

TIMOTEO DULTRA AND CECILIA DULTRA, PETITIONERS, VS. HON. COURT OF FIRST INSTANCE OF AGUSAN, HON. MANUEL LOPEZ ENAGE, PRESIDING JUDGE, BRANCH II, COURT OF FIRST INSTANCE OF AGUSA...

G.R. No. L-27682. April 30, 1976

Ponente: AQUINO, J.

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AQUINO, J.:

The spouses, Timoteo Dultra and Cecilia Dultra, in these special civil actions of certiorari, mandamus and prohibition, seek to annul the judgment and all the proceedings in Civil Case No. 985 of the Court of First Instance of Agusan.

It appears in that case that on April 29, 1964 the sisters, Esperanza Kuizon Gonzales and Socorro Kuizon Viray, filed a complaint in the lower court against the Dultra spouses for the recovery of an unregistered two-hectare irrigated riceland located at Calibunan, Cabadbaran, Agusan with an assessed value of P480.

They alleged that the said land, which they had inherited from their deceased mother, was invalidly sold on December 17, 1949 by their brother, Ruben Kuizon, to Avelina C. de los Reyes, who in turn sold it on March 21, 1951 for P900 to the Dultra spouses.

The record shows that Patrolman Gabriel Bernal, at the behest of the provincial sheriff, contacted the Dultra spouses at their residence at Cabadbaran on May 12, 1964 in order to serve them with the summons but they allegedly refused to accept service. So, the police record clerk returned the summons and a copy of the complaint to the clerk of court through the sheriff's office, with the statement that the "persons cited were duly contacted but refused to receive their copy as per notation of the serving officer".

For about five months plaintiffs Mrs. Viray and Mrs. Gonzales did nothing in the case. Then, on September 2, 1964 their counsel filed a motion wherein it was alleged "that the summons were served on the defendants on May , (sic) 1964; that per return of service by the serving officer the defendants refused to receive copies of the complaint tendered upon them", and that they did not answer the complaint.

Mrs. Gonzales and Mrs. Viray prayed that the Dultra spouses be declared in default and that a day be fixed for the reception of their evidence. No copy of the motion was sent to the Dultra spouses.

Believing that the Dultra spouses had refused "to receive copies of the complaint and to make their responsive pleading", the lower court in its order of January 2, 1965 declared them in default and allowed Mrs. Viray and Mrs. Gonzales to present ex parte their evidence before the clerk of court.

On the basis of plaintiffs' evidence, the lower court rendered a decision dated April 14, 1965 declaring that the sale of the disputed land to the Dultra spouses was void as to the two-thirds share of Mrs. Gonzales and Mrs. Viray. The court directed the Dultra spouses to deliver to them two-thirds of the land and to pay damages at the

rate of fifty cavans of palay annually, or its value at twelve pesos a cavan, from April, 1964 until the possession of the two-thirds share is delivered to the plaintiffs.

A copy of that decision was received by the Dultra spouses on June 23, 1965. On July 12, or within the thirty-day reglementary period, they filed a motion for reconsideration. They denied that they were served with summons. They contended that even if there was service of summons the service was void because it was made by a policeman who was not authorized, for special reasons, to make the service by the judge of the court issuing the summons. They invoked section 5, Rule 14 of the Revised Rules of Court and the ruling in *Sequito vs. Letrondo*, 105 Phil. 1139 that service of summons by a police sergeant, who was not a sheriff or a court officer and who was not authorized by the court to deliver the summons, was irregular. They also invoked section 20 of Rule 14 which requires that proof of service when made by a person other than the sheriff or his deputy should be under oath.

The Dultra spouses prayed that they be allowed to answer the complaint and that a new trial be held. The plaintiffs opposed the motion for reconsideration.

The lower court denied the motion on the ground that the chief of police in each municipality is an ex officio deputy sheriff (Sec. 184, Revised Administrative Code) and, therefore, service of summons upon the defendants by a member of the police force is valid. (A policeman serving a writ of execution was considered a deputy sheriff in *People vs. Lapitan*, 58 Phil. 774, 779).

