

MARCOS M. CALO, PETITIONER AND APPELLANT, VS. FRANCISCO MAGNO, RESPONDENT AND APPELLEE.*G.R. No. 18399. February 28, 1963*

Ponente: LABRADOR, J.

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Appeal from the decision of the Court of First Instance of Agusan in Special Civil Case No. 58, the Hon. Montano-Ortiz, presiding, dismissing the petition for injunction (with preliminary injunction) and damages filed, by petitioner Marcos M. Calo against respondent Francisco Magno. The case was originally appealed to the Court of Appeals but was certified by the Court of Appeals to this Court on the ground that it involves a question of law.

Marcos M. Calo filed the petition for injunction and damages to restrain and prevent respondent Francisco Magno, Acting Treasurer of Butuan City, from enforcing an order of distraint and levy issued by respondent on petitioner's properties for the collection of real property taxes in the sum of P797.91. It is alleged in the petition that respondent had no authority to collect the taxes or to issue order, because respondent's appointment and/or designation as acting city treasurer is contrary to the provisions of Republic Act No. 523, otherwise known as the Charter of the City of Butuan and therefore null and void. Petitioner also asks that respondent's appointment be declared invalid.

Respondent denied the material averments of the petition and avers that the resort to distraint and levy is a legal remedy in the collection of delinquent taxes, that his designation by the President under Commonwealth Act No. 588 is lawful, and therefore he is vested with authority to perform the acts complained of. By way of affirmative defense, respondent claims that petitioner had previously challenged the validity of the former's designation as Acting City Treasurer but was advised of its legality that the present action, questioning the legality of respondent's appointment, is in reality one of quo warranto which was not commenced within the period of one (1) year prescribed by law and which petitioner could not institute, he not being the proper party in interest; that petitioner is estopped to deny respondent's authority, the former having previously paid taxes to the city on several occasions during the latter's incumbency; that the court has no jurisdiction to restrain the collection of taxes; that there is non-joinder of an indispensable party, the city government of Butuan; and that assuming that respondent's appointment was illegal, he could be considered a de facto officer whose acts may not be attacked collaterally in an injunction proceeding.

Stipulation of facts:

1. That respondent is a duly designated Acting City Treasurer of Butuan by virtue of his designation as such, by the President of the Philippines, on October 21, 1955 pursuant to the provision of existing law, as shown by Annex '4' of respondent's answer;
- "2. That in consonance with the aforestated designation, respondent has cfdalified as such by taking his oath of office, as shown by Annex '4-A' of respondent's answer, and has entered into the performance of the duties of the office as Acting City Treasurer of Butuan since November 1, 1955 until the present;

"3. That the duly; appointed City Treasurer of the City of Butuan is Quirico Battad, Sr., who has been detailed for assignment in the Department of Finance, Manila, on November 10, 1954, with the approval of said department and the President of the Philippines, as shown by Annex 'A' of the instant stipulation of facts, and still is at present detailed in the Department of Finance, Manila;

"4. That prior to the designation of respondent as Acting Treasurer of Butuan on October 21, 1958, Mr. Felix Martires, who was then Provincial Treasurer of Agusan, has been designated as Acting City Treasurer of Butuan, which designation has not been questioned by the petitioner;

"5. That at the time of respondent's designation as Acting City Treasurer of Butuan, he was occupying the position of Property Clerk in the Office of the Provincial Treasurer of Agusan; and that respondent is still holding said position and drawing salary therefore from the province of Agusan, and in addition thereto, he is drawing as additional salary from the City of Butuan the difference between the salary as Acting City Treasurer and respondent's salary as Property Clerk, in accordance with and as provided for by law;

"6. That petitioner has previously questioned the legality of respondent's designation as Acting City Treasurer of Butuan to the President of the Philippines, Auditor General and Secretary of Finance, all in Manila, but was accordingly advised that the said designation is legal, valid and in consonance with existing law, Commonwealth Act No. 588, a copy of the reply from the Secretary of Finance, dated July 13, 1956 is hereto attached as Annex "B" of this stipulation of facts;

"7. That petitioner is the proprietor of the CVC Lumber Industries, otherwise known as the Consuelo V. Calo Lumber Industries; and that petitioner have knowledge and admits that the said entity have in several previous occasions paid internal revenue license, taxes, etc., to the Office of the City Treasurer during the incumbency of the respondent as Acting City Treasurer of Butuan, as shown by Annexes '1' and '2' of respondent's answer;

"8. That petitioner has previously paid, his professional tax as a practising attorney to the Office of the City Treasurer during the incumbency of the respondent as Acting City Treasurer of Butuan, as shown by Annex '3' of respondent's answer;

"9. That the communication, dated June 27, 1958 sent to and received by the petitioner from the respondent is a letter demanding the payment of the amount of P797.91 corresponding to petitioner's delinquent and unpaid real property taxes and penalties therein;

"10. That Mr. Modesto Piencenaves, the brother-in-law of the petitioner is the Assistant City Treasurer of Butuan and has been occupying the said position even before City Treasurer Quirico Battad, Sr. was detailed for assignment by the Department of finance, also during the time when Provincial Treasurer Felix Martires has been designated as Acting City Treasurer of Butuan By the President of the Philippines on October 21, 1955 until the present."

on the basis of which, the lower, court issued a resolution, a portion of which reads as follows:

"After a prolonged study of the foregoing legal provisions with the aid of the well prepared memorandums of the parties, the conclusion is inescapable that the designation of the respondent Francisco Magno, property clerk in the Office of the Provincial Treasurer of Agusan, as Acting City Treasurer of the City of Butuan was valid and in accordance with law, the law having been made to fill, a temporary vacancy in the Office of the City Treasurer of Butuan City.

