

**CARMEN AYALA DE ROXAS AND PEDRO P. ROXAS, PLAINTIFFS, VS.
THE CITY OF MANILA AND ROBERT G. DIECK, AS CITY ENGINEER,
DEFENDANTS.**

G.R. No. 3144. November 19, 1907

Ponente: ARELLANO, C.J.

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ARELLANO, C.J.:

The defendants' demurrer to the amended complaint having been overruled, an answer was presented, and the trial of the case proceeded with. Briefly, the subject of this action may be stated as follows:

- That on the 15th of January, 1906, the plaintiff, as owner of the property situated on the Escolta, district of Binondo, city of Manila, the eastern boundary of which adjoins the canal of San Jacinto or Sibacon to the extent of 23.50 meters, the total area of the ground being 658.19 square meters, applied to the city engineer, Robert Q. Dieck, the defendant herein, for a license to construct a terrace over "the strip of land 3 meters in width between the main wall of her house and the edge of the said canal of Sibacon or San Jacinto, which strip of land belongs exclusively to her"; but the defendant refused to grant the license or authorize the plaintiff to build the terrace.
- That a similar petition was addressed to the Municipal Board of the city of Manila on the 30th of said month and year, and it also was denied.
- That, as the plaintiff has been informed, the sole reason wherefor the license was denied is because "the said defendants pretend to compel the plaintiff to leave vacant and without any construction whatever thereon the said strip of 3 meters in width which is a portion of the ground belonging to her, in order, to use the same as a wharf or public way so that the plaintiff will only be able to use the said strip in the same manner and for the same purposes as the public in general, thus losing the enjoyment, use, and exclusive possession of the said strip of the property which the plaintiff and the former owners thereof have enjoyed quietly and peacefully during more than seventy years."
- That the strip in question was occupied by a two-story building constructed more than seventy years ago. It appears from the evidence:

First. That the plaintiff's ownership of the whole ground and of the strip in question is beyond all doubt, both by reason of her title thereto and the entry thereof in the registry of property, and by the acknowledgment thereof made by the city itself when obtaining by means of condemnation proceedings a portion of the same property adjoining the public road.

Second. That as a matter of fact, the license which the plaintiff, using her right of ownership, requested for the construction of a terrace on the strip of 3 meters adjoining the canal of San Jacinto or Sibacon, was denied; both parties agreeing that the denial was due to the intent to reserve the said strip for the establishment of a public easement, although the opposing witnesses did not agree as to the special easement intended to be established.

Third. That it was agreed between both parties that the strip above referred to had not been expropriated in whole

or in part by the municipality of Manila, and that neither had the latter offered any compensation for the same to the owner thereof.

Fourth. That according to Engineer Dieck, a defendant, the purpose of the city was to use the said strip of 3 meters as a place for discharging and landing goods, and as a place of shelter for shipwrecked persons and for fishermen, and to devote it also, together with other strips along the canal, by the gradual acquisition of land, to a towpath for craft passing through the canal; that a building line has been established by the Municipal Board along the Sibacon Creek leaving a strip of 3 meters within which, according to ordinances, no constructions would be permitted; that such is the purpose and the intent on which the existing ordinances are based. But John Tuther, the secretary of the Municipal Board, declares that, when Ordinance No. 78 was under discussion, he does not recall having heard any of the members of the board make reference to a towpath nor did he ever hear anything said with reference to the purpose to which the strip of 3 meters mentioned in Ordinance No. 78 was to be devoted, though he believes that, by thus leaving a strip of 3 meters, it would be easier to prevent collisions; that it would facilitate navigation, and that it had never been the intention of the Board to indemnify the Owners of such strips of 3 meters by reason of the use which parties landing thereon may make of the same.

Fifth. That, as stated in the brief of the defendants, "the intention of the Municipal Board, when denying the permit asked for by the plaintiff, has never been to establish any way whatever along the Sibacon Creek so that said plaintiff could, if she chose to, close her property with walls or the like perpendicularly to said creek, that is, over the two lines perpendicular to said creek, provided she does not close or build over the 3-meter space running along the creek," which space is subject, as stated in the evidence submitted by the defendants, to "the easement of public use for the general interest of navigation, flotation, fishing, and salvage," citing the Law of Waters and the Civil Code.

Sixth. And that the result is, according to No. 19 of the statement of facts of the complaint, "that the plaintiff shall only be able to use said strip in the same manner and for the same purposes as the general public, thus losing the enjoyment, use, and exclusive possession of said strip of the ground which the plaintiff and the former owners of the same have enjoyed as such owners quietly and peacefully during more than seventy years."

What the defendants have therefore done is to prevent the plaintiffs from continuing to enjoy, use, and freely dispose of such strip of their ground, as they had been doing up to the time when they applied for a license to construct a terrace over said strip, and the defendants prevented it with the intention of establishing a public easement provided for in an ordinance of their own which they consider is pursuant to the provisions "of the Law of Waters and of the Civil Code in force.

