

LEANDRO ALAZAS, PETITIONER, VS. HON. JUAN Y. REYES, JUDGE OF THE COURT OF FIRST INSTANCE OF CEBU, BRANCH I, GUMERCINDO JIMENEZ, DEPUTY PROVINCIAL SHERIFF OF CEBU, AND ROSARIO ME...

G.R. No. 55808. August 28, 1984

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

The petition for "Certiorari", Prohibition", and "Mandamus" with restraining order and preliminary mandatory injunction seeks to set aside the order of execution pending appeal dated November 11, 1980, and the writs of execution dated November 14, 1980 and December 19, 1980 issued by the respondent court in Civil Case No. R-15492 entitled "Rosario (Charito) Mercader, plaintiff, versus Leandro Alazas, defendant".

On July 28, 1976, respondent Mercader filed a complaint against petitioner Leandro Alazas for the recovery of property and damages with replevin. In her complaint, Mercader alleged that she is the owner-proprietor and manager of the Sultan Express Tours, a duly licensed local tour operator with office at the Magellan Hotel, Cebu City; that in said office she kept her personal properties; that on July 19, 1976, at about 8:45 o'clock in the morning, Alazas together with eight hired men illegally entered the said office and once inside ransacked her properties and carried away a steel filing cabinet and various other personal properties worth P97,700.00.

On August 4, 1976, the respondent court granted the prayer for the issuance of a writ of replevin. By virtue of this writ of replevin some of the properties taken by Alazas were returned to Mercader.

On August 24, 1976, the defendant filed his answer with counterclaim. In his answer he alleged that he is the owner and proprietor of the Sultan Express Tours and that plaintiff was appointed by him as manager of the firm; that he owned the furniture and fixtures claimed by the plaintiff including the steel filing cabinet and its contents; that he admitted taking the filing cabinet but denied that its contents were worth P97,700.00. The counterclaim was subsequently dismissed on a finding that the ownership of Sultan Travel and Tours was the subject of litigation between the same parties in Civil Case No. 15355 in another branch of the court.

During the pre-trial conference, the parties agreed to limit the issues being litigated to the question of who owns the personal properties listed in paragraph 5 of the amended complaint.

On December 27, 1979, the respondent court promulgated a decision in favor of plaintiff Mercader. The dispositive portion of the decision reads:

"WHEREFORE, judgment is rendered in favor of plaintiff Rosario 'Charito' Mercader and against defendant Leandro Alazas:

"1. Commanding the defendant to return to the plaintiff the properties which were not recovered or taken by the Provincial Sheriff or which were not turned over to said Sheriff by the defendant pursuant to the writ of replevin, which are as follows:

- "a) The sum of P50,000.00 in cash;
- "b) The balance of P450.00 out of P800.00 representing petty cash left at the office of Sultan Express Tours;
- "c) The diamond ring or in the alter-native, its value: P35,000.00;
- "d) The gold wrist watch costing \$200.00, or in the alternative its value P1,500.00 (\$200.00);
- "(e) deeds of sale of plaintiff's two parcels of land;
- "(f) deed of sale covering her TORANA car;
- "(g) registration papers of her cars;
- "(h) cash receipts;
- "(i) vouchers for 1974 and 1976 relative to the operation of local tour business;
- "(j) evidentiary papers and documents against defendant and his wife, together with other papers related thereto;

"2. Ordering the defendant to pay plaintiff the sum of P1,000.00 the latter paid to the First Integrated Bonding and Ins. Co. for the issuance of a replevin bond, representing the reimbursement thereof; and the mount of P5,000.00 as attorney's fees.

"Costs against the defendant."

On January 25, 1980, Alazas filed his notice of appeal and deposited with the clerk of court his cash appeal bond.

On February 4, 1980, Mercader filed a motion for execution pending appeal.

On February 7, 1980, the respondent court issued an order granting the aforesaid motion for execution pending appeal. Upon receipt of the said order, the defendant on the same day, February 8, 1980 filed an urgent motion for stay of execution pending appeal upon supersedeas bond. The motion was not acted upon by the respondent court. Hence, the defendant filed a petition for certiorari with preliminary injunction and restraining order before the Court of Appeals (CA-G.R. No. SP-10395) to challenge the order granting the motion for execution pending appeal.

On February 14, 1980, the appellate court issued a temporary restraining order enjoining the respondent court from implementing the February 7, 1980 order of execution pending appeal.

