Agustina Paranete et. al., Petitioners, vs. Hon. Bienvenido Tan, et al., Respondents, G.R. No. L-3791, November 29, 1950.

PROHIBITION; OWNERSHIP OF REAL PROPERTY IN LITIGATION; ORDER REQUIRING ACCOUNTING AND DEPOSIT OF PROCEEDS OF HARVEST WITH CLERK OF COURT, IMPROPER. — A trial court issuing an order requiring the party in possession of the property whose ownership is in litigation, to to make an accounting and to deposit the proceeds of the sale of the harvest with the Clerk of Court acted in excess of its jurisdiction. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants

Emiliano M. Ocampo for petitioners.

Jose E. Morales for respondents *Felix Alcaras*, and *Fructuosa, Maxima* and *Norberta*, all surnamed *Vasquez*.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for a writ of prohibition wherein petitioner seeks to enjoin the respondent judge from enforcing his order of March 4, 1950, on the ground that the same was issued in excess of his jurisdiction.

On January 16, 1950, Felix Alcaras, Fructuosa Vasquez, Maxima Vasquez and Norberta Vasquez filed a case in the Court of First Instance of Rizal for the recovery of five (5) parcels of land against Agustina Paranete and six other codefendants. (Civil Case No. 1020). On January 28, 1950, plaintiffs filed a petition for a writ of preliminary injunction for the purpose of ousting the defendants from the lands in litigation and of having themselves placed in possession thereof. The petition was heard *ex parte*, and as a result the respondent judge issued the writ of injunction requested. On February 28, 1950, the defendants moved for the reconsideration of the order granting the writ, to which plaintiffs objected, and after due hearing, at which both parties appeared with their respective counsel, the respondent judge reconsidered his order, but required the defendants to render an accounting of the harvest for the year 1949, as well as all future harvests, and if the harvest had already been sold, to deposit the proceeds of the sale with the Clerk of Court, allowing the plaintiffs or their representative to be present during each harvest. This order was issued on March 4, 1950. Defendants again filed a motion for the reconsideration of this order, but it was denied, hence the petition under consideration.

The question to be determined is whether or not the respondent judge exceeded his jurisdiction in issuing his order of March 4, 1950, under the terms and conditions set forth above.

We hold that the respondent judge has acted in excess of his jurisdiction when he issued the order above adverted to. That order, in effect, made the Clerk of Court a sort of a receiver charged with the duty of receiving the proceeds of sale and the harvest of every year during the pendency of the case with the disadvantage that the Clerk of Court has not filed any bond to guarantee the faithful discharge of his duties as depositary; and considering that in actions involving title to real property, the appointment of a receiver cannot be entertained because its effect would be to take the property out of the possession of the defendant, except in extreme cases when there is clear proof of its necessity to save the plaintiff from grave and irremediable loss or damage, it is evident that the action of the respondent judge is unwarranted and unfair to the defendants. (Mendoza v. Arellano, 36 Phil. 59; Agonoy v. Ruiz, 11 Phil. 204; Aquino v. Angeles David, L-375; prom. Aug. 27, 1946; Ylarde v. Enriquez, *supra*; Arcega v. Pecson, 44 Off. Gaz. (No. 12) 4384; Carmen Vda. de De la Cruz v. Guinto, 45 Off. Gaz. pp. 1309, 1311.) Moreover, we find that Agustina Paranete, one of the defendants, has been in possession of the lands since 1943, in the exercise of her rights as owner, with her codefendants working for her exclusively as tenants, and that during all these years said Agustina Paranete had made improvements thereon at her own expense. These improvements were made without any contribution on the part of the plaintiffs. The question of ownership is herein involved and both parties seem to have documentary evidence in support of their respective claims, and to order the defendants to render an accounting of the harvest and to deposit the proceeds in case of sale thereof during the pendency of the case would be to deprive them of their means of livelihood before the case is decided on the merits. The situation obtaining is such that it does not warrant the placing of the lands in the hands of a neutral person as is required when a receiver is appointed. To do so would be unfair and would unnecessarily prejudice the defendants.

While the respondent judge claims in his order of March 25, 1950, that he acted as he did because of a verbal agreement entered into between the lawyers of both parties, we do not consider it necessary to pass on this point because the alleged agreement is controverted and nothing about it has been mentioned by the respondent judge in his order under consideration.