In the decision entered by this court on the 5th of May, 1900, regarding the demurrer, the following was set forth:

"The easement of a zone for public use, authorized by article 73 of the Law of Waters of 1800, is developed in articles 160 to 104, inclusive, of said law; the general interest on behalf of which the easement is supported is determined, for navigation, by articles 100 and 101; for flotation, by article 102; for salvage, by article 103; and for fishing, by article 164; in all of them the owner of the riverside property supports the easement 'upon being previously indemnified for loss and damage.' (Folio 41.)

"Said zone for public use, the same as a towpath, is solely available for the purposes of navigation, flotation, fishing, and salvage, being closed to any other use which may be attempted; therefore, it is erroneous to pretend that the right of the owner of the property bordering upon the stream can be reduced to the level of the public right; on the contrary he should only be called upon to bear those burdens which are in the general interest, but not without prior or subsequent indemnity." (Folio 43.)

If as affirmed in statement No. 4, and accepted by the defendants, the Sibacon Creek is a canal—let us grant that it

is navigable, because it has so been held by competent authority—and that under the name of a public wharf, which is the largest in area, it is desired to establish a towpath, which is the smallest, it must be remembered that the law does not grant it along navigable canals (art. 157), and, at all events, the establishment thereof must be preceded by the corresponding indemnity. (Arts.. 154 and 157.)

The matter at issue herein being the enforcement of the Law of Waters and of the Civil Code, it is not out of place nor untimely, even now, to point out the administrative law which ought to have been applied had this act of the city of Manila been carried out by the late ayuntamiento during the former sovereignty; an administrative law which, owing to its having been so often repeated, is now raised to the rank of an incontrovertible principle of law on the matter.

"The powers of the administration do not extend to the establishment of new easements upon private property but simply to preserve old ones, whenever a recent and easily proven usurpation exists." (Decision of January 23, 1866.)

"Ayuntamientos are not authorized to impose an easement upon private property; therefore, any order thus given can not be held to have been issued in the exercise of their lawful powers." (Decision of July 28, 1866.)

"Administrative, action for the recovery of a public easement which has been usurped by a constructive work of private ownership can only be taken when such usurpation is of recent date and easily proven.

"When real rights are concerned an ayuntamiento may prosecute such actions as it may consider itself entitled to, for the possession or ownership in accordance with law." (Decision of October 26, 1866.)

This doctrine will be found far more vigorous at present upon reference to the principles of the law now in force. According to article 349 of the Civil Code, no one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after proper indemnity; if this requisite has not been fulfilled the courts must protect, and eventually restore possession to the injured party.

Under section 5 of the act of Congress of July 1, 1902, no legislation shall be enacted in the Philippine Islands which shall deprive any person of life, liberty, or property without due process of law; and the due process of law in order to deprive a person of his property is, according to the Code of Civil Procedure, reserved to the judicial authority. The refusal to grant a license or the enactment of an ordinance whereby a person may be deprived of property or rights, or an attempt thereat is made, without previously indemnifying him therefor, is not, nor can it be, due process of law.

And, considering that the easement intended to be established, whatever may be the object thereof, is not merely a real right that will encumber the property, but is one tending to prevent the exclusive use of one portion of the same, by expropriating it for a public use which, be it what it may, can not be accomplished unless the owner of the property condemned or seized be previously and duly indemnified, it is proper to protect the appellant by means of the remedy employed in such cases, as it is the only adequate remedy when no other legal action can be resorted to, against an intent which is nothing short of an arbitrary restriction imposed by the city by virtue of the coercive power with which the Same is invested. The question involved here is not the actual establishment of an easement which might be objected to by an action in court, but a mere act of obstruction, a refusal which is beyond the powers of the city of Manila, because it is not simply a measure in connection with building regulations, but is an attempt to suppress, without due process of law, real rights which are attached to the right of ownership.

"When * * * any corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by

such inferior tribunal,. corporation, board, or person, and the court, on trial, finds the' allegations of the complaint to be true, it may, if there is no other plain, speedy, and adequate remedy in the ordinary courts of law, render a judgment granting a peremptory order against the defendant, commanding him, immediately after the receipt of such order, or at some other specified time, to do the act required to be done to protect the rights of the plaintiff." (Code of Civil Procedure, sec. 222.)

Therefore, we hereby command the defendants, the city of Manila, and Eobert G. Dieck, as city engineer, or whomsoever may now be acting as such, to immediately issue a license in favor of the plaintiff herein, Dona Carmen Ayala de Eoxas, to construct the terrace as aforesaid in accordance with the plan and specification as per Exhibit A, the said defendants to pay the costs of these proceedings. So ordered.

Torres, Johnson, Carson, Willard, and Tracey, JJ., concur.

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