On August 6, 1980, the appellate court promulgated a decision granting the petition and set aside the February 8, 1980 questioned order on the ground that the required notice to the adverse party of the motion for execution pending appeal pursuant to Section 2, Rule 39 of the Rules of Court was not given. The court had granted the motion for execution pending appeal on February 7, 1980 one day before the date of the hearing on that motion on February 8, 1980.

In the meantime, on February 9, 1980, Alazas filed his record on appeal and set the hearing and approval thereof for February 14, 1980.

On October 7, 1980, apparently after the decision in CA-G.R. No. SP-10395 had become final and executory, Mercader filed before the respondent court a notice resetting the hearing of her motion for execution pending appeal. The trial court then set the motion for hearing. Consequently, defendant Alazas filed before the appellate court an urgent ex-parte motion to restrain the respondent judge from issuing a writ of execution pending appeal in CA-G.R. No. SP-10395, alleging that the re-setting of the hearing would only effect an exercise in futility since

the respondent judge had practically pre-judged the case and that at any rate said respondent court will finally or ultimately grant the private respondent's motion with or without presentation of evidence, imputing in effect bias and prejudice of the respondent court against herein petitioner. The appellate court in a resolution dated October 10, 1980 dismissed the motion on the ground that the defendant was given "x x x full opportunity to oppose the private respondent's motion for execution pending appeal and whether or not respondent court will grant or not said motion is beyond the domain of the Court in this Certiorari case."

On October 20, 1980, Alazas filed an opposition to the re-submission of the February 4, 1980 motion for execution pending appeal before the respondent court.

On October 27, 1980, a hearing was held in connection with the February 4, 1980 motion for execution pending appeal. Both parties were represented by their respective counsel. During the hearing Alazas brought up the delay in the approval of the record on appeal, hence the respondent court directed him to file a memorandum thereon. Thus, Alazas on November 6, 1980 filed "defendant's memorandum on approval of record on appeal", pointing out that his record on appeal had been pending before the court for nine (9) months without any action being taken on it.

On November 11, 1980, the respondent court issued an order granting the motion for execution pending appeal on the ground "x x x it clearly appearing that there are special and good reasons for such execution pending appeal x x x" (Order, respondent court, November 11, 1980, p. 87, Rollo).

On November 14, 1980, the assistant clerk of court of the respondent court issued a writ of execution in compliance with the order of execution. The writ was served by the provincial sheriff on the defendant in the morning of November 15, 1980 which was a Saturday. On the same day, the defendant Alazas filed before the respondent court a motion for reconsideration of the writ of execution alleging that the order of execution was not yet received by him, hence the writ was prematurely issued. He prayed that "x x x the issuance of the writ and its implementation be suspended until the issuance and service of the order of execution."

On December 19, 1980, the writ of execution was re-issued by the clerk of court of the respondent court.

On December 24, 1980, the deputy sheriff enforced the writ of execution and seized two motor vehicles belonging to defendant Alazas.

On December 29, 1980, the deputy sheriff continued to enforce the writ of execution and seized another motor vehicle allegedly belonging to the defendant. On this same day, the deputy provincial sheriff issued a notice of sale. The deputy provincial sheriff scheduled the sale of the three motor vehicles at public auction on January 5, 1981. Hence the instant petition.

Acting on the petitioner's ex-parte motion for issuance of restraining order and writ of preliminary mandatory injunction, we issued on January 7, 1981 a temporary restraining order enjoining the respondents from enforcing the writs of execution dated November 14, 1980 and December 10 (should be December 19) 1980 and from further proceeding with or carrying out the auction sale of the levied properties. On January 16, 1981 we issued a preliminary mandatory order ordering the respondents deputy provincial sheriff and/or the clerk of court as ex-officio sheriff of the Court of First Instance of Cebu, Branch I to release or restore possession of the three (3) cars to herein petitioner or to the Paramount Finance Corporation. The Paramount Finance Corporation made a demand on respondent deputy provincial sheriff for the return of two of the three cars scheduled to be sold by public auction as the owner thereof.

The pivotal issue raised in the instant petition centers on the respondent court's November 11, 1980 order granting execution pending appeal.

The petitioner contends that the respondent court abused its discretion in not approving the record on appeal despite no objections from the private respondent, in violation of Section 7, Rule 41 of the Rules of Court. The petitioner also states that the respondent court's various acts in relation to the withholding of approval of the record on appeal clearly show partiality towards the private respondent.

There is no dispute that the petitioner took steps to perfect his appeal within the reglementary period. Thus, on January 25, 1980, the petitioner filed his notice of appeal and deposited with the clerk of court his cash appeal bond. On February 9, 1980, he filed his record on appeal and set the hearing and approval thereof on February 14, 1980.

