

EUFEMIA MERCADO, PLAINTIFF AND APPELLANT, VS. THE MUNICIPAL PRESIDENT OP MACABEBE, PAMPANGA, AND THE SECRETARY OF COMMERCE AND COMMUNICATIONS, DEFENDANTS AND APPELLEES.

G. R. No. 37986. March 01, 1934

Ponente: DIAZ, J.

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DIAZ, J.:

This is an appeal taken by Eufemia Mercado from a judgment rendered by the Court of First Instance of Pampanga dismissing her appeal from an order of the Secretary of Commerce and Communications wherein said official directed Romulo Mercado, the appellant's predecessor in interest, to remove the two dikes which he had constructed at both ends of the creek named Batasan-Limasan or Pinac Bungalun, which traverses part of the hacienda described in certificate of title No. 329 of the registry of deeds of Pampanga, and formerly belonging to said Romulo Mercado, but which now belongs to the appellant by virtue of a formal donation made to her by said Romulo Mercado, after the institution of this action.

After due trial, the court a quo held that the creek in question is property of the public domain.

The contention of the appellant's predecessor in interest in the record of the investigation conducted by the Secretary of Commerce and Communications, through his agents, and that of the appellant, both in the court a quo and in this court, is that the said Batasan-Limasan or Pinac Bungalun creek is not a natural but an artificial creek which had been developed on his hacienda by means of excavations made by his men on two different occasions, the former before the revolution or during the Spanish regime, and the latter after the revolution.

The appellees, in turn, contend that the creek in question is a natural navigable creek which already existed on the said hacienda of the appellant not only long before the revolution but also from the time immemorial.

The evidence presented by the appellant shows that formerly when her so-called hacienda still belonged to her grandfather Mariano Mercado, the portion of the said creek, indicated on the plan Exhibit 2 by two parallel lines in black ink drawn from the point marked 3 towards the center until it turns northwards, was but a recess or arm then called Bungalun, of the Nasi River, which arm was lost on the hacienda. It extended close to a small creek called Batasan-Limasan which derived its waters, particularly during high tide, from the large creek called Limasan indicated on the aforesaid plan.

Mariano Mercado, the original owner of the hacienda, in order to facilitate the cutting and transportation of firewood and other products, produced on the said hacienda, towards the Nasi River on the east or towards Limasan creek on the west, connected the two recesses or bodies of water in question by means of excavations and, after having so connected them, made other excavations at both ends towards the said river and creek, thus constructing a sort of canal directly connecting both bodies of water, and which later became known as the Batasan-Limasan or Pinac Bungalun creek.

The said Batasan-Limasan or Pinac Bungalun creek or canal already existed at the time of the institution of the registration proceedings wherein judgment was rendered resulting in the issuance of certificate of title No. 329 in favor of Romulo Mercado. On the plan of the land, which was presented in the said case, the aforesaid creek appears; and at the time the case was tried as well as when the certificate of title was issued in favor of the applicant Romulo Mercado, none of the herein defendants nor the Insular Government filed opposition or objection thereto.

Once the said Batasan-Limasan or Pinac Bungalun creek or canal was opened from the Nasi River to Limasan creek, not only the residents of the hacienda and those who visited it but also some of the residents of the nearby barrios and municipalities began to use it as a means of communication in attending to their needs, sometimes with the permission of the owners of the hacienda, and at other times without even the latter's knowledge. It was then that Romulo Mercado, the appellant's predecessor in interest, decided to convert the said creek into a fish pond and with that object in view, in 1928 he closed the two openings thereof towards the Nasi River on one side and Limasan creek on the other side.

The appellant's witnesses, Romulo Mercado, Maximo de la Pena and Andres Limin testified that the creek in question became navigable only from the time Mariano Mercado had excavated both ends and the junction of the former two recesses from which said creek had been formed; that the former owners of the hacienda had employed about 60 men for a period of two weeks in order to perform such task, and that during the revolution and for about ten years, in view of the fact that many people entered the hacienda to cut or carry away firewood without permission, Romulo Mercado ordered the creek closed in order to prevent the entrance into and passage of strangers through it.

On the other hand, the appellees tried to prove by means of their witnesses Castor Quiambao, Maximino Guintu and Lorenzo Magat, that the creek in question has existed on the appellant's hacienda from time immemorial, and that they had been passing through and fishing in it, as others had done, as often as they wished, long before the revolution until it was closed by the appellant's predecessor in interest in 1928. To that effect, they presented resolution No. 6 of the municipal council of Macabebe, Pampanga, placing at public auction the privilege of fishing in the Batasan-Limasan creek (Exhibit 6), among other rivers and creeks. However, they failed to establish that anybody had ever obtained such privilege, for which reason said evidence cannot be given any weight, there being no doubt, as there can be no doubt, that a mere notice, as Exhibit 6, does not constitute sufficient evidence that the creek in question is the property of the public domain.

The testimony of the said witnesses for the appellees seems insufficient to overcome that of the witnesses for the appellant on the ground that Castor Quiambao is relatively young and he himself admitted that in his youth, as he remembered, he used to pass through the creek in question only once or twice a month. The other witnesses, not being residents of the place, were in no better position to know what the appellant's witnesses knew as to the true nature, conditions and changes which the said creek had undergone, inasmuch as the latter witnesses had lived and worked in that same place for many years.

