

**GUILLERMO VIACRUCIS, AND LUISA DE VIACRUCIS, PETITIONERS,
VS. HON. NUMERIANO G. ESTENZO, JUDGE OF THE COURT OF FIRST
INSTANCE OF LEYTE, ANASTACIO ORAIS, AND CELESTINA
MALAZARTE,...**

G. R. No. L-18457. June 30, 1962

Ponente: BARRERA, J.

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BARRERA, J.:

On November 15, 1960, respondents Anastacio Orais and Celestina Malazarte filed with the Court of First Instance of Leyte a complaint (Civil Case No. 444-0) against petitioners Guillermo Viacrucis and Luisa de Viacrucis, for recovery of possession of a parcel of land allegedly acquired by plaintiffs by virtue of a deed of sale in their favor, with damages. On December 15, 1960, petitioners were served with summons and a copy of the complaint. On December 21, 1960, due to respondents' failure to attach to the complaint a copy of the deed of sale, referred to Annex "A," petitioners, as defendants below, filed a motion seeking an extension of time for them to answer the complaint until after receipt of said document. Acting on said motion, the court, on December 28, 1960, issued an order giving petitioners 10 days from receipt of said document within which to file their answer to the complaint. Said order, together with the copy of said document, was actually received by petitioners' former counsel: on February 6, 1961, the notices issued by the postmaster of Davao City to said counsel having been issued as follows: First notice: January 24, 1961; Second notice: February 1, 1961; and Third notice: February 6, 1961.

On January 31, 1961, however, presumably on motion of respondents' counsel, the court issued an order declaring petitioners in default, to wit:

"ORDER

"For failure on the part of the defendants to file their answer; the said defendants are hereby declared in default.

"On motion of Attorney Leonardo C. Dejana, the hearing of this case for the reception of the evidence for the plaintiffs is hereby set on February 13, 1961 at 7:30 o'clock in the morning, with notice to Attorney Dejana in open court. "So Ordered."

On February 14, 1961, petitioners filed their answer, with counterclaim, asserting that the deed relied upon by the plaintiffs was but a simulated sale to enable plaintiffs to obtain a loan which was never carried out.

On February 15, 1961, the court received the evidence, for respondents ex parte and thereafter, on the same date, rendered a decision in favor of respondents the dispositive part of which reads:

"WHEREFORE, the Court hereby declares the plaintiffs to be the lawful owner of all the parcel of land described as follows: * * * The Court hereby orders the defendants to jointly and severally pay the plaintiffs

the sum of P400.00 representing damages from 1956 up to December, 1960, and another sum at the rate of P10.00 a month from January, 1961 up to the time the four-hectares northern portion of the aforesaid land shall have been delivered to the plaintiffs and to pay the plaintiffs the sum of P150.00 for as attorney's fees.

"The defendants are hereby ordered to vacate the four-hectare northern portion of land aforesaid and restore the plaintiffs to the possession thereof, and that costs is hereby adjudged against the defendants."

" On February 16, 1961, herein petitioners received notice of the order of the court of January 31, 1961, declaring them in default and setting the case for reception of evidence ex parte on February 13, 1961. Thereupon, petitioners filed a motion for reconsideration of the said order of default stating partly:

"1. The record of this case shows that by order of this Honorable Court dated December 28, 1960, the defendants were given ten (10) days from the receipt of the copy of the manifestation of the plaintiffs' counsel together with the copy of Annex 'A', the Deed of sale alleged in the complaint.

"2. The said order of this Honorable Court dated December 28, 1960, together with the copy of the Manifestation of plaintiffs' counsel and also a copy of the deed of sale (Annex 'A'), was received by the undersigned on February 6, 1961. Defendants therefore have up to February 16, 1961 within which period of ten (10) days said defendants should file their answer under and by virtue of said order of this Honorable Court dated December 28, 1960 referred above. The mail received was by ordinary registered mail.

