

SECOND DIVISION

[G.R. No. 117925, October 12, 1999]

**TENSOREX INDUSTRIAL CORPORATION, PETITIONER VS. COURT
OF APPEALS AND MERCANTILE INSURANCE CO., INC.,
RESPONDENTS.**

R E S O L U T I O N

QUISUMBING, J.:

This special civil action for certiorari and prohibition seeks to declare the proceedings in CA G.R. SP No. 32025 as well as CA Notice dated August 30, 1994, and CA Resolution dated November 7, 1994, null and void for being tainted with grave abuse of discretion. Petitioner also prays that the above-mentioned proceedings be enjoined for lack of jurisdiction.

The present controversy arose as a consequence of the execution of judgment in the case of *Tensorex Industrial Corporation vs. Alicia Gala and Heirs of Manuel Gala*, for ejectment with damages, docketed as Civil Case No. 34381 of the Metropolitan Trial Court (MTC) of Makati, Branch 65. In said case the MTC rendered judgment against defendants and in favor of plaintiff. From that judgment, defendants filed with the Court of Appeals a petition for certiorari with prayer for the issuance of a writ of preliminary injunction. To preserve the *status quo*, the Court of Appeals, in a Resolution dated January 31, 1990, granted the application for preliminary injunction and required the defendants to post an injunction bond in the amount of P200,000.00. Said bond was posted by private respondent, Mercantile Insurance Co., Inc.

On June 16, 1990, the Court of Appeals rendered a decision dismissing the petition for certiorari and recalling the writ of preliminary injunction it earlier issued. There being no impediment to the execution of judgment, defendants were ejected from the leased premises. However, despite said execution, there remained arrears in the amount of P710,000.00. Herein petitioner then filed, in the ejectment case before the MTC, a motion for the issuance of an alias writ of execution against the injunction bond posted in the certiorari case. Private respondent filed its opposition claiming that the bond is not a supersedeas bond but an injunction bond filed in a separate case. Despite said opposition, the MTC issued an Order dated July 2, 1991, treating the injunction bond posted by private respondent as a supersedeas bond. Accordingly, the MTC issued an alias writ of execution against said bond.

Private respondent then appealed the judgment of the MTC in the ejectment case to the Regional Trial Court of Makati. In the meantime, even before said appeal could be raffled, the Branch Sheriff of MTC-Makati served the alias writ of execution and levied upon the personal properties of the private respondent, threatening to sell said properties. Confronted with this dilemma, private respondent filed a petition for certiorari with prayer for the issuance of writ of preliminary injunction with the RTC of Makati, docketed as Civil Case No. 91-2148, to enjoin the sheriff from carrying

out the threatened sale of its properties. The RTC, after preliminary hearing, issued a writ of preliminary injunction conditioned upon the posting of an injunction bond in the amount of P200,000.00.

After hearing, the RTC, in a Decision dated January 21, 1993, dismissed the petition for certiorari and lifted the writ of preliminary injunction it earlier issued. From this dismissal, private respondent filed its notice of intention to appeal Civil Case No. 91-2148 to the Court of Appeals. Petitioner moved to expunge said notice of intention to appeal, and to declare said RTC decision final on the ground that the appeal to the Court of Appeals was not the proper remedy but a petition for review in accordance with Supreme Court Circular No. 2-92.

The RTC, in its Order dated May 24, 1993, granted the motion to expunge and declared its decision final.^[1] On Motion for Reconsideration by the private respondent, however, the RTC, in an Order dated June 21, 1993, reconsidered its previous order and gave due course to the appeal to the CA, ruling that "this case is not an appeal to this [trial court] in the exercise of its appellate jurisdiction".^[2] It was, as already adverted to, a petition for certiorari.

On April 20, 1994, the Court of Appeals dismissed private respondent's appeal for its failure to file Memorandum,^[3] and copy of said order of dismissal was received by private respondent's counsel on May 5, 1994.

On May 10, 1994, private respondent filed a Motion for Reconsideration premised on the ground that it did not receive any notice to file memorandum and as such its period within which to file the required memorandum had not yet lapsed. On May 26, 1994, the Court of Appeals denied the Motion for Reconsideration,^[4] copy of said order was received by private respondent on June 13, 1994. In the meantime, even before private respondent could receive said order of denial of the motion for reconsideration, it filed a Supplemental Motion for Reconsideration with prayer that its Comment filed on January 7, 1994, be considered as its Memorandum.

On June 22, 1994, herein private respondent filed a Motion for Leave to File Second Motion for Reconsideration, the resolution of which along with other pending incidents of the case was deferred by the Court of Appeals.

On August 30, 1994, the Court of Appeals promulgated a Resolution accepting private respondent's explanation and proceeded to treat the Comment filed by private respondent as its Memorandum. It also ordered the petitioner to file its Memorandum within 10 days from receipt of the Resolution after which the appeal shall be deemed submitted for decision. According to the Court of Appeals:

"It appears that the appellant's counsel did not receive the aforesaid notice to file Memorandum, we promulgated a Minute Resolution on January 31, 1994 ordering, among other things, that the Division Clerk re-send the notice of September 13, 1993 to appellant's counsel; the record does not show however, that a copy of said notice was actually mailed along with the resolution.

"Since the required Memorandum from the appellant had not been filed, on April 20, 1994, we promulgated another Resolution dismissing the appeal, a copy of which was received by the appellant's counsel on May 6, 1994; and on May 10, 1994 the appellant filed a Motion for