Instead of appealing from the order denying their motion for reconsideration, the Dultra spouses on September 10, 1965, filed a petition for relief from judgment which was supported by their joint affidavit of merits. They claimed that they were never served with summons because at the time the alleged service was made they were in Butuan City. They alleged that they were purchasers in good faith and had been in possession of the disputed land for fourteen years. They pointed out that Mrs. Viray and Mrs. Gonzales had joined their brother Ruben in selling the said land to Avelina C. de los Reyes in 1949 as shown by their signatures in the deed of sale, a copy of which was attached to their petition.

The lower court in its order of December 31, 1965 denied the petition for relief allegedly because it was filed beyond the sixty-day period and because there was no affidavit showing the fraud, accident, mistake or excusable neglect and the defenses of the Dultra spouses.

The Dultra spouses filed a motion for reconsideration which was denied by the lower court in its order of February 12, 1966. A second motion for reconsideration was filed. It was denied.

The Dultra spouses filed a notice of appeal, deposited P120 as appeal bond and submitted an unsigned record on appeal. Upon plaintiffs' objection, the lower court disapproved the record on appeal and dismissed the appeal. A motion for reconsideration of the order of dismissal was denied by the lower court in its order of October 18, 1966.

On February 10, 1967 Mrs. Gonzales filed a motion for execution. The order and writ of execution were issued on April 15 and 21, 1967, respectively.

The sheriff placed Mrs. Gonzales in possession of two-thirds of the disputed land over the opposition of the Dultra spouses who bitterly said that they would rather die than surrender the two-thirds portion. The sheriff levied upon two lots of the said spouses to satisfy the award for damages.

The instant petition of the Dultra spouses was received in this Court on June 21, 1967.

Annexed to the petition is an affidavit of Patrolman Bernal wherein he confessed that, contrary to the notation in the summons, he was not able to contact the Dultra spouses on May 12, 1964, when he went to their residence to

serve the summons, because they were in Butuan City; that the police record clerk gave him only the original summons and no copy of the complaint was attached thereto; that he did not leave a copy of the summons in the house of the said spouses because there was no extra copy, and that the notation in the summons as to the alleged service was false.

The Dultra spouses also annexed to their petition herein a copy of the deed of sale dated December 17, 1949 (also attached to their petition for relief from judgment filed in the lower court) wherein it appears that Ruben B. Kuizon and his sisters, Mrs. Gonzales and Mrs. Viray (private respondents herein and plaintiffs in the lower court) sold the disputed land for P700 to Avelina C. de los Reyes who in turn sold it to the Dultra spouses in 1951.

The issue is whether the Dultra spouses had been duly served with summons or whether the lower court had acquired jurisdiction over them.

The decisive fact is the candid admission of the process server, Patrolman Bernal, that he did not serve the summons on the Dultra spouses. As the Dultra spouses had not been properly summoned, the lower court did not acquire jurisdiction over them. It had no power or right to render judgment against them in an action in personam. Its judgment against them is void (*Banco Español-Filipino vs. Palanca*, 37 Phil. 921, 949-50).

"Summons is a writ by which the defendant is notified of the action brought against him. Service of such writ is the means by which the court may acquire jurisdiction over his person. Trial and judgment without such service are null and void." (1 Moran's Comments on the Revised Rules of Court, 1970 Edition, page 438; *Trimica, Inc. vs. Polaris Marketing Corporation*, L-29887, October 28, 1974, 60 SCRA 321, 325; *Caneda vs. Court of Appeals*, 116 Phil. 283; *Pantaleon. vs. Asuncion*, 105 Phil. 761).

The trial court erred in not granting the motion for reconsideration of the Dultra spouses, in not setting aside its decision after its attention was called to the fact that they had not been duly summoned, and in not allowing them to answer the complaint.