"It should be noted that under Com. Act. 488 one of the cases wherein the President of the Philippines may make the designation is in case of vacancy in the office. This phrase does not appear in paragraph 2, section 18 of Rep. Act 523 (Charter of the City of Butuan) which only provides that the officer next in charge (in the instant case, the Assistant City Treasurer) shall act in the City Treasurer's place in case of absence or sickness or inability to act for any other reason. This means that the Charter of the City of Butuan is limited in scope so that in case, of vacancy in the office, (Com. Act 588, The general law) must be applied. It may be argued that

'in case of vacancy in the office is included in the phrase 'inability to act for any other reason' under Section 18 of Rep. Act 523. Even if this interpretation is accepted, still the designation of the respondent is valid because under Sec. 19 of the same Act, the City Treasurer holds office at the pleasure of the President of the Philippines and is removable at his will.

"Sec. 19.—Appointment and removal of officials and employees.—The President of the Philippines shall appoint, with the consent of the Commission on Appointments, the judge and the auxiliary judge of the municipal courts, the city treasurer the city engineer, the city attorney, the city health officer, the chief of police, the chief of the fire department, and the other heads of such city departments as may be created. Except the judge and the auxiliary judge of the municipal court, said officers shall hold office at the pleasure of the President.

"If the President of the Philippines has the right to remove the City Treasurer of the City of Butuan at his pleasure, certainly he has the power to designate any other officer to act temporarily for him in case he is detailed for assignment, as In this case, in the Department of Finance. Hence, the present action cannot prosper.

"Moreover, it is a well established rule that injunction will not lie to restrain the collection of taxes except in case of irreparable injury which not shown in this case. In the mind of the Court, the real purpose behind this litigation is the ouster of the respondent to give way to the Assistant City Treasurer but the remedy is not injunction but quo warranto, which, however, is already barred by limitations. (Rule 68, sec. 16.)

"Wherefore, for all the foregoing, the present petition for a writ of preliminary injunction being improper and without cause of action is hereby dismissed with costs against the petitioner."

The question to be resolved in this case is: Which of the two provisions of law, Commonwealth Act No. 588, Sec. 1 or Sec. 18 of Republic Act 523, Charter of the City of Butuan, should apply. Said laws are as follows:

"Sec. 1. Any provisions of existing law to the contrary notwithstanding, when an officer in the Executive Department of the Government, appointed by the President of the Philippines with the consent of the Commission on Appointments of the National Assembly or by the President alone, is unable to perform the duties of his office owing to illness, absence, or other cause, or in case of vacancy in the office, the President may designate another officer already in the service or any other competent person to act temporarily in said office, and such person shall, during the period of his temporary incumbency, receive the compensation corresponding to the regular incumbent, which compensation shall be paid out of the appropriations for the office concerned, unless he is already in the Government Service which case he shall receive only such additional compensation as, with his existing salary, shall not exceed the salary authorized by law for the position filled." (Sec. 1, Com. Act No. 588.)

"Sec. 18. Powers and duties of the heads of departments.- Each head of department of the city government shall be in control of such department and shall possess such powers as may be prescribed herein or by ordinance. He shall certify to the correctness of all payrolls and vouchers of his department covering the payment of money before payment except as herein otherwise expressly provided. At least four months before the beginning of each fiscal year, he shall prepare and present to the Mayor an estimate of the appropriation necessary for the operation of his department during the ensuing fiscal year, and shall submit to the Mayor as often as required reports covering the operations of his department.

"In case of absence or sickness, or inability to act for any other reason, of the head of one of the city departments, the officer next in charge of that department, shall act in his place with authority to sign all necessary papers, vouchers, requisitions, and similar documents." (Sec. 18, Rep. Act 523, Charter of the City of Butuan.)

It will be noted that under the stipulation of facts the duly appointed city treasurer of Butuan is Quirico Battad,

Sr., but that on November 10, 1954 he was detailed for assignment in the Department of Finance, Manila, with the approval of the Department and the President. While the designation of Battad to the Department of Finance would not per se constitute an appointment, the effect of which would be his having vacated his office as city treasurer of Butuan, the fact that the designation was approved by the President and that immediately thereafter the President designated Francisco Magno as acting city treasurer of Butuan (Annex 4 of respondent's answer) and Magno soon after the designation took oath of office as City Treasurer, without the original incumbent Battad objecting to the appointment of said respondent Magno—all these circumstances had the effect of creating a vacancy in the office of city treasurer of Butuan. Hence, the apparent legality of respondent Magno's appointment by the President, followed by his taking the oath of office as such.

