

PRUDENTIAL BANK & TRUST COMPANY, PETITIONER, VS. HON. HIGINIO MACADAEG, SAURA IMPORT & EXPORT CO., INC., THE SHERIFF OF DAVAO AND THE REGISTER OF DEEDS OF DAVAO CITY, RESPONDENTS.

G.R. No. L-10454. May 25, 1959

Ponente: BENGZON, J.

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BENGZON, J.:

For having lifted the order of default he had previously issued against the defendant in Civil Case No. 26213 of the Manila Court of First instance, the respondent judge is impleaded together with such defendant and others in this petition for certiorari and mandamus.

In said case, Prudential Bank & Trust Co., sued Saura Import & Export Co., Inc. to collect P275,624.62 on a letter of credit, bank draft and trust receipt. Upon its request, the Sheriff of Davao levied preliminary attachment on two parcels of land in Davao belonging to defendant, and caused its annotation in the Office of the Register of Deeds. Summons having been duly served, defendant failed to answer on time. Consequently, upon Prudential Bank's petition, the Court defaulted Saura Import & Export Co., by order of August 23, 1955.

On November 22, 1955, alleging mistake, accident or excusable negligence, Saura Import & Export Co., Inc. filed a petition to set aside the entry of default. Prudential Bank opposed the petition calling attention to its alleged untimeliness, because 80 days had already elapsed from the time Saura Import & Export Co., Inc. first learned of the order of default, and denying the truth of such accident, mistake or excusable negligence, etc., etc.

On December 20, 1955, the respondent Judge Higinio Macadaeg, issued his order cancelling the previous order of default; furthermore, three days later, at the request of Saura Import & Export Co., Inc. over the Bank's opposition. His Honor decreed the dissolution of the preliminary attachment upon the filing of a suitable counterbond. (This explains the inclusion as respondents of the Davao Sheriff and Register of Deeds: the Bank requests for mandamus to reinstate the attachment.) After its motion to reconsider the orders cancelling the default and the attachment had failed, the Bank instituted this proceeding to obtain the annulment of both orders plus other allied relief.

At the outset, it may be stated that certain incidents have not been mentioned, they being immaterial to the issues here. It may also be stated that, as petitioner's objection to the dissolution rests on the default order which, it avers, should remain undisturbed, this decision will address itself solely to the questions pertinent to the quashing of the default.

Elementary, of course, is the principle that an order denying plaintiff's petition to declare defendant in default is interlocutory; no appeal lies therefrom. And we have ruled that as no appeal lies, neither will a certiorari petition be entertained to circumvent the principle.[1]

Now, the circumstances before us present practically the same situation. In effect, the respondent judge refused to

declare defendant in default; yet Prudential Bank brings the matter here for review.

Nevertheless, petitioner alleges lack of jurisdiction, the petition to set aside having been filed more than sixty days after Saura Import & Export Co., Inc. had come to know the entry of default. "From September 3, 1955" argues petitioner, "the day respondent Saura positively and undeniably learned of the order of default, to November 22, 1955, the day respondent Saura filed its petition to set aside the order of default on the ground of accident, mistake or excusable negligence, there had elapsed a total of 80 days, or 20 days more than the 60-day period allowed by sec. 3 of "Rule 38 of the Rules of Court".

This contention respondent's attorney denies, because in his view, the order of default was merely interlocutory and was subject to the control of the court until final judgment. He quotes from *Larrobis vs. Wislisenus*,^[2] the power of the courts, in accordance with immemorial usage, to set aside an interlocutory order of default,^[3] such order being under the control of the court until the final decision of the case, "and may be modified or rescinded on sufficient grounds shown at any time before final judgment".

At this juncture, it may be noted that after the entry of default, plaintiff Bank presented its evidence; but before decision or judgment or default could be entered, defendant asked for rescision of the entry of default; and then the Judge issued the order now in question. The default entry was, therefore, cancelled before rendition of final judgment.

In several decisions we said one who has defaulted may apply for relief under Rule 38 of the Rules of Court. (*Lim Toco vs. Go Pay*, 80 Phil., 166; *Gequillana vs. Buenaventura*, 48 Off. Gaz., 63.) This, at first glance, seems to require presentation of the petition within the time limits prescribed therein, i. e., within 60 days after a knowing the default order and within six months after the entry of such order.

In *Gana vs. Abaya*, 52 Off. Gaz., 231, we annulled on certiorari the order of the Manila court of first instance cancelling a decree of default, because the petition for relief had been filed more than six months after the issuance of such decree. We regarded the period fixed in Rule 38 to be jurisdictional. And in *Isaac vs. Mendoza*, L-2820, June 2, 1951, applying the ruling in *Lim Toco vs. Go Pay*, supra, we expressed the view that if the petition for relief from a default order is not presented within the six-month period fixed in Rule 38, the court of first instance loses the power to grant it. However, in other decisions, the opinion was expressed that a default order being interlocutory, is subject to the control of the court and may be modified or rescinded at any time before final judgment.^[4]

From these decisions the resultant principle appears to be that an order of default may be set aside at any time before final judgment, provided the petition for vacating it is made within six months after entry of the order.

In applying such resultant principle, we find in this litigation that whereas the default entry occurred on August 23, 1955, on November 22, 1955,—within six months—defendant petitioned for relief. The court had jurisdiction to lift the order of default.

Granted the court's jurisdiction to vacate, all issues referring to the reason or reasons for vacating do not need elucidation at this time.^[5] To do so would convert certiorari proceedings into a means of "evading the rule against appeals from interlocutory orders⁶ with the attending evils which the prohibition seeks to avoid. Specifically, this court has declared itself against appeals from orders vacating default judgments. (*Smith vs. Mijares*, 23 Phil., 619.)

Wherefore, there being no excess of jurisdiction, action favorable to petitioner must be declined.

As to alleged insufficiency of the counterbond, the matter may be submitted to the court below for consideration.

Paras, C. J., Padilla, Montemayor, Reyes, A., Bautista Angelo, Labrador, and Endencia, JJ., concur.
Concepcion, J., concurs in the result.

[1] Cf Mendoza vs. Montesa, 90 Phil., 631.

[2] 42 Phil., 401, 403.

[3] As distinguished from the final judgment to be rendered after hearing plaintiff's evidence.

[4] Larrobis vs. Wislizenns, supra; Mandian vs. Leong, 103 Phil., 1431.

[5] If after trial, defendant is absolved and plaintiff appeals, the matter may then be discussed.

[6] Cf. Samia vs. Medina, 56 Phil., 613; Mendoza vs. Montesa, supra.

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