

VIUDA E HIJOS DE CRISPULO ZAMORA, PETITIONER, VS. BEN F. WRIGHT AND F. SEGADO, AS INSULAR AUDITOR AND PURCHASING AGENT, RESPECTIVELY, OF THE GOVERNMENT OF THE PHILIPPINE ISLANDS...

G.R. No. 30888. September 28, 1929

Ponente: JOHNS, J.

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JOHNS, J.:

Ruling Case Law, vol. 18, p. 128, says:

"41. In General—It is the well established general rule that only specific legal rights are enforceable by mandamus, and the right sought to be enforced must be certain and clear; it is one of the highest writs known to our jurisprudence and will not be issued in cases where the right is doubtful."

This court has held that it is fundamental that the duties to be enforced by mandamus must be those which are clear and enjoined by law or by reason of official station, and that petitioner must have a clear, legal right to the thing demanded, and that it must be the legal duty of the defendant to perform the required act.

It is now the settled law of this court that mandamus will lie to compel the Insular Auditor to perform a ministerial act, and that it is for the court and not for the Insular Auditor to say what is and what is not a ministerial act.

Be that as it may, the real question involved in this case is the legal construction of the contract between the petitioner and the Government made by and through its Purchasing Agent, and the powers and duties of the Insular Auditor are merely incidental in the construction of the contract.

It is admitted that prior to the making of the contract in question the Government was purchasing its cross-arms from the United States at a cost of P3.11 for each cross-arm, a sample of which is in the record, known as Exhibit 2. This cross-arm consists of two pieces which are fastened around the pole by means of nuts and bolts, and from the end of either piece, the wires are strung. It is made of malleable iron, and its length is about 35 inches, leaving a distance between the opposite wires on each end of the cross-arm of about 32 inches. Such in general were the cross-arms in use at a cost to the Government of P3.11, when the petitioner submitted its offer of March 17, 1926, in which it is said:

Larger size—

Complete with bolts and nuts. each P3.59

Extra clip with bolts and nuts do 62

And "You have seen the working model of the double utility cross-arm." "It does not cost much more than the ordinary cross-arms now on the market Which loses its utility as soon as the lines are increased."

And "With our Double Utility Cross-Arms you can start a line just as easy and practically as cheap as at present

and when business justifies the increase of lines, all you do is buy extra clips from us and install them in no time, saving the cost of wood cross-arms and the reinstallation of the old lines." From which it is very apparent that the petitioner stated and represented that its cross-arms would not cost much more than the ordinary cross-arms now on the market, and that the Government could start a line just as easy and practically as cheap as at present. In the very nature of things, that specific language must have reference to the cross-arms for which the Government had been paying P3.11 when complete.

The petitioner's proposition to furnish the cross-arms to Topacio, as Director of Posts, was made on March 17, 1926, and on March 22, 1926, Topacio requested the Bureau of Supply to purchase 8,200 cross-arms in which he says:

"It is understood that the stock of the standard two-line iron cross-arms (the kind heretofore used by this Bureau), costing P3.11 each, including surcharges of the Bureau of Supply, is now exhausted."

And that the kinds offered by the petitioner "are acceptable to this office if no cheaper ones can be obtained elsewhere," and "that the two-line cross-arms, are of the same strength and durability as the kind we are using, and that the four-line cross-arms are twice as strong as the two-line cross-arms." It is suggested that samples be obtained from Zamora and sent to the Bureau of Science, and he says that "the distance between the holes of the two-line cross-arms must be exactly the same as that between the holes of the kind we are using, and the distance between those of the four-line cross-arms must be at least 12 inches."

Such are the specific instructions which were given by Topacio, as Director of Posts, to the Purchasing Agent.

The whole length of the two combined pieces of the cross-arm of the petitioner, known in the record as Exhibit 1, is 39 1/2 inches, and the distance between the lines on each end is 37 inches, or 5 inches more than the distance between the end lines on Exhibit 2. But in the event that four lines are strung on Exhibit 1, the distance from each end line to the center line is 9 inches only, as against the instructions of the Director of Posts which says that "the distance between those of the four-line cross-arms must be at least 12 inches," and the further statement that the petitioner's cross-arms "are acceptable to this office if no cheaper ones can be obtained elsewhere." That is to say, the Purchasing Agent of the Bureau of Supply had specific instructions as to both the kind, quality and dimensions and probable cost of the cross-arms, for which the requisition was made, and specific reference was made to the cost of P3.11 of the cross-arm now in use. In the face of those instructions, the Purchasing Agent, acting for, and on behalf of, the Government, entered into a contract with the petitioner, and now claims, and testified, that it was his understanding that the petitioner should have and receive P3.59 for each piece of the cross-arm, or a total of P7.18 for the two pieces when joined together as one cross-arm, and in the event that four-lines are used, the petitioner should have sixty centavos (P0.60) for each extra clip, with bolts and nuts. That is to say, that the actual cost of the cross-arm of the petitioner complete and ready for use with two lines is P7.18 as against P3.11, for which it was formerly purchased, and that the actual cost of petitioner's cross-arm complete and ready for use, with four lines, including the extra clips, with bolts and nuts, is P7.78.

