

SECOND DIVISION

[G.R. No. 125468, October 09, 2000]

**PRODUCERS BANK OF THE PHILIPPINES, PETITIONER, VS.
COURT OF APPEALS, NEW COTTON (PHIL.) CORP., LAN SHING
CHIN, SHIN MAY WAN AND NELSON KHO, RESPONDENTS.**

DECISION

QUISUMBING, J.:

This petition for review on certiorari seeks the reversal of the decision of the Court of Appeals dated June 19, 1996, which affirmed the decision of the Regional Trial Court of Makati, Branch 139, in Civil Case No. 88-2662, dismissing the complaint.

The issues raised before this Court are purely procedural. Did the appellate court err in affirming the trial court's ruling that the complaint ought to be dismissed for failure to prosecute? Should the dismissal be with or without prejudice?

The facts, as found by the trial court and by the Court of Appeals, are as follows: On December 9, 1988, Producers Bank of the Philippines filed a complaint with prayer for preliminary attachment against New Cotton (Phil.) Corporation concerning a loan of three million pesos. The bank alleged that on March 22, 1988, private respondent Lan Shing Chin, New Cotton's president, issued Promissory Note No. PC 015/88, for said amount. As agreed by the parties, the loan would mature in 55 days, or on May 16, 1988. It was renewed once, with maturity on July 15, 1988. Private respondents allegedly failed to pay the loans on their due dates.^[1] Hence the complaint was filed before the Regional Trial Court, Branch 139, Makati. The court issued an order dated January 3, 1989,^[2] granting the writ. It approved the attachment bond on February 6, 1989. Later, the court recalled its order dated February 6, 1989^[3] approving the bond.

On June 7, 1989, petitioner filed a motion for the issuance of summons, which the trial court granted. Only private respondent Wilson Kho was served summons through substituted service. The whereabouts of the other defendants were unknown. The corporation had already ceased operations. Lan Shing Chin and Shin Man Wan, the two other defendants who were not Filipinos, were reportedly already in Hongkong.

Only Kho filed an answer, received by the trial court on July 21, 1989.^[4] Kho denied the genuineness and due execution of the surety (bond) agreement guaranteeing the six million peso loan of New Cotton, claiming that he never signed nor authorized anyone to sign the surety in his behalf. He avers that the signature appearing on the surety agreement was a forgery.

On February 27, 1990, petitioner filed a motion to reinstate the order of attachment,

[5] which was opposed by private respondent Kho. The motion was set for hearing on April 27, 1990. At the hearing, the trial court noted that there was no return of service of the summonses to New Cotton, Lan Shing Chin and Shin May Wan. The trial judge deferred consideration of the motion until said summonses were duly served.

On June 22, 1990, Kho filed a manifestation and motion alerting the trial court that trial had not yet commenced one and a half years since the case was filed. Kho moved for scheduling of pre-trial conference and thereafter trial, without having to await for the return of the service of summonses.

On June 28, 1990, the trial court denied private respondent Kho's motion and ordered the court's process server to immediately serve the summonses on the other three respondents. The summonses, however, remained unserved.

On July 6, 1990, petitioner filed a motion for service of summons by publication against aforesaid respondents. One year and seven months had lapsed since the complaint was filed, and over one year since petitioner knew summonses could not be served personally or by substituted service. On August 14, 1990, the court granted petitioner's application for service of summons by publication. The summonses and a copy of the complaint were published in *The Philippine Star*.

On November 20, 1990, Kho moved to dismiss the complaint for failure to prosecute. The same was denied by the court in an order dated March 21, 1991, which also set for April 16, 1991, the hearing for the reinstatement of the writ of preliminary attachment.

On June 3, 1991, the trial court granted petitioner's application for preliminary attachment but only as against New Cotton Corp., Lan Shing Chin and Shin May Wan. It denied attachment as to Kho.

