

**FEDERAL FILMS, INC., PETITIONER, VS. BUENAVENTURA OCAMPO,
JUDGE OF FIRST INSTANCE OF MANILA, ET AL., RESPONDENTS.***G.R. No. L-1284. May 27, 1947*

Ponente: PARAS, J.

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This is an original action for prohibition instituted by the petitioner, Federal Films, Inc., praying that the respondent Judge, Honorable Buenaventura Ocampo, be ordered to recall the writ of execution issued by him on January 9, 1947, in Civil Case No. 73256, Pablo Roman, plaintiff, vs. Federal Films, Inc., defendant, and that the respondent provincial sheriff of Rizal be required to desist from carrying the same into effect.

In said Civil Case No. 73256, Judge Jose Gutierrez David issued an order dated December 17, 1916, dismissing petitioner's appeal therein, which order is the subject matter of an original action for certiorari instituted in this Court by the petitioner (G. R. No. L-1260), the pendency of which is invoked by the petitioner in support of this petition for prohibition. In other words, it is the contention of the petitioner that the herein respondent Judge, Honorable Buenaventura Ocampo, gravely abused his discretion or at least whimsically exercised his judgment in ordering the execution of the judgment in Civil Case No. 73256 before the final termination of said action for certiorari (G. R. No. L-1260).

Petitioner's contention is without merit. In the first place, we have dismissed the certiorari proceeding (G. R. No. L-1260).[1] In the second place, although a preliminary injunction could have been prayed for by the petitioner and granted by this Court in said G. R. No. L-1260, to preserve the rights of the parties (section 7, Rule of Court No. 67), no such remedy was sought, much less conceded. In the absence of any such restraining order, the herein respondent Judge was of course authorized to issue the writ of execution in question.

The petition is hereby dismissed, with costs against the petitioner. So ordered.

Pablo, Bengzon, Hontiveros, and Tuason, JJ., concur.

[1] See p. 472, ante.

DISSENTING**PERFECTO, J.:**

The writ of prohibition prayed for by petitioner in this case seeks to stop the execution of an appealed judgment which has wrongly been declared final and executory. Upon a false premise, the lower court dismissed the appeal and ordered the execution of the judgment.

This case is intimately related with the case of Federal Films, Inc. vs. Judge of First Instance of Manila (p. 472,

ante), where the question of whether the appeal of petitioner has been perfected on time or not is in issue. In said case, we have explained that the appeal has been perfected on time, and that the dismissal of the appeal constitutes a flagrant violation of Section 3 of Rule 41. Our opinion in said case should be considered as part of this opinion.

The execution of the judgment of the lower court having been ordered upon the erroneous assumption that the judgment had become final and executory, because the appeal has been filed late, it stands to reason that the execution should be recalled and set aside.

Our vote is to grant the petition, so that the order of execution in question be set aside and the lower court prohibited from ordering the execution of the judgment.

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