

JESUS AZCONA, PLAINTIFF AND APPELLANT, VS. PACIFIC COMMERCIAL COMPANY, DEFENDANT AND APPELLEE.

G.R. No. 45608. May 27, 1939

Ponente: DIAZ, J.

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DIAZ, J.:

Plaintiff commenced this case in the Court of First Instance of Manila to obtain the rescission of a certain contract into which, he alleges, he entered with the defendant on January 5, 1933 for the purpose of acquiring through purchase a Fricke-Glasser X-Ray Dosimeter machine; and to secure also an order for the refund to him of the sum of P658.37 which he has paid on account of the price agreed upon of the machine referred to, which was P1,300, as soon as he should have returned, on his part, said machine, with legal interest on the aforesaid sum from the date of the filing of his complaint.

The case was heard after defendant has filed its answer in which, besides a general and specific denial of the allegations of plaintiff's complaint, and the special defense that plaintiff bought the machine in question at his own risk, that he received it in good state and condition, and that defendant never guaranteed that it would function to plaintiff's satisfaction, it put up the counterclaim that plaintiff still owed it the amount of P786,\$8 as balance of the price of the machine referred to, plus the agreed interest at 12% per annum from September 6, 1935 until its full payment. At the trial the parties submitted, in addition to their oral and documentary evidence, the following:

"STIPULATION COVERING AGREED STATEMENT OF FACT

"Now come plaintiff, by J. Perez Cardenas, and defendant, by E. P. Revilla, and with leave of this Honorable Court, respectfully stipulate and agree on the following facts, to wit:

"1. That plaintiff is of legal age, resident of the City of Manila, and is and since about sixteen years ago a practicing physician and surgeon, and on and before May, 1931, and up to the present time has been operating and continuously operates an X-Ray clinic in the City of Manila;

"2. That defendant is a corporation duly organized and existing under and by virtue of the laws of the Philippines with principal office and place of business therein in the City of Manila;

"3. That on or about May 28, 1931, plaintiff placed an order with defendant for the purchase of one FRICKE-GLASSER X-RAY DOSIMETER to be imported from the United States, and for the purpose, deposited with defendant the sum of P120 evidenced by Receipt No. 382465 issued by defendant to plaintiff on May 28, 1931;

"4. That the said Dosimeter arrived in Manila about August, 1931; that upon delivery thereof to plaintiff for inspection, some of the parts were found to be broken, and because of this, plaintiff returned the aforesaid Dosimeter to defendant, and that defendant thereupon, upon agreement between plaintiff and defendant, returned the Dosimeter to the United States, with the request that another machine be sent out in its stead.

"5. That thereafter, the second Dosimeter arrived in Manila on or about August, 1932, also with some of the parts broken, in view of which fact, plaintiff refused to take delivery thereof, and upon agreement between plaintiff and defendant, the same was returned to the United States, and another Dosimeter ordered from the United States in lieu thereof;

"6. That upon arrival in the Philippines of the third FRICKE-GLASSER X-RAY DOSIMETER ordered from the United States, and on or about January 5, 1933, pursuant to Sales Order hereto attached and made a part hereof as Exhibit A, defendant delivered to plaintiff and plaintiff received from defendant the said FRICKE-GLASSER X-RAY DOSIMETER, said delivery and receipt being evidenced by the Charge Order duly signed by plaintiff, which Charge Order is hereto attached and made a part hereof as Exhibit B; "7. That in accordance with the terms of the Sales Order, Exhibit A hereof, and for the payment of the balance of the purchase price of the Dosimeter mentioned in the preceding paragraph, plaintiff executed in favor of and delivered to defendant, a promissory note hereto attached and made a part hereof as Exhibit C;

"8. That on account of the interest and principal of the promissory note Exhibit C hereof, plaintiff has made various payments in the total sum of P706.52 as shown in the statement hereto attached and made a part hereof as Exhibit C-1;

"9. That defendant made various demands upon plaintiff for payment of the balance due on the promissory note Exhibit C hereof, as evidenced by the letters, copies of which are hereto attached and made a part hereof as Exhibits D, D-1 up to and including D-41, duly sent by defendant to, and received by, plaintiff;

"10. That the parties reserve the right to present further evidence in support of their respective contentions in this case.

