

AURELIO LITONJUA, PETITIONER, VS. THE COURT OF APPEALS AND TARCELO PEÑARANDA, RESPONDENTS.

G.R. No. L-46255. October 28, 1977

Ponente: GUERRERO, J.

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GUERRERO, J.:

This is a petition for review by way of certiorari of the Decision of the Court of Appeals[1] as well as its Resolution denying petitioner's Motion for Reconsideration[2] pursuant to Rule 45 of the Rules of Court.

The main issue raised by petitioner is whether or not there was a valid service of summons upon him as to bring him within the jurisdiction of the trial court.

The records extant in this case demonstrate that for failure of petitioner who is the defendant in Civil Case No. 17853 of the Court of First Instance of Rizal to answer the complaint against him, he was declared in default and plaintiff in said case allowed to present his evidence ex-parte after which the court rendered its decision, dated August 16, 1973, the dispositive portion of which reads thus:

IN VIEW OF ALL THE FOREGOING, decision is hereby rendered in favor of the plaintiff and against the defendant, condemning the defendant to pay unto the plaintiff the amount of P5,796.00 for underpayment; P3,648.00 for overtime pay and the sum of P970.00 as separation pay. The defendant shall likewise pay the amount of P500.00 as attorney's fees plus the costs of this proceedings.

In a Motion to Set Aside Judgment by Default and/or for New Trial dated September 3, 1973, defendant (now petitioner herein), alleged that he learned of the filing of the complaint against him for the first time only on August 27, 1973 when he was notified of the court's decision and that he failed to answer the complaint because he was never served with summons issued in this case in the manner required by law. Defendant further pointed out that as a consequence of his non-receipt of the summons, he had been unjustly deprived of his day in court which materially affects or impairs his substantial rights; that he has a good and meritorious defense to the complaint which, if allowed to be presented, would most probably alter the result. Further, he contends that if the allegation of the plaintiff that he was employed as guard and in charge of the San Juan Bodega mentioned in the complaint is correct, defendant would not be the real party in interest responsible for plaintiff's employment. Defendant, however, clarifies that the truth of the matter is that plaintiff, admittedly "an old and unlettered man" unsuitable as a guard, together with his wife and a married son who has a child, merely asked for and was given permission to live on the subject premises (with an area of approximately 1-1/2 hectares) where they could raise vegetable crops primarily to prevent squatters nearby from occupying the area. Thus, he pleaded that the decision of the trial court dated August 16, 1973 be set aside and that he be given opportunity to cross-examine plaintiff on matters testified to during the ex-parte hearing and thereafter to present his evidence.

The trial court denied the Motion to Set Aside Judgment by Default and/or for New Trial, finding it to be not well-taken. Thus, on October 1, 1973, defendant thru counsel, manifested his intention to appeal from the adverse decision dated August 16, 1973. There being no opposition to the Record on Appeal filed by defendant Aurelio

Litonjua, the same was approved and the case was forwarded to the Court of Appeals.

In his brief, defendant-appellant gave three assignment of errors, to wit: I. THE TRIAL COURT ERRED IN NOT FINDING THAT DEFENDANT WAS NEVER DULY SERVED WITH SUMMONS. II. THE TRIAL COURT ERRED IN NOT FINDING THAT THE PLEADINGS AND EVIDENCE ON RECORD DO NOT MAKE OUT A CASE AGAINST DEFENDANT-APPELLANT. III. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S "MOTION TO SET ASIDE JUDGMENT BY DEFAULT AND/OR FOR NEW TRIAL."

Defendant-appellant's appeal was decided adversely against him, the respondent Court of Appeals finding the judgment appealed from to be in accordance with law and the evidence.

In this petition, both the petitioner and the private respondent agree that the issue for resolution is whether or not there was valid service of summons upon the former. The petitioner strongly asserts that he was never duly served with summons resulting in denial of due process and of his day in court. Respondent Court of Appeals citing the case of *Montalban v. Maximo*[3] maintains that there was valid service of summons as service on the cashier of the E & L Realty Co., Mr. Rodolfo Pamintuan, was reasonably calculated to give the defendant actual notice of the proceedings and was, therefore, sufficient to confer jurisdiction on the court below. It must be noted that Mr. Rodolfo Pamintuan who executed an affidavit of merit annexed to petitioner's "Motion to Set Aside Order of Default and/or For New Trial," manifested that sometime in June, 1973 he recalls that a Sheriff of the City of Manila went to the E & L Building where he was working as Cashier of the E & L Realty Co., looking for Mr. Aurelio Litonjua in order to serve the summons issued in the civil case filed against him by Mr. Tarcelo Peñaranda; that he informed the Sheriff that Mr. Aurelio Litonjua, who is already old, seldom goes to the office due to poor health and that he could be found at his residence at 1536 Princeton St., Wack Wack Subdivision, Mandaluyong, Rizal; that when the Sheriff asked him to accept the summons and sign for such receipt in behalf of defendant, he refused, informing him that he was not authorized to do so; further, that he refused to accept the summons because he personally knew that the subject premises where plaintiff was allegedly employed as guard is actually owned by Eddie Steamship (Phil.), Inc. in which defendant has no connection whatsoever.

