

IN RE JOSE DE BORJA, APPLICANT AND APPELLANT; AND IN RE JOSE FLORES, APPLICANT AND, APPELLEE.*G.R. Nos. 43232, 43270. September 13, 1935*

Ponente: BUTTE, J.

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These two appeals involve a review of the orders of the Public Service Commission pertaining to two certificates of public convenience and necessity to maintain and operate an ice plant in Pasig, issued to the appellant and appellee respectively.

On February 16, 1929, Jose de Borja filed his original petition with the Public Service Commission which was amended on May 3, 1929. He prayed for a certificate to operate an ice plant with a capacity of two tons daily in the municipality of Pasig, Rizal. Opposition to the granting of this petition was filed by San Miguel Brewery. On the date set for hearing of the petition, April 6, 1931, the applicant failed to appear and the commission dismissed the application. A motion for reconsideration was filed and the commission again set the application for hearing on August 4, 1931. The application then lay dormant in the office of the commission for two years. It was reset for hearing on August 31, 1933.

In the meantime, under date of June 21, 1933, Jose Flores, the appellee, filed a petition for a certificate of public necessity and convenience to install and operate an ice plant in Pasig of five tons capacity daily. The commission heard these two applications jointly on August 31, 1933, and rendered its decision on November 17, 1933. In its decision it is recited that in the judgment of the commission only one ice plant should be allowed to operate in Pasig and it is stated the applicant Jose Flores testified that he was willing to establish and operate an ice plant in Pasig in case the other applicant, Jose de Borja, failed to finish construction and commence operation within the period fixed by the commission. The commission granted the certificate to Jose de Borja subject to certain conditions, among them, that the applicant within thirty days shall commence the work contemplated by the certificate and within four months shall complete the installation and start the operation of his ice plant and that failure to comply with any of these conditions "shall be sufficient cause for declaring the certificate herein granted null and void and the issuance of a certificate of public convenience to the applicant Jose Flores."

On November 14, 1934, Jose Flores filed a petition with the commission alleging¹ that the other applicant, Jose de Borja, had done nothing to comply with the conditions of his certificate; that he has no ice plant in operation notwithstanding that almost a year has elapsed since the time the decision granting the certificate and that too in spite of the warning of the commission of July 30, 1934, calling the attention of Jose de Borja to the conditions of his certificate granted November 17, 1933. Flores further alleged in his petition that the public convenience of the people of Pasig requires the prompt installation of an ice plant and prays that the commission give effect to its decision of November 17, 1933, declaring De Borja's certificate forfeited and granting a certificate to Flores.

Under date of November 14, 1934, the commission directed its engineer to proceed to Pasig and make an investigation and report as to whether De Borja had complied with the terms and conditions of the decision of the

commission of November 17, 1933. On December 1, 1934, the engineer reported in substance that including extensions of time that have been granted to De Borja by the commission, the period for the installation and operation of his ice plant expired on April 27, 1934. The concluding paragraphs of the engineer's report are as follows:

"On November 20, 1934, I inspected the site where I was informed Jose de Borja proposes to install his ice plant in the barrio of Bambang, Pasig. In this barrio, Jose de Borja has a camarin used as a stable for animals. The dirt flooring of the camarin' was very dirty with animal manure.

"Dumped in the camarin was a Deutz 10 horsepower engine and a very old compressor. These were not installed and nothing has been done to show that they would be installed. Many essential parts of an ice plant machinery were lacking, the most important of which are the condenser, pump, cooling coils, and the accessories of the engine.

"Jose de Borja has therefore failed to comply with condition 3 of the decision of this commission of November 17, 1933 as modified by the resolution of December 16, 1933 which requires him to complete the installation and start the operation of his ice plant not later than April 27, 1934. In view of such failure and in accordance with condition 4 of the above mentioned decision, I recommend that the certificate of public convenience granted Jose de Borja in case No. 18740 be cancelled and a certificate of public convenience be issued to Jose Flores in case No. 36564 for the installation, maintenance and operation of an ice plant in Pasig and the sale of its produce in said municipality and in Taguig, Rosario, Pateros, Mandaluyong, Guadalupe, San Pedro Makati and San Juan del Monte, all in the Province of Rizal."

