

RUPERTO FULGADO, SUBSTITUTED BY HIS HEIRS, JULIANA, JOSE, MAXIMO, PACITA AND SEVERO ALL SURNAMED FULGADO, PETITIONERS, VS. HON. COURT OF APPEALS, RUFINO CUSTODIO, SIMPLICIA CUST...

G.R. No. 61570. February 12, 1990

Ponente: FERNAN, C.J.

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FERNAN, C.J.:

On September 9, 1967, Ruperto Fulgado, a man approaching the twilight of his life, undertook the arduous task of filing an action in the Court of First Instance of Rizal, Pasig branch, against Rufino Custodio, Simplicia Custodio, Arsenio Piguing, Ismael Porciuncula and Dominga Macarulay for the annulment of certain contracts of sale and partition with accounting.[1] The defendants (herein private respondents) filed their answer to the complaint with special and affirmative defenses and a counterclaim.

After several deferments, the pre-trial conference was finally set for February 1, 1968, at 8:30 in the morning. Private respondents and their counsel failed to appear on time at the pre-trial and were subsequently declared as in default. Plaintiff Fulgado was then allowed to present his evidence ex parte before the Deputy Clerk of Court.

Meanwhile, upon learning of their predicament, private respondents immediately filed a motion to lift the order of default on the same day that the order was issued. The trial court denied said motion in its order of February 16, 1972. Their motion for reconsideration was also denied. Persistently, respondents filed a petition for relief from the default order. Once more, this was denied.

On April 24, 1972, the trial court rendered a decision in favor of plaintiff Ruperto Fulgado. On appeal, however, the Court of Appeals found that private respondents had been deprived of their day in court by the unjust denial of their motion to lift the order of default.[2] The Appellate Court, in no less than explicit terms, said:

"WHEREFORE, the decision of the court a quo is hereby set aside and the case is remanded to the court of origin for trial on the merits, granting to the defendants the opportunity to present their evidence, provided, however, that the evidence already presented before the commissioner shall stand, but with the right of the defendants to cross-examine the witness who had already testified and with the right of the plaintiff to present additional evidence that then he may decide. Without costs."[3]

The Court of Appeals' decision became final and executory on June 27, 1974 and the records of the case were remanded to the trial court.

On July 3, 1975, or more than a year after the finality of the Appellate Court's decision, counsel for private respondents moved that the trial court "include th(e) case in any date of the August and September calendar of the Court, at the usual hour in the morning."[4]

The case was set for hearing on September 16, 1975. Unfortunately, the presiding judge went on official leave and the hearing was postponed anew to January 15 and February 15, 1976. In the meantime, plaintiff Ruperto Fulgado

died on November 25, 1975 and was substituted by his children as party plaintiffs. Fulgado's witness, Jose Fulgado, referred to in the dispositive part of the Appellate Court's judgment, had earlier migrated to the United States on September 16, 1974.

When the case was heard on May 4, 1976, the following proceedings transpired:

"Atty Dollete:

"For the plaintiff, Your Honor. If your Honor please, may I inform this Honorable Court that this is a remanded case from the Court of Appeals for cross-examination or presentation by the plaintiff of any additional evidence. But we have no further evidence in this case x x x except those evidence already adduced in the lower court before it was appealed in the Court of Appeals. It is up for the defense now to cross-examine the witnesses.

"Court (To Atty. Tuangco):

"You are through with the cross-examination?

"Atty. Tuangco:

"Not yet, Your Honor, we were granted by the Court of Appeals the right to cross-examine the witnesses x x x. The last time this case was called for hearing by this Honorable Court, the Presiding Judge tried to make the parties come to a settlement, but it seems that they could not come to such settlement. I advised my clients to try to meet them. So now, this is the stage where they could not agree and so we will be proceeding with the cross-examination of the witnesses.

"Atty. Dollete:

"There were only two witnesses. Two witnesses were presented, one is Ruperto Fulgado and he died already, Your Honor, the other witness was Jose Fulgado who is now abroad for almost a year, Your Honor.

"Atty. Tuangco:

"I understand that the other witness was here on a visit, Your Honor. He came back.

"Court:

"So, what shall we do now?

"Atty. Tuangco:

"So, I move to strike out the testimonies of the witnesses who testified on the ground that we were deprived of our right to cross-examine them.

"Atty. Dollete:

"We will submit, Your Honor, for resolution the motion of the defendants.

"Court (To Atty. Tuangco):

"So what do you want?

