

**FILOMENA MARTINEZ, PETITIONER, VS. PEDRO CONCEPCION,
JUDGE OF FIRST INSTANCE OF MANILA, EL COLEGIO DE LA
INMACULADA CONCEPCION DE LA CONCORDIA AND THE
PROVINCIAL SHERIFF OF CAVI...***G.R. No. 30004. December 29, 1928*

Ponente: ROMUALDEZ, J.

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This is a certiorari proceeding originally instituted in this court seeking to have an order issue to the respondent Judge Pedro Concepcion directing him to forward to this court the record in case No. 25961 of the Court of First Instance of Manila, entitled Colegio de la Inmaculada Concepcion de la Concordia vs. Jose Martinez, for review; that the proper order issue to all the respondents enjoining them from taking any steps relative to the continuation of the attachment and sale of the petitioner's property at public auction until this court has rendered judgment, and annulling the writ of execution issued in said case. Wherefore, the petitioner prays as ancillary relief, that an injunction be issued; (a) To Judge Pedro Concepcion directing him to vacate his writ of execution of April 11, 1928, against the sureties in said civil case No. 25961; (b) to the Colegio de la Inmaculada Concepcion de la Concordia, its agents, attorneys, representatives and mandataries, and any other persons who might aid and represent it, restraining them from asking for the execution of any judgment rendered by the respondent Judge against the petitioner; and (c) to the provincial sheriff of Cavite or his deputies to refrain from taking any action with reference to the attachment of the herein petitioner's property, and to suspend the public auction sale of said property announced for July 13, 1928, at 9 a. m., at Cavite, Cavite, granting the petitioner any other just and equitable remedy.

On July 12, 1928, the writ of injunction applied for was issued by a member of this court and on the 26th day of the same month and year the respondents filed an answer praying for the dismissal of the action and that the petitioner be sentenced not only to pay the costs of this action, but also to reimburse the Colegio de la Inmaculada Concepcion de la Concordia for all expenses occasioned by the fact that the auction was not held on July 14, 1928.

Counsel for the petitioner replied to this answer on July 31, 1928.

Having set the day, oral argument was had on the case on July 31, 1928.

In a petition presented on August 6, 1928, the respondents through counsel insisted upon, their prayer for dismissal, giving as a reason the fact that the defendant in said civil case No. 25961 took an appeal, which, according to said lawyer, confirms his contention that the certiorari is not the proper remedy, but the appeal.

On August 11, 1928, counsel for the petitioner filed an opposition to the petition for dismissal formulated by the attorney for the respondents.

The facts pertinent to the case are as follows:

On May 22, 1924, the herein petitioner Filomena Martinez subscribed a bond in the sum of P1,000 for the dissolution of the preliminary attachment ordered in said civil case No. 25961 of the Court of First Instance of Manila.

On October 29, 1925, said cause was dismissed for failure of the plaintiff to prosecute, the lower court issuing the following order:

"Neither party having taken any steps in the prosecution of this case from October 21, 1924, to date.

"It is hereby ordered that the same be dismissed without special pronouncement as to costs, and without prejudice to reinstating the action by the payment of the proper docketing fee.

"So ordered."

On November 7, 1925, the party plaintiff prayed that said dismissal of the case be set aside.

On November 14, 1925, the lower court decided the petition by an order which, literally, is as follows:

"Having heard the petition presented by the attorney for the plaintiff praying that the order of dismissal issued in this case be set aside, it is hereby denied unless the proper docketing fee be paid to the clerk.

"So ordered."

On December 28, 1925, the parties in said civil case, No. 25961, filed the following stipulation with the trial court:

"Come now the parties in the above-entitled case and respectfully submit the present stipulation as follows, to wit:

"That this case be ordered reinstated, setting aside the order of dismissal, and just as soon as this stipulation is approved the plaintiff shall pay the proper docketing fee to the clerk of this court.

"Manila, December 28, 1926 (should be 1925).

"J. R. SERRA

"438 Rizal Ave., Manila

"Attorney for defendant

"GREGORIO PERFECTO

"93 Legaspi, Manila

"Attorney for the defendant (should be plaintiff)"

On January 22, 1926, the trial court issued the following order:

"In accordance with the foregoing stipulation of the parties, the order of dismissal shall be set aside as soon as the proper fee is paid to the clerk of the court."

