

CECILIO AYO, PETITIONER, VS. HONORABLE TOMAS FLORDELIZA, JUDGE OF FIRST INSTANCE OF SORSOGON, JUSTO DELLOSA, JULIAN LACRE AND VICENTE DICHOSO, RESPONDENTS.*G.R. No. 24843. October 30, 1925*

Ponente: STREET, J.

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This is an application for the writ of mandamus by which the petitioner, Cecilio Ayo, seeks to compel the respondent Judge of the Court of First Instance of Sorsogon to reinstate an election protest which said respondent had dismissed and to compel the same judge to issue a subpoena duces tecum to the municipal secretary of Bacon, Sorsogon, to produce in court the return of the municipal council as a board of canvassers showing the number of votes received by the several candidates for the office of president of the municipality of Bacon at the last general election. The cause is now before us upon the demurrers of the respondents.

It appears that the petitioner was a defeated candidate for the office of the municipal president of Bacon, Sorsogon, at the last election, the successful candidate being one Justo Delloso. In due time thereafter the present petitioner instituted a contest over the office and made the said Delloso, with two other defeated candidates, parties to the proceeding. In his motion of protest the petitioner asked for a recount of the votes in the fifth precinct. The successful candidate, Justo Delloso, met the protest with a counter-protest, in which he asked for a recount of the votes in precincts Nos. 1, 2, 4 and 6. One of the unsuccessful candidates, Vicente Dichoso, also came back with a counter-protest, in which he asked for a recount of the votes cast in all six of the election precincts of the municipality. In due course the recount was begun, but after the votes cast in the first precinct had been recounted by the commissioners, Dichoso, apparently finding no encouragement in the results, made a motion to withdraw his counter-protest, which was granted. This had the effect of placing the votes of the third precinct out of the litigation; and in order to bring the votes to this precinct back into the controversy the petitioner asked for leave to amend and to make the proper changes that would justify a recount of the votes of this precinct. This motion of the petitioner was denied by the court as having been presented out of time. The recount of the votes of the five precincts was continued, however, and concluded. The matter of the contest then came before the respondent judge for decision, but as the returns from only five of the precincts were before the court, and no evidence whatever to show the returns from the third precinct, his Honor, on August 1, 1925, dismissed the protest, with costs against the petitioner.

It is insisted for the petitioner that this action on the part of the respondent judge was unlawful, inasmuch as the law requires the judge in charge of a protest proceeding to make a finding as to who was elected, or whether no person was elected. It is true that the law so provides but the law contemplates that the proof upon which a lawful decision can be made shall be placed by the contending parties before the court; and in a case where a cause is submitted without sufficient proof to enable the court to determine the protest, it is not improper, indeed it is necessary, merely to dismiss the contest.

The principal contention presented in this petition arises over the responsibility for the situation which arose in the manner above stated; and the petitioner seeks to put the blame on the court for not having before it the return of the board of canvassers, which would have shown the result of the election in the uncontested precinct. In this connection it appears that in his original motion the petitioner asked the court to issue a subpoena duces tecum against the municipal secretary of Bacon, who is supposed to be the proper custodian of the report of the canvassing board. In acting upon the petition his Honor made a proper order upon the municipal treasurer to produce the boxes, lists of registered voters, and other papers and documents used in the general election, to the end that the contest could be proceeded with. His Honor, however, either by oversight or believing that all of the necessary documents and papers would be produced by the treasurer, failed to make an order upon the municipal secretary to produce the return of the board of canvassers. It does not appear that the attention of his Honor was especially called to the request for a subpoena duces tecum to the municipal secretary, and the non-production of the evidence concerning the returns as to the third precinct was not noted until the cause was submitted.

In behalf of the respondents it is pointed out that it was the duty of the petitioner to produce the necessary evidence upon which a proper judgment could be made, and in particular it is insisted that the duty of issuing the subpoena duces tecum is a ministerial duty of the clerk of court, not requiring a special order of the court. This suggestion given is, we think, satisfactory; and in our opinion no one is chargeable with the oversight except the petitioner himself.

The petition is therefore, in our opinion, not well founded; and the demurrers to the petition will be sustained and the petition declared insufficient. It furthermore appearing that the petition suffers from a defect not curable by amendment, an order absolute will be entered, dismissing the same, with costs against the petitioner.

Avanceña, C. J., Malcolm, Villamor, Ostrand, Johns, Romualdez, and Villa-Real, JJ., concur.

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