"3. That it may also be mentioned herein that an order of this Honorable Court dated January 24, 1961, was received on the said date of February 6, 1961 setting the hearing of this case on January 31, 1961 at 7:80 A.M., with the notice to Atty. Dezano in open court. It is herein alleged that the envelope containing this order was postmarked at Ormoc City Post Office January 27, 1961 and as already said, received on February 6, 1961. It was sent by ordinary mail.

"4. That defendants filed their answer by registered airmail on February 14, 1961 as per registry office receipt No. 14189 issued by Davao City Post Office and clearly within the ten-day period granted to the defendants in the said order of this Honorable Court on December 28, 1960 which was received on February 6, 1961.

"5. That considering these incontrovertible facts appearing in the record of this case, the undersigned counsel cannot imagine how the defendants could be declared in default; and furthermore the undersigned counsel entertain the belief that plaintiffs were permitted to present their evidence on February 13, 1961 by and under the virtue of the order herein sought to be reconsidered.

"6. That under the above set of incontrovertible facts, there is absolutely no justification that defendants be declared in default and therefore whatever proceedings had on February 13, 1961 will have no binding effect upon the defendants.

"WHEREFORE, it is respectfully prayed of this Honorable Court that the order dated January 31, 1961 be reconsidered, lifting same; and that whatever proceedings had on February 13, 1961, having no binding effect upon the defendants, be set aside."

Said motion was denied by respondent Judge on April 21, 1961, in an order of this tenor:

"ORDER

"It appears from the certificate issued by the Postmaster of Davao City that as early as January 24, 1961, the first registry notice was sent to Attorney Bonifacio Tamayo representing the defendants.

"The said registered letter No. 3789 contains the order of this Court giving the defendant ten (10) days within which to present his answer to the complaint.

"Under Section 8, Rule 27, of the Rules of Court that service on this letter is deemed complete on January 29,

1961, and that on February 9, 1961, as the defendants have not filed any answer, this Court is well grounded in proceeding with the hearing of this case as the defendants, since then, have already been in default.

"This Court has waited until February 15, 1961, for this Court to receive an answer, but as no answer was filed, the hearing proceeded and a corresponding decision was rendered.

"WHEREFORE, for lack of sufficient merits, the motion for reconsideration filed by the defendants is hereby denied, with notice to Attorneys Dezano and Payos, in open court. "So ordered."

Notified of this order of denial on April 26, 1961, petitioners filed with this Court the present petition for certiorari (with prayer for preliminary injunction) and mandamus.

Petitioners claim that respondent Judge acted with grave abuse of discretion and in excess of his jurisdiction in declaring them in default on January 31, 1961. Respondents on their part urge the dismissal of the present petition, on the ground that appeal from the order of April 21, 1961 denying petitioners' motion for reconsideration of the default order, is the proper remedy.

Petitioners admit that the first notice of the registered mail containing the order of the trial court dated December 28, 1960 (giving them 10 days from receipt thereof within which to file their answer to the complaint) was sent by the Davao City Postmaster to petitioners' counsel on January 24, 1961. Having failed to claim said mail from the post office within 5 days from said date of first notice, or specifically on January 29, 1961, service thereof was, pursuant to Section 8, Rule 27, of the Rules of Court, deemed completed at the expiration of the latter date. Nonetheless, petitioners had until February 8, 1961 (10 days from January 29) within which to file their answer to the complaint. In the circumstances, the trial court could not have legally declared them in default before such date. Hence, the order of default made on January 31, 1961, *Le.*, 8 days prior to the expiration of the time expressly granted petitioners to answer, was premature and, therefore, null and void.

