

**DULOS REALTY & DEVELOPMENT CORPORATION, PETITIONER,
VS. HONORABLE COURT OF APPEALS (TWELFTH DIVISION),
HONOR-ABLE CICERO C. JURADO AS PRESIDING JUDGE, BRANCH
CLXII, REGIONAL TRI...**

G.R. No. 76668. January 28, 1988

Ponente: PARAS, J.

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PARAS, J.:

This is a petition for review on certiorari seeking to set aside: (1) the Resolution[*] of the 12th Division of the Court of Appeals dated October 10, 1986 in CA-G.R. SP No. 09031 entitled Dulos Realty & Development Corporation vs. Hon. Cicero C. Jurado, Judge, Regional Trial Court of Pasig, Metro Manila, Branch CLXII, and Samson Boats and Allied Industries, Inc., Et Al. and (2) Resolutions[**] dated November 12 and November 24, 1986, denying the motions for reconsideration thereof filed by petitioner, for lack of merit.

The factual background of this case as gathered from the records is as follows:

A complaint for the declaration of the existence of an easement of right of way, with preliminary mandatory injunction, and for legal redemption with preliminary prohibitory injunction with damages was filed on July 21, 1976 against Samson Boats and Allied Industries, Inc., et al. which was subsequently amended on August 11, 1976.

After all the necessary pleadings had been filed and the issues were joined, the case was calendared for pre-trial conference. Since no settlement or compromise was reached by and among the parties, the case was set for trial on the merits on February 2, 1981 where plaintiff (petitioner herein) presented its first witness Juan B. Dulos, President and General Manager of plaintiff corporation. The direct examination, however, was suspended to give way to other cases. The hearing was scheduled to continue on April 3, 1981, but the same was cancelled and reset for June 26, 1981. Juan Dulos was recalled to the witness stand. Direct testimony was conducted and defendants' counsel was given opportunity for cross-examination. This was, however, suspended upon petition of counsel for defendant. Continuance was set for August 31, 1981. On April 4, 1984, an Order was issued dismissing the case for failure of plaintiff to prosecute (Resolution, CA-G.R. SP No. 09031, Rollo, pp. 27-28; Petition, pp. 7-8).

The order of dismissal was allegedly received by plaintiff-petitioner only on November 22, 1985 and a motion for reconsideration was filed by registered mail on December 6, 1985. Said motion was denied on March 11, 1986 for having been filed ostensibly beyond the 15-day period for appeal.

On April 16, 1986 petitioner filed with this Court a petition for review on certiorari of said orders, praying that Civil Case No. 23924 be reinstated and respondent judge be directed to proceed with the trial of the same (Rollo, pp. 24-25). Said petition was, however, referred to the Court of Appeals where it was denied due course (Resolution, CA-G.R. SP No. 09031; Rollo, p. 29).

Petitioner moved for reconsideration of the motion but the same was denied in the resolution of November 12,

1986.

Hence, this petition.

By resolution dated January 27, 1987, the Second Division of this Court without giving due course to the petition required the private respondents to comment (Rollo, p. 41). On February 12, 1987, respondents Spouses Trinidad Diaz-Enriquez and Modesto Enriquez filed their comment (Rollo, pp. 42-46) to which petitioner replied on March 12, 1987 (Rollo, pp. 64-68) and a counter comment on DBP's comment was filed by petitioner on March 25, 1987 (Rollo, pp. 78-80).

Thereafter, the Court resolved to give due course to the petition and required the parties to file their respective memoranda (Rollo, p. 82). Respondents Spouses Enriquez filed their memorandum on July 11, 1987 (Rollo, pp. 96-106); respondent Development Bank of the Philip-pines on July 28, 1987 (Rollo, pp. 206-213), and petitioner filed its memorandum on June 16, 1987 (Rollo, pp. 218-225).

The only issue raised in this petition is the timeliness of the filing of the motion for reconsideration dated December 6, 1985.

Petitioner contends that it filed its motion for reconsideration of the order of Judge Cicero C. Jurado, by registered mail on December 6, 1985 or on the 14th day of the reglementary period of fifteen (15) days (Rollo, p. 10); that the rubber stamp receipt impressed on the registry receipt, as proof of date of mailing, was inverted, such that it appeared as "Dec. 6, 1985"; that the lower court erred in finding that it instead filed its motion for reconsideration on December 9, 1985, two days beyond the reglementary period because in arriving at its finding it failed to carefully scrutinize and evaluate the rubber stamp impressed on the registry receipt but it simply focused its sight on the No. "6" which as inverted was read as No. "9" without taking into account the abbreviated words of the month "Decem-ber" and the year "1985" (Rollo, p. 221); and finally that the outright denial of its motion on such basis alone without paintakingly considering the whole impressed date "December 6, 1985" was tantamount to a denial of due process (Rollo, p. 222).