The case was set for pre-trial conference on August 13, 1991. On August 3, **1991**, the court re-set the conference for September 17, 1991, since petitioner bank and its counsel could not be present. On August 5, the bank filed a motion to re-set pre-trial conference to either September 11, 13 or 17. The trial court re-set it for September 17. On August 14, Kho filed his pre-trial brief. On September 17, Kho's counsel attended but petitioner and its counsel did not, despite the fact that the date for the conference was upon their motion. The conference was re-set for October 22. On October 11, petitioner filed its pre-trial brief with corresponding request for implied admission of facts by respondent. On October 22, respondent moved, that in view of the bank's implied admission of the facts contained in the request for admission, incorporated in Kho's pre-trial brief, specifically for failure to answer within the period provided for in Rule 26 of the Rules of Court, Kho asked that he be allowed to present, his evidence to support his claim for damages, without the court receiving petitioner's evidence. The court issued an order granting the motion.

On November 19, 1991, a month after said order was issued, petitioner filed a motion for reconsideration. It was opposed by respondent on November 26. Thereafter, a reply and then a rejoinder followed. On April 14, **1992**, the lower court despite clear provision on the Rules of Court on implied admissions, issued an order reversing its order of October 22, 1991. It also ordered continuation of the pre-trial.

On May 8, petitioner again filed another motion to re-set the continuation of the pre-trial on May 28 to June 30, July 8 or 16, 1992. This was the second motion for postponement of the pre-trial by petitioner. On May 28, the lower court issued an order granting petitioner's motion to re-set pre-trial conference for July 16, 1992. Respondent averred that because of the re-setting to the said date which conflicted with respondent's prior scheduled appearance in another court, respondent was constrained to move for re-setting to July 29, 1992. On July 13, petitioner filed a manifestation and motion that the pre-trial set for July 16 be re-set for August 18, 19 and 25. The court re-set the same for September 2, 1992, which was again in conflict with respondent counsel's schedule, constraining the latter to ask that it be re-set for September 15. The court re-set the pre-trial conference on October 20. On October 20, after the petitioner and private respondent failed to arrive at an amicable settlement and after they had defined the issues, the lower court issued an order terminating the pre-trial. The petitioner's presentation of evidence was scheduled on January 21, 26, 28 and February 4, 9, 11, 16 and 18, **1993**, all at 8:30 a.m., while the presentation by respondents of their evidence was scheduled on March 4, 9, 11, 16, 18, 23, 24 and 30, 1993. **In all, pre-trial took one year and seven months.**

Even before trial began, on January 18, **1993**, petitioner filed an urgent motion to reset scheduled hearings on January 21, 26, 28 and February 4, 1993, to February 9. It explained that its principal witness, Luis L. Co, was still abroad on a business trip, and two other witnesses were unavailable. Kho did not object.

On January 23, the lower court issued an order granting the motion to re-set. It re-scheduled the hearings for February 9, 11, 16, and 18, with stern warning that should petitioner fail to present its evidence on said date, the court would consider petitioner's right to present evidence waived.

Before the scheduled hearing on February 9, 1993, despite stern warning from the court, petitioner filed its fourth motion for postponement, praying that the scheduled hearing on February 9, 1993 be reset to March 4, 1993. It explained that Co, its principal witness, faxed that he would not be available on the date of hearing since he would just be arriving then; that Ms. Joan T. Chan, whose whereabouts was previously unknown, went abroad for a vacation; and that Atty. Salvador Hababag, the notary public who notarized the surety agreement, asked to be presented on a much later date because of prior commitments. Petitioner likewise prayed that all scheduled hearing dates prior to March 4, 1993 be re-set. Respondent interposed no objection. The lower court issued an Order re-setting the presentation of evidence for the petitioner on March 4, 16, 18, 23, 25 and 30.

On March 2, 1993, it was respondent's counsel who moved for postponement of the trial, except those scheduled for March 9 and March 11, to June 22, July 13, 15, 21, 22, and 27. Respondent explained that his counsel had prior court commitments and would be out of the country for the entire month of May and first two weeks of July. Recall that March 4, 1993 was agreed upon by both counsels during their October 20, 1992 end of pre-trial conference. Note also that the motion for postponement by respondent was triggered by the re-scheduling of previous hearings on motion of petitioner.

Acting on the motion of the private respondent and without objection on the part of the petitioner, the lower court issued an order resetting the presentation of