

**FOTO-QUICK, INC., PETITIONER, VS. HON. NICOLAS P. LAPENA, JR.,
PROVINCIAL SHERIFF OF RIZAL, AND RUSTICO CLAVERIA, DOING
BUSINESS UNDER THE NAME AND STYLE PHOTO-QUICK,
RESPONDENTS.**

G.R. No. 76322. March 11, 1991

Ponente: PADILLA, J.

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PADILLA, J.:

This is a petition for certiorari with prayer for the issuance of a writ of preliminary injunction and/or restraining order, which seeks to annul on the ground of grave abuse of discretion the Order of the respondent Judge, dated 23 October 1986, granting the motion for execution pending appeal in Civil Case No. 29674 entitled "Rustico Claveria, doing business under the name and style 'PHOTO-QUICK', plaintiff, versus Foto-Quick Inc., defendant," Branch 167, RTC, Pasig, Metro Manila.

The facts which gave rise to this petition are as follows:

On 23 April 1978, private respondent Rustico Claveria, filed with the Philippine Patent Office a petition for cancellation of Certificate of Registration No. 24381 issued for the trade name FOTO-QUICK. While the administrative case was pending, Rustico Claveria filed on 1 June 1978 a complaint against Foto-Quick, Inc. with the Regional Trial Court of Pasig for unfair competition with preliminary injunction docketed as Civil Case No. 29674.

After trial, the respondent Judge rendered a decision on 17 March 1986 dismissing the complaint and lifting the preliminary injunction earlier issued. The plaintiff (private respondent herein) was also ordered to pay defendant (petitioner herein) attorney's fees of P20,000.00 as well as the costs of suit. The defendant's counter-claim for damages was dismissed for lack of merit.[1]

Private respondent Claveria then filed a motion for reconsideration and/or new trial dated 4 April 1986. Said motion sought a new trial upon the ground of newly discovered evidence consisting of the decision rendered by the Philippine Patent Office dated 14 January 1985 in the cancellation case docketed as Inter Partes Case No. 1163 entitled "Rustico Claveria etc. versus Foto-Quick, Inc.," cancelling therein respondent's Certificate of Registration No. 24381 dated 16 November 1976 for the trade name "FOTO-QUICK" for use on photo-vending equipment.[2]

The court a quo granted the motion for new trial and on 26 September 1986, the respondent Judge found the petitioner Foto-Quick, Inc. guilty of unfair competition and therefore liable for damages. The dispositive part of the lower court's resolution reads as follows:

"WHEREFORE, this Court reconsiders its Decision dated 17 March 1986 and enters a new one ordering defendant to pay plaintiff:

1. the amount of P100,000.00 as actual and compensatory damages; and
2. the amount of P50,000.00 as attorney's fees.

This Court further makes the writ of preliminary injunction earlier issued permanent.

Costs against defendant.

SO ORDERED."[3]

Private respondent (as plaintiff) then moved for execution pending appeal alleging as good reasons therefore the following:

"A.

Plaintiff has reliable information that defendant has transferred and/or is in the process of transferring its properties to another in order to render ineffective any eventual judgment against it.

B.

The bulk of defendant's properties consist of photo-vending machines acquired years back and which by now have greatly depreciated and/or had broken down and/or are unserviceable or non-operational and therefore the lapse of additional time would also 'make the ultimate judgment ineffective' (Scottish Union and National Ins. Co. et al. vs. Macadaeg, 48 O.G. 4774), assuming arguendo that there are still properties available for execution.

C.

Plaintiff is not aware of any visible operations for sometime now on part of the defendant that makes said plaintiff conclude that the 'judgment debtor is in imminent danger of insolvency' (Santos vs. Mojica, L-24266, January 24, 1969) or is actually insolvent (Padilla, et al. vs. C.A. et al., L-31569, September 28, 1973) which are two (2) valid grounds for execution during the appeal period."[4]

Petitioner Foto-Quick, Inc. filed on 15 October 1986 its opposition to the motion for execution pending appeal and a timely notice of appeal from the resolution dated 26 September 1986 of the court a quo.