We find merit in petitioner's case. We hold that the case of *Montalban v. Maximo*,[4] is not in point as said case ruled that a suit in personam against a resident of the Philippines temporarily absent therefrom may be validly effected by substituted service under Section 8, Rule 14 of the Rules of Court. In said case, the question of primary importance which necessarily involved an inquiry into procedural due process was whether summons in a suit in personam against a resident of the Philippines temporarily absent therefrom may be validly effected by substituted service under Section 8, Rule 14 of the Revised Rules of Court. Plaintiffs therein themselves argued that if the ordinary method prescribed by the rules, that is personal service under Section 7, Rule 14, was not feasible, then the substituted service in Section 8, aforesaid came into play. The Court accordingly held that since personal service was impossible because of therein defendant's absence from the country, resort to substituted service became a necessity.[5]

It is evident from a perusal of the records of the case at bar that respondent's suit is one in personam against petitioner (defendant) Aurelio Litonjua. Hence, service of summons should be in accordance with Section 7 of Rule 14 of the Revised Rules of Court which underscores the need for the summons to be served by handing a copy thereof to the defendant in person, or, if he refuses to receive it, by tendering it to him. Substituted service should be availed of only when the defendant cannot be served promptly in person. Impossibility of prompt service should be shown by stating the efforts made to find the defendant personally and the failure of such efforts. The statement should be made in the proof of service.[6]

Here, the manner of service as reflected in the Record on Appeal[7] was "service thru Miss Rudy Pamin-tuan, who (however) refused to sign the receipt hereof but tender the same." There is no showing that efforts were made to serve the summons personally upon defendant. If the defendant could not be served personally with summons within a reasonable time, substituted service may be availed of and may be effected by either of these two modes: (1) by leaving copies of the summons at the defendant's dwelling house or usual residence with some person of suitable age and discretion then residing therein, or (2) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof.

But the sheriff who served the summons immediately resorted to substituted service by leaving the summons with the cashier of the E & L Realty Co. who cannot be said to be the competent person in charge of the office. The cashier refused to accept the copies but instead disclosed the correct address or residence of defendant. But notwithstanding the information of defendant's whereabouts, the sheriff proceeded to tender the summons upon the cashier instead of essaying to personally serve the same upon defendant. Considering the advanced facilities of transportation and communication, it would have been such an easy matter for him to have gone to defendant's residence at Mandaluyong, Rizal or he could have easily availed of telephone facilities to determine the correctness of defendant's address. But he did not adopt any such measure to personally get in touch with defendant.

It thus becomes apparent that the sheriff was in such haste to effect the service of summons and such apparent haste also made manifest from his action in immediately making a return of the summons on the same date (June 26, 1973) he made substituted service to the cashier of the E & L Realty Co.[8], despite the fact that the alleged substituted service was wrongfully effected since he was duly informed that defendant because of old age hardly went to said office of E & L Realty Co.

Since summons is the writ by which the defendant is notified of the action against him and since the service of such writ is the means by which the court acquires jurisdiction over his person, the conclusion that comes to the fore is that since the summons was not validly effected, the court acquired no jurisdiction over the person of petitioner (defendant) Aurelio Liton-jua, and the judgment against him must perforce be nugatory and without legal effect. Thus, the Court in the recent case of *Dultra v. the Court of First Instance of Agusan, et al.*[9] held on precisely the same issue of whether an invalid summons confers jurisdiction over the person of a defendant, that since the defendants therein had not been properly summoned, the lower court did not acquire jurisdiction over them; that such court had no right or power to render judgment against them in an action in personam; and that its judgment against them was void. It must be noted that the issue in this case is also whether the *Dultra* spouses had been duly served with summons or whether the lower court had acquired jurisdiction over them.

In still another case, *Delta Motor Sales Corporation v. Mangosing, et al.*,[10] the Court likewise ruled that the trial court did not acquire jurisdiction over therein petitioner-defendant because it had not been properly served with summons. Consequently, the order of default, the judgment by default and the execution issued by the trial court were held to be void and were set aside.

In the present case, petitioner asseverates that he was not properly served with summons and consequently, the judgment by default rendered against him should be set aside.

The case of *Tumaming v. Ganzon*[11] wherein We reaffirmed the leading case of *Coombs v. Santos*, 24 Phil. 466, (where a motion to set aside the order of default was denied by the trial court but granted by this Court) fully supports petitioner's case:

"A default judgment does not pretend to be based upon the merits of the controversy. Its existence is justified on the ground that it is the one final expedient to induce the defendant to join issue upon the allegations

tendered by the plaintiff, and to do so without unnecessary delay. A judgment by default may amount to a positive and considerable injustice to the defendant; and the possibility of such serious consequences necessitates a careful examination of the grounds upon which the defendant asks that it be set aside.

"In *Watson vs. R. R. Co.* (41 Cal., 17, 20), the court said: 'Applications of this character are addressed to the discretion -- the legal discretion -- of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the courts ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application.'

"It might be added that if plaintiff relies upon his judgment obtained by default and directs the attention of the court to no real injury which would result to his interests by the re-opening of the case, his objection to such action assumes, to say the least, the appearance of a technicality, which, in this liberal age, is not looked upon with favor. An examination of the authorities shows that where the application to set aside a default judgment is made immediately following its entry, it will receive much greater consideration than where a delay of months or even weeks has occurred."

WHEREFORE, the order of default, judgment by default and other proceedings in Civil Case No. 17853 below are set aside and the case is remanded to the lower court for further proceedings and trial and determination on the merits. No costs.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Muñoz Palma, Martin, and Fernandez, JJ., concur.

[1] Decision in CA-G.R. No. 54343-R, 5th Division, Court of Appeals dated April 29, 1973, pp. 20-30, rollo.

[2] Resolution in same case dated May 19, 1973, p. 31, rollo.

[3] No. L-22997, March 15, 1968, 22 SCRA 1070-71.

[4] Id. p. 1074.

[5] Id. at p. 1081.

[6] Vol. I, Moran, Comments on the Rules of Court (1970 ed.)

[7] Record on Appeal, p. 15.

[8] Id.

[9] No. L-27682, April 30, 1976, 70 SCRA 466.

[10] No. L-41667, April 30, 1976, 70 SCRA 599.

[11] No. L-17456, October 22, 1966, 18 SCRA 415-416.

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