Under date of December 7, 1934, the commission entered an order cancelling the certificate of De Borja and granting a certificate to Flores. Copy of this decision was served on De Borja who filed a petition for reconsideration under date of January 7, 1935, which the commission set for hearing on January 26, 1935. At the hearing held on January 26, 1935, De Borja admitted in effect that the findings of the engineer were correct and that his certificate was subject to cancellation in accordance with its terms for breach of the conditions thereof. De Borja explained that the delay in installing the plant was due to typhoons but the commission rejected this explanation as being unsatisfactory and untrue. The commission accordingly reaffirmed its decision of December 7, 1934, under date of February 16, 1935.

The petition of reconsideration filed by De Borja on January 8, 1935, objected to the order of December 7, 1934, cancelling his certificate on the ground that he had not been granted a hearing on the merits. The petition proceeds then to an extended statement of the steps he had taken to install the ice plant and the difficulties he had encountered which caused the delays in the installation of the plant. A reply to the motion for reconsideration was filed by Flores. As stated, the case was practically reopened and heard by the commission on January 26, 1935, two parties appearing. At this hearing counsel for De Borja asked for a further extension of sixty days "para poder comenzar la instalaci6n de la planta y ponerla en operation." Counsel also stated: "Aceptamos que son ciertos los hechos mencionados en el report del Inspector Talavera pero sostene mos que la Comisi6n por razones de equidad y de justicia debe darnos otra oportunidad para poder instalar la planta puesto que el Sr. De Borja ya ha adquirido las maquinarias y esta dispuesto a operar la planta dentro de sesenta dias." (T. s. n. 18, 19.)

The appellant's first assignment of error is to the effect that the cancellation of Jose de Borja's certificate was made without due process of law and he calls attention to section 15 (i) of the Public Service Law (Act No. 3108) as amended which reads as follows:

"* * * no certificate of public convenience issued in accordance with law shall be suspended, revoked or cancelled without giving the interested party an opportunity to be heard directly by the Public Service Commission."

Although the commission entered its order of December 7, 1934, without notice or hearing, the defect, if any there was, was cured by the hearing held on January 26, 1935, on De Borja's motion for reconsideration. It is plain, moreover, that the defect was waived when the applicant petitioned for another extension of sixty days in which to install his ice plant. He did not stand upon the technical objection which he now presents on this appeal but submitted a new petition to the commission which went to the merits of the case. In view of the hearing held on January 26, 1935, it cannot be said that De Borja's certificate was cancelled without giving the interested party an opportunity to be heard. There was a substantial compliance with the requirement of section 15 (i) of Act No. 3108 as amended by Act No. 3884, supra. (Cf. Section 24, paragraph [;].)

The record shows that on February 8, 1934, the commission entered the following order:

"Considering the petition filed by the herein applicant for another extension of time within which to begin the installation of his ice plant authorized in this case, and it appearing that the Exhibit X mentioned therein is merely an offer for the purchase of the necessary machineries, and not a contract for the purchase of the said machineries, the commission is of the opinion that the said petition is not well founded and therefore resolves to deny the same.' Copy of which was received by Jose de Borja on February 21, 1934. He filed a motion for reconsideration on February 26, 1934, which was denied by the commission on July 30, 1934. It is charged on page 19 of the appellant's brief as follows:

"Como se comprobaba Jose de Borja no fue el que origin6 con su indiferencia y dejadez el retardo de la construccion de su planta de hielo, sino, la misma Comision que dej6 pasar tanto tiempo sin tomar accion sobre esta mocion de reconsideracion."

The appellant may be convinced by this ingenious shifting of the responsibility for his failure to comply with the conditions of his certificate of public convenience and necessity on the commission, but he seems to ignore the mandatory obligation of paragraph 3 of his certificate that "he shall complete the installation and start the operation of his plant" within four months after he received notice of the granting of the certificate of November 17, 1933. When the commission, on February 8, 1934, denied his petition for an extension of time, it was his duty to act and not sit idly by. It does not appear that he did anything after February 8, 1934, to get his plant in prompt operation.

Finding no merit in either of the assignments of error of the appellant and that there is no basis for holding "that it clearly appears that there was no evidence before the commission to support reasonably such orders" (section 35 of Act No. 3108), the orders under review are affirmed with costs against the appellant.

Malcolm, Villa-Real, Imperial, and Goddard, JJ., concur.

Orders affirmed.

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