However, considering that the evidence of both parties is equiponderant, could not the question be decided by taking into consideration only, or mainly, the undisputed fact that the creek in question, both during the first years of its existence, when it was but a small creek formed by the channels or recesses called Batasan-Limasan and Bungalun by some witnesses, and after it had been converted into said creek, whether naturally or artificially, that is, by means of man's labor, with openings toward the Nasi River and toward the Limasan creek, derived its waters from the aforesaid river and creek, which unquestionably belong to the public domain?

The lower court, invoking the provisions of articles 339, 407 and 408 of the Civil Code, decided the question

mainly by taking said fact into consideration.

The pertinent parts of the aforesaid three articles provide as follows:

"Property of public ownership is—

"1. That devoted to public use, such as roads, canals, rivers, torrents, ports and bridges constructed by the State, riverbanks, shores, roadsteads, and that of a similar character." (Art. 339.)

"The following are of public ownership:

"1. Rivers and their natural channels;

"2. Continuous or intermittent waters from springs or brooks running in their natural channels and the channels themselves;

"3. Waters rising continuously or intermittently on lands of public ownership;

* * * * *

"8. Waters which flow continuously or intermittently from lands belonging to private parties, to the State, to provinces, or to towns, from the moment they leave such lands." (Art. 407.)

"The following are of private ownership:

"1. Waters, either continuous or intermittent rising on private estates, while they run through them;

"2. Lakes and ponds and their beds when formed by nature on said estates;

"3. Subterranean waters found on the same;

"4. Rain waters falling thereon as long as they remain within their boundaries;

"5. The channels of flowing streams, continuous or intermittent, formed by rain water, and those of brooks crossing estates which are not of public ownership.

"The water, bed, banks, and floodgates of a ditch or aqueduct are deemed to be an integral part of the estate or building for which the waters are intended. The owners of estates through or along the boundaries of which the aqueduct passes can assert no ownership over it, nor any right to make use of its beds or banks, unless they base their claim on title deeds which specify the right or the ownership claimed." (Art. 408.)

It will be noted that the appellant cannot invoke in her favor the article last quoted on the ground that although it is true that the Batasan-Limasan or Pinac Bungalun creek passes through her hacienda, it is none the less true that it is not included in any of the kinds of private property therein enumerated. The appellant and her predecessors in interest, in closing the two openings of the said creek and converting it into a fish pond, not only appropriated for themselves the channel of the said creek but also the creek itself; and a creek is not a brook because the latter is but a short, almost continuous stream of water (Diccionario de la Real Academia Espanola), while the former is a recess or arm extending from a river, which participates in the ebb and flow of the sea. (15 Enciclopedia Juridica Espanola, 216.)

On the other hand, the aforesaid article 339 provides that canals, rivers, torrents, * * * and those of a similar character are property of public ownership, and the similarity between rivers, canals, and creeks is undoubtedly obvious on the ground that, as has been stated, a creek is no other than an arm extending from a river. Furthermore, under article 407, the Batasan-Limasan or Pinac Bungalun creek may be considered as belonging to the class of property enumerated in paragraph 8 thereof. And, in addition to the foregoing, the Contentious Court of Spain (Tribunal Contencioso de Espana) in a decision dated June 25, 1890, laid down the doctrine that creeks

are property of the public domain (15 Enciclopedia Juridica Espanola, 216).

And even granting that the Batasan-Limasan creek acquired the proportions which it had, before it was closed, as a result of excavations made by laborers of the appellant's predecessor in interest, it being a fact that, since the time it was opened as a water route between the Nasi River and Limasan creek, the owners thereof as well as strangers, that is, both the residents of the hacienda and those of other nearby barrios and municipalities, had been using it not only for their bancas to pass through but also for fishing purposes, and it being also a fact that such was the condition of the creek at least since 1906 until it was closed in 1928, if the appellant and her predecessors in interest had acquired any right to the creek in question by virtue of excavations which they had made thereon, they had lost such right through prescription inasmuch as they failed to obtain, and in fact they have not obtained, the necessary authorization to devote it to their own use to the exclusion of all others. The use and enjoyment of a creek, as any other property susceptible of appropriation, may be acquired or lost through prescription, and the appellant and her predecessors in interest certainly lost such right through the said cause, and they cannot now claim it exclusively for themselves after the general public had been openly using the same from 1906 to 1928. When two different interests, one being private and the other public, are in conflict with one another, the former should yield to the latter.

It is useless for the appellant now to allege that she has obtained certificate of title No. 329 in her favor because the said certificate does not confer upon her any right to the creek in question, inasmuch as the said creek, being of the public domain, is included among the various exceptions enumerated in section 39 of Act No. 496 to which the said certificate is subject by express provision of the law, and furthermore, because it so appears in the certificate itself.

The doctrine laid down in the case of the Government of the Philippine Islands vs. Santos (G. R. No. 27202, promulgated September 2, 1927, not reported), which the appellant invokes in her favor, is not applicable herein because the subject matter in that case is not of the same nature as the Batasan-Limasan or Pinac Bungalun creek. The thing involved therein was simply a date or, in the words of the trial court, a low depression on the defendant's land where there was a waterway passable by bancas at high tide, but which completely dried up at low tide and during the dry season. From what has been hereinbefore stated, it may be inferred that the Batasan-Limasan creek is perfectly navigable by bancas throughout the year, inasmuch as at the time it was measured in November by employees and agents of the Bureau of Lands, it was more than two meters deep at its mouth and around a meter and a half deep at its shallow parts. Furthermore, in the case of Urbano Santos, the creek in question was closed a few years after excavations had been made in the land under consideration.

Wherefore, the judgment appealed from is hereby affirmed, with costs against the appellant. So ordered.

Street, Malcolm, Abad Santos, and Butte, JJ., concur.

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