

SONIDA INDUSTRIES, INC., PETITIONER, VS. HON. CORNELIO W. WASAN, SR., IN HIS CAPACITY AS PRESIDING JUDGE OF BRANCH XXXIX, REGIONAL TRIAL COURT OF PANGASINAN, AND RURAL TELEPHONE...

G.R. No. 76342. December 04, 1989

Ponente: PARAS, J.

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PARAS, J.:

Assailed in this petition for certiorari and prohibition with an application for preliminary injunction or at least a restraining order under Rule 65 of the New Rules of Court is the special order of execution pending appeal issued by the respondent judge, on the grounds that the same were issued after the trial court had lost jurisdiction over the case as the appeal had already been perfected and in like manner there was no good reason for granting immediate execution.

Respondent Rural Telephone Company (Rutelco), holder of a franchise to establish, operate, and maintain a public telephone system in Urdaneta, Pangasinan, entered into a Memorandum of Agreement (with Option to Sell) with petitioner Sonida Industries, Inc., holder of a franchise authorized to construct, operate, and maintain radio communications system within and without the Philippines, whereby the former leased to the latter the Urdaneta Public Telephone System for a period from September -19, 1980 to September 19, 1985.

When petitioner took over the operation of the System, it was alleged that the inside and outside equipment were burned out as petitioner had to rehabilitate the system before it could start with its operation. The facts that the municipal franchise granted by the Municipality of Urdaneta was already cancelled due to poor and inefficient service and that respondent is indebted to Philippine Long Distance Telephone Company were allegedly concealed to petitioner at the time, the Agreement was entered into. By reason of these alleged fraudulent representations and clever machinations of the respondent, petitioner repeatedly failed to pay the monthly rentals of P4,000.00.

On October 27, 1981, Rutelco filed an action in court (Civil Case No. 15739) against Sonida for the rescission of the Memorandum of Agreement plus damages, on the ground of violation of the terms and conditions of the agreement. Meanwhile, on May 24, 1984, Sonida became the owner of the leased premises because the Metro Bank, to whom Rutelco had previously mortgaged the premises, foreclosed the same and sold the premises to petitioner.

On June 25, 1986 respondent judge rendered a decision ordering Sonida to pay Rutelco the sum of P4,000.00 a month, plus legal interest, from November 1, 1980 up to such time that the defendant (now petitioner) returns to plaintiff (now respondent) the operation of the Urdaneta Public Telephone System; ordering the rescission of the agreement; and ordering petitioner Sonida to pay litigation expenses. Notice of the aforementioned decision was received by the parties on July 7, 1986.

Subsequently, on July 21, 1986, petitioner Sonida filed its notice of appeal. On July 25, 1986, or eighteen (18) days after notice of the decision was received, respondent Rutelco filed a motion for execution pending appeal. On August 7, 1986, respondent judge issued a special order granting the motion for execution pending appeal.

A motion for reconsideration with offer to file a supersedeas bond to stay execution by the petitioner was denied. Finding no appeal nor any other plain, speedy, and adequate remedy in the ordinary course of law, petitioner Sonida Industries filed the instant petition, alleging that respondent judge acted with grave abuse of discretion and without or in excess of his jurisdiction, because the special order was issued after the appeal had already been perfected and also there was no special reason for an immediate execution because petitioner already became the owner of the property leased.

In their comment, respondents argue that petitioner failed to appreciate the difference between "taking" an appeal and "perfecting" an appeal. The former is merely the filing of a notice of appeal which does not necessarily mean that an appeal is perfected while the latter means that the appeal taken is approved or given due course. Thus, in the case at bar, the appeal is not yet perfected by the mere filing of the notice. After such filing, the court has yet to determine the timeliness of the appeal and thereafter approve or give due course thereto, and it is only in this event that an appeal is deemed perfected. Considering, therefore, that the appeal taken was not yet given due course when the respondent court issued the special order for execution, the appeal was not yet perfected and thus, the lower court still had jurisdiction over the case.

