34 Phil. 526

[G.R. No. 10493. March 29, 1916]

FREDERICK L. COHEN AND MARCUS COHEN, PLAINTIFFS AND APPELLEES, VS. THE BENGUET COMMERCIAL CO. (LTD.), DEFENDANT AND APPELLANT.

D E C I S I O N

MORELAND, J.:

It appears in this case that an action was brought by a foreign commercial partnership located and doing business in the city of London, England, known as "Harris, Cohen & Sons." This company was not registered under the Corporation Law and has no office in the Philippine Islands in or through which its business is transacted. The defendant is a domestic corporation located and doing business in Baguio, Province of Benguet, with its main, and, indeed, its only office located at that place.

The action was one for the recovery of damages for breach of contract for the sale of merchandise. Two summons were served on the defendant. In both the venue was laid in the city of Manila. The first was served on the president of the defendant company in the city of Baguio. Immediately upon such service counsel for the defendant appeared specially and objected to the jurisdiction of the court over the person of the defendant and the subject-matter of the action on the ground that the venue had been improperly laid by plaintiff as the trial, under the provisions of the Code of Civil Procedure, must take place in the province where either the plaintiff or the defendant resided or was found at the time the summons was served (sec. 377). The prayer of the motion was "that the above entitled cause be dismissed." The motion was denied by the court on the ground that the motion, especially the prayer, constituted a voluntary general appearance in the action, and that such an appearance was a waiver of the objection to the venue.

The second summons was served on the defendant by delivering it to the president thereof in the city of Manila. It appears by this service to have been the intention of the plaintiff to abandon the previous service and to begin a new action. Upon being served with the second

summons the defendant again appeared and made the following motion:

> "Now come the undersigned attorneys appearing specially in behalf of the defendant in the above entitled case for the sole purpose of objecting to the venue of the action, and respectfully show the court:
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> "That defendant prefers to defend this action in the jurisdiction of its legal domicile in the subprovince of Benguet; that the attempted service of summons herein upon H. P. Whitmarsh in the city of Manila on the 11th day of June, 1913, was ineffective to confer jurisdiction upon this court, for the reason that neither the plaintiffs nor the defendant reside in the city of Manila and that defendant has not been found therein; all of which will more fully appear from the stipulation hereto attached and from the complaint herein.
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> "Wherefore defendant prays that the court declare the aforesaid attempted service of June 11,1913, as well as the service heretofore attempted to be made in the subprovince of Benguet, ineffective and void."

The stipulation referred to is as follows:

> "*Stipulation*.—Plaintiffs and defendant in the above entitled cause, for the sole purpose of defendant's objection to the venue therein stipulate and agree:
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>> "I. That the facts herein set out, except as otherwise specified, have continued from the time, of the filing of the complaint in the above entitled case to the present.
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>> "II. That the Benguet Commercial Company (Limited), defendant herein, is a corporation organized under the laws of the Philippine Islands, and that its principal place of business, in accordance with its articles of incorporation, and in fact, is in the city of Baguio, in the subprovince of Benguet; that a summons, with a copy of complaint attached, in the above entitled cause, was delivered by a deputy sheriff of the city of Manila, on the 11th day of June 1913, in the city of Manila, to H. P. Whitmarsh; that the said H. P. Whitmarsh is the

> president of the defendant corporation; that the defendant corporation is engaged in manufacturing and in selling goods, wares, and merchandise in the sub-province of Benguet, and has no business in the city of Manila except only its relation with wholesale dealers, bankers, transportation companies, and the like, such as are usual and customary with provincial mercantile houses; that defendant has no agency nor resident representative in the city of Manila; that the said H. P. Whitmarsh is a resident of the city of Baguio, and at the time of the aforesaid attempted service was casually in Manila, for a period of not more than a week, without intention of remaining, and without maintaining, while in Manila, any office or place of business.
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> "III. It is further agreed that this stipulation as to defendant is not to be taken as equivalent to a general appearance, but is intended solely to take the place of affidavits or other showing of fact in support of defendant's pending objection to the venue."

The court, in considering this motion, treated it "as a motion to dismiss" saying that "unless this is to be treated as a motion to dismiss, it seems to raise nothing more than a mooted question. Courts do not declare a service void or valid, except in granting some actual relief to which the parties are entitled. We might in a proper case decline to exercise any jurisdiction over defendant, or the grounds for the motion, if well taken, might justify a transfer of the cause ('change of the venue') to the Province of Benguet (tho clearly that is not the purpose of the motion), but merely to declare the service void is at least unusual. On the other hand, if it is to be treated as a motion to dismiss, it still seems premature, for the reasons recited in our last order." The foundation of the first order clearly was, as we have already observed, that the motion made by counsel constituted a voluntary general appearance. Continuing the court said, speaking of the second motion:

> "We might therefore dispose of the motion by overruling it on the ground that it seeks no relief proper at this time, but as the stipulation presents a question which must be met in the course of this litigation, we have no objection to expressing our opinion thereon."