Even so the petitioner vigorously and forcibly contends that was the contract which it made with the Government, and that the Purchasing Agent, who made the contract, testified that under the terms and provisions of the contract, the petitioner should have and receive P3.59 for each piece of the two pieces of the cross-arm, and that he so understood it, and that such construction and understanding of the Purchasing Agent is binding on the Government. In other words, that the Bureau of Posts made a requisition on the Bureau of Supply for the purchase of 8,200 cross-arms, with specific advice that the Government had been paying P3.11 for its two-line cross-arms then in use, and that the cross-arms of the petitioner "are acceptable to this office if no cheaper ones can be obtained elsewhere" and that "the distance between those of the four-line cross-arms must be at least 12 inches," and that by reason of the fact that the Purchasing Agent entered into a contract with the petitioner for the purchase

of the cross-arms in question, the Government is now bound not only by the contract, but it is also bound by the construction of the contract as it is construed by the Purchasing Agent. This contention overlooks the underlying, fundamental fact, first, that after a contract is once made, it is the duty of the courts, and not of the Purchasing Agent, to construe its legal force and effect, and, second, that the cross-arms were purchased by the Bureau of Supply for and on account of, and as the agent of, the Bureau of Posts, and that the powers and duties of the Purchasing Agent are like those of any other agent.

Ruling Case Law, vol. 22, page 461, says:

"124. Duty of Good Faith.—Every public officer is bound to perform the duties of his office faithfully and to use reasonable skill and diligence and to act primarily for the benefit of the public. In other words he is bound, *virtute Officii*, to bring to the discharge of his duties that prudence, caution and attention which careful men usually exercise in the management of their own affairs."

Tested by that rule, it was the duty of the Purchasing Agent to follow the specific instructions of the Director of Posts as to the kind, cost and quality of the cross-arms, and he had no legal right to make any contract which violated the tenor of those instructions.

Section 2041 of the Administrative Code, as amended by Act No. 2864, provides:

"Functions of Bureau of Supply.—It shall be the function of the Bureau of Supply to procure and furnish supplies to the various Offices, officials, and branches of the Government and to other persons entitled to make purchases through said Bureau, the same being required for official or other lawful use; and in the absence of special provision, all purchases of supplies for the use of the various Departments, Bureaus, and Offices of the Insular Government or for the use of a chartered city or of any province or municipality shall be made exclusively through this Bureau.

"The Secretary of Commerce and Communications may also, in his discretion, authorize the performance of the same service for the authorities of the United States in the Philippine Islands or for other persons therein."

Section 2045 provides:

"Requirement of requisition.—No order for supplies shall be filled by the Bureau of Supply for any branch of the Government except upon written requisition as hereinbelow provided."

And section 2046 says:

"Officers having authority to draw requisitions.—Insular requisitions shall be drawn by the chief of Bureau or Office concerned or other officer having control of the appropriation to which the expenditure is chargeable; *
* *"

In the instant case, the requisition of the Director of Posts was made under specific instructions as to what he wanted and the probable cost and dimensions of the cross-arms. In violation of those instructions, the Purchasing Agent entered into a contract with the petitioner to furnish the cross-arms, and in legal effect to pay P7.18 for a two-line cross-arm, for which the Government was formerly paying P3.11, and the cross-arms so purchased, when used with four lines, have a space of 9 inches only between the outside and center lines, as against the specific instructions of the Director of Posts, that "the distance between those of the four-line cross-arms must be at least 12 inches."

It is a matter of common knowledge that the use of electricity is very dangerous, and that when the wires are too close to each other, electricity will jump from a high tension wire to a low tension wire, or from a live wire to a dead wire, and it was for such reason that in his instructions the Director of Posts specified that "the distance between those of the four-line cross-arms must be at least 12 inches." That was a wise precaution which was

intended to guard against accidents and injuries. Yet the Purchasing Agent entered into a contract with the petitioner for the purchase and sale of its double utility cross-arm which has a space of 9 inches only between the end and center lines when it is used as a four-line cross-arm. It must follow that if the space of 12 inches between lines is required and necessary for safety in operation, the cross-arm of the petitioner would not be of any value to the Government, and could not be used as a four-line cross-arm, for want of the required space of "12 inches at least between the four lines."

Again, in common parlance and the ordinary use of language, a cross-arm is construed to mean an arm on each side of a pole, and in common every-day use, no one ever speaks of a cross-arm as on one side only of a pole. Here, again, counsel for the petitioner concedes that the use and ordinary meaning of the word "cross-arm" is an arm on both sides of a pole. But, again, he contends that the Government is bound by the construction placed on the contract by the Purchasing Agent, and his evidence to the effect that the word "cross-arm," as used in the contract, was intended to be applied and limited to one piece or one-half of the cross-arm, and that the contract must be so construed.

As stated, the real question involved in this case is the construction of the contract which the petitioner made with the Government, and it is true that the Purchasing Agent testified as to his construction of that contract. But in the final analysis, it is for the court and not for the Purchasing Agent to construe the legal force and effect of the contract.