Wherefore, petition is hereby granted. The Court declares the order of the respondent judge of March 4, 1950 null and void and enjoins him from enforcing it as prayed for in the petition.

Paras, Feria, Pablo, Bengzon, Padilla; Tuason; Montemayor; Reyes, and *Jugo, JJ.*, concur.

XI

Tomas T. Fabella, Petitioner, vs. Tiburcio Tancinco et al., Respondents, G. R. No. L-3541, May 31, 1950.

PLEADING & PRACTICE; EXECUTION; PROCEDURE IN ORDER THAT BOND FOR PRELIMINARY INJUNCTON MAY BE APPLIED TO SATISFACTION OF JUDGEMENT. — A bond filed for the issuance of preliminary injunction is not one given under section 2 of Rule 39 to guarantee the performance of an appealed judgment. The preliminary injunction issued in this case was for the purpose of staying the execution of a judgment which is sought to be set aside on the ground of fraud, accident, mistake or excusable negligence. Such a bond is specifically authorized by section 5 of Rule 38, and its condition is that if the petition to reopen is dismissed or petitioner fails on the trial of the case upon its merits, the petitioner "will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction, or the other proceedings following the petition." Such bond "will not answer for the amount of the judgment sought to be set aside." (I Moran, Rules of Court, 636.) As directed by section 9 of Rule 60 the damages recoverable on a bond of this kind "shall be claimed, ascertained and awarded under the same procedure as prescribed in section 20 of Rule 59, which clearly contemplates that before damages could be recovered on the bond, there must first be an application with due notice to the other party and his sureties setting forth the facts showing applicant's right to damages and the amount thereof. To this application, the other party may interpose his pleading, and upon the issue thus being joined the matter will be tried and determined.

Alberto R. de Joya for petitioner.

Cecilio I. Lim and *Antonio M. Castro* for respondents.

DECISION

REYES, *J.*:

This is a petition for certiorari to annul two orders of the Court of First Instance of Manila in Civil Case No. 3354, entitled Juan A. Ramos et al. vs. Tomas T. Fabella.

It appears that on December 24, 1947, plaintiffs in said case obtained a judgment against defendant for the sum of P4,050.00 plus legal interest and costs. Defendant did not appeal, but on March 17, 1948, he filed a petition to have the judgment set aside,

and, in accordance with section 5 of Rule 38, Rules of Court, and upon the filing of a bond for ₱4,050.00, he had the court issue a preliminary injunction to prevent the judgment from being executed.

The petition to set aside the judgment was granted. But in the new trial that followed, defendant again lost. Not only that; plaintiffs were allowed to recover more, for in the new judgment that was rendered, defendant was ordered to pay them ₱12,400.00, plus interest, in addition to the sum previously adjudged. Notified of this new judgment on July 21, 1949, defendant filed his motion for reconsideration 33 days thereafter, but it was denied by the court on the ground that the said judgment had already become final.

On August 30, 1949, the court, at the instance of plaintiffs, ordered the issuance of a writ of execution, and on the 21st of the following month, again at plaintiffs' instance, ordered the above mentioned bond confiscated, "to be applied," so the order says, "in partial satisfaction of the judgment rendered herein." Reconsideration of this last order having been denied by the court below, its annulment is now sought in the present petition.

On October 4, 1949, defendant filed a petition to set aside the order of August 30, denying reconsideration of the second decision for the reason that the same had already become final. As ground for this petition defendant alleged that the late filing of his motion for reconsideration was due to mistake and excusable negligence, more specifically as follows:

> "1. That the said motion for reconsideration was not filed on time, i. e., August 20, 1949, due to mistake and excusable neglect on the part of the clerk of the undersigned counsel, which consists in that said clerk, Miss Jovita Nierras, had been sick from August 18, 1949 to August 22, 1949, and consequently she was absent and did not come to the office of the undersigned, during the said period; that inasmuch as the undersigned had been relying upon her said clerk to remind him of the filing of pleadings, records, briefs, etc. as they become due, and that said clerk had been absent during the said period, and failed to notify the undersigned of the last day for the filing of the said record on appeal, and the undersigned counsel not knowing of the exact last day for the perfection of the appeal in this case, he was not able to perfect the appeal in this case; that the truth of the matter being said clerk had been preparing the record on appeal in this case; that defendant had not had the intention to abandon his appeal in this case; that the amount involved in the appeal is more than ₱16,400; that it would be an injustice to the herein defendant to be deprived of his right to appeal in this case; that the said defendant has been the victim of persecution, criminal and civil, which has impoverished him; that his case is meritorious and that the judge then presiding over this Honorable Court, the Hon. Buenaventura Ocampo had not fully appreciated the evidence and the law in this case; that no violation of any substantial right of the plaintiffs in this case could be incurred, in view of the fact that said plaintiffs had already levied upon all the properties of the herein defendant, including those which are by law exempt from execution, thus totally depriving the herein defendant of his only means of livelihood."

