

**FRANCISCO N. DY, JR., SUBSTITUTED BY HIS ESTATE REP. BY
ROSARIO PEREZ-DY, ADMINISTRATRIX, PETITIONER, VS. COURT OF
APPEALS AND FERTILIZER MARKETING COMPANY OF THE
PHILIPPINES, R...**

G.R. No. 97130. June 19, 1991

Ponente: GRINO-AQUINO, J.

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GRINO-AQUINO, J.:

This is a petition for review of the Court of Appeals' decision dated December 11, 1990, which affirmed in toto the decision of the Regional Trial Court of Makati dated July 18, 1988, which ordered the petitioner to pay the private respondent the sum of P337,120.00 plus interest of 12% per annum, attorney's fees and costs.

Private respondent Fertilizer Marketing Company of the Philippines filed an action to collect from Francisco Dy, Jr. (now deceased) and the Francisco Dy, Jr. Trading Corporation the sum of P337,120 as unpaid balance on their purchase of fertilizers on credit from the private respondent.

The defendants were declared in default on August 15, 1983 for failure to answer the complaint within the reglementary period. Private respondent was thereafter allowed to present its evidence ex parte before the Branch Clerk of Court.

Subsequently, the defendants filed a motion to admit their answer, but it was denied by the court. They filed a motion for reconsideration; it was granted; the order of default was set aside; their answer was admitted; and they were allowed to present their evidence without retaking the plaintiff's evidence.

On the date set for the reception of their evidence, the defendants failed to appear despite due notice, so, judgment was rendered by the trial court against them on January 4, 1984.

On appeal to the Court of Appeals, the judgment by default was set aside and the case was remanded to the lower court for pre-trial and trial on the merits (AC-G.R. CV No. 03747, p. 46, Rollo).

At the pre-trial conference on November 12, 1987, the plaintiff and defendant Francisco Dy, Jr. appeared, but there was no appearance for the defendant trading corporation, so it was declared in default again and the plaintiff was allowed to present its evidence ex parte before the Branch Clerk of Court. However, in that same pre-trial conference the parties agreed that the evidence previously presented by the plaintiff shall remain on record for purposes of the continuation of the trial, subject to cross-examination in open court, and, that the presentation of the affidavits in question and answer form will constitute the direct testimony of the defendant's witnesses likewise subject to cross-examination of the adverse counsel.

On motion for reconsideration, the order of default against the corporation was lifted. A second motion for reconsideration was filed by the defendants on January 22, 1988 to set aside the agreement for trial by affidavits but it was denied by the court.

On the date of the hearing set on April 25, 1988, the defendants failed to appear to present their evidence despite due notice, hence, they were deemed to have waived the presentation of their evidence. The case was submitted for decision upon the plaintiff's evidence.

On July 18, 1988, the trial court rendered a decision (mentioned earlier) for the plaintiff and against the defendants. The latter appealed to the Court of Appeals (CA-G.R. CV No. 23540) alleging that the court a quo erred (1) in reinstating the nullified proceedings on August 19, 1983 before the Branch Clerk of Court; (2) in denying her procedural due process; and (3) in awarding damages against her.

During the pendency of the appeal, Francisco Dy, Jr. passed away on June 20, 1989. His wife, Rosario Perez-Dy, as judicial administratrix of his estate, prosecuted the appeal (*Azarraga vs. Cortes*, 9 Phil. 698).

On December 11, 1990, the Court of Appeals dismissed the appeal (CA-G.R. CV No. 23540) for lack of merit.

In this petition for review of that decision, the petitioner reiterates the same issues that she raised in the Court of Appeals.

With regard to the validity of the proceedings before the Branch Clerk of Court, we agree with the observations of the Court of Appeals that:

"Appellant is now estopped from questioning the retention of the proceedings held on August 19, 1983 before the Branch Clerk of Court since her husband agreed to the same during the pre-trial conference held on November 12, 1987. Agreements reached at the pre-trial conference and embodied in the pre-trial order shall control the subsequent course of the trial and should not be disturbed unless there would be manifest injustice.

"The agreement is not unjust to appellant. Aside from appellant having the right to adduce evidence on her behalf, the parties agreed that the evidence presented by appellee before the Branch Clerk of Court would be retained, with appellant having the right to cross-examine appellee's witnesses.

"xxx xxx xxx.

"The agreement of the parties as contained in the pre-trial order is not invalid. The parties are authorized by the Rules of Court to consider '[s]uch other matters as may aid in the prompt disposition of the action.' An authority believes this includes 'agreement on certain matters so that witnesses need not and will not be called.' Undoubtedly, the procedure agreed upon by the parties in this case would have greatly accelerated the trial and the decision therein, which at the time of the pre-trial conference, had been pending for three years and had already gone up on appeal to this Court." (pp. 27--28, *Rollo*.)

The presentation of the plaintiff's evidence before the Branch Clerk of Court was not void. The Supreme Court, in the case of *Continental Bank vs. Tiangco, et al.* (94 SCRA 715) departing from its contrary statement in the *Lim Tan Hu* case (66 SCRA 4251), declared that a decision based on evidence heard by a deputy clerk of court as commissioner is valid and enforceable because it was rendered by a court of competent jurisdiction, was not impaired by extrinsic fraud, nor by lack of due process, and there was no showing that the private respondents were prejudiced by such a procedure, or that the commissioner committed any mistake or abuse of discretion, or that the proceedings were vitiated by collusion and collateral fraud. That ruling applies four square to this case.

The practice of designating the clerk of court as a commissioner to receive evidence in the event of the non-appearance of the defendant and its counsel, is not irregular and is sanctioned by Rule 33 of the Rules of Court on trial by commissioner (*J.M. Tuazon, Inc. vs. Dela Rosa*, 18 SCRA 591; *Wassmer vs. Velez*, 12 SCRA 648).

The petitioner was not denied due process. As pointed out by the appellate court:

"x x x Appellant retained her right to present evidence on her behalf and the opportunity to cross-examine the witnesses already presented by appellee. At any rate, if appellant believes that her right to procedural due process had been curtailed, the same was due to a voluntary waiver by her husband." (p. 28, Rollo.)

WHEREFORE, the petition for review is denied for lack of merit. Costs against the petitioners.

SO ORDERED.

Narvasa, (Chairman), Cruz, Gancayco, and Medialdea, JJ., concur.

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