1 Phil. 334

[G.R. No. 1005. August 26, 1902]

JOSE V. L. GONZAGA, PETITIONER, VS. W. F. NORRIS, JUDGE OF THE COURT OF FIRST INSTANCE OF NEGROS, RESPONDENT.

D E C I S I O N

LADD, J.:

The petition sets forth, in substance, that at the trial of the main action in the court below certain material evidence offered by the petitioner was excluded; that he excepted to the exclusion thereof and duly tendered a bill of exceptions to the judge; that the judge refused to sign such bill of exceptions or to restate the facts and exceptions embraced therein, but directed the opposing counsel to prepare a bill; and that without notice to the petitioner the judge signed and certified the bill so prepared, which was thereupon transmitted to this court as the bill of exceptions of the petitioner. The prayer of the petition is that the printing of this bill of exceptions be suspended and that a mandamus issue to the judge directing him to transmit to this court the entire record, together with the bill tendered by the petitioner, and for such relief as may be deemed equitable.

Construing the petition liberally, as we are bound to do (Code of Civil Procedure, sec. 2), we think it is evident that the object is to obtain relief against the action of the judge in refusing to sign the petitioner's bill of exceptions, under the provisions of section 499 of the Code of Civil Procedure. This section provides that where "from any cause the bill of exceptions is not certified by the judge of the court below, without fault of the party tendering the bill of exceptions," a mandamus may issue from this court upon petition "requiring him forthwith to make return of his reasons for not certifying the bill of exceptions" and for a hearing upon the judge's return, at which other testimony than the return may, in the discretion of the court, be received "in determining the validity of the reasons given by the judge for his failure or refusal to sign the bill of exceptions." If the reasons given in the return are insufficient or no return is made, an absolute mandamus is to issue commanding the judge

to sign and certify "the bill of exceptions as set forth in the petition or as modified by the Supreme Court"

We think the remedy provided in this section applies not only to cases where the judge has declined to take action on the bill of exceptions tendered by the party or has refused to certify,such bill without substituting another in its place, but also to cases where he has certified a bill of exceptions but has refused to embody therein some or all of the exceptions embraced in the bill tendered him, and which the party claims to have been properly taken. The language of the Code does not expressly limit the remedy to cases where no bill of exceptions has been signed, but on the contrary it is to be available whenever "from any cause the bill of exceptions is not certified * * * without fault of the party tendering the bill of exceptions," the implication clearly being that it may be invoked whenever the specific bill of exceptions tendered by the party is improperly disallowed, either as a whole or in any material part.

Some inconvenience may result .from permitting parties to establish the truth of exceptions in this court, but a like procedure prevails under statutes more or less similar to the provisions in question in several of the United States (3 Enc. of PI. and Pr.j 493), and the framers of the Code may well have considered that it was necessary or expedient to grant such relief to parties who should claim that they had been deprived of their right to bring their cases to this court for decision by erroneous or arbitrary and unauthorized action on the part of the trial judge.

It is difficult to see why any distinction should be made between a case in which no bill of exceptions whatever has been certified and one in which the bill of exceptions certified does not conform to the truth of the facts. A trial judge may as effectually destroy a party's right to have an adverse judgment reviewed in the appellate court by refusing to embody in the bill of exceptions as signed a single exception of vital importance to the party's case, as by refusing to sign any bill of exceptions whatever.

The petition is denied as respects the suspension of the printing of the bill of exceptions transmitted to this court, the printing being already so nearly completed as to render such suspension impracticable. Upon the filing by the petitioner of a copy of the bill of exceptions presented to the judge a mandamus will issue to the latter directing him forthwith to make return of his reasons for not certifying the same. So ordered.

Arellano, C. J., Torres, and *Willard, JJ.,* concur.

Mapa, J., did not sit in this case.

DISSENTING

COOPER, J.:

This is an application to this court for a writ of mandamus against W. F. Norris, judge of the Court of First Instance of Negros, to compel him to certify a bill of exceptions prepared by petitioner and presented to the said judge for approval in the case of D. Jose V. L. Gonzaga vs. Dona Carmen F. de Canete. It is alleged in the petition that on the 15th day of May, 1902, a judgment was rendered by the Court of First Instance against the petitioner in said suit; that petitioner, through his attorney, within the time prescribed by law, prepared and presented a bill of exceptions for appeal which the judge of the Court of First Instance refused to approve and sign, and required him to amend the same; that another bill of exceptions was presented which was examined by the judge and also disapproved; that the judge thereupon directed the opposite party to prepare and present a bill of exceptions in case; that this bill of exceptions was approved, signed, and ordered filed in the case without notice to petitioner, and that the case has been appealed to this court on this bill of exceptions, the contents of which are to him unknown. He attaches a copy of the bill of exceptions prepared by him to his petition and asks that the judge below be compelled by writ of mandamus to send up the judgment of the court below with his bill of exceptions; that the printing of the bill of exceptions signed and approved by the judge of the Court of First Instance, and certified to this court, be suspended, and that a mandamus issue to the judge directing him to transmit to this court the entire record together with the bill tendered by the petitioner.

Our statute regulating the perfecting of bills of exceptions provides that "the excepting party shall cause to be presented to the judge a brief statement of the facts of the case sufficient to show the bearing of the rulings, orders, or judgments excepted to, and a specific statement of each ruling, order, or judgment that has been excepted to, for allowance by the judge. The judge shall thereupon, after reasonable notice to both parties and within five days from the presentation of the bill of exceptions to him, restate the facts if need be, and the exceptions, so that the questions of law therein involved, and their relevancy shall all be made clear, and when the bill of exceptions has been perfected and allowed by the judge, he shall certify that it has been so allowed, and the same shall be filed

and thereupon be transferred to the Supreme Court for determination of the questions of law involved." (Sec. 143, Code of Civil Procedure, 1901.)