While it is true that initially the respondent court may not be faulted for withholding the approval of the record on appeal in view of a petition for certiorari filed with the Court of Appeals by the petitioner challenging the respondent court's initial order granting the motion for execution pending appeal, the same does not hold true when after the appellate court granted the petition and set aside the execution pending appeal, the respondent court still withheld any action on the record on appeal. Parenthetically, it was the court's own fault that its order had to be raised to the appellate court.

Section 7, Rule 41 of the Rules of Court provides:

"Hearing and approval of record. - Upon the submission for approval of the record on appeal, if no objection is filed within five (5) days, the trial judge may approve it as presented or, upon his own motion or at the instance of the appellee, may direct its amendment by the inclusion of any matters omitted which are deemed essential to the determination of the issue of law or fact involved in the appeal. If the trial judge orders the amendment of the record, the appellant, within the time limited in the order, or such extension thereof as maybe granted, or if no time is fixed by the order within ten (10) days from receipt thereof, shall redraft the record by including therein, in their proper chronological sequence, such additional matters as the court may have directed him to incorporate, and shall thereupon submit the redrafted record for approval, upon notice to the appellee, in like manner as the original draft."

The records of the case show a pattern of bias and partiality on the part of the respondent court against the petitioner, a deliberate procrastination and withholding of required action in order to keep the appeal from being perfected thus enabling the court to order execution pending appeal nine (9) months after the record on appeal was filed and set for approval.

As earlier stated, the court granted on February 7, 1980 the motion for execution pending appeal which motion was supposed to be heard on the following day. The Court of Appeals set aside the February 7 order on a finding that the petitioner was deprived of his day in court. Moreover, the required three-day notice had not been furnished. The petitioner was not given the opportunity to oppose the motion or even appear at the date of hearing.

Before the petitioner could go to the Court of Appeals, the sheriff had already garnished his accounts in four commercial banks, thus calling for a restraining order.

The second writ of execution was issued late on a Friday afternoon on November 14, 1980 and served on the defendant on Saturday morning the following day. At this time, the petitioner had not even received the November 11, 1980 court order forming the basis of the issued writ. Because the petitioner objected, the writ had to be reissued on December 19, 1980. On the day before Christmas, two motor vehicles were seized. On December 29, 1980 another vehicle was seized and simultaneously, a notice of sale at public auction on January 5, 1981 was issued.

If the trial court noted any omission of essential matters, in the record on appeal, it should have ordered their

inclusion in an amended record and thereafter approved the record within the period provided by the Rule.

Without in any way passing upon the merits of the pending appeal, we also see no obvious or palpable basis for the trial court's finding that the petitioner's appeal is "clearly frivolous and delatory (sic) and a delay in the final disposal of the article (sic) and money sought to be recovered would cause grave, serious and irreparable damage and injury to the plaintiff", thus warranting execution pending appeal. As a matter of fact, the court itself stated that most of the properties sought to be recovered were already in the possession of Mercader by virtue of a writ of replevin it had earlier issued.

The respondent court ignored without comment the petitioner's pleas for due process. Alazas questioned the resubmission of the February 4, 1980 motion after the Court of Appeals had set aside the order granting it because of the circumstances surrounding its issuance. The court was also silent on the memorandum discussing the nine (9) months inaction when the memorandum was filed pursuant to the court's order.

Premised on the foregoing concatenation of circumstances clearly showing not only grave abuse of discretion but also improper judicial conduct, this Court is constrained to censure the respondent judge. A judge's official conduct and his behaviour in the performance of judicial duties should be free from the appearance of impropriety and must be beyond reproach.

In the case at bar, there is no showing that private respondent filed objections to the record on appeal.

WHEREFORE, the order of execution pending appeal dated November 11, 1980 and the writs of execution dated November 14, 1980 and December 19, 1980 are hereby SET ASIDE. The Judge of the Regional Trial Court to whom the case below has been assigned is directed to give due course to the petitioner's appeal and to elevate the records to the Intermediate Appellate Court. The Temporary Restraining Order and the Preliminary Injunction enjoining the enforcement of the writs of execution and the public auction sale are made permanent. Costs against the respondents.

For the reasons abovestated, the respondent judge is also censured for improper judicial conduct.

SO ORDERED.

Teehankee, Acting C.J., Melencio-Herrera, Plana, Relova, and De la Fuente, JJ., concur.

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