

FIRST DIVISION

[G.R. No. 115953, October 28, 1996]

**GENOVEVA LIGOT SEMPIO AND HEIRS OF BERNARDO SEMPIO,
PETITIONERS, VS. COURT OF APPEALS AND DEVELOPMENT
BANK OF THE PHILIPPINES, RESPONDENTS.**

D E C I S I O N

BELLOSILLO, J.:

The spouses Bernardo Sempio and Genoveva Ligot owned a parcel of land situated in San Miguel, Bulacan, containing an area of 3,192 square meters and covered by Transfer Certificate of Title No. T-6263, which they mortgaged to respondent Development Bank of the Philippines (DBP) to secure a loan of P116,700.00.^[1] upon failure of the spouses to meet their loan obligation DBP extrajudicially foreclosed the mortgage. At the public auction sale, DBP emerged as the highest bidder and was correspondingly issued a *Certificate of Sale*.^[2]

On 8 March 1990 the Sempio spouses filed a complaint for *Annulment of Foreclosure, Reconveyance of Title and Damages*^[3] contending that they were not notified of the foreclosure sale as DBP failed to comply with the requirements of Act No. 3135, particularly on notice, posting and publication. They also alleged that the auction sale was null and void as it was held in a place other than that agreed upon by the parties and was supervised by the Provincial Sheriff of Nueva Ecija instead of the Provincial Sheriff of Bulacan where the property is situated as required under the same Act. No. 3135.

In its *Answer*^[4] DBP maintained that legal notices were actually made and that the Sempio spouses were already estopped to question the situs of the auction sale since they already knew of such fact prior to the auction sale as they even sought its postponement.

Pending litigation, Bernardo Sempio died hence his substitution by his heirs.

The pre-trial conference was set on 21 May 1990 but was reset to 1 June 1990 upon failure of counsel for DBP to appear. On 1 June 1990 counsel for DBP again failed to appear. Thus at the instance of DBP the pre-trial was reset to 19 June 1990. Again counsel for DBP failed to appear. Instead, he sent a telegram requesting for resetting to 10 July 1990. However, counsel for DBP again failed to appear hence the court was constrained to declare DBP as in default and the Sempios were allowed to present their evidence *ex parte*.^[5] As the records show, the pre-trial conference was scheduled for four times but counsel for DBP repeatedly failed to appear. This despite due notice and the fact that he himself requested for the re-settings of the conference as well as the hearing for the reception of the evidence of respondent DBP as shown hereunder.

On 27 July 1990 DBP filed a *Motion to Set Aside Order of Default*,^[6] which the court granted in its order of 16 August 1990.^[7] On the same date counsel for DBP appeared but only to ask that he be allowed to present evidence on 17 September 1990. Again the court below acquiesced to the request. Consequently, as requested, DBP was allowed to present its evidence on 17 September 1990. On said date counsel for DBP again failed to appear. Thus, on the basis of petitioners' evidence, the court a quo rendered its decision of 24 September 1990^[8] holding that -

The mortgage contract executed by the plaintiffs with defendant bank expressly provides under paragraph 14 thereof that 'in case of foreclosure under Act No. 3135, as amended, the auction sale shall take place in the city or capital of the province where the mortgaged property is situated.' It is evident that the auction sale of plaintiffs' property was conducted by the Deputy Sheriff at Baliuag, Bulacan as evidenced by Sheriff's Certificate of Sale (Exh. B) in clear violation of the plaintiffs' mortgage contract. The terms/conditions of the mortgage contract should be strictly complied with for purposes of the validity of the foreclosure proceedings as the terms and conditions thereof are the law between the parties. The public auction sale of plaintiffs' property in a place other than that as stipulated in the mortgage contract is violative of Sec. 2 of Act No. 3135, as amended, which in part reads:

Said sale cannot be made legally outside of the province in which the property sold is situated; and in case the place within said province in which the sale is to be made is the subject of stipulation, such sale shall be made in said place x x x x (underscoring supplied).

It is likewise significant to note that the said property subject of mortgage was sold by the Provincial Sheriff of Nueva Ecija thru Deputy Sheriff Felixberto Samonte per Sheriff's Certificate of Sale dated March 1, 1982. The property is situated at San Miguel, Bulacan and the conduct of auction sale thereof falls within the competence of the Provincial Sheriff of Bulacan and not of Nueva Ecija. This finds support under Section 4, supra, which insofar as pertinent, likewise provides:

The sale shall be made at public auction between the hours of 9:00 in the morning and 4:00 in the afternoon, and shall be under the direction of the sheriff of the province x x x (underscoring supplied).

