11927 as null and void, and making permanent the preliminary injunction issued therein by the appellate court.

Pursuant to a decision duly rendered by the Court of First Instance of Manila in Civil Case No. 11927 and affirmed by the Supreme Court,[1] therein defendant Jose C. Zulueta was ordered to pay therein plaintiff George Edward Koster, Inc. "the sum of P46,093.77 with interest at the rate of 6% per annum from September 27, 1949, with respect to the sum of P30,000.00; and from December 8, 1949, as to the sum of P16,093.77, until the entire amount is fully paid." Said decision having become final and executory, a writ of execution was issued on December 28, 1956.

On April 27, 1957, Zulueta paid the plaintiff corporation, then under liquidation, J. A. Wolfson, liquidator, the sum of P46,093.77, for which the corporation's counsel issued a receipt in the following tenor:

"Received, for and in behalf of my client, G.E. Koster, Inc., Treasury Warrant No. 394899 dated April 23, 1957, in the amount of Forty Six Thousand Ninety three and 77/100 (P46,093.77) representing full payment of the principal obligation of Mr. Jose C. Zulueta to my client, G.E. Koster, Inc., for the above amount in G.R. No. L-9305, entitled G.E. Koster, Inc. vs. Jose C. Zulueta', in accordance with communications lately exchanged between Mr. Zulueta on the one hand, and Atty. J.A. Wolfson, as liquidator of G.E. Koster, Inc., and the undersigned, on the other hand, in connection with this case.

"This receipt cancels a previous one dated April 23, 1957 on the same subject matter, and signed by Mr. Quintin Paredes III.

"Manila, April 25, 1957.

"CIRILO PAREDES

For and in behalf of

G.E. KOSTER, INC.

"ORIGINAL RECEIVED:

JOSE C. ZULUETA"

(Italics supplied.)

As a result, the Sheriff returned the writ of execution with the statement that it has been partially satisfied.

Subsequently, George E. Koster, Inc. transferred for a consideration its right to the unpaid balance of the judgment (representing the interest) against Zulueta, to the Exchange Investment, Ltd. On November 16, 1958, Exchange Investment, Ltd. was substituted for the judgment creditor George E. Koster, Inc. Thereafter, the transferee Exchange Investment, Ltd. petitioned the court a quo for the issuance of an alias writ of execution for the collection of the "unsatisfied part of the judgment". Defendant Zulueta filed an opposition to the petition claiming that there was condonation of the interest in consideration of his having helped in obtaining dollar allocations from the Central Bank in favor of American Builders, Inc. in which George E. Koster was personally interested together with one Mr. Lewis, and that there having been no reservation made in the receipt at the time of payment of the principal, the interest is presumed to have been paid in accordance with Article 1176 of the new Civil Code. Petitioner filed an opposition denying the fact of remission and arguing that neither the lawyer, who had no special authority, nor Koster personally, as mere stockholder of the corporation, could compromise the judgment in favor of the corporation by remitting the interest. After due hearing, the court, in a reasoned order dated January 16, 1959, sustained the contention of petitioner Exchange Investment, Ltd. and issued the alias writ of execution. Zulueta filed a motion for reconsideration which was denied in the court's order of March 12, 1959. Copy thereof was served on said defendant on March 17, 1959.

On April 18, 1959, and after the Sheriff of Manila had already placed under garnishment certain properties belonging to the defendant the latter filed in the Court of Appeals an original petition for certiorari and secured from said court a writ of preliminary injunction enjoining the City Sheriff to refrain from enforcing the aforementioned alias writ of execution.

After due hearing on the matter, the Court of Appeals rendered judgment, dated July 30, 1959, holding that there was condonation of the interest payable by Zulueta effected prior to the transfer of G. E. Koster, Inc.'s interest to the Exchange Investments, Ltd., and that the trial court, therefore, gravely erred in issuing the alias writ of execution for the collection of said interest. The alias writ of execution was set aside and the preliminary injunction made permanent. The petitioner now comes to us seeking to nullify the said decision of the Court of Appeals.

