

**VICENTE S. DY REYES, ET AL., PLAINTIFFS AND APPELLANTS, VS.
FRUCTUOSO ORTEGA AND NAGA CITY SHERIFF, DEFENDANTS AND
APPELLEES.**

G.R. No. L-21471. April 30, 1966

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This case has been certified to us by the Court of Appeals, only questions of law being raised in the appeal, interposed by the spouses Vicente S. Dy Reyes and Remedios P. Reyes, from a decision of the Court of First Instance of Camarines Sur, dismissing their petition in Civil Case No. 5109 of said court.

The record shows that sometime in November, 1960, defendant Fructuoso Ortega filed unlawful detainer case No. 1805 of the Municipal Court of Naga City against plaintiff Vicente Dy Reyes, to oust the latter from a house of the former in Naga City, Camarines Sur, and recover rentals allegedly unpaid, as well as attorney's fees and costs. Reyes was not personally served with summons in said case. Instead, the summons was published in the Bicol Examiner on November 12, 19 and 26, 1960. As Reyes did not know of the institution of said case and, hence, did not appear before the court on December 8, 1960, the date set for the hearing thereof, Reyes was then declared in default. Moreover, Ortega introduced his evidence and the municipal court rendered judgment sentencing Reyes to pay P2,080.00 to Ortega, with interest at the legal rate, from the date of the filing of the complaint, plus P100 a month, from June, 1960, until the house involved in the case shall have been vacated, and the further sum of P500, as attorney's fees. A writ of execution of said judgment having been subsequently issued, on January 10, 1961, the Sheriff of Naga City levied upon a gasoline station building belonging to Reyes and his wife and issued a notice to the effect that said property would be sold at public auction on January 19, 1961.

On the latter date, Reyes and his wife instituted Civil Case No. 5109 of the Court of First Instance of Camarines Sur, against Ortega and said Sheriff. In the petition therein filed, dated January 18, 1961, the Reyeses prayed that the defendants therein be immediately enjoined from executing said judgment of the municipal court, that said judgment be set aside and a new trial ordered and that such other relief as may be just and equitable under the premises be granted. This prayer was predicated upon allegations to the effect that the aforementioned non-appearance of Reyes at the municipal court, his declaration of default in Case No. 1805, and the aforementioned judgment therein were due to fraud, accident, mistake or excusable negligence on the part of Ortega, who knew that the Reyeses are and have been permanent residents of Manila, since 1959; that they had not known of the judgment in Case No. 1805 until January 11, 1961; and that they had a good and valid defense against the complaint therein, as attested to by two (2) affidavits attached to the petition.

After appropriate proceedings, the Court of First Instance of Camarines Sur rendered a decision in said Case No. 5109 declaring that the Municipal Court of Naga City had not acquired jurisdiction over the person of Reyes as defendant in detainer Case No. 1805, because the summons by publication therein was defective, copy of the summons and of the order for its publication not having been deposited in the post office postage prepaid, directed

to Reyes by ordinary mail to his last known address and that, accordingly, the decision in said Case No. 1605 was void. This, notwithstanding, said court dismissed the petition in Case No. 5109, upon the ground that the proper remedy for Reyes is not to seek a relief under Section 1, Rule 38, of the Rules of Court, but to bring an action to enjoin the execution of the judgment of the municipal court, if not already carried into effect, or if property had already been disposed of in compliance therewith, to institute an action for the recovery of said property. Hence this appeal by the Reyeses.

We are unable to agree with the conclusion thus reached in the decision appealed from. To begin with, the decision of the municipal court had not, as yet, been executed when the present case was filed on January 19, 1961. It should be noted that the petition herein was prepared on January 18, 1961 and that the sale of the gasoline station building of the Reyeses was to take place on January 19, 1961. Hence, petitioners prayed that the defendants be immediately enjoined from executing the decision in the detainer case, and consequently, from proceeding with said sale. Besides, even if it took place on said date, the sale would not be definite until sometime thereafter, in that it would be subject to redemption within 12 months (Rule 39, Section 30, of the Rules of Court). Accordingly, the court of first instance could still have seasonably exercised its authority under Rule 38 of the Rules of Court, considering particularly that the Reyeses had commenced this proceedings well within the period set forth in Section 3 of said Rule.

What is more, it should have exercised said authority, not only because Ortega had not specifically denied in his answer to the petition herein the truth of the allegation in paragraph 5 thereof, to the effect that he and his counsel knew petitioner's address in Manila, but, also, because the lower court had found the decision in the detainer case to be null and void, for lack of jurisdiction of the municipal court over the person of the defendant therein. Indeed, the summons therein served by publication was defective for the reason adverted to above, as pointed out in the decision appealed from. But, even if there had been no such defect, it would not have conferred jurisdiction over the person of the defendant, because a detainer case is an action in personam, whereas summons by publication cannot satisfy the requirements of due process, insofar as the acquisition of said jurisdiction, except in actions in rem or quasi in rem. (*Pantaleon vs. Asuncion*, 105 Phil., 761; *Nelson vs. Platon*, 58 Phil., 913.)

Wherefore, the decision appealed from is hereby reversed, and another one shall be entered declaring that the decision of the Municipal Court of Naga City in said case No. 1805 and the auction sale made in connection therewith, are null and void, with the costs of this proceedings against defendant Fructuoso Ortega. It is so ordered.

Bengzon, C.J., Bautista Angelo, Reyes, J.B.L., Barrera, Dizon, Regala, Makalintal, Bengzon, J.P., and Sanchez, JJ., concur.

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