In the case of *Rodriguez vs. Del Rosario*, 49 Off. Gaz., p. 5447, Oct. 30, 1953, we held that the temporary designation of the Mayor of Cebu as a technical assistant in Malacañang had the effect of depriving the incumbent mayor of his position as mayor, which said incumbent mayor could accept or reject; but that when he thereafter demanded back his position as city mayor, said act of his amounted to his renunciation of his position as technical assistant in which he could not be compelled to stay. These acts of his therefore did not amount to a renunciation by him of his position as mayor. Conversely, in the case at bar, as the previous incumbent Battad was designated to the department of finance with the approval of the President and the President thereafter appointed respondent Magno as the acting city treasurer of Butuan, who thereafter took oath of office without any express objection on the part of former City Treasurer Battad, the former incumbent Battad was deemed to have accepted the designation and thus abandoned the position of city treasurer. So that when the President appointed the respondent Magno as acting city treasurer of Butuan the position of said treasurer had become vacant by the renunciation of the position by former treasurer Battad.

There was, therefore, a vacancy in the office of the city treasurer of Butuan when Battad was designated to the Department of Finance by action of the secretary of finance and of the President. Battad was not merely absent or sick or unable to act for any other reason within the meaning of Sec. 18 of the Charter of the City of Butuan, and the provision of said charter authorizing the officer next in charge in the department to perform the duties of the previous incumbent is not applicable.

A case in point is *Nolan, Atty. General vs. Representative Council of City of Newport, Rhode Island Supreme Court*, March 12, 1948. (57 A. 2d. pp. 730-732) The Court said in said case:

"The answer to that question involves a construction of secs. 24 and 26 of the city charter, Public Laws 1906, chapter 1392. The pertinent part of sec. 24 provides that the board of aldermen shall elect a chairman who shall preside and perform the duties of the mayor in case of the absence or inability of the mayor to act'. The provision of sec. 26 which is involved reads as follows:

'In case of vacancy in the office of the mayor or of any member of the board of aldermen the representative council may call a special election to fill the vacancy.'

* * * * *

"We are, therefore, of the opinion that sec. 24 does not authorize the chairman of the board of aldermen to perform the duties of the mayor in the case of a vacancy in that office created by the mayor's death. We find no other provision in the charter which authorizes the chairman or anyone else to act as mayor in case of a vacancy. Such a contingency appears to have been provided for only by sec. 26. Therefore, unless a special election is called in accordance with that provision, the special powers vested in the mayor cannot lawfully be exercised by anyone. In so holding we pass no judgment on the act or acts of anyone who has assumed the exercise of such powers since the death of the mayor. That question is not now before us."

Similarly, the designation of Battad to the Department of Finance created a vacancy in the office of city treasurer of Butuan, which vacancy may be filled permanently or temporarily, by the President under Com. Act 588. There being a vacancy in said office, it may not be considered as a mere absence or inability of the incumbent to act where the next ranking officer may perform the duties of the absent officer.

The action may be dismissed also on the ground that no action lies to enjoin the collection of a tax. (*David vs. Ramos & Maria B. Castro*, 90 Phil., 351.)

Wherefore, the decision appealed from is hereby affirmed, with costs against petitioner-appellant. So ordered.

Bengzon, C. J., Dizon, Regala and Makalintal, JJ., concur,

CONCEPCION, J.:

Concurring in the result. We have already held that the acceptance of a temporary designation as City Mayor of Cebu (*Rodriguez vs. Del Rosario*, 49 Off. Gaz., 5427) or of a designation as Acting Mayor of Manila (*Santiago vs. Agustin*, 46 Phil., 14), and the assumption of said offices, do not constitute an abandonment of the offices formerly held by the designee and the appointee respectively. Accordingly, the acceptance by City Treasurer Battad of his designation or detail to the Department of Finance, did not amount to an abandonment of his office as City Treasurer of Butuan. Neither may said abandonment be deduced from his failure to object expressly to the subsequent designation of respondent Magno as Acting City Treasurer of Butuan, for a "designation" is not an "appointment", and is necessarily temporary in character (Com. Act No. 588) and this is further stressed by the fact that respondent was designated as acting treasurer—like the officer involved in *Santiago vs. Agustin* (*supra*) who was designated as Acting mayor of Manila (See *Amante vs. Austria*, 79 Phil., 780; *Mendenilla vs. Onandia*, L-17803, June 30, 1962; *Agapuyan vs. Ledesma*, L-10535, April 25, 1957.) Hente Battad had no reason to object to said designation.

However, I concur in the result for, even if the designation of respondent Magno were hypothetically considered illegal, he would be a *de facto* officer and, as such, his title to the office can not be questioned except by *quo warranto* proceedings and then only by the person who claims to be entitled to the office or by the Solicitor General.

Padilla and Bautista Angelo, concur.

REYES, J.B.L., J.:

I concur in the result. Appellant has no personality to question appellee's title to the office held, and doubts as to the legality of the Treasurer's appointment or designation do not excuse nonpayment of taxes or the paralyzation of the means to enforce their collection.

Padilla, concur.

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