The contention is devoid of merit. The trial court had no more jurisdiction over the case when it issued the special order granting the motion for execution pending appeal. Paragraph 1, Section 23 of the Interim Rules provides:

"In cases where appeal is taken, perfection of the appeal shall be upon the expiration of the last day to appeal by any party."

"Under this section, the mere filing of the appellant's notice of appeal does not divest the trial court of its jurisdiction over the case. The court may still take cognizance of the other party's motion for new trial under Rule 37, if he should opt to file one, or, as in the instant case, a motion for execution pending appeal, provided such motions are filed within 15 days from said party's notice of the decision. x x x." (Universal Far East Corp. v. Court of Appeals, 131 SCRA 642) [Underscoring for emphasis].

It is worthwhile to note that notice of the decision was received on July 7, 1986 and the motion for execution pending appeal was filed on July 25, 1986, or 18 days thereafter, which is evidently beyond the reglementary period for appeal. Timeliness of the resolution by the court of said motion is not the point under consideration because to require the trial court to resolve such motion within the reglementary period for appeal "would be difficult, if not impossible, to follow (Ibid). What is crucial to determine is the timeliness of the filing of the motion for execution pending appeal. In the case at bar, the appeal was perfected, not on July 21, 1986 (date of filing of notice of appeal), but on July 22, 1986 (expiration of the last day to appeal of both parties). Since the motion for execution pending appeal was filed on July 25, 1986, that is, after the appeal had already been perfected by reason of the expiration of the period to appeal, the trial court had already lost jurisdiction over the case and thus cannot validly grant the said motion anymore. Perforce, the motion should have been filed before the perfection of the appeal or within the 15-day period. Respondent, in his comment, erred in applying the maxim under Rule 41, Sec. 9 of the Rules of Court which provides that mere filing of the notice of appeal, record on appeal, and appeal bond does not perfect an appeal as it is the filing within the reglementary period plus the approval by the court of the record on appeal and appeal bond which perfect the appeal. Under the present procedure for appeal (Interim Rules), an appeal bond is no longer necessary, and the filing of a record on appeal is not required anymore except in cases of multiple appeals. What determines perfection of the appeal is the

expiration of the reglementary period for appeal. This new procedure finds application to the case now before us. The same principle was reiterated in the cases of *Montelibano v. Bacolod-Murcia Milling Co., Inc.*, 136 SCRA 294 and *Yabut v. IAC*, 142 SCRA 124.

As regards the second issue, we agree with the petitioner that there exists no sufficient and good reason for ordering immediate execution. Although ascertainment of these special reasons lies within the sound discretion of the trial judge, and the appellate court should not normally disturb such findings, intervention by the appellate court may be proper, if it be shown that there has been an abuse of discretion or that conditions have so far developed as to necessitate the interference of the reviewing court. The grounds relied upon by the trial court are the following, to wit: (a) the appeal taken by the defendant is clearly dilatory; (b) the Memorandum of Agreement had expired already and yet the defendant still wanted to hold on to the equipment of the plaintiff; and (c) plaintiff is willing and is capable of posting a bond. While it may be true that petitioner asked for several postponements, said motion were however granted by the trial judge during the proceedings. If the postponements were truly intended for delay, respondent judge should not have granted the same. Moreover, the expiration of the agreement is of no moment because in the first place, petitioner Sonida had already become the owner of the property in question. Assuming, *arguendo*, that Rutelco's fear of possible "dissipation of the property in question will lead to its loss," still what is applicable in this event is a protective order under Rule 41 Sec. 9 and not an execution pending appeal. A special order of execution pending appeal is usually not favored because it affects the rights of the parties which are yet to be ascertained on appeal. The purpose of an immediate execution is not to protect and preserve the subject matter of the litigation. Furthermore, the petitioner is correct in saying that the question as to whether an appeal is frivolous or not is not for the trial court to determine but the appellate court.

WHEREFORE and by reason of the foregoing, this petition is GRANTED, the questioned special order of execution pending appeal is SET ASIDE, and the provincial sheriff of Pangasinan is enjoined from enforcing the writ of execution.

SO ORDERED.

Padilla, Sarmiento, and Regalado, JJ., concur.
Melencio-Herrera, J., (Chairman), on leave.

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