

ILDEFONSO SUZARA, PETITIONER, VS. HON HERMONES CALUAG, ET AL., RESPONDENTS.*G.R. No. L-15404. April 25, 1962*

Ponente: BAUTISTA ANGELO, J.

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On August 8, 1958, Aurora de Castro filed a complaint before the Court of First Instance of Quezon City seeking to recover from Ildefonso Suzara the sum of P2,000.00 and P1,152.00 on two causes of action. Defendant failed to file his answer within the reglementary period and so plaintiff filed a motion to declare him in default. On October 13, 1958, the court declared defendant in default, and after allowing plaintiff to present her evidence, it rendered judgment against defendant as prayed for in the complaint.

Before defendant became aware of the order of default and of the judgment rendered against him, he filed on November 17, 1958 his answer wherein he alleged as defense that the amounts which plaintiff seeks to collect are usurious. On November 19, 1958, when he learned of the order of default and the judgment rendered against him, defendant filed a motion for reconsideration which was verified although not accompanied by affidavits of merit. On November 29, 1958, the court denied the motion, but issued a writ of execution of its decision. On December 17, 1958, defendant gave notice of appeal from the order denying his motion to set aside the order of default, which was followed by the record on appeal and appeal bond, but the court denied the appeal on the ground that defendant having been declared in default has no standing in court, while his petition for relief was presented out of time. Hence, defendant interposed the present petition for certiorari.

It should be stated at the outset that while the present petition partakes of the nature of a certiorari based on grave abuse of discretion on the part of the court a quo, it however asks that respondent judge be ordered to give course to petitioner's appeal. In effect, therefore, it is a petition for mandamus.

There is no dispute that petitioner was declared in default because of his failure to file his answer within the reglementary period, and as a result judgment was rendered against him on October 20, 1958. On November 19, 1958, petitioner filed a motion for reconsideration which was verified although it was not accompanied by the required affidavits of merit. It is probably for this reason that the court a quo denied the motion and instead issued a writ of execution of the decision. The question that now arises is: Can said motion for reconsideration be considered as a petition for relief under Section 2, Rule 38, of our Rules of Court? Should the answer be in the affirmative, can that motion be considered as one filed in accordance with our rules?

In order that said motion may be considered as a petition for relief, the following requisites must be present: (1) it must be verified; (2) it must be filed within 60 days from the time petitioner learns of the decision but not more than 6 months from entry thereof; and (3) the petition must be accompanied by affidavits of merit showing the fraud, accident, mistake or excusable negligence relied upon and the facts constituting petitioner's cause of action or defense. Here it appears that the motion was filed before the reglementary period for appeal has expired, or before the decision has become final and executory. In other words, the motion was filed before entry of judgment

and so it cannot be considered as a petition for relief. Thus, in *Quirino vs. Philippine National Bank, et al.*, 101 Phil. 705; 54 Off. Gaz., (14) 4248, we held:

"We are in complete accord with the trial court and counsel for the appellee bank in the position taken by them. When the appellant filed his petition for relief before the Court of First Instance, the judgment against him by the Justice of the Peace had not yet become final and executory. Consequently, relief under Rule 38 of the Rules of Court was not in order for the reason that said relief is available only after a decision or a judgment from which relief is sought is final and executory. Such is our ruling in the case of *Veluz vs. Justice of the Peace Court of Sariaya*, 42 Phil., 557; wherein we said. * * *"

The motion filed by petitioner cannot therefore be considered in any other light than that of a motion for new trial for in effect it seeks to set aside the order and judgment of default based on fraud, accident, mistake or excusable negligence, as provided for in Section 1, Rule 37 of our Rules of Court. Even then, said rule requires that the motion be accompanied by affidavits of merit, which was not done in the present case. This is perhaps the reason why the court a quo denied it even though it does not say so in so many words.

But petitioner contends that the lower court erred in denying him his right to appeal. He contends that his motion was verified and sets forth his special defense as well as the facts on which it is based. It states in effect that the amounts claimed are not true and correct and part thereof constitutes a violation of the Usury Law. He claims that his motion substantially complies with the rule and so the lower court erred in denying him his right to appeal.

We believe that this is a right which the trial court cannot deny unless it appears that the appeal is flagrantly frivolous and having denied it without any valid reason, the court a quo committed an abuse of discretion which needs to be corrected.[1] We find, therefore, the present petition justified.

Wherefore, petition is granted. Respondent court is ordered to give course to the appeal of petitioner, with costs against respondent Aurora de Castro.

Bengzon, C. J., Padilla, Labrador, Concepcion, Reyes, J. B. L., Paredes, and Dizon, JJ., concur.

[1] *De la Paz vs. Biring, et al.*, 96 Phil., 733; 51 Off. Gaz., [5] 2419; *Coquiliano vs. Buenaventura* 87 Phil., 300; 48 Off. Gaz., 63; *Medran vs. Court of Appeals, et al.*, 83 Phil., 164; 46 Off. Gaz., 4277; *Tecson, et al. vs. Melendres, et al.*, 88 Phil., 703.

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