

## SECOND DIVISION

[ G.R. No. 130570, May 19, 1998 ]

**SPOUSES GIL AND NOELLI GARDOSE, PETITIONERS, VS.  
REYNALDO S. TARROZA, RESPONDENT.**

### DECISION

**PUNO, J.:**

This is a petition for review on certiorari assailing the Decision of the Court of Appeals dated April 29, 1997 and its Resolution dated September 10, 1997 in CA-G.R. CV No. 45046.

On September 20, 1989, private respondent filed a complaint for a sum of money with preliminary attachment against the petitioners, spouses Gil and Noelli Gardose, and a certain Cecilia "Baby" Cacnio. The case was docketed as Civil Case No. Q-89-3500 and raffled to Branch 92 of the RTC of Quezon City, presided by then Judge Pacita Canizares-Nye.

On February 7, 1990, private respondent was allowed to summon by publication the petitioners who were abroad. On August 28, 1990, the complaint against the petitioners was dismissed for failure of the private respondent to have the summons published in a newspaper of general circulation within a reasonable time, amounting to failure to prosecute. The case against Cacnio was also later dismissed for failure of private respondent to file a pre-trial brief. The orders of dismissal became final and executory.

On February 13, 1991, private respondent filed a new complaint for a sum of money against the petitioners. The case was raffled to Branch 78 of the RTC of Quezon City and docketed as Civil Case No. Q-91-7959. The complaint contained the same allegations as the complaint in Civil Case No. Q-89-3500 except that it excluded Baby Cacnio as defendant.

On April 25, 1991, petitioners filed their Answer with Counterclaim. They invoked the principle of **res judicata**. They also alleged that Noelli Gardose issued the checks in question merely to guarantee the loans of Cacnio. Petitioners moved to dismiss the complaint on the ground of **res judicata** but failed. The case was set for hearing on the merits.

It appears that petitioners' counsel failed to appear in the hearing of March 31, 1992. The trial court allowed private respondent to present his evidence ex-parte but reset the continuation of the case to May 26, 1992 for cross-examination of the witness. The petitioners challenged the action of the trial court via a petition for certiorari but the challenge was dismissed by this Court on April 27, 1992.

The May 26, 1992 hearing for cross-examination of witness was reset to September 10, 1992 on motion of the petitioners. Again, petitioners failed to appear on September 10, 1992. The trial court considered petitioners' right of cross-

examination waived and allowed private respondent to make a formal offer of his evidence. Still, the case was reset to October 15, 1992 to receive petitioners' evidence.

Through a **new counsel**, petitioners again moved for a reconsideration of the order denying their motion for dismissal on the ground of **res judicata**. They also insisted that they be allowed to cross-examine the private respondent. In the hearing of October 15, 1992, the trial court denied the reiterated motion to dismiss. It reinstated petitioners' right to cross-examine but their new counsel refused to exercise the right during said hearing. It then ordered petitioners to present their evidence but said counsel sought a resetting of the case as he has yet to familiarize himself with its facts. The trial court ruled that petitioners have waived their right to cross-examine and right to present evidence. The case was deemed submitted for decision. Petitioners' motion for reconsideration was denied on March 15, 1993. They went to the Court of Appeals on certiorari, injunction and prohibition.<sup>[1]</sup> Their petition was denied on May 31, 1993.

On January 11, 1994, the trial court rendered its Decision in favor of the private respondent. It ordered:

"WHEREFORE, judgment is rendered ordering defendants to pay plaintiff the following:

1. P70,000.00 plus interest thereon at 12% per annum from the date of the filing of the complaint until fully paid;
2. P50,000.00 plus interest thereon at 12% per annum from the date of the filing of the complaint until fully paid;
3. P200,000.00 plus interest thereon at 12% per annum from the date of the filing of the complaint until fully paid;
4. P50,000.00 as and for attorney's fees; and
5. Cost of suit."

Petitioners now contend:

## I

The Court of Appeals gravely erred in not holding that the dismissal in the first case for failure to prosecute and for lack of interest had the effect of an adjudication on the merits and operates as **res judicata** to the second case.

## II

The Court of Appeals gravely erred in not holding that the filing of the second case after dismissal of the first case for failure to prosecute and lack of interest constitutes forum shopping.

## III

The Court of Appeals seriously erred in holding that since petitioners failed to include forum shopping as one of the grounds in their omnibus motion, they cannot now raise the said issue on appeal.

#### IV

The Court of Appeals gravely erred in holding that the petitioners were not denied procedural due process and they were not denied of their right to cross-examine private respondent and present their evidence.

#### V

The Court of Appeals gravely erred in considering petitioner Noelli Gardose as an accommodation party primarily and unconditionally liable to the private respondent for the three dishonored checks.

#### VI

The Court of Appeals gravely erred in awarding 12% interest on petitioners' alleged obligation to the private respondent as well as attorney's fees.

The petition is unmeritorious.

Firstly, the principle of **res judicata** cannot be invoked. The principle is enunciated in Section 49 (b) and (c) of Rule 39, viz:

"Sec. 49. Effects of judgments. -- The effect of a judgment or final order rendered by a court or judge of the Philippines, having jurisdiction to pronounce the judgment or order, may be as follows:

"xxx

(b) In other cases, the judgment or order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity;

"(c) In any other litigation between the same parties or their successors in interest, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The rule in Section 49 (b) is known as "bar by former judgment" while the rule embodied in paragraph (c) of the same section is known as "conclusiveness of judgment". There are four (4) requisites which must concur in order for **res judicata** as a "bar by former judgment" to attach, viz: (1) the former judgment must be final; (2) **it must have been rendered by a court having jurisdiction over the subject matter and the parties**; (3) it must be a judgment or order on the merits; and (4) there must be between the first and second action identity of parties, identity of subject matter and identity of causes of action.