It is, however, contended that petitioners' remedy properly should have been an appeal from the order denying their motion to set aside the order of default, citing the case of *Madrigal Shipping Co. vs. Ogilvie, et al.*, (104 Phil., 748; 55 Off. Gaz. [35] 7331), wherein this Court said:

"Counsel argue that an order of default being interlocutory, the petitioner could not appeal therefrom. True, but from a denial of a motion to set aside an order of default, as the petitioner's 'urgent motion to set aside order of default' (Annex F), which may be deemed to fall under section 2, Rule 38, the petitioner could have appealed. Instead of taking an appeal from such denial, the petitioner chose to bring the matter to this Court by a petition for certiorari with preliminary injunction which was correctly dismissed for the remedy was an appeal from the order denying the motion to set aside the order of default entered against the petitioner because of mistake or excusable neglect. * * *." (*Italics supplied.*)

Note, however, that in the above-mentioned case, the motion to set aside the default order, being predicated on the movant's own alleged mistake and excusable neglect, was treated, and properly so, as one for relief under Rule 38. In other words, the order of default issued therein was not being assailed as inherently defective, but as one resulting from the mistake or excusable neglect of the party seeking the relief. 'It is evident that upon denial of the motion to set aside such order of default, appeal is in order.

Upon the other hand, we have the case of *Luz vs. Court of First Instance of Tacloban, et al.* (77 Phil., 454, 44 Off. Gaz. 42) wherein this Court, finding that—

"When the motion to declare defendant in default was filed on February 24, * * * and when the decision was rendered on March 24, 1944, defendant's petition to dismiss sent from Docos Sur since January 31 was in transit and must have been received between the date of the decision and April 1, 1944, when the order denying it was

issued",

held that the lower court acted prematurely in pronouncing defendant (petitioner) in default, and the decision rendered therein, without giving said defendant her day in court, was declared null and void.

In another case^[1] we granted the writ of certiorari prayed for where it was established that the defendant was prematurely declared in default through misinterpretation by the lower court of the provisions of section 5 of Rule 13, of the Rules of Court. Such premature declaration of default of defendant or the rendering of judgment before the expiration of the time for the filing of an answer, we held therein, deprives the defendant of his day in court and the judgment so rendered may, consequently, be vacated.

Conformably with the foregoing pronouncements, the declaration of default by the court in this case, before petitioners' period to file their answer had expired, clearly is in excess of and/or without jurisdiction and, therefore, properly correctable by a writ of certiorari.

Respondents also argue that since petitioners actually filed their answer only on February 14, 1961, i.e., 6 days after the expiration of the period to file the answer (on February 8), the trial court correctly proceeded ex parte with the case on February 15. Differently stated, it is respondents' contention that petitioners' failure to file their answer on time cured the previous premature declaration of default and validated the otherwise defective proceedings had on February 15.

Such argument can not be sustained. Firstly, under Section 6, Rule 35, of the Rules of Court, a defendant who fails to timely file his answer can only be declared in default "upon motion of the plaintiff" (not motu proprio by the court). There is no question that after the premature, and hence void, declaration of default on January 31, 1961, no other motion to the same effect was filed by respondents-plaintiffs and granted by the court. Petitioners, therefore, were never legally in default. Secondly, petitioners' subsequent failure to file their answer within the extension period could not produce the retroactive effect of supplying the deficiency or lack of legal basis of the declaration of default issued on January 31. A null and void order can not be revived or ratified. Thirdly, the proceeding on February 15, that is, the reception of plaintiffs' evidence ex parte and the decision rendered thereon, having been predicated on a void order of default, is by itself also a nullity which is reviewable by certiorari (*Luna vs. Abaya, etc., et al., supra.*)

The records before us containing the pleadings of the parties indicate that there are genuine issues raised by the defendants-petitioners which would seem to entitle them to a due hearing on the merits.

Wherefore, the writ of certiorari prayed for by petitioners is granted, the order of January 31, 1961, as well as the decision rendered on February 15, 1961, and the order of denial of the motion for reconsideration issued on April 21, 1961, are set aside, and the case ordered remanded to the court of origin for further proceedings, upon the complaint and answer filed therein, without costs.

So ordered.

Bautista Angelo, Labrador, Concepcion, Reyes, J.B.L., Paredes, Dizon, Regala and Makalintal, JJ., concur.

[1] *Luna vs. Abaya, etc., et al., Off. Gaz., (12) Supp. p. 126*

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