

**CITIZENS' SURETY & INSURANCE COMPANY, INC.,
PETITIONER, VS. HON. JUDGE A. MELENCIO-HERRERA, SANTIAGO
DACANAY, AND JOSEFINA DACANAY, RESPONDENTS.**

G.R. No. L-32170. March 31, 1971

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Petitioner Citizens' Surety & Insurance Company, Inc, seeks review of an order of respondent Judge in Civil Case No. 77134 of the Court of First Instance of Manila, Branch XVII, entitled "Citizens' Surety & Insurance Co., Inc. vs. Santiago Dacanay and Josefina Dacanay", dismissing the complaint for lack of proper service of summons upon defendants.

The record is to the effect that petitioner had filed its complaint in the Court below, alleging that at request of defendant Santiago Dacanay, the plaintiff Surety Company had issued its Surety Bonds Nos. 4942 and 4944, the first, in favor of Gregorio Fajardo to guarantee payment of a P5,000-promissory note executed by said Dacanay, and the second, in favor of Manufacturers Bank & Trust Co., to guarantee payment of another promissory note in like amount; that in consideration of said bonds, Santiago and Josefina Dacanay executed Indemnity Agreements, binding themselves jointly and severally to indemnify plaintiff for any losses, costs and expenses which it might sustain in connection with the issuance of the bonds aforesaid, with interest at 12% per annum; that as additional security, the Dacanays mortgaged to plaintiff a parcel of land in Baguio City, covered by Certificate of Title No. T-8116, the mortgage having been duly recorded; that the promissory notes were not paid and as a result, plaintiff Surety was compelled to pay P5,000.00 to Gregorio Fajardo and P4,081.69 to the Manufacturers' Bank; that the Dacanays failed to reimburse the Surety for such payments, whereupon the Surety caused the extra-judicial foreclosure of the mortgage to pay its claim of P12,491.69 representing its payments, interest and stipulated liquidated damages; that at the foreclosure sale, the land mortgaged was sold to plaintiff, as highest bidder, for the sum of P2,000.00 - leaving an unsatisfied balance of P10,491.69, that plaintiff sought to recover from defendants Dacanay, plus 10% thereof as attorneys' fees, and the costs.

At petitioner's request, respondent Judge caused summons to be made by publication in the newspaper Philippines Herald. But despite the publication and deposit of a prepaid copy of the complaint at the Manila post office, defendants did not appear within the period of 60 days from last publication, as required by the summons.

Plaintiff then asked that defendants be declared in default; but instead, the Judge, by order of May 16, 1970, asked it to show cause why the action should not be dismissed, the suit being in personam and defendants not having appeared. Then, on May 29, 1970, respondent Judge dismissed the case, despite plaintiff Surety's argument that the summons by publication was sufficient and valid under section 16 of Rule 14 of the Revised Rules of Court.

We agree with respondent Judge that the action of plaintiff petitioner, being in personam, the Court could not validly acquire jurisdiction on a non-appearing defendant, absent a personal service of summons within the forum. We have explicitly so ruled in *Pantaleon vs. Asuncion*, 105 Phil. 765, pointing out without such personal service,

any judgment on a non-appearing defendant would be violative of due process. In the aforecited case this Court, through Justice Roberto Concepcion, now Chief Justice, ruled as follows:

"Apart from the foregoing, it is a well-settled principle of Constitutional Law that, in an action strictly in personam, like the one at bar, personal service of summons, within the forum, is essential to the acquisition of jurisdiction over the person of the defendant, who does not voluntarily submit himself to the authority of the court. In other words, summons by publication cannot consistently with the due process clause in the Bill of Rights - confer upon the court jurisdiction over said defendants.

'Due process of law requires personal service to support a personal judgment, and, when the proceeding is strictly in personam brought to determine the personal rights and obligations of the parties, personal service within the state or a voluntary appearance in the case is essential to the acquisition of jurisdiction so as to constitute compliance with the constitutional requirement of due process. * * *.

'Although a state legislature has more control over the form of service on its own residents than nonresidents, it has been held that in actions in personam * * * service by publication on resident defendants, who are personally within the state and can be found therein is not "due process of law", and a statute allowing it is unconstitutional.' (16A C.J.S., pp. 786, 789; Italics ours.)"

The proper recourse for a creditor in the same situation as petitioner is to locate properties, real or personal, of the resident defendant debtor with unknown address and cause them to be attached under Rule 57, section 1(f), in which case, the attachment converts the action into a proceeding in rem or quasi in rem and the summons by publication may then accordingly be deemed valid and effective.

But because debtors who abscond and conceal themselves are also quite adept at concealing their properties, the dismissal of the case below by respondent Judge should be set aside and the case held pending in the court's archives, until petitioner as plaintiff succeeds in determining the whereabouts of the defendants' person or properties and causes valid summons to be served personally or by publication as the case may be. In this manner, the tolling of the period of prescription for as long as the debtor remains in hiding would properly be a matter of court record, and he can not emerge after a sufficient lapse of time from the dismissal of the case to profit from his own misdeed and claim prescription of his just debt.

WHEREFORE, the order of dismissal of the case issued by the Court below is hereby set aside, and in the interest of justice, the proceedings are ordered suspended, to be held pending until the plaintiff petitioner succeeds in ascertaining the whereabouts of the defendants and/or locating properties of the same, to enable proper summons to be issued conformably to this Opinion. No costs.

Concepcion, C.J., Makalintal, Zaldivar, Fernando, Teehankee, Barredo, Villamor, and Makasiar, JJ., concur. Dizon and Ruiz Castro, JJ., reserve their vote.

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