Respondent spouses on the other hand contend that the lower court, in finding that the motion for reconsi-deration was filed on December 9, 1985 instead of on December 6, 1985, based its finding on the rubber stamp impressed on the upper right hand corner of said motion which reads:

"Received by: Signature illegible
Date: 12-9-85
Time: 2:00"

(Annex "U", Rollo, pp. 102 and 186). Furthermore, they contend that if petitioner did believe that it has a meritorious case, it should have presented its evidence (registry receipt and certification of the Postmaster) at the first opportunity before the trial court (Rollo, p. 103).

In brief, therefore, petitioners claim that the motion for reconsideration in question was mailed on December 6, 1985 as shown by an alleged inverted date of the proof of mailing while private respondents claim that said motion was directly filed with the lower court on December 9, 1985 as shown by the rubber stamp impressed on the right hand corner of said motion.

A perusal of the record discloses that there is no showing that at the time the lower court resolved the motion for reconsideration, the registry receipt or even the envelope that should have contained such motion, and which should bear on its face the post office stamp of mailing, was attached to the record which could have served as the lower court's basis in determining the timeliness of the filing of said motion or in reckoning the 15-day period within which to file a motion for reconsideration.

On the contrary, the issue of the inverted date on the proof of mailing was raised for the first time on appeal where petitioner to bolster its assertion, presented to the Court of Appeals a mere xerox copy of the alleged registry receipt without a certification from the postmaster as to the supposed date of mailing. Later, petitioner filed a "Supplement to Motion for Re-consideration" attaching again a mere xerox copy of the alleged certification made by the postmaster. Thus, the Court of Appeals correctly found the same unreliable without the original and official copy and the fact that it is too late in the day to present any such certification which was not presented in the lower court, nor in the petition only serves to add to its doubtful contents (Rollo, pp. 28 and 39). As held by the court in a number of decisions, issues not raised in the trial court cannot be raised for the first time on appeal. (Matienzo v. Servidad, 107 SCRA 276 [1981]; Garcia v. C.A., 102 SCRA 597 [1981]; Aguinaldo Industries Corporation v. Commissioner of Internal Revenue, 112 SCRA 136 [1982]; Soriano v. Philippine National Railways, 84 SCRA 722 [1978]).

Still further, the Court of Appeals took cognizance of the fact that for a period of nine (9) years since the filing of this case, petitioner had not yet even finished presenting its first witness. Added thereto, are two occasions when this case was ordered dismissed, likewise for failure of petitioner to appear during the scheduled hearings despite due notice but in the interest of justice and to give petitioner the chance to present its case, the orders of dismissal were reconsidered (Rollo, p. 28). In fact, the dismissal of this case on April 4, 1984 was already the third of such series of dis-missals.

Petitioners' contention that the Court of Appeals acted with grave abuse of discretion amounting to lack of jurisdiction in holding that petitioner filed its motion for reconsideration on December 9, 1987, notwithstanding the certification of the postmaster, has no basis in fact and in law.

By "grave abuse of discretion" is meant, such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of personal hostility and must be so patent and gross as to amount to an evasion of positive duty or to virtual refusal to perform the duty enjoined or to act at all in contemplation of law (G.R. No. 59880, George Arguelles Hda. Emma Arguelles v. Romeo Zang, etc. [September 11, 1987]).

It is evident that such situation does not obtain in this case. More than that, the findings of the trial court and the Court of Appeals on the exact date of receipt of the questioned motion for reconsideration are factual in nature and are not reviewable by this Court unless the case falls within any recognized exceptions to the rule (Chua Giok Ong v. Court of Appeals, 149 SCRA 115 [1987]; Manlapaz v. C.A., 147 SCRA 238-239 [1987]).

Under the circumstances, there appears to be no cogent reason to disturb the findings of both the trial court and the Court of Appeals.

PREMISES CONSIDERED, this petition is DENIED and the assailed resolutions are AFFIRMED.

SO ORDERED.

Teehankee, C.J., Narvasa, Cruz, and Gancayco, JJ., concur.

[*] Penned by Justice Jose C. Campos, Jr. concurred in by Justices Reynato Puno and Venancio D. Aldecoa, Jr.

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