The trial court should not have ignored the defense of the Dultra spouses that Mrs. Gonzales, Mrs. Viray and their brother Ruben signed a deed of sale in 1949 in favor of Avelina C. de los Reyes, a document which contradicts their theory that Ruben sold the land without their knowledge and consent.

Moreover, according to the evidence submitted by Mrs. Gonzales and Mrs. Viray in the lower court, the disputed land is covered by Tax Declaration No. 56 dated June 11, 1951 in the name of Timoteo Dultra (Exh. B, page 22, Expediente of Civil Case No. 985). The deed of sale in favor of the Dultra spouses was registered in the registry of deeds of Agusan on March 11, 1963 as Entry No. 3515, page 1, volume II of the Day Book under Act No. 3344 (Page 49, Expediente of Lower Court).

And considering that the two-thirds share of Mrs. Gonzales and Mrs. Viray in the disputed land is apparently pro indiviso, the sheriff could not have delivered to Mrs. Gonzales a specific portion of the land. "Each co-owner owns the whole, and over it he exercises rights of dominion, but at the same time he is the owner of a share which is really abstract, because until the division is effected, such share is not concretely determined" (3 Manresa, *Codigo Civil*, 3rd ed., page 486, cited in *Lopez vs. Cuaycong*, 74 Phil. 601, 604-5).

WHEREFORE, the lower court's order of default and judgment by default and all the subsequent proceedings in the case are set aside. The provincial sheriff is directed to restore the Dultra spouses to the possession of the two-thirds portion of the disputed land which was delivered to Esperanza Kuizon Gonzales. The levy on the spouses' two residential lots is cancelled. The said spouses should answer the complaint. The lower court is directed to conduct further proceedings consistent with this decision. Costs against the private respondents.

SO ORDERED.

Fernando, (Acting C.J.), Antonio, and Concepcion, Jr., JJ., concur.

Barredo, J., concurs in the result in a separate opinion.

CONCURRING OPINION**BARREDO, J.:**

I concur in the result. The moment the petitioners flatly denied in their motion for reconsideration which was opportunely filed that they had not actually been served summons and considering that the regularity of a policeman serving summons was raised by petitioners, as they asked for an opportunity to file their answer, the trial court should have tried to ascertain with more concreteness whether or not there was really a regular service of the summons upon petitioners, particularly because the return was not made under oath as required by Section 20 of Rule 14, whenever the service is made by someone other than the sheriff. That in *People vs. Lapitan*, 58 Phil. 774, We deemed a policeman serving a writ of execution as a deputy sheriff is not controlling because the deputy of the sheriff referred to in the above provision of the rules contemplates a regular deputy sheriff, duly appointed as such, which a policeman is not.

I am not averse to pragmatic approaches when the merits are shown to be ponderously in favor of a party who has failed to comply with the ordinary rules of procedure, but I am afraid, the majority is going beyond permissible bounds of the rule of substantial justice in relying on evidence of total non-service of the summons submitted to this Court for the first time and not offered at all to the court below. I do not believe the Court has any authority to receive in a certiorari proceeding evidence on facts which would alter the factual basis of the action taken by the respondent court. Indeed, were it not for the fact that I feel the proof of service made by the policeman in this case was fatally defective, I would hold that the judgment of the trial court involved here became final after the motion for reconsideration of petitioners was denied, and instead of appealing they filed a petition for relief. My considered view is that petition for relief under Rule 38 cannot be filed after a motion for new trial or reconsideration on the same ground relied upon in the petition for relief has been previously denied. A petition for relief may be filed only if no timely motion for new trial has been filed.

If as the majority opinion implies, the petitioners' case on the merits is really worth being heard, then it is but just that the subject case be reopened by the trial court, but in my view, this has to be done not because the Court accepts the belated proof they have submitted of non-service of the summons in question but because even without such evidence accompanying their petition, and on the basis alone of what the records showed as of the time the respondent court denied their motion for reconsideration, it was already clear that such denial was legally erroneous, it appearing that as pointed out in petitioners' motion for reconsideration, the proof of the purported service of summons upon them was not under oath and as such was fatally defective as explained above.

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