"Atty. Tuangco:

"That the whole testimonies of the two witnesses who were presented ex parte be stricken off the record because we have not been granted the right of cross-examining them and they are not available at this stage, Your Honor.

"Atty. Dollete:

"We will submit Your Honor. We maintain, Your Honor. Our opposition is that it hinges on the fact that defendants committed laches in their failure to cross-examine the witness. That is our opposition.

"Court:

"Why?

"Atty. Dollete:

"There were several opportunities for them to cross-examine especially the witness Ruperto Fulgado, Your Honor. They are with full knowledge of the age of this witness. They could have taken steps to assert their right granted by the Court of Appeals. Notwithstanding their knowledge about the age, the advanced age and health condition of this witness Ruperto Fulgado, then we maintain, Your Honor, that defendants, in a way, have committed laches in the assertion of their right to cross-examine.

"Atty. Tuangco:

"The records will show Your Honor, that it was the defendants who moved to set this case for hearing upon the remanding of the records from the Court of Appeals.

"Court:

"You make a written motion and I will grant you a period of ten (10) days within which to file an opposition and then another additional period of ten (10) days within which to reply. Then this matter shall be deemed submitted for resolution. But the fact is clear now that plaintiff has no more additional evidence.

"Atty. Dollete:

"Yes, Your Honor.

"Court:

"So that in case the court favorably grants the motion of defendants and orders the striking out of the testimonies of Ruperto Fulgado and the other witness, together with the documentary evidence, the plaintiff had no more evidence to offer.

"Atty. Dollete:

"Yes, Your Honor. We stand on the evidence on record."[5]

On June 30, 1976, the trial court issued an order dismissing the case. It decreed:

"For reason stated in the defendants' motion filed on May 18, 1976, which the Court finds meritorious, the testimonies of plaintiff's witnesses Ruperto Fulgado and Jose Fulgado, who were not presented by the plaintiff so that the defendants could cross-examine them on May 4, 1976, are stricken off the record and, as a consequence, in view of the manifestation of plaintiff's counsel that he had no more witnesses to present, the above-entitled case is dismissed without pronouncement as to costs."[6]

On appeal to the Appellate Court in C.A.-G.R. No. 62353-R, said order was affirmed on June 30, 1982.[7] Petitioners now question said affirmance before this Court in the instant petition for review.

The principal issue in the case at bar is the propriety of the exclusion of the testimonies given by the now deceased Ruperto Fulgado and his witness, Jose Fulgado, who has departed for the United States, which resulted in the dismissal of the complaint. Private respondents maintain that such testimonies are wholly inadmissible for being hearsay, because respondents were not able to cross-examine the witnesses.

Petitioners, on the other hand, contend that while the right to cross-examination is an essential part of due process, the same may however be waived as the private respondents have done when they allowed an unreasonable length of time to lapse from the inception of the opportunity to cross-examine before availing themselves of such right and likewise when they failed to exhaust other remedies to secure the exercise of such right.

The appeal is well-taken.

In *Savory Luncheonette vs. Lakas ng Manggagawang Pilipino*,^[8] and the cases cited thereunder, the Court, speaking through Justice Munoz Palma, has provided us with a concise overview of the right to cross-examination as a vital element of due process. Thus:

"The right of a party to confront and cross-examine opposing witnesses in a judicial litigation, be it criminal or civil in nature, or in proceedings before administrative tribunals with quasi-judicial powers, is a fundamental right which is part of due process. However, the right is a personal one which may be waived expressly or impliedly by conduct amounting to a renunciation of the right of cross-examination. Thus, where a party has had the opportunity to cross-examine a witness but failed to avail himself of it, he necessarily forfeits the right to cross-examine and the testimony given on direct examination of the witness will be received or allowed to remain in the record.

"The conduct of a party which may be construed as an implied waiver of the right to cross-examine may take various forms. But the common basic principle underlying the application of the rule on implied waiver is that the party was given the opportunity to confront and cross-examine an opposing witness but failed to take advantage of it for reasons attributable to himself alone."

The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examine if desired.^[9] Thus the resolution of the present case would hinge on whether or not there was an opportunity for cross-examination.