We are of the opinion that the learned trial court misapprehended the nature of the question to be decided. There appears to have been a confusion in the mind of the court between the place of trial (sec. 377) and the place where the summons may be served (sees. 394, 396.) The court said:

> "Defendant's counsel observes that 'service is not the test of venue.' But it is clearly a means by which venue is fixed, for by Code of Civil Procedure sec. 377 (second sentence) the venue is properly laid in any province where the defendant may 'be found.' "

The court then proceeds to discuss the question where service must be made within the provision of section 396 and following section of the Code of Civil Procedure and concludes:

> "We can reach no other conclusion than that a service upon the proper corporate official in another county or province of the same state or territory as that in which the corporation's principal place of business is located, falls clearly within the second sentence of Code of Civil Procedure sec. 377, and that for the purposes of service, the corporation is 'found' in such province or county."

The court terminated its opinion denying the motion as follows:

> "We must therefore find that this court's jurisdiction of defendant's person (and hence of the venue of the cause) has been perfected.
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> > "(1) By defendant's general appearance in the form of a motion to dismiss on May 22,1913.
> >
> > "(2) By service upon defendant's principal officer within the territorial jurisdiction of this court.
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> "Either of the acts was, in our judgment, sufficient and the pending motion is accordingly overruled."

Let us take up the various grounds on which the decision of the trial court denying the motion is founded. The first is "the general appearance in the form of a motion to dismiss on May 22, 1913." Reviewing this ground we should observe, in the first place, that the service of the summons and complaint on which the motion of the 22d of May, 1913, was based was abandoned and disregarded completely by plaintiff. Nothing was ever done thereafter based on that service and, so far as we can see, it produces no effect on this case. It was followed on the 11th of June, as we have already observed, by another service on the defendant corporation in the city of Manila. If it had not been the intention to abandon the first service there would have been no necessity for the second. Moreover, the motion to dismiss the action commenced by that service on the ground of improper venue was overruled and nothing further was done with that action by the defendant. It would seem that, if the parties had considered that the first service was still effective, the defendant would have noted his exception to the denial of the first motion and would have taken his appeal therefrom as well as from the order denying the second motion. On the contrary, the parties appear to have disregarded the proceedings up to the service of the second summons making that the real beginning of the action. Just why the second service was made we do not know unless counsel believed, as the trial court subsequently held, that the place of trial depends on the place of service of summons; that venue and place of service are, somehow or other, bound together; and that, if counsel for plaintiff desired to have the trial take place in the city of Manila, service of summons must be made in the city of Manila. We are forced to conclude from these facts and circumstances that everything connected with the action up to the service of the second summons was disregarded by the parties and did not and does not form the basis of any subsequent proceedings in the action. Everything dates from the second service. We find, therefore, that the court was in error in basing its denial of the motion in the second action, as it does in part, on proceedings which occurred in the action which all parties have abandoned.

It would appear, in the second place, that, even if the proceedings prior to the second service were not abandoned, the motion of the 22d of May, 1913, was not a voluntary general appearance. In that motion counsel said:

> "Now come the undersigned attorneys appearing specially in behalf of the defendant in the above entitled case for the *sole* purpose of objecting to the venue of the action."

This limited the character of the appearance in that motion unless, by some subsequent act, the defendant waived the limitation or exceeded it by acts which constitute a general appearance. The mere fact that the prayer of the motion was for a dismissal of the action is not sufficient to constitute such waiver, or even a general appearance, having in mind the limitation stated in the body of the motion. A prayer in a motion, like a prayer in a complaint, is not conclusive as to the character of the motion. Indeed, under the Code of Civil Procedure dismissal of the action is one of the remedies for an improper venue. Improper venue is a ground of demurrer and it may be made the basis of a plea in abatement; and, as the ordinary effect of sustaining a demurrer is to dismiss the complaint, if it is not amended, and, as the result of a plea in abatement is to terminate the action, it necessarily follows that the remedy prayed for was one of the remedies to which defendant was entitled if its motion was proper.