"Manila, Philippines, February 23rd, 1937.

"J. PEREZ CARDENAS

"Attorney for plaintiff

"30 Hogar Filipino Bldg., Manila

"E. P. REVILLA

"Attorney for defendant

"3rd Floor Perez-Samanillo Bldg., Manila"

Upon the conclusion of the trial, the court rendered judgment dismissing plaintiff's complaint and sentencing him on defendant's counterclaim to pay the latter P786.68 plus interest at the rate of 12 per cent per annum from September 6, 1935 until full payment, and to pay also an amount equivalent to 10 per cent of P786.68 as attorney's fees and expenses of collection, and the costs of the suit. From this judgment plaintiff took an appeal, and now contends that the lower court committed the following errors:

- In finding that defendant is not liable in the event that the Fricke-Glasser X-Ray Dosimeter machine should not function properly;
- In dismissing plaintiff's complaint and in sentencing him to pay defendant the amount of P786.68 together with interest at the rate of 12 per cent per annum, plus an amount equal to 10 per cent of the aforesaid sum as attorney's fees and the costs of the suit, instead of sentencing defendant to pay him the sum of P658.37;
- In denying his motion for new trial.

Before going into the subject matter, it is well to observe that, inasmuch as the suit between the parties in this case involves only a small amount, it is neither incumbent upon us nor necessary to review the facts because the appellant does not question the findings of fact of the lower court in his three assignments of error. He raises only

questions of law. On the other hand, although it is true that appellant announced that he would appeal the judgment rendered against him to the Court of Appeals, it is no less true that in formally submitting his bill of exceptions to perfect his appeal he expressly asked that it be forwarded directly to this court. We shall, therefore, limit ourselves to considering and deciding only the questions of law raised by the appellant, naturally accepting the facts found by the lower court which the parties themselves accept as true in their stipulation just above-quoted.

According to the stipulation of facts referred to and the findings of the lower court, the plaintiff and appellant is a medical specialist who, in the practice of his profession, had been using uninterruptedly in his clinic for sixteen years prior to the year 1931 X-Ray machines or apparatus to cure his patients by electro-therapy. As a specialist, he had in his clinic five dosimeters, in the handling and use of which he was very adept. Desiring to have one more, he corresponded in the early part of January, 1931 with the Victoreen Instrument Company of Cleveland, State of Ohio, United States, which was the distributor of the apparatus in that country, for the purpose of asking said company to furnish him information, details and other particulars as well as prices of the apparatus in question. As soon as he obtained the foregoing data and was informed by one surnamed Buckman who was connected with the General Electric X-Ray Company, manufacturer of the class of dosimeters to which the one here involved belongs, that the Manila agent of the Victoreen Instrument Company was the appellee, plaintiff immediately placed an order for one of said machines through the appellee which forwarded the order in due time upon deposit by the appellant of the amount of P120. The machine he ordered was received by him some months thereafter. It was, however, found to be useless because it had many broken parts. Accordingly, as the stipulation hereinbefore mentioned reads, "that defendant thereupon, upon agreement between plaintiff and defendant, returned the dosimeter to the United States * * *" to ask that it be changed with another (paragraph 4, Stipulation). This was done, but the second machine which arrived after some months had also several broken parts. As on the former occasion, the appellant and the appellee again agreed to return it to the United States to have it changed once more with another (paragraph 5, Stipulation). The third machine arrived about the first two days of January, 1933. After it was delivered to the appellant by the appellee, the former ordered its installation in his clinic. It functioned for 10 or 15 minutes after its installation, but ceased to do so thereafter without any explainable cause. Nevertheless, the appellant voluntarily executed the promissory note, Exhibit C, in the amount of P1,180 to answer for the payment of the price agreed upon which was P1,300, binding himself therein to pay the aforesaid amount in eight equal installments of P147.50 each (Exhibits C, A, and B). On account of the said sum of P1,180 the appellant made payments on different occasions which, in September, 1935, amounted to P658.37. From then on he made no further payment until, upon being continuously pressed by the appellee to fulfill his obligation to pay to it the balance still remaining, he commenced this case by filing his complaint on December 2, 1935.