While by statute a bill of exceptions drafted and tendered on behalf of the party appealing should be taken by the trial judge as a basis of the authenticated bill, still, where the bill is found by the judge in his opinion not correct, the trial judge must decide as to the proper contents of the bill, and state the facts, if need be, and proceed to settle and sign it accordingly. (Sec. 143, Code of Civil Procedure, 1901.)

Where the statements of the bill as settled are deficient or false, a restatement should be asked before the transcript has been transferred to the appellate court; because the record of the trial court remains within the power of the trial court, while the record on appeal lies within the power ot the appellate tribunal. (Elliott, Appellate Procedure, 205.)

It is admitted by the petitioner that a bill of exceptions was prepared in the case and has been filed in the court below and certified to this court on the appeal. An examination of the bill of exceptions shows a strict compliance with the provision of this section. A bill of exceptions signed, filed, and made part of the record as the law requires, imports absolute verity. (Elliott on Appellate Procedure, sec. 811.) The bill of exceptions filed in the case and certified to this court being in strict compliance with the law must, under this principle, import absolute verity, unless the provisions of section No. 499 of the Code of Civil Procedure (1901) are applicable to the case.

In the opinion of the majority of the court the petition is construed to have for its object relief against the action of the judge in declining to sign the petitioner's bill of exceptions. Regarding it as such, does the petitioner bring himself within the provisions of section 499? The section in question reads as follows:

> "SEC. 499. *Judge failing to sign, exceptions, how compelled*.—If from any cause a bill of exceptions is not certified by the judge of the court below, without fault of the party tendering the bill of exceptions such party, or his attorney, may apply at the next term of the Supreme Court, and on petition obtain from said court a mandamus directed to such judge. (1) Such petition must set out substantially the bill of exceptions tendered, and shall be verified by oath by the lawyer as to the truth of the bill of exceptions as tendered by the party or his lawyer and as to the other facts stated therein. (2) Upon the filing of such petition, the Supreme Court shall issue a mandamus directed to the judge of the Court of First Instance,

> requiring him forthwith to make return of his reasons for not certifying the bill of exceptions, and the judge shall forthwith make such return, and the Supreme Court shall hear the original parties and determine the validity of the reasons given by the judge for his failure or refusal. (3) If the reasons be insufficient, or the judge fails or refuses to make any return to the mandamus, the Supreme Court shall issue a mandamus absolute, commanding the judge to sign and certify the bill of exceptions, as set forth in the petition, or as modified by the Supreme Court. (4) If he still refuses to do so, the cause shall be heard by the Supreme Court on the exceptions as verified in the petition for mandamus. (5) In the hearing upon the judge's return, as provided in subdivision 2 of this section, the Supreme Court may, in its discretion, receive other testimony than the judge's return, in determining the validity of the reasons given by the judge for his failure or refusal to sign the bill of exceptions."

The duty of settling a bill of exceptions is judicial. Mandamus will lie to compel the trial judge to settle and sign a bill of exceptions, but it would be a violation of principle to specially direct him what to put in the bill in a case where there is a controversy as to what the bill should contain. (Elliott on Appellate Proceedings, sees. 516, 798, 810.) A bill of exceptions must be settled by the trial judge, and by him only. The appellate court is not authorized to act except by statute. (Enc. P1. and Pr., vol. 3, p. 442.)

In the State of California, one of the States referred to in the decision of the court as having a statute resembling our statute, and in which a similar practice is supposed to prevail, it has been held that the statute of that State applies only in cases where upon the settlement of a bill of exceptions or statement of facts, the judge refuses to allow an exception, but where the judge merely refuses to settle a bill as presented, a mandamus is the proper remedy. (Tibbets vs. Eiverside Banking Co., 97 Cal, 258; Landers vs. Landers, 82 Cal., 480; Saig vs. Saig, 49 Cal., 263.)

The proceedings under these statutes is not against the judge to compel him to sign a bill of exceptions, where from any cause a bill of exceptions has not been certified to, but is a proceeding before the appellate court to establish by proof some exception which has been disallowed by the trial judge. Qn the contrary, the proceeding under our statute is where *from any cause the bill of exceptions is not certified by the judge of the court below* to compel him by mandamus to make return of his reasons for not certifying the bill of exceptions. It is said in the decision that the remedy provided by this section of the statute

applies not only to cases where the judge has omitted to take any action upon the bill of exceptions tendered by the party, or has declined to certify such bill without substituting another in its place, but also to those where he has certified the bill of exceptions, but has refused to embody therein some or all of the exceptions or facts contained in the bill tendered him, and which the party claims to have been properly taken. In other words, that it is within the scope of the remedy to disprove before this court a bill of exceptions duly authenticated and filed in the case by the judge below, and which has been certified to this court on appeal.

The fact that a trial judge may as effectually destroy a litigant's right to have an adverse judgment reviewed in the appellate court by refusing to embody in the bill of exceptions as signed an exception vital to the party's cause, as by refusing to sign any bill of exceptions whatever, is a matter which addresses itself to the legislative discretion, and a statute or provision not intended for this purpose should not be used to effect such results. The law as expressed in this opinion is in accordance with the law upon the subject prevailing in a large number of the States of America. In fact it seems to be the established doctrine of all the American courts except those in which this practice has been changed by statute.

For the reasons above stated I am unable to concur in the opinion of the majority of the court.

Date created: April 03, 2014