This petition was also denied in an order rendered November 4, 1949. This is the second order whose annulment is herein sought.

Going back to the order for the confiscation of the bond, it should be noted that the said bond is not one given under section 2 of Rule 39 to guarantee the performance of an appealed judgment, but one required for the issuance of a writ of preliminary injunction to stay the execution of a judgment which is sought to be set aside on the ground of fraud, accident, mistake or excusable negligence. Such a bond is specifically authorized by Section 5 of Rule 38, and its condition is that if the petition to reopen is dismissed or petitioner fails on the trial of the case upon its merits, the petitioner "will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction, or the other proceedings following the petition." Such a bond "will not answer for the amount of the judgment sought to be set aside." (I Moran, Rules of Court, 636).

As directed by Section 9 of Rule 60, the damages recoverable on a bond of this kind "shall be claimed, ascertained and awarded under the same procedure as prescribed in section 20 of Rule 59," which, in so much as is pertinent to this case, provides:

> "x x x x. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. x x x."

This provision clearly contemplates that before damages could be recovered on the bond here under consideration, there must first be an application with due notice to the other party and his sureties setting forth the facts showing applicant's right to damages and the amount thereof. To this application, the other party may interpose his pleading, and upon the issue thus being joined, the matter will be tried and determined. But the respondent judge appears to have completely disregarded this procedure and, without hearing on the amount of damages and without even notice to the surety, declared the bond confiscated and ordered it applied to the satisfaction of the judgment, merely on the gratuitous assumption that the plaintiffs had suffered damages in the amount of the bond. The order is illegal and should therefore be revoked.

As to the other order herein complained of, it should be recollected that defendant's motion for a reconsideration of the second judgment was filed after the said judgment had already become final. It was, therefore, properly denied. It may be added that the motion was merely pro forma. But 35 days after the denial of the motion. defendant sought reconsideration of the order of denial, alleging as a ground that the tardiness in the filing of the first motion was due to "mistake and excusable neglect" on the part of his clerk who, it was alleged, had been absent from office on account of sickness, and invoking the precedent established by this Court in Coombs vs. Santos, 24 Phil. 446, and in Siguenza vs. Mun. of Hinigaran, 14 Phil. 495. It may well be disputed whether an attorney could be excused for the negligence of his clerk where there is no showing that he himself has shown diligence or has done anything to guard against such negligence. But assuming that a case of that kind is covered by the precedent laid down in the cases cited, it may not be amiss to point out that the defendants in those cases had not had their day in court, for judgment was obtained against them by default, and this consideration must have weighed heavily in the mind of the Court. Such is not the situation here. The judgment which petitioner seeks to set aside is one that has been rendered after regular trial, and the first motion for reconsideration does not contain any *prima facie* showing that the judgment was wrong. Indeed, said motion for reconsideration was merely *pro forma*, based on the bare statement that the decision was contrary to law and was not supported by the evidence. And nothing was said at that time why the motion was filed out of time.

A petition for reconsideration on the ground of excusable negligence is addressed to the sound discretion of the court. This discretion can not be interfered with except in a clear case of abuse. Taking into account all the circumstances of the case, we are not prepared to say that the respondent judge did not make a good use of its discretion in refusing to set aside his order denying reconsideration of the judgment on the ground that this had already become final.

Wherefore, the order of September 21, 1949, for the confiscation of the bond is hereby revoked; but the order of November 4, 1949, denying the motion to set aside the order of August 30. which in turn denies reconsideration of the judgment, is affirmed. Without pronouncement as to the costs.

Ozaeta, Pablo, Bengzon, Tuason, Montemayor, J.J.; concur.