

**GRACIANO SITCHON AND ANTONINO CALMA,
PLAINTIFFS-APPELLANTS, VS. THE PROVINCIAL SHERIFF OF
OCCIDENTAL NEGROS AND LUZON SURETY CO., INC.,
DEFENDANTS-APPELLEES.**

G.R. No. L-1853. February 27, 1948

Ponente: FERIA, J.

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FERIA, J.:

This is a motion for dismissal of the appeal interposed by the plaintiff-appellant on the ground that the order which declared the plaintiff in default for his failure to answer the defendant's counterclaim within the time fixed by Rules of Court, is not final and therefore not appealable.

It is evident that an order declaring the plaintiff in default for his failure to answer the defendant's counterclaim, is an interlocutory order, just like an order declaring the defendant in default for his failure to answer the plaintiff's complaint, and therefore not subject to appeal under Sec. 2, Rule 41. Such order is interlocutory, because it does not put an end to the ordinary proceeding in the nature of judicial action therein, since the court if it still to proceed to the hearing of the evidence to be presented by the other party in support of his claim or counterclaim.

The proper remedy for the plaintiff would have been to file a motion to set aside the order of default under Sec. 2, Rule 38, and if denied to appeal from the final judgment of the court on the merits of the counterclaim. Unless he has filed said motion the defaulting party can not appeal from a final judgment by default on the merits (*Maxima Garcia Lim Toco v. Go Fay*, G. R. No. L-1423). And on appeal, appellant may not only have the judgment revised and corrected, but he may also raise the question as to whether or not the order of default was correct or in accordance with law and facts of the case, because the reversal of the order of default will necessarily carry with it the invalidity of the subsequent final judgment on the merits.

The reason of the law in permitting appeal only from a final order or judgment, and not from interlocutory or incidental one, is to avoid multiplicity of appeals in a single action, which must necessarily suspend the hearing and decision on the merits of the case during the pendency of the appeal. If such appeal were allowed the trial on the merits of the case should necessarily be delayed for a considerable length of time, and compel the adverse party to incur unnecessary expenses; for one of the parties may interpose as many appeals as incidental questions may be raised by him and interlocutory orders rendered or issued by the lower court.

In view of the foregoing, appeal is dismissed with costs against the appellant.

Moran, C.J., Paras, Pablo, Bengzon, Briones, Padilla, and Tuason, JJ., concur.

DISSENTING

PERFECTO, J.:

There is no reason in dismissing the appeal in this case. On the contrary, the interest of a speedy administration of justice requires that the appeal should be decided on the merits, so as to help the prompt disposal of the main litigation.

The appeal raises only a very simple question whether the lower court acted correctly in issuing the order of August 28, 1947, declaring plaintiffs-appellants in default. It would be better if this simple question could be settled once and for all before trial on the merits takes place in the lower court.

Under the proceeding outlined in the majority resolution, the parties will have to enter first in a trial and wait for a final decision, before an appeal against the order of default can be taken. Should the order of default be reversed on appeal, the case will be remanded by the appellate court to the lower court, where the parties will have to face and undergo a new trial and the lower court shall have to render a second decision.

Why should the parties be required to waste so much time by undergoing two trials, when the proceedings can be simplified by reducing them to only one trial?

We disagree with the suggestion that, before plaintiff may appeal against the order of default, they should have filed first a motion to set aside the order of default under Section 2 of Rule 38. There is nothing in the rules nor in judicial precedents in support of the suggestion. The majority, in making it, proceeded in effect to introduce an amendment to the rules. We do not believe that the Supreme Court can legislate by decisions. The rule-making power granted to it by the Constitution (Section 13, Art. VIII) must not be exercised through decisions or resolutions in pending specific cases. The Constitution requires that the rules "shall be uniform" and there cannot be any uniformity when for any specific case a new specific rule is to be adopted. Much more, new rules or amendatory rules are not to have retroactive effect. Otherwise, lawyers and party litigants will always be groping in the dark.

The majority invoke as authority the divided resolution in *Lim Toco vs. Go Fay*, L-1423, but the theory maintained by the majority therein was shown to be wrong in the able opinion penned by Mr. Justice Hilado and concurred in by Mr. Justice Paras and ourselves. There is no reason why we should change our stand in said case.

We vote against the order of dismissal of the appeal.

Appeal dismissed.

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