In its opposition to private respondent's motion for execution pending appeal, petitioner Foto-Quick, Inc. averred that no proof had been presented by Rustico Claveria as to the truthfulness of his allegations and the absence of verification in the motion for execution pending appeal clearly showed that even he (Rustico Claveria) was not convinced of the factual basis of his said allegations.[5]

On 23 October 1986, however, respondent Judge granted private respondent's motion for execution pending appeal upon his filing of a P150,000.00 bond which would answer for whatever damages the petitioner may suffer as a consequence thereof.[6] Upon posting of the bond by private respondent, a writ of execution pending appeal was issued on 29 October 1986. Consequently, on 30 October 1986, the Deputy Sheriff of Branch 167 of the courts a quo seized the following personal properties of the petitioner: three (3) photo-vending machines and four (4) I.D. photo three-minute service machines.

As a result of the seizure of said machines, Virginia Ong, treasurer of Island-Photo Center, filed a third-party claim, alleging ownership over the seven (7) photo-vending machines, subject of the execution sale scheduled on 18 November 1986, and stating in its claim that the aggregate value of the machines was P605,000.00.[7]

Thereupon, the petitioner interposed the present petition claiming that respondent judge acted without jurisdiction and with grave abuse of discretion in granting the motion for execution pending appeal and that there is no appeal nor any plain, speedy and adequate remedy in the ordinary course of law other than the present petition.

On 17 November 1986, the Court issued a Temporary Restraining Order enjoining the respondent Judge from enforcing and/or carrying out the Order dated 23 October 1986 issued in Civil Case No. 29674. On the same day, the court a quo issued an Order acting on the urgent ex-parte motion to stay execution filed by the petitioner. In said Order, the court a quo approved the supersedeas bond posted by the petitioner in the amount of P200,000.00 and stayed the execution pending appeal.[8]

The principal issue for this Court's resolution is whether or not the respondent judge committed grave abuse of discretion amounting to lack of jurisdiction in granting the motion for execution pending appeal in the civil case before him.

Section 2, Rule 39 of the Rules of Court provides that on motion of the prevailing party with notice to the adverse party the court may, in its discretion, order execution to issue even before the expiration of the time to appeal, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the motion and the special order shall be included therein.

Since the issuance of an execution pending appeal is a matter which is properly within the discretion of the court having jurisdiction, and such discretion may be interfered with only in case of grave abuse thereof, the facts and circumstances which moved the court a quo to act as it did and its own assessment of the equities of the case are entitled to considerable weight when grave abuse of discretion is alleged, particularly, when the conclusions of said court are based on evidence that is not controverted.[9]

Petitioner assails the order granting execution pending appeal on the following grounds: (1) private respondent did not present any proof as to the truthfulness of his allegations supportive of his motion for execution pending appeal; and (2) no affidavit of merit or verification was attached by private respondent to his motion.[10]

It would appear that neither in this petition nor in the memorandum of petitioner is there any showing that the facts alleged in the motion for execution were lacking in truth. The record is barren of any petitioner's attempt to refute the allegations contained in private respondent's motion for execution pending appeal.[11]

As noted in the memorandum of the private respondent, petitioner's two-paged opposition even conclusively corroborated private respondent's subject motion by clearly admitting that since the issuance of the preliminary injunction in July 1978, petitioner was no longer doing any visible operation of its business.[12] The records also show that a third-party claim dated 14 November 1986 was filed by Virginia Ong, treasurer of Island Photo-Center, over the movables seized pursuant to the writ of execution issued on 29 October 1986.

The contention of petitioner as to the motion's lack of verification is untenable. There is no requirement under the Rules of Court that the motion for issuance of a writ of execution must be verified.[13]

All the requisites provided for by Section 2, Rule 39 of the Rules of Court being present, this petition must fail. That the action of respondent Judge could not correctly be characterized as a grave abuse of discretion is obvious as it finds direct support in the applicable legal provisions.

We do not, however, agree with the claim of private respondent Rustico Claveria that the posting and approval of a bond, by itself, constitutes sufficient reason for the execution of a judgment pending appeal, and negates any claim of abuse of discretion on the part of the trial court.

