

ANTONIO BORLONGAN, PETITIONER, VS. THE HON. COURT OF APPEALS, THE HON. JUDGE E. LUSTRE (CFI-RIZAL, BRANCH XVII, QUEZON CITY), DIOSCORO MACARAIG AND SUSANA MACARAIG, RESPONDENTS.

G.R. No. L-35102. July 25, 1983

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This is a petition to review the decision of the defunct Court of Appeals which dismissed a petition for certiorari.

The antecedent facts are the following:

In the defunct Court of First Instance of Quezon City, the spouses Dioscoro and Susana Macaraig filed a complaint against Antonio Borlongan for damages due to an alleged breach of contract. After the issues had been joined, the trial judge set the case for pre-trial on October 27, 1970. On that date, both Borlongan and his counsel failed to appear and on motion of the plaintiffs Borlongan was declared in default. The plaintiffs were told to present their evidence ex-parte before the Deputy Clerk of Court on October 29, 1970. The evidence was accordingly submitted and a report was made to the trial judge. While the case was pending decision the following events took place:

On May 27, 1971, Borlongan filed a motion to set aside the order of default which had been issued on October 27, 1970. The motion states that the order was received only on May 13, 1971. The motion also alleges:

"I. THAT NEITHER DEFENDANT NOR HIS COUNSEL (THE UNDERSIGNED ATTORNEY) RECEIVED NOTICE OF THE PRE-TRIAL SET FOR OCTOBER 27, 1970; SUCH FAILURE TO RECEIVE NOTICE WAS DUE TO ACCIDENT OR MISTAKE;

"II. THAT THE ORDER OF DEFAULT (ORDER OF OCTOBER 27, 1970) WAS ISSUED WITHOUT PROOF THAT DEFENDANT AND HIS COUNSEL RECEIVED NOTICE OF PRE-TRIAL SET FOR OCTOBER 27, 1970;

"III. THAT DEFENDANT HAS MERITORIOUS DEFENSES TO THE COMPLAINT AND ALSO HAS VALID COUNTERCLAIMS AGAINST PLAINTIFF." (CA-Rollo, Annex E to Petition.)

The motion was opposed by the plaintiffs who claimed that the defendant did not receive notice of the pre-trial because he failed to get the same from the post office of Manila notwithstanding three notices sent to him to claim the letter.

On June 19, 1971, the trial judge denied the motion to set aside the order of default. Afterwards he also denied an oral motion for reconsideration. Borlongan then filed a petition for certiorari with the Court of Appeals to annul the orders of the trial judge dated October 27, 1971, and June 19, 1971, averring lack of appeal or plain, speedy and adequate remedy in the ordinary course of law. The Court of Appeals dismissed the petition. It said:

"Without delving into the merits of the instant petition, it is our considered opinion that the same cannot be entertained for the reason that appeal is the proper remedy. While the order of October 27, 1970, declaring defendant as in default (Rule 20, Section 2, Rules of Court) is not appealable, it being interlocutory in nature (Sitchen vs. Sheriff of Occidental Negros, No. L-1853, February 27, 1948; 80 Phil. 397), the denial of the motion to set aside the order of default is appealable. (Espiritu vs. Lazaro, No. L-2383, May 28, 1959; Coloma vs. Fariñas, No. L-6323, April 29, 1954.) Thus, the instant petition for certiorari will not lie, an adequate remedy, that is, an appeal from the order denying the motion to set aside the order of default, being available to petitioner. (Santos vs. Court of Appeals, No. L-6436, June 30, 1954.)" (Rollo, p. 41)

In the instant petition Borlongan assails the decision of the Court of Appeals. He invokes *Matute vs. Court of Appeals*, L-26751, January 31, 1969, 26 SCRA 768 which states that although appeal is the proper remedy for a defendant who has been validly declared in default, a party who has been illegally or improvidently declared in default may pursue a speedy and more efficacious remedy like a petition for certiorari to have the judgment by default set aside as a nullity.

The only question, therefore, is whether or not the petitioner was illegally or improvidently declared in default. He was not.

In their answer to the petition, the private respondents state, *inter alia*, that:

"On August 12, 1970 respondents Dioscoro Macaraig and Susana Macaraig filed a complaint before the Court of First Instance of Rizal, Quezon City, Branch XVII against the petitioner herein for damages in Civil Case No. Q-14785. After the defendant therein, petitioner now in this case has filed his answer and the issues were joined, respondent Court of First Instance of Rizal, presided by the respondent Judge issued notice of hearing to the parties setting the case for October 27, 1970 at 1:30 in the afternoon which notice of hearing were sent by REGISTERED MAIL on October 7, 1970 to the petitioner at his address in Manila and to Atty. Tomas O. del Castillo, Jr. at his address at 208 Citizens Bank Bldg., T.M. Kalaw St., Ermita, Manila.

Notices of the Registered letter were sent to the petitioner at his address on October 13, and 20, 1970 but petitioner did not claim his letter from the Post Office of Manila.

Likewise, on October 15, counsel for the petitioner was issued at his office the first notice of the Registered letter by the Manila Post Office which he failed to claim. Again on October 20, 1970 the second notice card was issued addressed at his office address which he failed again to claim his letter and on October 30, 1970 the last notice card was issued by the Post Office of Manila to the office of the counsel but still failed to claim his letter." (Rollo, pp. 49-50.)

The petitioner did not deny the above-factual statements. In fact he submitted a manifestation "that he is submitting the above case for decision on the basis of the arguments raised in his petition and without any further proceedings." (Rollo, p. 58.)

In the light of the facts, the service of the order of default upon the petitioner was complete. "Service by registered mail is complete upon actual receipt by the addressee; but if he fails to claim his mail from the post office within five (5) days from the date of first notice of the postmaster, service shall take effect at the expiration of such time." (Rule 13, Sec. 8, Rules of Court.)

The order of default was neither illegally nor improvidently issued.

WHEREFORE, the petition is hereby dismissed for lack of merit. Costs against the petitioner.

SO ORDERED.

Makasiar (Chairman), Aquino, Concepcion Jr., Guerrero and Escolin, JJ., concur.
De Castro, J., on sick leave.

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