When the appellant noted that the dosimeter for which he had paid the aforesaid sum of P658.37 did not function in spite of the fact that he employed every means at his disposal to correct what he believed to be its defect, eliminating the cause of its failure to function which he attributed to dampness, he sent a notice to that effect to Buckman, asking him to repair the machine. Although Buckman promised that he would, he was unable to do so on account of the fact that he had to leave for Java unexpectedly. After Buckman left, the appellant was approached by an employee of the appellee in its chemical products department surnamed Becker, who told him that a man by the name of Fosch, an expert on dosimeters of the Fricke-Glasser brand, would arrive promptly to repair the machine. Nevertheless, Fosch himself did not come, and appellant's machine has not functioned anymore from then on until this case was instituted in the lower court.

In the decision appealed from it is made to appear that Buckman was not an employee of the appellee; that he was merely the representative in Manila of the Victoreen Instrument Company; that Becker was really an employee of the appellee, but was not authorized to bind himself in its name in the sense maintained by the appellant, because

his duty referred exclusively to rendering his services in its chemical products department; that appellee has never had in Manila or in any other part of the Philippines any expert on dosimeters; and that it never guaranteed the proper functioning of the dosimeter in question.

Relying on the facts just stated, the lower court laid down the following conclusions:

"There is nothing in the documentary evidence presented which may indicate in one way or another such obligation on the part of the defendant. However, this obligation seems to be inferred from the fact that defendant accepted the first two or three dosimeters which it delivered to plaintiff and which the latter returned to it because of the fact that they failed to function, and were in turn returned by the defendant to the United States for their repair.

"Nevertheless, there exists a difference between the returned dosimeters and the last one, which until now is in the possession of the plaintiff, inasmuch as the first ones arrived in the Philippines with imperfections, while the last one was delivered to plaintiff in apparently good condition. They likewise differ in that the first dosimeters had some broken parts, while the last one did not have any.

"It was in such a good condition that plaintiff, on the day following its delivery, or on January 6, 1933, executed the promissory note, Exhibit C, in favor of the defendant. And not only did he do so, but also paid to the defendant, according to Exhibit C-1, on different subsequent occasions, various amounts which rose to the total sum mentioned in the complaint, or P658.37.

"Furthermore, after the delivery of each of the first dosimeters, plaintiff did not sign any promissory note nor made a single payment on account of their price, except perhaps the deposit of P120, while for the last dosimeter, on the day after receiving it, he executed Exhibit C, and on subsequent occasions made payments on account of the price of said machine.

"There is also the difference that there was no formal acceptance of the first dosimeters or those returned, while there was acceptance of the last one.

"May the promise of Buckman and that of Becker later that the last dosimeter would be repaired in order that it might function properly be interpreted as an act explanatory of the contract of sale of the dosimeter in question between plaintiff and defendant, or as an implied condition of that sale that the defendant must put the machine in perfect working order for the consummation of the sale in favor of the plaintiff? In the first place, Buckman did not have any connection with the defendant, and in the second place, Becker is a mere employee of the defendant in its chemical products department, and there is no evidence that one or the other acted under instructions from the defendant in this respect.

"Moreover, the simple promise that the machine would be repaired does not necessarily mean that this repair is an essential part of the contract between plaintiff and the defendant, for the same reason that it may be an additional work which defendant would perform upon a likewise additional payment.

