2 Phil. 509

[G.R. No. 1147. September 24, 1903]

ESCOLASTICO DUTERTE Y ROSALES, PLAINTIFF AND APPELLANT, RS. FLORENTINO RALLOS, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

The plaintiff and appellant claimed that he, the defendant, and one Castro were partners in the management of a cockpit. The defendant denied this. The court found that no such partnership existed and ordered judgment for the defendant. The plaintiff moved for a new trial, which was denied. To this order and the judgment he excepted and has brought here the evidence on which the court below based its finding. We have examined the evidence and are of the opinion that said finding, so far as the existence of the copartnership to September 1, 1901, is concerned, is plainly and manifestly against the evidence.

We reach this conclusion chiefly from the documents written by the defendant and sent to the plaintiff. It is not contradicted that the plaintiff demanded by letter of the defendant a settlement of their accounts. These demands the defendant answered with the folloAving letter:

> "MY DEAR BOY: I am working at these accounts. Perhaps I will have them ready tomorrow morning. But I have no money, unless Mr. Spitz comes on 6ne of these boats, when we will have funds.
>
> "Yours, "FLORENTINO RALLOS.
>
> "April 13,1902."

On May 7 the defendant wrote another letter to the plaintiff which is in part as follows:

"CEBU, *May 7,1902.*

"Senor DON ESCOLASTICO DUTERTE.

"DEAR BOY: In your letter which I received this afternoon, you designate me as a little less than embezzler. I have in my possession the money of no one but myself. If I have not called you an embezzler or something worse on account of all that you have done and are doing with me, reflect whether you have reason to write me in the manner you do. I have done you a favor in admitting you into the cockpit partnership, as the only manner in which I might collect what you owe me. I think you have made a mistake, and I will frankly refresh your memory. You are indebted to me nearly one thousand pesos, advanced for vour former market contract,"

In the preceding year, the defendant sent to the plaintiff statements of the business for the months of June, July, and August. They are in legal effect the same. The one for July is as follows:

"Receipts of the cockpit of this city during the entire month of July $520,622

"Expenses—

"Cuotas.....	$300.00	
"Rent, 6 days.....	60. 00	
"Present to Biloy.....	20.00	
	_____	380.000
		_____

	140. 622
	=======
“One-third……..	46.873
“Ticoy owes for seats…….	31. 200
	_____
	15. 673
	30. 000
“Ticoy’s net share…….	45. 673″

Ticoy stands for the plaintiff.

That the plaintiff rendered services in the management of the cockpit, and that the defendant paid him money on account of the cockpit, is undisputed.

The defendant, after denying that the plaintiff was his partner, testified, among other things, as follows:

> “The profits were divided. A portion was given to two friends, Senores Duterte and Castro, but not as partners. A portion was given to Senor Duterte solely because he was a friend who aided and encouraged the cockpit. I did not have an agreement Avith them. As a private individual, he had no duty to perform, except when he had to preside at the cockpit. I am not aware that they, or either of them, rendered other services. I did not tell them the reason Avhy I gave them a share. I paid them for my pleasure, as friends. Duterte had no legal interest.
>
> “Senor Duterte had no authority to employ any person in the cockpit; this function was exercised solely by Benor Isabelo Alburo, since I gave Seiior Duterte a portion only as a friend.”

Castro, the other supposed partner, and a witness for the defendant, denied that he was such partner, but his testimony is in part as follows:

> “I do not remember what the profit was, but, as I have said, Senor Rallos sent me $20 or $30. I did not keep any account. I did not receive money monthly, but on Mondays Senor Rallos would send me some money. Senor Rallos began to send

> me money from February, 1901. I am sure it was about that time. It may have been a little later. I did not receive any money before that time. It is true that the amount was from 20 to 30 pesos, and this money was what was obtained on the preceding Sunday in the cockpit. I think Senor Rallos sent it to me as a present for the reason that he could not be present at the cockpit. I am not a servant or employee of the cockpit. I have not had any conversation with Senor Rallos with reference to the business. When Senor Rallos sent me the monev he sent me no letter. He sent it to me by a messenger. I think that Senor Rallos sent me that money because I went to the cockpit and helped the president on account of the former. Senor Rallos asked me to go to the cockpit. Yes, I have had a conversation with Senor Rallos. In this conversation Senor Hallos said nothing to me about money. Senor Rallos asked me to go to the cockpit to aid the president. It is not true, as I went to the cockpit only to do him a favor."

We have, then, ,the testimony of the plaintiff that he made a verbal contract of partnership with the defendant for this business, uncontradicted evidence that he performed services in connection with it; that the defendant paid him money on account thereof and sent him accounts for three months showing his interest to be one-third of the profits, in addition to the $5 each day, and wrote him a letter in. which he said that he admitted the plaintiff into the partnership in order to collect what the plaintiff owed him on another transaction.

The reason which the defendant gives for paying the plaintiff money is not credible.

We see no way of explaining the accounts submitted by the defendant to plaintiff on any theory other than that there was a partnership between them up to September 1, 1901, at least. The letter of the defendant, in which he says that he admitted the plaintiff into the partnership, can be explained on no other theory.

That there was an agreement to share the profits is clearly proved by the accounts submitted. The plaintiff testified that the profits and losses were to be shared equally. But even omitting this testimony, the case is covered by article 1689 of the Civil Code, which provides that, in the absence of agreement as to the losses, they shall be shared as the gains are.

Article 1668 of the Civil Code is not applicable to the case. No real estate was contributed by any member. The partnership did not. become the owner of the cockpit. It is undisputed that this was owned by the defendant and that the partnership paid him ten dollars a day for

the use of it.

Neither can the judgment be sustained on the ground stated by the court in its decision and relied upon by counsel for the appellee here, namely, that Castro should have been joined as a party to the suit. One of the grounds for demurrer mentioned in section 91 of the Code of Civil Procedure is "that there is a defect or misjoinder of parties plaintiff or defendants." No demurrer was interposed on this or any other ground, and by the terms of section 93 of the same Code, by omitting to demur on this ground the defendant waived the objection which he now makes.

The finding of fact by the court below, that there was no partnership, at least to September 1, 1901, was plainly and manifestly against the evidence, and for that reason a new trial of this case must be had. In this new trial, if the evidence is the same as upon the first trial, the plaintiff will be entitled to an accounting, at least to September 1, 1901, and for such further term as the proof upon the new trial shows, in the opinion of the court below, that the partnership existed; that accounting can be had in this suit and a final judgment rendered for the plaintiff if any balance appears in his favor. No second or other suit will be necessary.

The judgment of the court below is reversed and the case remanded for a new trial, with the costs of this instance against the appellee, and after the expiration of twenty days, reckoned from the date of this decision, judgment shall be rendered accordingly, and the case is returned to the court below for compliance therewith.

Arellano, C. J,, Torres, Cooper, Mapa, and *McDonough, JJ.,* concur.

Date created: April 15, 2014