

MANILA ELECTRIC CO., PLAINTIFF AND APPELLANT, VS. SANTIAGO ARTIAGA, ENGINEER OF THE CITY OF MANILA, AND JOHN W. GREEN, CHIEF OF POLICE OF THE CITY OF MANILA, DEFENDANTS AND APPE...

G.R. No. 26658. March 18, 1927

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

The present appeal was taken by the Manila Electric Company from the judgment of the Court of First Instance of Manila dismissing, with costs, the complaint filed by it to compel Santiago Artiaga, as city engineer of Manila, to issue to it a permit to make the necessary excavations and constructions for the laying of a switch and a curve on Calle Azcarraga.

In support of its appeal the appellant makes the following assignment of errors alleged to have been committed by the court: (1) The trial court erred in permitting the witness Santiago Artiaga to answer, over the objection of the plaintiff, the following question: "Can you tell Mr. Artiaga, in view of plan Exhibit A, and the personal knowledge you have, according to what has been stated in regard to the proposed additional line by Meralco, if it constitutes a change or alteration in its line on said street?" (2) the trial court erred in holding that the connection of plaintiff's existing line on Calle Azcarraga with its adjacent property on that street, by a switch and a curve, was a change in plaintiff's lines; (3) the trial court erred in holding that plaintiff must obtain the consent of the Municipal Board of the City of Manila before constructing a switch and a curve from its line on Calle Azcarraga to its adjacent property; (4) the trial court erred in dismissing the complaint; and (5) the trial court erred in overruling plaintiff's motion for a new trial

We have not the evidence introduced at the trial before us. This omission on the part of the appellant compels us to abide exclusively by the findings of fact made by the trial court in its decision, according to which, the work of laying a switch and a curve by the plaintiff is an entirely new undertaking not authorized by any ordinance in force and is to be laid, for the first time across Calle Azcarraga; that it radically alters the location and direction of the track already existing on said street and is not a mere repair or construction of a track already outlined and authorized by Special Ordinance No. 44.

In regard to the first assignment of error which deals with the admissibility of evidence, not having the evidence introduced in the Court of First Instance before us, we are unable to consider said assignment of error.

As to the second assignment of error, the same absence of the evidence introduced in the trial court prevents us from taking said assignment of error into consideration, being obliged to accept the finding of facts made by the trial court in its judgment.

Coming to the third assignment of error, if the construction for which the plaintiff-appellant corporation is petitioning the defendant-appellee to issue a permit, according to the facts found by the trial court, is a new

undertaking, which radically alters the construction and direction of the line already existing and is not a mere repair and construction of a track already outlined and authorized by the ordinance in force, the defendant-appellee is not authorized to grant said permit, in accordance with section 1043 of the Revised Ordinances of the City of Manila, but the Municipal Board, according to section 24 of Special Ordinance No. 44.

As to the legal question whether or not the decision of this court revoking the order of the lower court sustaining the demurrer to the complaint constitutes *res judicata*, since the facts involved are the same, it is sufficient to cite the doctrine laid down by the Supreme Court of Arizona in the case of *Reilly vs. Perkins* (56 Pac, 734), which reads as follows:

"The doctrine of *res judicata* amounts simply to this. That a cause of action once finally determined without appeal, between the parties on its merits, cannot afterwards be litigated by new proceedings, either before the same or any other tribunal. It is only, however, a final judgment upon the merits to which this doctrine applies. Until final judgment is reached, the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar until the judgment, with its verity as a record, settles finally and conclusively the questions and issues. An interlocutory order or decree made in the progress of a case is always under the control of the court until the final decision of the suit, and may be modified or rescinded upon sufficient grounds shown at any time before final judgment, though it be after the term in which the interlocutory order or decree was given, and is not, therefore, a final judgment, to which the doctrine of *res adjudicata* can apply. (*Foster vs. Richard Busteed*, 100 Mass., 412; *Webb vs. Buckelew*, 82 N. Y., 555; *Black, Judgm.*, 308.)

"An interlocutory order, overruling a general demurrer to a complaint, is not *res judicata* of its sufficiency to support a judgment for plaintiff, and hence is no bar to the subsequent vacation of such order at a subsequent term, and the entry of judgment on the pleadings in favor of defendant, since the doctrine of *res judicata* applies only to a final judgment on the merits."

For the foregoing considerations and finding no errors in the judgment appealed from, the same is affirmed in all its parts, with the costs against the appellant. So ordered.

Johnson, Street, Malcolm, Villamor, Ostrand, and Romualdez, JJ., concur.

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