

7 Phil. 323

[G.R. No. 2913. January 11, 1907]

CANDIDO FLORES, PLAINTIFF AND APPELLEE, VS. EDUARDA FLORES AND SANTIAGO ROJAS, DEFENDANTS AND APPELLANTS.

D E C I S I O N

JOHNSON, J.:

This was an action brought by the plaintiff in the Court of First Instance of the city of Manila against the defendants to recover a certain horse or its value, estimated to be 200 pesos, conant. The complaint was filed upon the 13th day of September, 1904. On the 11th day of October, 1904, Eduarda Flores filed a demurrer to said complaint based upon the following grounds:

First. That the defendant lacks the personality to be sued;

Second. That the complaint does not contain facts sufficient to constitute an action; and

Third. That the complaint is vague.

On the 9th day of November, 1904, the defendant Santiago Rojas filed his separate answer alleging:

First. That for more than two years he and his wife Eduarda Flores have lived separately; and

Second. That the horse in question was in the possession of his wife who had obtained the same from the plaintiff upon the 23d of April, 1904.

On the 20th day of December, 1904, the defendant, Eduarda Flores, presented her answer as follows:

First. She denied all of the facts stated in the complaint;

Second. As a special defense she alleged that the horse in question belonged to her and that she acquired it by purchase from its former owner, one Rufino Hizon.

The issue thus presented to the court was tried by said court upon the 28th day of July, 1905. After hearing the evidence in said cause, the lower court found that the horse in question was in the possession of the defendant, Eduarda Flores, and was the property of the said plaintiff, Candido Flores; that the value of the horse was 200 pesos, conant, and rendered a judgment against the defendant, Eduarda Flores, and in favor of the plaintiff Candido Flores, for the sum of 200 pesos, together with interest thereon, amounting to 17 pesos, and the costs of the suit. From this judgment, the defendant appealed to this court, and assigned the following errors:

First. That the court erred in denying the demurrer interposed by the defendant Eduarda Flores;

Second. That the inferior court erred in rendering a judgment condemning Eduarda Flores to return the said horse without having heard the proof of the said defendant;

Third. The court erred in denying the motion for a new trial and in denying the defendant Eduarda Flores a right to present her proof;

Fourth. The court erred in denying a motion for a new trial.

The record fails to disclose that the lower court ever passed upon the demurrer filed by the defendant Eduarda Flores. The answer of the defendant dated the 20th of December, 1904, had the effect of withdrawing said demurrer. When one of the parties to an action files a demurrer and then subsequently answers the same matter before the demurrer is passed upon by the court, the answer has the effect of withdrawing the demurrer. (*Magatinge vs. La Electricista*, 2 Phil. Rep., 182.)

With reference to the second assignment of error the record discloses that the said cause was set down for trial on the 28th day of July and that all the parties to the said action had notice of this fact. The defendant, Eduarda Flores, did not appear on the said 28th day of July, for the reason, as she states, that she believed that said cause was set down for the 29th day of July and not the 28th. The failure of the defendant to be present at the time of the trial on the said 28th day of July, she having been given notice of said trial, must have been due to her negligence.

The record discloses no error committed by the lower court sufficient to justify this court in modifying its decision. The judgment of the lower court is therefore affirmed with interest at the rate of 6 per cent from the 2d day of August, 1905, and costs. After the expiration of twenty days let judgment be entered accordingly, and ten days thereafter the case be returned to the court from whence it came for proper action. So ordered.

Arellano, C. J., Torres, Mapa, Carson, Willard, and Tracey, JJ., concur.

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