On February 4, 1926, the plaintiff, alleging payment of the proper fee, asked that the order of dismissal of the case be set aside.

On February 6, 1926, the trial court granted the petition issuing an order which reads:

"The fee of the clerk of this case having been paid again, and, in accordance with the petition of the attorney for the plaintiff, the order of dismissal of October 29th of last year is hereby set aside."

A trial having been had and judgment rendered against the defendant, the latter appealed therefrom to this court, which, deciding the appeal, on October 7, 1927, sentenced the defendant to pay the plaintiff the sum of P717.10 with legal interest and costs. Then the order of execution having issued, it was found that the defendant was insolvent, for which reason, upon petition of the plaintiff Colegio de la Inmaculada Concepcion de la Concordia, the trial court on April 11, 1928 ordered the issuance of a writ of execution against the defendant's sureties, the said defendant's automobile, which had been attached, having disappeared, the release of which from the attachment was ordered because said sureties furnished a bond.

Steps were taken to comply with the last writ of execution, announcing the public auction sale of some realty belonging to the herein petitioner, one of the said sureties.

But the latter, believing her rights to be injured and alleging that the respondent Judge of First Instance had no authority to order the execution of such judgment against the aforesaid sureties, and in doing so had exceeded its jurisdiction, instituted the present certiorari proceedings.

The question presented for our consideration is whether or not the bond given by the aforementioned sureties continued in effect in spite of the dismissal of the case ordered by the Court of First Instance on October 29, 1925, said dismissal not being imputable to said sureties, and the latter not having taken any part in the stipulation by and between the parties on December 28, 1925, agreeing to a reinstatement of the case.

It should be observed that the order of November 14, 1925, issued before the dismissal ordered on October 29, 1925, became final, substantially modified said order of October 29th, the order of November 14th having the effect, although indirectly, of setting aside the dismissal upon payment of the docketing fee. The setting aside of the order of dismissal having been thus conditionally granted, the case continued to subsist although the proceedings therein were suspended while the condition imposed for the payment of the said fees was not fulfilled, for which the court had fixed no period.

It is to be observed, moreover, that the dismissal ordered on October 29, 1925, could not have the effect of terminating the case while it was not entered on the docket of the court as required in the last part of subsection 4 of section 127 of the Code of Civil Procedure. And it does not appear that such entry was made. At any rate, said order of dismissal, as we have said, was duly modified before it became final.

Consequently, by virtue of the order of November 14, 1925, the case, strictly speaking, was not dismissed but simply suspended, that is, to use the English juridical phraseology, there was a "stay" of the proceedings. Such suspension or "stay" is within the discretion of the courts and may be granted for several causes.

"A stay of proceedings is a matter so largely within the discretion of the court that no attempt seems to have been made specifically to enumerate the grounds authorizing it. Stays have been most frequently granted upon the ground of another action pending, and as a means of enforcing the payment of costs, but various other grounds have been recognized." (1 C. J., 1161, 1162.)

And in the footnote of the text cited, among the grounds for such suspension or stay is the one which the trial court took into consideration in the case before us, that is, the lack of the prosecution of the case for a long time. Such footnote, in its pertinent part, is as follows:

"(a) Grounds authorizing stay.—(1) * * * (2) where an unreasonable length of time has been allowed to elapse after the institution of the action without taking any steps therein. (Bryan vs. Zimmerly, 16 Pa. Co., 564.)"

The condition of payment of said fee did not necessarily signify the renewal of an action already dismissed, but was a sanction or penalty imposed on the plaintiff for failure to take any steps in the proceeding. Such penal conditions in these cases may be imposed by the courts. It may be seen from the part cited from Corpus Juris (vol.

1, pp. 1161, 1162) that:

"Stays have been most frequently granted upon the ground of another action pending, and as a means of enforcing the payment of costs, etc." (Italics ours.)

For this reason, from the time the order of November 14, 1925, was issued, the original case remained in such a state of abeyance pending the payment of the fee. That status quo could not, for the reasons stated, be considered anything more than a mere stay of proceedings, and the court that issued said orders thus understood it, when on January 22, 1926, in the face of the stipulation of the parties that the case be reinstated (not that the action be renewed, in the phraseology of the order of October 29, 1925, later modified), it reiterated its order of November 14, 1925, absolutely promising to set aside the dismissal as soon as the proper fee was paid. As may be seen from the copy of said order of January 22nd above quoted, its text, among other things, says:

"* * * the order of dismissal shall be set aside as soon as the proper fee is paid to the clerk of the court."