Whatever doubts may have been generated by early decisions involving this matter, starting with Hacienda

Navarra Inc. vs. Labrador, et al., G.R. No. L-45912, May 24, 1938, 65 Phil. 536, have been clarified in Roxas vs. CA, et al., G.R. No. 56960, January 28, 1988, 157 SCRA 370, thus:

"It is not intended obviously that execution pending appeal shall issue as a matter of course. Good reasons, special, important, pressing reasons must exist to justify it; otherwise, instead of an instrument of solicitude and justice, it may well become a tool of oppression and inequity. But to consider the mere posting of a bond a 'good reason' would precisely make immediate execution of a judgment pending appeal routinary, the rule rather than the exception. Judgments would be executed immediately, as a matter of course, once rendered if all that the prevailing party needed to do was to post a bond to answer for the damages that might result therefrom. This is a situation, to repeat, neither contemplated, nor intended by law."^[14]

But the course of action taken by the lower court was actually in compliance with the express directive in Section 4, Rule 39 of the Rules of Court, providing for the immediate execution of judgments rendered in injunction cases notwithstanding the pendency of an appeal. For this, no special reason need even be invoked. The trial court may, in its discretion, stay immediate execution or refuse to do so.^[15]

A complaint for unfair competition is basically a suit for "injunction and damages" (Section 29 in relation to Sec. 23, Republic Act 166). Injunction, for the purpose of enjoining the unlawful competitor from proceeding further, and damages, in order to allow the aggrieved party to recover the damages he has suffered by reason of the said unlawful competition.^[16] And it has been held that an action for unfair competition with prayer for an injunction, as in Civil Case No. 29674, partakes of the nature of an action for injunction within the contemplation of Section 4 of Rule 39 of the Rules of Court.^[17]

With respect to the issue of the propriety of a special civil action for certiorari to assail an order for execution pending appeal, this Court has held that:

"Although Section 1, Rule 65 of the Rules of Court provides that the special civil action of certiorari may only be invoked when 'there is no appeal, nor any plain, speedy and adequate remedy in, the course of law' this rule is not without exception. The availability of the ordinary course of appeal does not constitute sufficient ground to prevent a party from making use of the extraordinary remedy of certiorari where the appeal is not an adequate remedy or equally beneficial, speedy and sufficient. It is the inadequacy - not the mere absence - of all other legal remedies and the danger of failure of justice without the writ, that must usually determine the propriety of certiorari." (Jaca vs. Davao Lumber Co., L-25771, March 29, 1982, 113 SCRA 107)

WHEREFORE, this petition for certiorari is DISMISSED and the temporary restraining order heretofore issued in this case is hereby LIFTED. With costs against petitioner.

SO ORDERED.

Melencio-Herrera, (Chairman), Sarmiento, and Regalado, JJ., concur.
Paras, J., no part.

[1] Rollo, pp. 21-22

[2] Id., p. 24

[3] Rollo, pp. 61-62

[4] Id., p. 65

[5] Id., p. 68

[6] Id., p. 71

[7] Id., p. 170

[8] Id., p. 243

[9] Padilla vs. CA, G.R. NO. L-31569, September 28, 1973, 53 SCRA 168

[10] Rollo, p. 5

[11] Lao vs. Hon. Mencias, et al., G.R. No. L-23554, November 25, 1967, 21 SCRA 1021

[12] Rollo, p. 212

[13] Lao vs. Hon. Mencias, supra.

[14] PNB vs. Hon. Puno, et al., G.R. No. 76018, February 10, 1989, 170 SCRA 229; Stronghold Insurance Co., Inc. vs. CA, et al., G.R. No. 84979, November 6, 1989, 179 SCRA 117

[15] Reparations Commission vs. Hon. Morfe, et al., G.R. No. L-25939, March 20, 1968, 22 SCRA 1177

[16] Universal Rubber Products, Inc. vs. CA, G.R. No. L-30266, June 29, 1984, 130 SCA 104

[17] Converse Rubber Corp. vs. Jacinto Rubber and Plastics Co., Inc., G.R. Nos. L-27425 and L-30505, April 28, 1980, 97 SCRA 158

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