"It is of the utmost importance to consider the fact that on no occasion did defendant have an expert on dosimeters in the Philippines, and in this sense it could not have bound itself to plaintiff to sell him the dosimeter in question under the condition that it would place it in perfect working order in plaintiff's clinic.

"These facts make it clearly understood that plaintiff himself considered the sale as consummated.

"The dosimeter in question was known to plaintiff not only because he has had various dosimeters in his clinic of other manufactures, but also because he had received information concerning the machine from the Victoreen Instrument Company by virtue of a letter of his addressed to the corporation. Upon knowing it, he immediately placed his order. When he received said machine on its delivery to him by the defendant, he at least manifested that it was the very one he ordered. He could not reject it, inasmuch as 'if the sale takes place by samples or by a fixed quality known in commerce, the purchaser can not refuse to receive the articles

contracted for, if they are in accordance with the samples or quality mentioned in the contract.' (Art. 327, Code of Commerce.) If he could no longer reject it, and as a matter of fact did not do so, but on the contrary accepted it, said plaintiff has become more bound by the contract and this obligation was strengthened and made demandable by the acceptance of the machine."

We believe that the conclusions and findings of the lower court as above shown are in accordance with law, especially because its opinion is supported by what this court held in the case of *Pacific Commercial Company vs. Ermita Market & Cold Stores, Inc.* (56 Phil., 617), which is based on the provision contained in article 327 of the Code of Commerce, cited in the decision appealed from. And it can not be said that the sale of the machine in question was made subject to trial (article 1453 of the Civil Code), for, as the lower court held in its decision, the appellant himself considered the sale consummated after the installation of the machine in his clinic, executing the promissory note, Exhibit C, and later making partial payments pursuant to the terms thereof for two years thereafter. Neither can it be said that the appellant made the purchase under the circumstances provided in article 328 of the Code of Commerce, which says:

"In the purchase of goods which are not seen or can not be classified by a fixed quality and well known in commerce it shall be understood that the purchaser reserves the privilege of examining them and unrestrictedly rescinding the contract if the goods do not suit him.

"The purchaser shall also be entitled to rescind said contract if he reserved the right by an express agreement to examine the goods contracted for." The reason is that, according to the facts found by the lower court to have been proved, the appellant was an expert in dosimeters and was moreover the owner of five machines of the same kind; that he knew the details and particulars of the machine which had been delivered and sold to him by virtue of his order before making it; that he had before him two other machines of the same kind before he decided to keep the one in question; that he installed it in his clinic, making it function thereafter, and attempted to preserve it from dampness; and that he allowed almost three years to pass before taking action to free himself from the effects of the obligation formally assumed by him.

For the reasons heretofore stated, we find clearly that the first two errors attributed to the lower court cannot be sustained; and as the third error is no more than the result of said two errors, we do not believe it necessary to enter into further consideration of that question.

In conclusion, we hold that the appeal taken by the appellant from the decision and judgment of the lower court is without merit and that said decision and judgment are in accordance with law.

Wherefore, they are affirmed in their entirety, with costs against the appellant. So ordered.

Imperial, Laurel, and Concepcion, JJ., concur.

Moran, J., see dissenting opinion.

Avanceña and Villa-Real, JJ., concurs in the dissenting opinion of Justice Moran.

DISSENTING OPINION

MORAN, J.:

I dissent for the reason that this court has no jurisdiction to take cognizance of this case on appeal. The case comes from the Court of First Instance of Manila where it was decided against the plaintiff. Thereafter, he filed

his notice of appeal in which he "announces his intention to appeal to the Honorable Court of Appeals through the filing of the corresponding bill of exceptions." However, when he filed his bill of exceptions he asked the court to "forward it to the Honorable Supreme Court together with the oral and documentary evidence and the original record." This prayer has been interpreted by the majority in the sense that plaintiff has desired to appeal to this Court and not to the Court of Appeals. In my opinion, that interpretation is incorrect.