And, indeed, when the said fee was paid the court, by its order of February 6, 1926, set aside "the order of dismissal of October 29th of last year." And it should be noted, in confirmation of the conclusion that by the last-named order the case was only reinstated and was not renewed, that there was no new complaint, nor any new summons, nor new allegations, and the case continued from the stage of the proceeding where it was left off by the stay.

The fact that the sureties did not participate in the agreement to reinstate the case, is, in our opinion, of no importance. That agreement was not to renew a case already finally dismissed, but only to reinstate a case conditionally suspended.

During that stay of the case it is clear that the bond given by the herein petitioner, and the scope and effects of which are discussed in the present proceedings, continued and still continues to remain in full force and effect.

It follows from this that the herein petitioner, by virtue of such bond given by her, is still bound under the provisions of section 440 of the Code of Civil Procedure, the respondent judge not having acted without or in excess of his jurisdiction in ordering the execution of the aforesaid judgment against the sureties in view of the insolvency of the principal obligor, the defendant in said case.

For the foregoing, the petition for certiorari filed herein must be, as it hereby is, denied, with costs against the petitioner, setting aside the preliminary injunction herein issued. So ordered.

Avanceña, C. J., Johnson, Villamor, and Ostrand, JJ., concur.

DISSENTING

MALCOLM, J., with whom concurs VILLA-REAL, J.:

No one could quarrel particularly with the statement of facts made in the majority decision. It is only as to the deductions drawn from those facts that I am totally unable to agree. Also there is a void in so far as the facts connect up with the law.

As mentioned in the majority decision, case No. 25961 of the Court of First Instance of Manila, entitled *Colegio de la Inmaculada Concepcion de la Concordia vs. Jose Martinez*, was dismissed on October 29, 1925, for the failure of the parties to prosecute the action for more than a year "sin perjuicio de poder renovarse la accion mediante el pago de los derechos de registro correspondiente." What was the effect of this dismissal? It meant that the parties and the entire cause of action were out of court for every purpose other than to carry the order into

effect or to vacate or modify the same; in so far as the particular action was concerned, it was the same as a judgment for the defendant on the merits.

There followed the order of dismissal, another order dated November 14, 1925, denying the motion by the plaintiff which asked for the reinstatement of the case, a stipulation of the parties dated December 28, 1925, for the reinstatement of the case, and an order confirming the reinstatement dated February 6, 1926. In other words, from October 29, 1925, when the case was dismissed until February 6, 1926, when the case was reinstated, more than three months had elapsed. What was the effect of this delay? It meant that while it was competent for the court in the exercise of its discretion to reinstate the case by consent during the same term, as this language is used in the United States but which signifies, in the Philippines, before the judgment became final, it was not within the jurisdiction of the court to do so after the judgment became final. In the case of *Veluz vs. Justice of the Peace of Sariaya* ([1921], 42 Phil., 557), after defining a judgment of nonsuit, this court remarked: "Of course, after the judgment becomes final, the court loses all control to change, alter, or modify the same, except for the purpose of correcting clerical errors."

It is also to be noted that the right to renew the action contemplated the payment of a new registration fee. What was the effect of this proviso? The outward indicia of a new action is invariably the satisfaction of the filing fee.

Again in all of the statements which have been made, it will not escape notice that no mention at all has been made of the signers to defendant's bond for the dissolution of the attachment in the original action. What was the effect of this? It meant that a principle of natural justice was neglected when the stipulation was entered into by the parties and approved by the court without the conformity of the bondsmen and without giving them notice of any sort.