As urged by herein petitioners in their brief, the petition for certiorari filed by Jose C. Zulueta on April 18, 1959, or 32 days after he was notified of the court's denial of his motion for reconsideration of the order for the issuance of an alias writ of execution, should have been dismissed, appeal therefrom being the proper remedy.

Rule 67 of the Rules of Court provides:

"SECTION 1. Petition for certiorari.—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 of such tribunal, board or officer as the law requires, with costs."

It is explicit thereunder, that for a writ of certiorari to issue, it must not only be shown that the board, tribunal or officer acted without or in excess of jurisdiction, or in grave abuse of discretion, but also there is no appeal or other plain, speedy, and adequate remedy in the ordinary course of law available to the aggrieved party.

In the case at bar, it is not disputed that the trial court's order of January 16, 1959, directing the issuance of the alias writ of execution in question, as well as that of March 12, 1959, denying respondent Zulueta's motion for

reconsideration of the aforesaid order, not being interlocutory are appealable. No appeal from said orders, however, was interposed within the reglementary period, nor any reason given for such failure.[2] Under the circumstances, and the right to appeal having been lost for reasons not herein proved to be excusable, a petition for certiorari is not proper,[3]

It is true, that in several instances, this Court allowed petitions for certiorari notwithstanding the existence of appeal therein. It may be pointed out, however, that in those instances, the orders complained of were either issued in excess of or without jurisdiction,[4] or that, for certain special considerations, as public welfare or public policy,[5] this Court has decided to entertain the action. In other words, those are exceptional instances where the provisions of Section 1 of Rule 67 abovequoted are not strictly applied. The case at bar, certainly, does not fall within the exception.

It is also argued that certiorari is the appropriate remedy where, as in this case, execution had already been commenced, respondent citing *Santos vs. Pecson*, 79 Phil., 261, wherein this Court said:

"Mere possible delay in the perfection of an appeal and in securing a decision from the appellate court is no justification for departing from the prescribed procedure. Delay might be a good ground for invoking the extraordinary remedy in cases where there was lack or excess of jurisdiction or abuse of discretion and the delay would work injustice to the complaining party or make the appeal ineffectual to redress the error; where, for instance, execution had been issued, a receiver had been appointed, or attachment had been levied, and there is no time to waste. * * *." (Italics supplied.)

Evidently, the above pronouncement contemplates of instances where there is right to appeal, said right still existing and available, but would be inadequate to prevent the injury or wrong sought to be corrected. Hence, this Court declared that certiorari may be allowed. This pronouncement cannot be invoked in the instant case, because not only is there no showing that appeal from the disputed orders would be inadequate and insufficient remedy, but also that, the right to such appeal, at the time the petition for certiorari was filed, has already been lost—through respondent's own fault and negligence—and no longer available. Furthermore, the execution of the order (to enforce collection of the interest) was made after the expiration of the period to appeal without such appeal having been perfected. Clearly, respondent lost his right to question the correctness of said order.

With the foregoing conclusion, there is no need for us to pass upon the other issues raised by petitioners.

Wherefore, the decision of the Court of Appeals is hereby reversed and set aside, and the orders of the court a quo of January 16, 1959 and March 12, 1959 affirmed, with costs against respondent Zulueta. So ordered.

Bengzon, C.J., Padilla, Bautista Angelo, Labrador, Concepcion, Reyes, J.B.L., Dizon, De Leon and Natividad, JJ., concur.

[1] G. R. No. L-9305. (99 Phil., 945; 53 Off. Gaz., [4] 1076)

[2] It is merely alleged that the trial court gravely abused its discretion in issuing the order complained of.

[3] *Profeta vs. Gutierrez David*, 71 Phil., 582.

[4] *Director of Lands vs. Abada*, 41 Phil., 71; *Director of Lands vs. Santamaria*, 44 Phil., 594; *Perlas vs. Concepcion*, 34 Phil., 559; *Director of Lands vs. Gutierrez David*, 50 Phil., 797; *Clemente vs. Lucban*, 53 Phil., 500; 2 *Moran*, *Comments on the Rules of Court*, pp. 158-160, 1957 Ed.

[5] *People vs. Zulueta*, 89 Phil., 752; *Pineda vs. Ampil Mfg. Co., et al.*, 95 Phil., 930.

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