There is no disputing that where there was no such opportunity (to cross-examine) and the want of it was caused by the party offering (plaintiff), the testimony should be stricken out. However, where the failure to obtain cross-examination was imputable to the cross-examiner's fault, the lack of cross-examination is no longer a ground for exclusion according to the general principle that an opportunity, though waived, will suffice.^[10]

From the records presented, it is manifest that private respondents had enough opportunity to cross-examine plaintiff Ruperto Fulgado before his death, and Jose Fulgado before his migration to the United States. Conceding that private respondents lost their standing in court during the time they were in default, they were no longer in that situation on June 6, 1974 when the Court of Appeals set aside the default judgment in CA-G.R. No. 42590-R and remanded the case to the court of origin for trial on the merits, "granting to the defendants the opportunity to present their evidence x x x."^[11] This was a positive signal for them to proceed with the cross-examination of the two Fulgados, a right previously withheld from them when they were considered in default. But despite knowledge of Ruperto's failing health (he was then 89 years of age) and Jose's imminent travel to the United States, private respondents did not move swiftly and decisively. They tarried for more than one year from the finality of the Appellate Court's decision on June 27, 1974 to ask the trial court on July 3, 1975 to set the already much delayed case for hearing "in any date of August and September x x x."^[12]

Such inaction on the part of private respondents cannot be easily dismissed by the argument that it is the duty of the plaintiff to always take the initiative in keeping the proceedings "alive." At best, the argument is fatuous.

The task of recalling a witness for cross-examination is, in law, imposed on the party who wishes to exercise said right. This is so because the right, being personal and waivable, the intention to utilize it must be expressed.

Silence or failure to assert it on time amounts to a renunciation thereof. Thus, it should be the counsel for the opposing party who should move to cross-examine plaintiff's witnesses. It is absurd for the plaintiff himself to ask the court to schedule the cross-examination of his own witnesses because it is not his obligation to ensure that his deponents are cross-examined. Having presented his witnesses, the burden shifts to his opponent who must now make the appropriate move. . Indeed, the rule of placing the burden of the case on plaintiff's shoulders can be construed to extremes as what happened in the instant proceedings.

Having had the liberty to cross-examine and having opted not to exercise it, the case is then the same in effect as if private respondent had actually cross-examined. We therefore hold that it was gross error for both the trial court and the Appellate Court to dismiss the complaint in Civil Case No. 10256 on the ultimate ground that there was an alleged failure of cross-examination. The wholesale exclusion of testimonies was too inflexible a solution to the procedural impasse because it prejudiced the party whose only fault during the entire proceedings was to die before he could be cross-examined. The prudent alternative should have been to admit the direct examination so far as the loss of cross-examination could have been shown to be not in that instance a material loss.[13] And more compellingly so in the instant case where it has become evident that the adverse party was afforded a reasonable chance for cross-examination but through his own fault failed to cross-examine the witness.

Where death prevents cross-examination under such circumstances that no responsibility of any sort can be ascribed to the plaintiff or his witness, it seems a harsh measure to strike out all that has been obtained in the direct examination.[14]

As to the witness Jose Fulgado who is reportedly abroad, private respondents could have resorted to the various modes of discovery under the Rules of Court to cross-examine Jose. During the hearing of May 4, 1976, counsel for private respondents unwittingly or wittingly disclosed that they knew that Jose was in the country "for a visit" but they did not exert any effort to have him subpoenaed.

Altogether, the acts of private respondents constitute a waiver, and consequently, a forfeiture of their right to cross-examination. And having failed to make use of this right, the consequences should rightfully fall on them and not on their adversary.

WHEREFORE, the decision under review of the Court of Appeals in CA-G.R. No. 62353-R dated June 30, 1982 is SET ASIDE. The trial court is ordered to REINSTATE Civil Case No. 10256 and to allow the direct testimonies of plaintiff Ruperto Fulgado and his witness Jose Fulgado to remain in the record. The court is further ordered to give priority to the hearing of said case in view of the length of time that it has remained unresolved on account of procedural differences. This judgment is immediately executory. No costs.

Gutierrez, Jr., Feliciano, Bidin, and Cortes, JJ., concur.

[1] Civil Case No. 10256.

[2] CA-G.R. No. 45290-R.

[3] Annex P of Petition, p. 186, Rollo.

[4] Annex R of Petition, p. 190, Rollo.

[5] Rollo, pp. 28-31.

[6] Annex C of Petition, p. 213, Rollo.

[7] Annex EEE of Petition, p. 297, Rollo.

[8] L-38964, January 31, 1975, 62 SCRA 258, 263-267.

[9] 5 Wigmore, Section 1390, p. 110.

[10] 5 Wigmore, *supra*, p. 111.

[11] Annex P of the Petition, p. 186, Rollo.

[12] Rollo, p. 190.

[13] 5 Wigmore, *supra*, p. 110.

[14] *Ibid*.

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