Section 2051 of the Administrative Code, as amended by Act No. 2864, provides that:

"Charges for supplies.—For services rendered and supplies furnished, the Bureau of Supply shall charge the cost thereof plus a surcharge not in excess of seven and one-half per centum which shall be fixed by the Purchasing Agent, with the approval of the Secretary of Commerce and Communications. * * *"

That is to say, that in the making of purchases on requisitions, the Bureau of Supply acts as an agent, and is paid for its services. In the instant case, the Purchasing Agent was acting for, and representing, the Bureau of Posts, which was his principal, in the purchase of the cross-arms, and the Bureau of Posts gave the Bureau of Supply specific instructions as to the cost, kind, quality and dimensions of the cross-arms. In the very nature of things, the Purchasing Agent should have more or less latitude in the purchase of the cross-arms, and a substantial compliance with his instructions would be sufficient. But even so, in the instant case, by his own evidence, the Purchasing Agent entered into a contract with the petitioner to purchase 8,200 cross-arms which when used for two lines would cost the Government P29,438, when it appears and is admitted that the price which the Government was previously paying for a similar two-line cross-arm would have amounted for that number to P12,751 only. Yet the Purchasing Agent received commission for his services, and in the making of such purchase, he was acting for, and representing, the Government.

The record is conclusive that at the time the petitioner wrote its letter of March seventeenth, it knew that the Government was then paying P3.11 for a two-line cross-arm, and it then said:

"1. It does not cost much more than the ordinary cross-arms now on the market which loses its utility as soon as the lines are increased."

And that "you can start a line just as easy and practically as cheap as at present."

The petitioner now seeks to enforce a contract with the Government as it is construed by the Purchasing Agent, and to force the Government to pay P3.59 for each of the two pieces of the cross-arm, or a total of P7.18 for each two-line cross-arm complete, as against a cost of P3.11 which the Government was previously paying for a similar two-line cross-arm. It also appears that on March 30, 1926, and about the time of the original contract, the

petitioner sold to the Bureau of Supply forty double utility cross-arms at P3.48 each, and there is evidence tending to show that the forty cross-arms in question consisted of eighty pieces, or two pieces for each cross-arm, and this evidence is not explained or denied by the petitioner. It is conceded that all previous cross-arms purchased under the contract now in question were delivered and paid for at the rate of P3.59 for each of the two pieces of the two-line cross-arms, or a total of P7.18 for the two-line cross-arm complete.

The Insular Auditor claims and alleges, in legal effect, that such previous payments were made through an oversight or mistake, and that the petitioner should be paid P3.59 for each cross-arm, and that under the contract, a cross-arm consists of two pieces and not one, as the petitioner contends.

It is but fair to say that the cross-arm of the petitioner is heavier and made of better material than those which were formerly purchased by the Government at P&ll, and that it is a home product, which would account for some of the difference in price between the respective cross-arms.

In the final analysis, we have this situation: The petitioner is now seeking to enforce the payment of its claim upon the theory that it is entitled to have and receive P3.59 for each one of the two pieces of its double utility cross-arm, and to compel the Insular Auditor to sign the warrants in question in payment. As stated, the petitioner, as a condition precedent, must both allege and prove a clear, legal right to the granting of the writ. The question presented involves the construction of the contract and its legal force and effect, and the powers and duties of the Purchasing Agent. As we analyze the record, there is a failure of proof. To say the least, the legal rights of the petitioner are not well defined, clear, definite and certain. There is a serious doubt as to the authority of the Purchasing Agent to make the contract, which he claims to have made, or that it should be construed as he construed it, or that the Government is bound by his construction.

We have given this case the careful consideration which its importance deserves, and are clearly of the opinion that the petitioner has failed to make out a case which would justify this court in issuing a writ of mandamus to compel the Insular Auditor to countersign the warrants in question.

The petition is dismissed, with costs against the petitioner. So ordered.

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

Villa-Real, J., concurs in the result.

CONCURRING

STREET, J.:

I was at first impressed by the fact that before this contract was made the petitioners submitted a sample of the cross-arm which they were to supply, and this sample (without the clips, bolts, and nuts) consisted only of one piece, from whence it might be inferred that the article which was the subject of the contract was intended to comprise only one piece. It appears, however, that the two ends of the cross-arm proper are identical pieces, and it was not intended or expected that one of these pieces alone should be bracketed to the telegraph post for the purpose of suspending telegraph wires. On the contrary, it was intended that two pieces together, extending in opposite directions, should be bolted to the telegraph pole. This shows that the cross-arms which were the subject of this contract were the ordinary cross-arms with ends extending from the telegraph pole in both directions. From the contract itself it also appears that the petitioners represented that the cross-arm to be supplied under this contract would be complete. It results that, by the proper interpretation of the contract, the petitioners were bound to supply complete cross-arms, consisting of two pieces, in the form commonly understood in the use of this term

in English. The Insular Auditor is therefore not compellable to countersign the warrant drawn in the amount to which the petitioners suppose themselves entitled, and this notwithstanding the fact that the Insular Purchasing Agent may have understood the situation differently.

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