

MARC DONNELLY, PETITIONER, VS. COURT OF FIRST INSTANCE OF MANILA AND RODOLFO VILLAVICENCIO, RESPONDENTS.*G.R. No. L-31209. April 11, 1972*

Ponente: VILLAMOR, J.

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In this petition for review by certiorari, the plaintiff in Civil Case No. 76166 of the Court of First Instance of Manila (Branch IX) seeks the reversal of that court's order dismissing the case on the ground of prescription as well as the order denying the plaintiff's motion for reconsideration.

This case had its origin in Civil Case No. 23466 of the Court of First Instance of Manila. After trial in the said case, which was an action for foreclosure of a chattel mortgage, the court rendered judgment for one of the defendants, herein petitioner Marc Donnelly, on his counterclaim, ordering the plaintiff, herein respondent Rodolfo Villavicencio, among other things, to pay defendant Marc Donnelly the sum of P10.00 per day from July 23, 1954, until the delivery to the latter of the car subject matter of the action, and the sum of P300.00 as attorney's fees.

Plaintiff Villavicencio, together with his surety, the World Wide Insurance And Surety Co., Inc., appealed to the Court of Appeals, which rendered judgment on July 15, 1957, affirming that of the trial court. On August 5, 1957, final judgment was entered by the appellate court; and on August 16, 1957, the record of the case was remanded to the court of origin for execution. On September 3, 1957, the surety company delivered the car and paid P2,400.00 to Marc Donnelly. On the side, however, of plaintiff Villavicencio, the writ of execution was returned unsatisfied.

On July 8, 1967, or before the lapse of ten (10) years from August 5, 1957 (when final judgment was entered), Marc Donnelly filed an action (Civil Case No. 70028) with the Court of First Instance of Manila against Villavicencio to revive the judgment in Civil Case No. 23466 and to secure a judgment directing Villavicencio to pay the plaintiff the sum of P9,250.00 allegedly due him from Villavicencio under the dormant judgment. Summons, however, could not be served upon defendant Villavicencio in spite of the exercise of due diligence by the plaintiff. For this reason, the court, then presided over by Judge Conrado M. Vasquez, issued an order on March 10, 1969, dismissing the action "for failure to prosecute, but the dismissal shall be without prejudice." Copy of the order was received by Marc Donnelly on March 19, 1969.

Shortly thereafter, or on March 31, 1969, a second case (Civil Case No. 76166) for revival of the judgment rendered in Civil Case No. 23466 was filed by Marc Donnelly against Villavicencio. Unfortunately, however, as in the first action of the same nature, summons could not be served upon defendant Villavicencio, whose whereabouts was unknown, although diligent efforts toward that end were exerted by the sheriff and the plaintiff. This predicament impelled Marc Donnelly to move to be allowed to effect service of summons thru publication, on the theory that an action for revival of judgment is an action quasi in rem. The court, now presided over by Judge Alberto J. Francisco, did not, however, rule on the motion; instead, it issued on August 30, 1969, the order

now complained of dismissing the case with costs against the plaintiff, "[i]t appearing from the allegations of the complaint that the instant case for revival of judgment was instituted after the lapse of ten (10) years after the decision sought to be revived had become final and executory." The plaintiff moved to reconsider, but his motion was denied on October 25, 1969. Hence, the present recourse.

Petitioner raises before this Court two (2) issues, namely: (a) whether an action for revival of judgment is one quasi, in reim and, therefore, service of summons may be effected thru publication; and (b) whether the second action for revival of judgment (Civil Case No. 76166) has already prescribed. To our mind, the first is not a proper and justiciable issue in the present proceedings, for, as alleged by petitioner himself, the trial court, far from acting on his motion where the said issue was squarely presented, dismissed the case on the ground of prescription. Nevertheless, let it be said that an action to revive a judgment is a personal one (*Aldeguez vs. Gemelo, et al.*, 68 Phil., 421).

The sole issue to be resolved herein is whether or not prescription has set in to bar the filing by petitioner of his second action to revive the judgment in Civil Case No. 23466. An action for the revival of a judgment prescribes in ten (10) years (Art. 1144 [3], Civil Code). The ten-year period is counted either from the date the judgment became final or from the date of its entry (*Vda. de Decena vs. De los Angeles, etc., et al.*, L-29317, May 29, 1971, 39 SCRA 95, 99). The prescription of an action is interrupted, among others, by its filing before the court (Art. 1155, Civil Code).

Applying the foregoing tenets to the case at bar, we find that petitioner's filing of the first action for revival of the judgment in Civil Case No. 23466 was well within the ten-year prescriptive period. Final judgment was entered by the Court of Appeals on August 5, 1957. Petitioner filed Civil Case No. 70028 (his first action to revive the judgment) on July 8, 1967. Therefore, as of the latter date, only nine (9) years, eleven (11) months and three (3) days had elapsed. The ten-year prescriptive period was effectively suspended by the filing of Civil Case No. 70028.

Let us now consider the second complaint. (Civil Case No. 76166) for revival of the same judgment in Civil Case No. 23466, in which complaint petitioner also alleged that final entry of the judgment was made on August 5, 1957. The first such action (Civil Case No. 70028) was dismissed by the court without prejudice; and copy of the dismissal order was received by petitioner on March 19, 1969. On March 31, 1969, petitioner filed the second action for revival of the judgment. When a case is ordered dismissed without prejudice, the plaintiff may file his complaint against the same defendant in a separate action, even if the order has already become final and executory (*Rapadaz Vda. de Rapisura vs. Nicolas, etc., et al.*, L-22594, April 29, 1966, 16 SCRA 798, 801). As it is, the second case to revive the judgment was filed even before the order of dismissal in the first case could become final, for only twelve (12) days had expired between March 19, 1969, when petitioner received notice of the dismissal order, and March 31, 1969, when he filed the second action. In any event, the dismissal of the first case being without prejudice, the filing of the second action was still within the original period of ten (10) years. At any rate, when the defendant's address cannot with due diligence be ascertained and no property of his can be found, the period of prescription is tolled under article 1108(2) of the new Civil Code. In the premises, our conclusion must necessarily be that the trial court committed a reversible error in dismissing Civil Case No. 76166 on the ground of prescription.

WHEREFORE, the order of the trial court dated August 30, 1969, and October 25, 1969, are hereby set aside, and the said court is directed to send the said case to the archives, until private respondent's address is known or any property belonging to him is found. No pronouncement as to costs.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Zaldivar, Castro, Fernando, Teehankee, Barredo, and Makasiar, JJ.,

concur.

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