The sale of the plaintiffs' property being effected by the Provincial Sheriff of Nueva Ecija and not of the provincial Sheriff of Bulacan in clear violation of the aforesaid legal authority, is legally assailable. A sheriff of a certain province cannot act as such in another province. The sale thus made is null and void. (Macondray and Co, v. Coletto, 61 Phil. 73).

x x x x

WHEREFORE, judgment is hereby rendered in favor of plaintiff Genoveva Ligot and the substituted plaintiffs against the defendant bank ordering the following:

a) The extrajudicial foreclosure of the real estate mortgage, the Sheriff's Certificate of Sale, and all consequent proceedings thereafter over a parcel of land subject of mortgage and covered by TCT No. T-6263 of the Registry of Deeds of Bulacan in the names of plaintiffs Bernardo Sempio and Genoveva Ligot are hereby declared null and void and of no legal effect.

b) Plaintiff Genoveva Ligot vda. de Sempio and the substituted plaintiffs are hereby ordered to pay the defendant bank the amount of P119,320.00 with legal rate of interest effective March 1, 1982 minus the amount of P30,301.00 paid for by the plaintiffs after the public auction sale;

c) Defendant bank is hereby ordered to execute the release and/or cancellation of the mortgage upon full payment of plaintiffs' obligations; and

d) Defendant bank is hereby ordered to pay P5,000.00 as and for attorney's fees.

x x x x

The court *a quo* concluded that the plaintiffs were not even aware of the extrajudicial foreclosure proceedings as, in fact, they continued to pay their loan obligations even after the auction sale. Their payments were also accepted by the bank as evidenced by its official Receipts Nos. 138033 and 138109.

The bid of DBP to reconsider the above decision was rejected by the trial court. It ruled that the repeated and chronic failure of defendant and its counsel to appear during the scheduled pre-trials and hearings despite due notice was without justifiable cause. DBP gravely abused the accommodations so generously granted to it by the court. It further declared that the *Agreement to Postpone* the holding of the auction sale was not even duly signed by mortgagor Bernardo Sempio. The letter offering to repurchase the property was likewise not signed by Bernardo Sempio and Genoveva Ligot nor by any of the substituted plaintiffs but by one Adela Sempio de la Cruz who was not one of them.

DBP then sought relief from respondent Court of Appeals by filing a *Petition for Certiorari, Prohibition and Mandamus* which, at first, was denied by the Court of Appeals^[9]-

First, the respondent court, under the facts, has jurisdiction over the case and authority to issue the questioned decision and the order denying the motion for reconsideration. It had been stated over and over again that the functions of both writs of certiorari and prohibition are to keep an inferior court within the bounds of its jurisdiction or to prevent it from committing grave abuse of discretion amounting to excess of jurisdiction. Where there is jurisdiction over the subject matter the decision or order on all other questions arising in the case is but an exercise of that jurisdiction (*Herrera v. Baretto, et al.*, 85 Phil. 245; *Commodity Financing Company v. Jimenez*, L-31384, June 29, 1979).

Not every error in the proceeding or every erroneous conclusion of law or of facts may be considered an abuse of discretion (Villa Rey Transit v. Bello, No. L-18957, April 23, 1963). The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty as where the power is exercised in a despotic manner by reason of passion or personal hostility (Luna v. Nable, 67 Phil. 340; Alafriz v. Nable, 72 Phil. 278).

x x x x

Second, under Section 1, Rule 65 of the Rules of Court, for the writs of certiorari and prohibition to issue, there is no appeal nor plain, speedy and adequate remedy in the ordinary course of law (Roque v. Court of Appeals, 93 SCRA 540, 547). Here appeal is available. And if by now there is no appeal, it is because the petitioner simply did not avail of it. The rule is that the writ of certiorari or prohibition may not be availed of to make up for the loss, through omission or oversight of the right to appeal. But petitioner was not denied that right to appeal. Petitions for certiorari to annul a decision or order which could have been appealed, but have not been appealed, should be dismissed (Lobete v. Sundiam, 123 SCRA 95).

It is true that although appeal is available, certiorari may still lie if the appeal does not prove to be a speedy and adequate remedy (Valdez v. Querubin, 37 Phil. 774; Saludes v. Pajarillo, 78 Phil. 775). But the petition has not shown why appeal is not speedy and adequate under the circumstances.^[10]

Undaunted, DBP filed a *Motion for Reconsideration*,^[11] *Supplemental Motion for Reconsideration*^[12] and *Additional Argument in Support of the Motion for Reconsideration & Supplemental Motion*.^[13] On 15 February 1994 the Court of Appeals granted DBP's motion for reconsideration.^[14] It ruled -

Petitioner apparently has meritorious defenses, in that it has all the documents to show that it has complied with the legal requirements in the extrajudicial foreclosure of mortgage it undertook in the case; that private respondents may have been estopped from questioning the validity of the auction sale on grounds of i.e., lack of notice and publication because they had even asked for the postponement of the auction sale from October 12, 1981 to March 1, 1982 to which petitioner had agreed and thus the postponement of the sale (Rollo, pp. 20-22 and 113-114).

Under the circumstances, petitioner's loss of its property because of the gross negligence of its counsel may, in a definite sense, constitute a miscarriage of justice.^[15]

Their *Motion for Reconsideration of Decision*^[16] having been denied,^[17] Genoveva Ligot Sempio and the heirs of her husband now come to us through the instant petition for review on certiorari. They contend that respondent Court of Appeals erred when it reversed its earlier ruling that certiorari would not lie if appeal was