An analysis of the salient facts is now known to us. How about the law? In dismissing the action, the Judge of First Instance was acting in conformity with section 127 of the Code of Civil Procedure. This section provides that "An action may be dismissed, with costs to the defendant, in the following cases: * * * 3. By the court, when the plaintiff fails, for an unreasonable length of time, to prosecute his action. In either of these three cases a dismissal of the action shall not be a bar to another action for the same cause; * * *." (Italics provided.) It is difficult indeed to give to the phrase "bar to another action" any other meaning than "bar to another action." In this connection it is the rule that whatever destroys the attachment, and surely the dismissal of the action has this effect, will destroy liability on the bond. Among other cases, that was the holding of this court in the decision in *Hi Caiji vs. Philippine Sugar Estates Development Co.* ([1927], 50 Phil., 592), written by Justice Johnson for a unanimous court of nine members.

The Philippine law on the subject of the dismissal of actions was derived from the laws of California. In the early case of *Dowling vs. Polack* ([1861], 18 Cal., 625), it was the holding, that a judgment dismissing a suit is, in effect, a final judgment in favor of defendant; and, although it may not preclude the plaintiff from bringing a new suit, still for all purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits. But particular attention is invited to the later decision coming from the Supreme Court of California in the case of *Hamilton vs. Bell* ([1898], 123 Cal., 93), which, on both facts and law, is on all fours with the present proceeding. It was there said:

"HAYNES, C.—The question for decision arises out of the following facts: In May, 1891, the 'Auburn Opera House and Pavilion Association' brought suit against George M. Hill to recover the sum of one thousand dollars, claimed to be due upon contract, and caused a writ of attachment to be issued therein under which money and other property was attached. On September 22, 1891, on the application of the defendant in said action, the court fixed the amount of the bond or undertaking for the redelivery of the attached property at fifteen hundred dollars, and the defendants in this action became the sureties on such bond, and the attached

property was released and delivered to the defendant. In November, 1891, the cause came on for trial, and at the conclusion of plaintiffs evidence the court granted defendant's motion for a nonsuit. From that judgment and an order denying a new trial the plaintiff appealed, and this court, on March 9, 1893, reversed said judgment and order. (32 Pac. Rep., 587.) On January 9, 1895, said cause was again tried, and the plaintiff had judgment for the full amount of its claim and interest. Thereafter, in September, 1895, execution was issued thereon, and was returned wholly unsatisfied; and on November 25, 1895, said Auburn Opera House and Pavilion Association assigned to George W. Hamilton, the plaintiff in this action, its said judgment and said redelivery bond, and said Hamilton, after due demand for the delivery of said property, or payment of its value, brought this action against the sureties on said bond, and obtained judgment against them, and this appeal is from that judgment and an order denying a new trial.

"Appellants contend that the judgment of nonsuit entered against the plaintiff in the action in which the attachment was issued operated to discharge them from all liability upon said bond which was given to release the property attached in that case.

"Respondent's contention is, in effect, that the judgment of nonsuit having been reversed and the cause remanded for a new trial, and having obtained a judgment upon such new trial it was a judgment recovered 'in the action' in which the undertaking was given, and that therefore the defendants are liable upon the undertaking.

"But while it is true that the judgment rendered upon the second trial was rendered in the same action, it does not follow that the liability of the sureties upon said undertaking continued until the second judgment was rendered. Indeed, it is quite clear that it did not.

"The fact that in the case at bar the appellants gave an undertaking for the redelivery of the property to the sheriff in case the opera house association should recover judgment against the defendant in that action, or would pay the value of the property so released, does not affect the question. The dissolution of the attachment by the judgment of nonsuit discharged the obligation of the sureties upon the bond. (Drake on Attachments, secs. 341 b, c, and d, and cases there cited.) * * *.

"We advise that the judgment and order appealed from be reversed.

"Belcher, C, and Britt, C, concurred.

"For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

"GAROUTTE, J., VAN FLEET, J., HARRISON, J."

We thus find the prevailing decision resting on the proposition that the court (1) may disregard the effect of the dismissal of an action, (2) may disregard the finality of the judgment on a dismissal of an action after the passing of the statutory period, (3) may disregard the payment of a filing fee as indicative of a new action, (4) may disregard due process of law by holding a party bound without notice and without hearing, (5) may disregard the exact language of the controlling law, and (6) may disregard decisions interpreting and enforcing that law found both in this jurisdiction and in the jurisdiction from which the law was taken. To such a proposition I cannot bring myself to give assent, and so am forced to dissent and to vote in favor of granting the writ of certiorari and of prohibiting the trial judge from attempting to proceed further to enforce an illegal order.

Petition denied.

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