

**CONSTRUCTION SERVICES OF AUSTRALIA-PHILIPPINES, INC.,
MELCHOR D. ELEGADO, ISIDRO D. CARINO AND GERRY DE VERA,
PETITIONERS, VS. AMADO P. PERALTA, RESPONDENT.**

G.R. No. 82506. May 12, 1989

Ponente: PARAS, J.

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PARAS, J.:

This is a petition for review on certiorari under Rule 45 seeking to set aside the decision of the Court of Appeals* in CA-G.R. CV No. 04844 entitled Amado P. Peralta vs. Construction Services of Australia-Philippines, Inc. and Melchor D. Elegado which affirmed in toto the decision of the Regional Trial Court, Alaminos, Pangasinan, Branch 54** in Civil Case No. A-1439 entitled “Amado P. Peralta vs. Construction Services of Australia-Philippines, Inc. et al.” for collection of a sum of money and damages with prayer for preliminary injunction.

The undisputed facts are as follows:

On August 2, 1983, private respondent Amado P. Peralta filed a complaint for collection of a sum of money and damages with prayer for preliminary injunction alleging, among others, that petitioner Construction Services of Australia-Philippines, Inc. (Consaphil for brevity) undertook the construction of the Bolinao Dendro Thermal Project in Bolinao, Pangasinan. Said Consaphil through Melchor D. Elegado, Ely Conde and Gerry Y. de Vera purchased on account, from Bolinao Construction Supply, owned and managed by private respondent, various construction materials and supplies amounting to P252,520.39. Upon completion of the project, the said account was left unsettled. Repeated demands for payment were made by private respondent upon petitioner Consaphil but to no avail. Consaphil through its Assistant Treasurer wrote private respondent confirming and assuring payment of its account. Subsequently, Consaphil paid only the sum of P50,504.08 and left the balance unpaid. Private respondent still made repeated demands for payment of the remaining account but petitioner Consaphil failed to pay the same.

Summonses were served to petitioners Consaphil, Melchor Elegado, Isidro D. Carino and Gerry de Vera but not at first, on Ely Conde who was no longer connected with petitioner corporation.

On October 4, 1983 an alias summons was served upon Ely Conde, who thereafter, filed his answer with the trial court.

On November 11, 1983, private respondent filed a motion to declare petitioners in default for failure to file their answer.

On January 12, 1984, Ely Conde filed a motion to dismiss the complaint, insofar as he was concerned, on the ground that he has resigned from petitioner corporation and that the account due to the private respondent is a corporate obligation for which Ely Conde may not be held liable as he was no longer connected with petitioner corporation.

On January 17, 1984, the trial court issued an order dismissing the complaint insofar as Ely Conde was concerned since no objection was filed by private respondent and further declaring petitioner Consaphil, Isidro D. Carino, Melchor D. Elegado, and Gerry de Vera in default and allowing private respondent to present his evidence ex-parte, on January 23, 1984, with which order the latter complied (CA decision, pp. 21-22, Rollo)

On February 9, 1984, counsel for petitioners entered its formal appearance.

On February 15, 1984, petitioners filed a motion to dismiss grounded on lack of jurisdiction over their persons, the summons not having been served upon them validly. (p. 82, Ibid.)

On February 28, 1984, the trial court issued an order stating that it could not entertain the motion to dismiss filed by petitioners for they no longer had any personality before the trial court, having been declared in default and having failed to file a motion to set aside the order of default.

Petitioners filed a motion for reconsideration of the said order but the same was likewise denied on May 9, 1984. (p. 22, Ibid.)

On July 11, 1984, the court a quo rendered a decision in favor of private respondent, the decretal portion of which reads:

“WHEREFORE, in view of all the foregoing, judgment by Default is hereby rendered in favor of plaintiff and against defendants Construction Services of Australia-Philippines, Inc. (Consaphil), Isidro D. Carino, Melchor D. Elegado and Gerry de Vera, as follows:

1. Ordering defendants Construction Services of Australia-Philippines, Inc. (Consaphil), Isidro D. Carino, Melchor D. Elegado and Gerry de Vera, jointly and severally to pay the plaintiff Amado P. Peralta the amount of P202,916.31 plus interest computed at 12% per annum from the time of demand of December 20, 1982 till it is fully paid;
2. Ordering defendants Consaphil Isidro D. Carino, Melchor D. Elegado and Gerry de Vera jointly and severally to pay plaintiff reasonable attorney's fees of P5,000.00; and
3. Ordering defendants Consaphil Isidro D. Carino, Melchor D. Elegado and Gerry de Vera to jointly and severally pay to plaintiff litigation expenses of P5,000.00 and to pay the costs.

SO ORDERED." (pp. 20-21, Ibid.)

On appeal, the Court of Appeals affirmed the trial court's decision in toto on January 20, 1988. A motion to reconsider the same was denied on March 8, 1988. (pp. 26-29, Ibid.)

Hence, the instant petition.

Private respondent filed his comment on the petition on June 8, 1988 (p. 39, Ibid.) in compliance with the resolution of April 18, 1988 (p. 38, Ibid.). Petitioners filed a reply to said comment on August 15, 1988 (p. 43, Ibid.) in compliance with the resolution of July 6, 1988 (p. 42, Ibid.). In the resolution of August 31, 1988 the Court gave due course to the petition and required both parties to submit simultaneous memoranda within thirty (30) days from notice (p. 50, Ibid.). Private respondent filed his memorandum on December 19, 1988 (p. 60, Ibid.) while petitioners filed their memorandum on January 10, 1989 (p. 77, Ibid.)

