

JOSE ONG, PETITIONER, VS. BIENVENIDO A. TAN, JUDGE OF THE COURT OF FIRST INSTANCE OF RIZAL, AND MACARIO FELIPE, RESPONDENTS.

G.R. No. L-2099. May 30, 1949

Ponente: MONTEMAYOR, J.

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MONTEMAYOR, J.:

On September 8, 1945, the petitioner Jose Ong filed before the justice of the peace court of Pasay (now Rizal City) an action for forcible entry and detainer against the respondent Macario Felipe regarding the possession of a house situated at No. 248 Apelo Cruz Street, Pasay. On September 11, 1945, the justice of the peace court handed down its decision ordering the defendant Felipe to vacate the house in question and to pay the costs, at the same time dismissing the counterclaim interposed by the defendant. The present petition for certiorari, filed by Jose Ong with this Tribunal, alleges that the defendant Felipe was ejected from the house in question after the decision of the justice of the peace court was rendered in spite of his appeal. The appeal was given due course, was docketed as civil case No. 7526 in the Court of First Instance of Rizal, and on December 6, 1945, the copy of the notice of entry of appeal in the docket of said court, intended for the plaintiff-petitioner, was sent not to him but to one Atty. Arturo Mendoza, Pasay, who does not appear as his attorney of record. In support of his allegation, petitioner points out that the Court of First Instance of Rizal refused to hear Felipe's motion for dismissal on the ground that Atty. Arturo Mendoza did not appear in the record as counsel for plaintiff Ong, so Felipe's counsel was ordered to serve copy of his motion on the plaintiff himself, setting said motion again for hearing.

Petitioner further alleges that on May 21, 1947, that is, one year and eight months after he won the case for forcible entry against respondent Felipe in the justice of the peace court of Pasay, and unaware that it had been duly appealed and was pending trial in the Court of First Instance, he left the Philippines for China and returned to these Islands only on January 29, 1948. In June 1947, after Ong had left for China, the defendant-respondent filed his answer and cross-complaint before the Court of First Instance, and on August 23, 1947, the first notice of the hearing set for September 10, 1947, was sent to plaintiff-petitioner by registered mail; but, inasmuch as he was then in China, he could neither claim nor receive it. On September 10, 1947, respondent Judge Bienvenido A. Tan declared the plaintiff-petitioner in default, dismissing his complaint and ordering the clerk of court to receive the evidence in support of defendant's counterclaim, and, on September 20, 1947, said judge rendered judgment sentencing plaintiff-petitioner to pay defendant P25 a month from October 1, 1946, until he vacated the house, and ordering him or anyone occupying the house to vacate and deliver it to the defendants.

On March 10, 1948, the plaintiff-petitioner filed a motion before respondent Judge Tan asking that the decision of September 20, 1947, be set aside and the case retried on the ground that due notice of the appeal was not made to him or his attorney; that plaintiff was not duly notified of the hearing of the case; and that the reception of the evidence for the defendant by the clerk of court, as ordered by the court, was not authorized by the Rules of Court. Said motion was, however, denied by the respondent judge in his order of March 13, 1948, on the ground that it was the duty of a party-litigant to notify the court of any change in his address. On March 13, 1948, the

plaintiff-petitioner filed a motion for reconsideration stating that he did not notify the court of his change of address because he was not aware of the pendency in the Court of First Instance of Rizal of any case in which he was a party-litigant. This motion for reconsideration was equally defied on March 18, 1948. The respondent judge has already issued the writ of execution ordering the sheriff of Rizal to evict the plaintiff-petitioner or anyone occupying the house in question.

Claiming that in denying the motion of plaintiff-petitioner to set aside the decision of September 20, 1947, the respondent judge acted with abuse of judicial discretion for the reason that the failure of the plaintiff-petitioner to be present at the trial of the case on appeal was not due to any fault or negligence on his part but rather to wrongful service of a judicial notice, and that, therefore, the decision of September 20, 1947 is a nullity due to the defect of jurisdiction and that he has no plain, speedy and adequate remedy available in the ordinary course of law, specially in view of the writ of execution already issued to the sheriff, petitioner has filed this petition for certiorari, asking that an order be issued directing the respondent judge to desist from acting further on the case at bar until this incident is solved, and ordering that the writ of execution issued by the said judge be stayed pending resolution of this petition, and that an order be issued commanding the respondent judge to set aside his decision of September 20, 1947, and to order a retrial in civil case No. 7526.

Upon the posting of a bond in the amount of P200 fixed by this Court, a writ of preliminary injunction was issued commanding the respondent judge and the sheriff "to desist from acting further in civil case No. 7526 of the Court of First Instance of Rizal, and from executing the writ of execution issued in said civil case until further order from this Court."

Considering the facts in this case and the circumstances surrounding the same, we are satisfied that petitioner's failure to be present at the hearing of the appealed case on September 10, 1947, was not due to his fault. Through improper service of the notice of the entry of the appeal in the Court of First Instance¹ of Rizal, petitioner was not duly notified of the pendency of said appeal. When, after winning the case in the justice of the peace court on September 11, 1945, he failed to be informed officially or judicially of the pendency of the appeal as late as May 21, 1947, that is, one year and eight months after the decision of the justice of the peace court was rendered, he was warranted in believing and taking for granted that the case had been terminated and that he could well and without any risk leave the Islands on a trip abroad, which he did. Not knowing or suspecting that there was any litigation pending against him, it was not necessary for him to notify the court of his imminent absence from the Philippines, or to appoint a representative to receive court notices and act for him in his absence. And the ground alleged by the respondent judge in his order of September 10, 1947, dismissing the complaint due to petitioner's failure to appear despite due notification, is not supported and warranted by section 22, Rule 7, of the Rules of Court, which requires the affidavit of the sheriff serving the notice by registered mail and the attachment thereto of the registry receipt and return card,—both requirements not having been fulfilled. Furthermore, as pointed out by the petitioner, the reference of the case to the clerk of court to receive evidence in support of the defendant's cross-complaint, does not seem to be in accordance with the provisions of Rule 34, section 2, of the Rules of Court. In this connection, it may be added that, because of the absence of the plaintiff-petitioner from the Philippines, he did not receive copy of the answer and of the cross-complaint filed by the defendant, the evidence for which the clerk of court was erroneously commissioned to receive.

In view of all the foregoing, the petition is granted, the decision of September 20, 1947 is set aside, including the writ of execution issued in pursuance thereof, and the respondent judge is directed to hold a rehearing or retrial of the case with due notification of the parties. No pronouncement of costs.

Ozaeta, Paras, Pablo, Perfecto, Bengzon, Tuason, and Reyes, JJ., concur.

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