Section 377 provides that the defendant may enter a general appearance in the action without waiving his rights, even where the venue is improperly laid, provided he, at the same time, files an objection to the venue. The distinction between a general and special appearance does not seem to have been preserved, at least in words, by the Code of Civil Procedure, it appearing to have been the purpose of the legislature, in enacting section 377, to require the courts to look at the intent and purpose of the appearing party and to deal with him accordingly, leaving out of account all technicalities which would deprive him of that which he really desired to secure by his appearance. Furthermore, there does not seem to be any provision in the Code of Civil Procedure with respect to change of venue in cases like the present, the remedy appearing to be a dismissal of the action on the ground that the jurisdiction, if any, which the court obtained over the person of the defendant by the service of the summons within the jurisdiction of the court, is divested by objection in conformity with the provisions of section 377.

As to the second ground on which the court bases its order, namely, that the court obtained jurisdiction over the person of the defendant "by service upon defendant's principal-officer within the territorial jurisdiction of this court," we might say that this continues the confusion between the place of service and the place of trial. The place of service has no connection whatever with the place of trial. The primary process of the Court of First Instance, that is, the summons, may be served on the defendant anywhere within the Philippine Islands; but the court issuing the process cannot, for that reason alone, try the defendant or his case in any province of the Philippine Islands. Where a case is triable is determined by section 377, which has nothing to do with the place of service (sec. 394). Nor does the fact that the trial court has acquired jurisdiction 'of the person of the

defendant conclude the matter of venue and prevent the defendant from entering the objection mentioned in section 377. Obtaining jurisdiction over the person does not, under all circumstances, confer the right to try. This is clearly deducible from the provisions of section 377 which authorize the defendant, under the circumstances therein named, to make objection to the place of trial. If the act of obtaining jurisdiction of the person of the defendant deprives him of his right to divest that jurisdiction in a proper case and to prevent the court acquiring such jurisdiction from trying his case, then the provisions of section 377 with respect to venue are of little value to a defendant.

Section 377 provides that actions of this character "may be brought in any province where the defendant or any necessary party defendant may reside or be found, or in any province where the plaintiff or one of the plaintiffs resides, at the election of the plaintiff." The plaintiff in this action has no residence in the Philippine Islands. Only one of the parties to the action resides here. There can be, therefore, no election by plaintiff as to the place of trial. It must be in the province where the defendant resides. The defendant resides, in the eye of the law, in Baguio. Was it "found" in the city of Manila under section 377, its president being in that city where the service of summons was made? We think not. The word "found" as used in section 377 has a different meaning than belongs to it as used in section 394, which refers exclusively to the place where the summons may be served. As we have said a summons may be legally served on a defendant wherever he may be "found," i. e., wherever he may be, provided he be in the Philippine Islands; but the venue cannot be laid wherever the defendant may be "found." There is an element entering in section 377 which is not present in section 394,—that is *residence*. Residence of the plaintiff or defendant does not affect the place where a summons may be served; but residence is the vital thing when we deal with venue. The venue must be laid in the province where one of the parties resides. If the plaintiff is a nonresident the venue must be laid in the province of the defendant's residence. The venue can be laid in the province where defendant is "found" only when defendant has no residence in the Philippine Islands. A defendant can not have a residence in one province and be "found" in another. As long as he has a residence in the Philippine Islands he can be "found," for the purposes of section 377, *only* in the province of his residence. In such case the words "residence" and "found" are synonymous. If he is a nonresident then the venue may be laid in the province where he is "found" at the time the action is commenced or in the province of plaintiff's residence. This applies also to a domestic corporation.

While the service of the summons was good in either Baguio or Manila we are of the opinion that the objection of the defendant to the place of trial was proper in both cases and that the

trial court should have held that the venue was improperly laid.

The case having been fully tried there results, practically speaking, no difference whether an order be entered changing the place of trial or whether the action be dismissed without prejudice to the commencement of another action in which the venue is properly laid. Inasmuch as, under section 147 of the Code of Civil Procedure, it will not be necessary to retake the evidence already taken, the dismissal of the action will not, comparatively speaking, seriously prejudice the plaintiff in view of the fact that, on a change of venue, it would be necessary to submit the case in one way or another to the Court of First Instance of the province to which the action would be sent.

The judgment appealed from is reversed and the case remanded to the Court of First Instance with instruction to dismiss the action without prejudice to the commencement of another action in which the venue will be laid in the proper province. So ordered.

Torres, Trent, and *Araullo, JJ.,* concur.

ON MOTION FOR REHEARING

October 28, 1916.

MORELAND, J.:

This is a motion for a rehearing based upon the ground that the judgment of this court with reference to which the motion is made is erroneous in that it holds that, in a transitory action the defendant in which is a resident of the Philippine Islands and the plaintiff a resident of a foreign country, the venue must be laid in the province where the defendant resides and not in the province where he *may* be found. The contention is that, by such holding, the word “found” is given no significance or effect and is practically eliminated from the statute.