Petitioners raise the following assignments of errors:

1. The lower court erred in not entertaining the motion to dismiss the complaint alleging lack of jurisdiction of the lower court over the persons of the defendant-appellants which motion was supported by affidavits and in

requiring the defendant-appellants to lift the order of default entered against them first before the lower court entertains and rules on the motion to dismiss the complaint.

2. The lower court erred in making the finding of fact that the defendant-appellants ordered/requisitioned and received the goods described in the sales invoices of the plaintiff-appellee marked as Exhibits "A-1" up to "A-12" wherein no signature of any of the defendants or their respective representatives appear on any of the sales invoices either in agreement thereto or in receipt thereof and despite the failure of plaintiff-appellee to produce a single purchase order or an acknowledgment receipt thereof of the defendant-appellants.

3. The lower court erred in making a finding of fact that the assistant treasurer of the defendant-appellant Consaphil acknowledged and assumed payment for defendant-appellant Consaphil of the purchase and receipt of the goods described in the sales invoices marked as Exhibits "A", "A-1" to "A-12", notwithstanding the letter of the defendant-appellant's assistant treasurer was premised on defendant-appellant Consaphil's verification and express acknowledgment of the plaintiff-appellee's claim.

4. The lower court awards of litigation expenses and attorney's fees in favor of the plaintiff-appellee are not supported by fact and by law. (pp. 7-8, Ibid.)

The petition is devoid of merit and deserves scant consideration of the Court.

Petitioners were declared in default for failure to file their answer within the period provided by the Rules. Under the Rules of Court there are several remedies available to a defaulted party, namely: (a) The defendant in default may, at anytime after discovery thereof and before judgment file a motion, under oath to set aside the order of default on the ground that his failure to answer was due to fraud, accident, mistake or excusable neglect, and that he has a meritorious defense (Sec. 3, Rule 18); (b) If the judgment has already been rendered when the defendant discovered the default, but before the same has become final and executory, he may file a motion for new trial under Section 1 (a) of Rule 37; (c) If the defendant discovered the default after the judgment has become final and executory, he may file a petition for relief under Section 2, Rule 38; and (d) He may also appeal provided the decision is not yet final, from the judgment rendered against him as contrary to the evidence or to the law, even if no motion to set aside the order of default had been presented by him (*Tiburcio vs. Judge Castro* G.R. No. L-58997, May 28, 1988).

Since petitioners failed to file a motion to set aside the order of default prior to rendition of the judgment and instead they opted to file a motion to dismiss which is not the proper pleading, respondent court correctly ruled that "petitioners have lost their standing in court or considered out of court and consequently cannot appear in court" (p. 23, Rollo) and had no right to expect that said motion would be acted upon by the court. Loss of standing in court is the consequence of an order of default. Thus, a party declared in default is considered out of court and cannot appear therein, adduce evidence, and be heard and for that reason he is not entitled to notice (Rule 18, section 2). However, "loss of standing" must be understood to mean only the forfeiture of one's rights as a party litigant, contestant, or legal adversary. A party in default loses his right to present his defense, control the proceedings, and examine or cross examine witnesses. He has no right to expect that his pleadings would be acted upon by the court nor may he object to or refute evidence or motions filed against him. (*Cavili vs. Florendo*, 154 SCRA 616 [1987]).

Where summons was in fact received by the petitioners, their argument that the sheriff should have tried first to serve summons to each of them individually by personal service before resorting to substituted service of summons at petitioner corporation's office is not meritorious (*Boticano vs. Chu, Jr.*, *supra*).

Petitioners' Assistant Treasurer made representations admitting the corporation's liability and confirming a

payment schedule by which it could pay-off Consaphil's obligation to private respondent (pp. 24-25, Rollo), in response to the latter's letters of demand. Petitioners cannot now make a turn around and deny having ordered/requisitioned and received the goods the price of which it had already acknowledged to pay, and in fact the first payment in the sum of P50,504.08 was given on April 13, 1983 (p. 25, Rollo).

By petitioners' conduct, admissions and representations, they are deemed estopped to question any further the contract of sale entered into between them and from which they benefited. A party will not be allowed to make a mockery of justice by taking inconsistent positions. Doctrine of estoppel bars a party from trifling with the courts (*Depositario vs. Hervias*, 121 SCRA 756 [1983]). Through estoppel an admission or representation is rendered conclusive upon the person making it, and cannot be denied or disproved as against the person relying thereon (Article 1431, Civil Code).

The manifestly grave and evident bad faith displayed by petitioners in refusing to satisfy private respondent's plainly valid, just and demandable claim justifies the award of attorney's fees and litigation expenses under Article 2208 (5) Civil Code.

PREMISES CONSIDERED, the petition is DENIED for lack of merit, and the decision appealed from is AFFIRMED.

SO ORDERED.

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

* Penned by Justice Venancio D. Aldecoa, Jr., with the concurrence of Justices Oscar R. Victoriano and Ricardo P. Tensuan.

** Penned by Judge Ruben Ayson.

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