Since plaintiff has manifested in his notice of appeal that he appealed to the Court of Appeals, his subsequent prayer that the bill of exceptions be forwarded to the Supreme Court may only be attributed to a mistake, not to a change of intention, because if that were so, plaintiff would have amended his notice of appeal. The pleading which reveals the court to which a party desires to appeal his case, is the notice of appeal. This is the only pleading wherein a party must show not only his intention to appeal, but also the court to which he desires to appeal, if, as in the present case, there are two courts to which the appeal may be brought. The notice of appeal would be incomplete or insufficient in itself if one or the other were not made known therein. And if, as in the case at bar, the notice of appeal mentions the court to which the appellant desires to apply, the subsequent pleadings which have for their purpose that of simply giving course to the appeal, must be interpreted as giving course to the appeal to the court already named. And this is specially true in this case in which there is palpable proof of mistake in the prayer that the bill of exceptions be forwarded to the Supreme Court. In that prayer it is asked that not only the bill of exceptions but also the oral and documentary evidence be forwarded to this court, which shows that the appellant had the intention to raise questions of fact in his appeal, a thing he could not do in the Supreme Court but only in the Court of Appeals.

At all events, although the plaintiff may have in truth desired to appeal to this court, if, according to the law, this court lacks appellate jurisdiction in view of the nature of the appeal, we cannot in any manner validly act on this case, except to remove it to the competent court pursuant to section 145-H of the Administrative Code as amended by Commonwealth Act No. 3. The subject matter of the litigation is worth no more than one thousand three hundred pesos (P1,300), and in the appeal questions of fact, and none on the constitutionality or validity of a treaty, law, ordinance, executive order or regulation, or on the legality of any tax, impost, assessment or toll, or any penalty imposed in relation thereto, or on the jurisdiction of the lower court, are raised, and, consequently, in accordance with section 145-F of the said Code, as amended by Commonwealth Act No. 3, the case falls under the appellate jurisdiction of the Court of Appeals and must be forwarded to that court.

The majority, however, maintain that the appellant, in his three assignment of errors, does not question the findings of fact of the lower court. The first error to which the appellant points in the judgment of the lower court consists in that the latter found that the defendant is not liable for the fact that the machine in question does not function properly. The question of whether or not the defendant is liable for the defective functioning of the machine depends on the contract had between the parties, which contract is a question of fact. It must be noted that although the parties submitted a stipulation of facts, they adduced evidence concerning said contract. And the appellant under his first assignment of error questions precisely some conclusions of fact reached by the lower court. It will suffice to cite a passage from the brief of the appellant to establish the truth of this assertion:

"Coming now to the fact that the plaintiff kept on paying the installments on the apparatus even when he found out that it was defective. Can this fact be counted against him as the trial court held, when he only did so because the defendant promised to repair and place the apparatus in good working order and condition? Of course most of these promises came from Buckman and Becker whom the defendant denies having authorized to make such promises, but again can the plaintiff be blamed for believing them? It is admitted that Buckman is an agent of the General Electric X-Ray Corporation which later assimilated the Victoreen Instrument Co. It has also been proven by the testimony of the plaintiff (p. 6, t. s. n.), and this fact has not been contradicted, that it was either Buckman or Becker who delivered the dosimeter to him and made him sign the 'pagarel. Becker

on the other hand, was admitted to be an employee of the defendant corporation with offices in said corporation. In the face of these facts, can the plaintiff have any reason to suspect or disbelieve the truth of their representations ?

"We reiterate that the holding of the lower court to the effect that the defendant's liability extends only to the delivery of the FRICKE-GLASSER X-RAY DOSIMETER regardless of whether it functions or not is error on its part."

And as we cannot decide this case with justice without determining the questions of fact raised, which may have a bearing on the outcome of the case, I am of the opinion that it should be transmitted to the Court of Appeals.

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