Section 377 of the Code of Civil Procedure provides with respect to transitory actions that

they “may be brought in any province where the defendant * * * may reside or be found, or in any province where the plaintiff * * * resides, at the election of the plaintiff.”

This action was brought by a foreign partnership against a corporation organized under the laws of the Philippine Islands having its only office and place of business in Baguio, province of Benguet. The venue was laid in the city of Manila. Objection to the place of trial was duly made by the defendant, was overruled and the case was tried in the city of Manila. On appeal to this court based on the ground, among others, that the court erred in requiring defendant to go to trial in the city of Manila, we held that the objection to the venue was well taken and should have been sustained; and vacated the judgment of the trial court and dismissed the cause without prejudice to the bringing of a new action in which the venue should be properly laid.

The moving party contends that the venue was properly laid under section 377 in that it was laid in the province where the defendant was found at the time summons was served on its president, he having been found and served with process in the city of Manila. For the purposes of the discussion we assumed in the main case, as the plaintiff claimed, that the defendant was in fact and in law found in the city of Manila; and proceeded to decide the cause upon the theory that, even if the defendant were found In the city of Manila, that did not justify, under the facts of the case, the laying of the venue in the city of Manila.

We do not believe that the moving party’s objection that our construction deprives the word ”found” of all significance and results, in effect, in eliminating it from the statute, is sound. We do not deprive it of all significance and effect and do not eliminate it from the statute. We give it the only effect which can be given it and still accord with the other provisions of (he section which give defendant the right to have the venue laid in the province of his residence, the effect which it was intended by the legislature they should have. We held that the word “found” was applicable in certain cases, and in such cases gave it full significance and effect. We declared that it was applicable and effective in cases where the defendant is a nonresident. In such cases the venue may be laid wherever he may be found in the Philippine Islands at the time of the service of the process; but we also held that where he is a resident of the Philippine Islands the word “found” has no application and the venue must be laid in the province where he resides.

The construction which the moving party asks us to place on that provision of section 377 above quoted would result in the destruction of the privilege conferred by the section upon a resident defendant which requires the venue to be laid in the province where he resides.

This is clear; for, if the venue may be laid in any province where the defendant, although a resident of some other province, may be found at the time process is served on him, then the provision that it shall be laid in the province where he resides is of no value to him. If a defendant residing in the province of Rizal is helpless when the venue is laid in the province of Mindoro in an action in which the plaintiff is a nonresident or resides in Manila, what is the value of a residence in Rizal? If a defendant residing in Jolo is without remedy when a nonresident plaintiff or a plaintiff residing in Jolo lays the venue in Bontoc because the defendant happens to be found there, of what significance is a residence in Jolo? The phrases "where the defendant * * * may reside" and "or be found" must be construed together and in such manner that both may be given effect. The construction asked for by the moving party would deprive the phrase "where the defendant * * * may reside" of all significance, as the plaintiff could always elect to lay the venue in the province where the defendant was "found" and not where he resided; whereas the construction which we place upon these phrases permits both to have effect. We declare that, when the defendant is a resident of the Philippine Islands, the venue must be laid either in the province where the plaintiff resides or in the province where the defendant resides, and in no other province. Where, however, the defendant is a nonresident the venue may be laid wherever defendant may be found in the Philippine Islands. This construction gives both phrases their proper and legitimate effect without doing violence to the spirit which informs all laws relating to venue and which insists always that the action shall be tried in the place where the greatest convenience of the parties will be served. Ordinarily a defendant's witnesses are found where the defendant resides; and plaintiff's witnesses are generally found where he resides or where the defendant resides. It is, therefore, generally desirable to have the action tried where one of the parties resides. Where the plaintiff is a nonresident and the contract upon which suit is brought was made in the Philippine Islands it may safely be asserted that the convenience of the defendant would be best served by a trial in the province where he resides.

The remaining contention of the moving party to the effect that the defendant not having stood upon his objection to the venue but having come in and defended, ought not to be permitted at this time to raise the question of venue, is, we think, equally without merit. Having made his objection as required by law, and that objection having been overruled and an exception taken, the defendant waB free to proceed as he pleased. He could defend or not. The fact that one right had been denied him furnished no reason why another should be taken away from him. Having protected his rights with respect to the venue in every way possible to him, there is no reason why he should not go on and protect his other rights as

best he could. The court having ordered him to trial over his objection we know of no principle by virtue of which he can be prejudiced by complying with that order.

The motion for a rehearing is denied. So ordered.

Torres, Carson, Trent, and *Araullo, JJ.,* concur.

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