

CING HONG SO (ALIAS TAN LIM ZI), PLAINTIFF AND APPELLANT, VS. TAN BOON KONG ET AL., DEFENDANTS AND APPELLEES.*G.R. No. 31137. August 30, 1929*

Ponente: ROMUALDEZ, J.

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After the period for the pleadings had terminated and the hearing of the case had been postponed several times, the court, on September 25, 1928, the date last set for the trial, in the absence of the plaintiff, denied the motion for a further postponement of the hearing for a few days, dismissed the complaint as against the defendants represented by Attorney Yap, and, granting the petition of counsel for defendant Tan Boon Kong, declared the plaintiff in default and permitted said defendant to adduce his evidence, which was done, and judgment was rendered on September 26, 1928, absolving said defendant Tan Boon Kong from the complaint, declaring the document, the deed of sale, attached to said defendant's answer fraudulent and void, with costs against the plaintiff.

Such is the judgment from which the present appeal is taken, based upon three assignments of error, to wit: First, the denial of the motion to postpone the hearing, and in not postponing the same to the next day, although the party defendant was agreeable thereto; second, in declaring the plaintiff in default, absolving the defendants from the complaint, dismissing said complaint, and in permitting the defendants to adduce evidence; and third, in denying the motion for a new trial.

The following, found on pages 21-26 of the bill of exceptions, is an account of what took place in the court below relative to this case on September 25, 1928, when it came up for trial:

"This case having come up for trial, Attorney Aboitiz appeared in behalf of defendant Tan Boon Kong, and Attorney Yap in behalf of the other defendants, the plaintiff entering no appearance.

"Attorney Seva appeared and informed the court that he had come to Iloilo because he had a case in Branch III of said court, and that the day before he had been asked to represent the plaintiff in this case; that he appeared not as counsel for the plaintiff, but in order to pray the court to postpone the hearing of the case in order to give him time to study it and see whether he could or should represent the plaintiff in this case.

"Attorney Aboitiz asked that the defendant Tan Boon Kong be personally permitted to answer the petition for postponement presented by Attorney Seva.

"On being called upon by the court, defendant Tan Boon Kong stated that he had brought his witnesses, and would consent to the postponement of the hearing of this case only till the following day, but that he could not agree to have it postponed any longer because said hearing had already been postponed several times.

"Then Attorney Seva informed the court that he could not take charge of this case as counsel for the plaintiff, if the hearing were postponed only to the following day, because he had a case in the Court of First Instance of Negros on that day.

"The court denies the postponement prayed for by Attorney Seva, it appearing of record that counsel for the plaintiff had been notified on August 11 of this year that the hearing of this case would be had today; that said counsel filed a motion on the 22d instant praying; that the hearing of the case be postponed, and that as counsel for defendant Tan Boon Kong objected to such postponement, it was denied.

"If the plaintiff was not sure of securing attorneys to take the place of those who had been representing her, she should not have consented to the petition filed yesterday afternoon and signed by her attorneys, praying that they be relieved from representing her in this case.

"It appears from this proceeding that the first time, the date set for trial was December 14, 1927, and it was postponed on motion of defendant Tan Boon Kong, on account of illness, according to the medical certificate attached to the motion.

"The second time the hearing was set for the 1,2th of January of this year, and on the 10th of January counsel for the plaintiff moved for the postponement of the trial on the ground that his witness Enrique Echaus was absent from this province; and the court granted the petition for postponement.

"Once more the hearing of this case was set for the 21st of February this year, and because defendant Tan Boon Kong and his attorney had not been notified of it, the hearing of this case was again postponed to March 15 of this year.

"On March 12 of this year, the court on petition of defendant Tan Boon Kong, ordered several other persons to be included as parties defendant: this being the reason why the trial was not held on March 15 of this year.

"The hearing of this case was again set for June 15 of this year, and upon petition of the attorney for defendant Tan Boon Kong, it was postponed to July 2 of this year.

"On the 2d of July, the hearing of this case was again postponed on motion of counsel for the plaintiff, to the 11th of said July, when it was again postponed upon petition of the attorney for defendant Tan Boon Kong.

"The trial being set for August 6 of this year, it was postponed again to this day, because the court was busy hearing election contests.

"There having been so many postponements of the trial of this case, upon petition both of the plaintiff and of the attorney for defendant Tan Boon Kong, and it being publicly known to all attorneys and other interested parties who come to this court, that as a rule petitions for postponements of the hearing presented on the day of the trial are denied, unless justified by just and powerful reasons, which is not the case with the petition to postpone presented today by Attorney Seva, the court reiterates its ruling denying the postponement prayed for, and hereby orders that the hearing of the case proceed.

"The plaintiff upon being again called by the announcer, failed to appear.

"Attorney Yap, who represents the other defendants, prays for the dismissal of the complaint because of the plaintiff's failure to appear.

"Attorney Aboitiz, in behalf of defendant Tan Boon Kong, prays the court to enter an order of default against the plaintiff, and to permit him to adduce his evidence in support of his answer.

"In accordance with Attorney Yap's petition, the court orders the dismissal of the complaint against the defendants represented by said Attorney Yap.

"In accordance with Attorney Aboitiz's petition, the plaintiff is declared in default, and said attorney is hereby authorized to adduce his evidence.

"So ordered."

From the foregoing it appears that on the afternoon before the 25th day of September, 1928, the attorneys for the plaintiff had presented a petition to the court praying to be relieved from the representation of the plaintiff in this case, to which petition said plaintiff agreed; that on said preceding day, Attorney Seva had been asked to represent the plaintiff, and on said 25th day of September, 1928, he appeared in court, not as counsel for the plaintiff, but merely to ask for the postponement of the hearing of the case in order to have time to study it and to decide whether or not he would represent the plaintiff; that the defendant personally answered saying that he had brought his witnesses, and that he would consent to postponing the trial to the next day, which did not seem to Attorney Seva to be sufficient time, for which reason he informed the court that he could not undertake to represent the plaintiff.

We believe that under the circumstances of the case, no negligence can be imputed to the plaintiff for not being definitely represented by counsel on September 25, 1928. On the preceding day, when her first attorneys retired from the case, Attorney Seva was asked to represent the plaintiff, for which reason he appeared in the court on September 25, 1928, and presented the petition to postpone the trial of the case, asking for sufficient time to inform himself of the same, in order to decide whether or not he would represent the plaintiff.

We also consider that, in view of these facts, the interests of justice and equity required that the petition presented by Attorney Seva, who had just been designated to represent the plaintiff, be granted, and that the hearing be postponed for a greater length of time than a day.

It is true that there had been postponements of the hearing of this case since the 14th of December of the preceding year, that is, for more than seven months previously; but of the eight postponements appearing in the above-quoted order, five had been requested by the defendant, one had been made by the court itself, and only two had been requested by the plaintiff.

In cases like the present, where a party litigant, without malice, fault, or inexcusable neglect, is not prepared for the trial of a case, the court exceeds the discretion conferred upon it by law in denying to said litigant a reasonable opportunity to prepare for the trial and to obtain due process of law and proper protection under the law.

The doctrine enunciated by this court in similar cases, such as, *Lino Luna vs. Arcenas* (34 Phil., 80), should be followed in the present case.

Wherefore, the judgment appealed from is reversed, setting aside the trial held, and under the provisions of section 496 and others in connection therewith of the Code of Civil Procedure, let the case be remanded to the court below for a new trial, giving the parties a reasonable opportunity to protect their respective rights. Without express pronouncement of costs. So ordered.

Avanceña, C. J., Johnson, Street, Villamor, Johns, and Villa-Real, JJ., concur.

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