

CEBU CONTRACTORS CONSORTIUM COMPANY, PETITIONER, VS. THE COURT OF APPEALS, HON. ZOSIMO ANGELES AND MAKATI LEASING AND FINANCE CORPORATION, RESPONDENTS.

G.R. No. 98046. December 14, 1992

Ponente: GRIÑO-AQUINO, J.

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GRIÑO-AQUINO, J.:

Before us for review is the decision dated February 11, 1991 of the Court of Appeals dismissing the petition in CA-G.R. SP No. 23143 entitled, "Cebu Contractors Consortium Company, petitioner vs. Hon. Zosimo Angeles, Presiding Judge, Branch 158, Regional Trial Court, Makati, Metro Manila and Makati Leasing and Finance Corporation, respondents," where the petitioner sought to set aside the order of execution pending appeal issued by respondent Judge Angeles in Civil Case No. 5450.

On September 14, 1978, Makati Leasing and Finance Corporation (MLFC), now the BPI Leasing Corporation, filed a collection suit with replevin (Civil Case No. 5450 in the Regional Trial Court of Makati) against Cebu Contractors Consortium Company (CCCC) to recover on the said defendant's principal obligation of P1,067,861.70.

After the trial, judgment was rendered on August 7, 1989 against CCCC, the dispositive portion of which reads:

"WHEREFORE, premises considered judgment is hereby ordered in favor of the plaintiff and against the defendant.

"1) Ordering the defendant to pay plaintiff the amount of P1,067,861.70, as principal obligation after the application of the proceeds from sale of the repossessed equipments;

"2) Ordering the defendant to pay plaintiff a sum equivalent to 25% of the principal obligation as attorney's fees as stipulated in the contract;

"3) Ordering the defendant to pay plaintiff the sum of P486,422.28 as litigation and repossession expenses; and to pay the costs of the suit." (p. 22, Rollo.)

CCCC received the decision on August 15, 1989 and CCCC filed a motion for a reconsideration on August 21, 1989, which MLFC opposed, praying at the same time for the immediate execution of the judgment in its favor. On May 4, 1990, the trial court denied CCCC's motion for reconsideration.

On May 17, 1990, MLFC filed a motion for execution pending appeal on the ground of CCCC's imminent insolvency.

Despite the pendency of that motion, CCCC filed a notice of appeal on May 21, 1990.

After several exchanges of pleadings by the parties and flip-flopping orders of the trial judge, the latter on September 21, 1990 granted MLFC's motion for execution pending appeal, "on condition that MLFC posts the

necessary bond" (p. 36, Rollo).

CCCC filed an Urgent Motion to Dissolve the Writ of Execution (which MLFC opposed) wherein it sought to disprove its alleged insolvency by attaching an invoice or delivery order worth P1,400,000.00.

On the same day, however, the trial court found MLFC's P2-million bond, for the issuance of writ of execution pending appeal, posted by the FGU Insurance Corporation, to be in order, approved it, and ordered the implementation of the writ of execution by deputy sheriff Honorio Santos.

The trial court set for hearing on October 15, 1990 CCCC's Motion to Dissolve Writ of Execution Pending Appeal. During the hearing, only MLFC and its witness appeared. CCCC sent a telegram informing the court that it "was cancelling the hearing" (p. 36, Rollo) and that it would file a petition for certiorari in the Court of Appeals. The trial court denied CCCC's motion to dis-solve the writ of execution.

CCCC's petition for certiorari was docketed as CA--G.R. SP No. 23143 in the Appellate Court.

On February 11, 1991, the Court of Appeals rendered a decision dismissing the petition. It found the motion for execution pending appeal to have been filed seasonably on May 17, 1990, four days before CCCC filed its notice of appeal, hence, before the trial court lost jurisdiction over the case (*Universal Far East Corporation vs. CA*, 131 SCRA 646). The imminent insolvency of the losing party, coupled with the prevailing party's P2 million bond, which the appellate court found sufficient, justified the grant of execution pending appeal.

CCCC moved for a reconsideration of the Court of Appeals' decision, but it was denied for lack of merit. Hence, this petition for review alleging grave abuse of discretion amounting to lack of jurisdiction on the part of the appellate court, in dismissing the petition for certiorari and in affirming the issuance of the writ.

Petitioner alleges that as of May 21, 1990, when it perfected its appeal by filing of a notice of appeal, the lower court lost jurisdiction over the case; that as required by Section 11, Rule 41 of the Rules of Court, the clerk of court of the trial court should have transmitted the records of the case to the Court of Appeals within ten (10) days from the perfection of the appeal, but because the branch clerk delayed the trans-mittal, the court was able to act on the motion for execution pending appeal on September 21, 1990, or four (4) months after the perfection of the appeal; that the filing of a motion for execution pending appeal is not one of the incidents which the trial court may act upon under Section 9 of Rule 41 of the Rules of Court after an appeal has been perfected[1]; and that the respondent judge's order granting execution pending appeal constitutes a pre-judgment of the appeal itself.

We find no merit in those arguments.

The mere filing of the appellants' notice of appeal did not automatically divest the trial court of its jurisdiction over the case. Section 23 of the Interim Rules provides when an appeal may be deemed perfected:

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

"B. In cases where a record on appeal is required the appeal is perfected upon approval thereof by the court which should be done within ten (10) days.

The motion for immediate execution pending appeal was filed within the reglementary period for perfecting CCCC's appeal, i.e., before the expiration of the period for it to appeal. The filing of CCCC's notice of appeal on May 21, 1990 did not divest the court of its jurisdiction to resolve the pending motion for immediate execution of the judgment pending appeal because the court must hear and resolve it for it would become part of the records to be elevated on appeal. Since the court had jurisdiction to act on the motion at the time it was filed, that jurisdiction continued until the matter was resolved and was not lost by the subsequent action of the defendant

(Pamintuan vs. Tiglao, 53 Phil. 1; University Union of Free Workers vs. Santos, 97 Phil. 976; People vs. Pegarum, 58 Phil. 715; Asuncion vs. Aquino, 4 SCRA 917). We agree with the observation of the Court of Appeals that:

"Firstly, the records of this case show that the motion for execution pending appeal was filed by MLFC on May 17, 1990, whereas, the notice of appeal filed by CCCC was on May 21, 1990. Therefore, when the notice of appeal was filed, the motion for the issuance of writ of execution pending appeal was already pending before the court a quo. The jurisprudence on this point is to the effect that notwithstanding the appeal having been perfected, the trial court continued to have jurisdiction over pending incidents (Universal East Corporation vs. Court of Appeals, No. L-64931, 131 SCRA 646 [1984]). In the instant case, therefore, the trial court still has jurisdiction to decide the pending incident for the issuance of writ of execution pending appeal.

"Secondly, CCCC, having invoked and submitted to the jurisdiction of the court by participating in the proceedings on the motion for the issuance of a writ of execution pending appeal by filing their opposition/comment and subsequently the motion for dissolution without assailing the trial court's jurisdiction, is now estopped from assailing the same jurisdiction it earlier invoked." (pp. 23-24, Rollo.)

WHEREFORE, the petition for review is DENIED for lack of merit. Costs against the petitioner.

SO ORDERED.

Cruz, (Chairman) and Bellosillo, JJ., concur.

Padilla, J., no part.

[1] (1) to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal; (2) to approve compromises submitted by the parties; and (3) to permit the prosecution of pauper's appeal (Universal Far East Corporation vs. Court of Appeals, 131 SCRA 644).

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