

**ANTONIO CARBALLO, PETITIONER, VS. DEMETRIO B. ENCARNACION
IN HIS CAPACITY AS JUDGE OF THE FIRST INSTANCE OF MANILA
AND MARIANO ANG, RESPONDENTS.***G. R. No. L-5675. April 27, 1953*

Ponente: MONTEMAYOR, J.

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In the Municipal Court of Manila, Mariano Ang filed a complaint (civil case No. 8769) against Antonio Carballo for the collection of P1,860.84. The corresponding summons was served upon defendant Carballo for appearance and trial on October 10, 1949. As counsel for him Atty. J. Gonzales entered his written appearance on October 12, 1949. On the same day said counsel filed a motion for postponement of the hearing for one month on the ground that he was sick, attaching a medical certificate to prove his illness. Hearing was postponed to October 14, 1949 at which time defendant asked for another postponements on the ground that his counsel was still sick. The hearing was again postponed to October 24, 1949. In said last two postponements of the hearing, the municipal court warned the defendant that the hearing could not wait until his counsel recovered from his illness, and that if said counsel could not attend the trial he should obtain the services of another lawyer

On the day set for hearing, namely October 24, 1949, neither defendant nor his counsel appeared although there was a written manifestation of defendant's counsel requesting further postponement because he was still sick. At the request of plaintiff's counsel, defendant was declared in default. The evidence for the plaintiff was received after which judgment was rendered against the defendant ordering him to pay the sum of P1,860.84 with legal interest. Counsel for defendant was duly notified of said decision and he filed a motion for new trial on the ground that injustice had been done, and that an error was committed in the decision. The motion for new trial was denied. Through his counsel defendant perfected his appeal to the Court of First Instance of Manila and he later filed an answer.

When the case was called for hearing on March 18, 1952, counsel for plaintiff argued that the decision appealed from had become final and executory for the reason that said judgment having been rendered by default, no appeal could be validly taken from it. Despite opposition of the defendant, the Court of First Instance in an order dated March 18, 1952, considering said decision final and unappealable because it had been rendered by default, and held that the only jurisdiction left to it was to order the execution of said decision, so it ordered the return of the record to the municipal court for that purpose.

Defendant Carballo filed a motion for reconsideration of the order dismissing his appeal which motion was denied by an order dated March 21, 1952, whereupon Carballo filed the present petition for certiorari, injunction, prohibition and mandamus wherein he asks that after due hearing the orders and actuaciones of respondent Judge Encarnacion of the Court of First Instance of Manila be declared null and void; that he be ordered to desist from executing said orders and that furthermore, he be commanded to proceed with the trial of the case "de novo."

We agree that a decision by default rendered by an inferior court is not appealable (*Lim Toco vs. Co Fay*, [1] 45

Off. Gaz., No. 8, p. 3350). The question now is whether defendant (now petitioner Carballo) defaulted in the municipal court of Manila. True, he filed no answer, but his counsel filed a written appearance. In addition, said counsel filed a motion or manifestation asking for postponement of the hearing on the ground that he was ill. In the case of *Flores vs. Zurbito*, (37 Phil., 746), this Court held that an appearance in whatever form without expressly objecting to the jurisdiction of the court over the person, is a submission to the jurisdiction of the court over the person. It is, therefore, clear that petitioner Carballo made an appearance in the municipal court. Could he then be declared in default just because he filed no answer? The answer must be in the negative. In the case of *Quizon vs. Arellano*,^[2] G. R. No. 4461, December 28, 1951, the Supreme Court said that in the justice of the peace court failure to appear, not failure to answer is the sole ground for default. What really happened in the municipal court was that the defendant tho he filed no answer to the complaint, nevertheless, he made his appearance, and in writing at that, but because of his failure and that of his counsel to appear on the date of the trial, a hearing ex-parte was held and judgment was rendered thereafter. The judgment, therefore, was not by default. So, defendant Antonio Carballo had a right to appeal as in fact he appealed, and the Court of First Instance should not have declared the decision appealed from final and executory under the theory that it was not appealable.

The present petition is granted and the respondent judge is hereby directed to proceed with the trial of the case. Respondent Mariano Ang will pay the costs.

Paras, C. J., Feria, Pablo, Bengzon, Tuason and Labrador, JJ., concur.

[1] 80 Phil., 166.

[2] 90 Phil., 644.

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