

PHILIPPINE NATIONAL BANK, PLAINTIFF-APPELLANT, VS. AGUSTIN PARIÑA, DEFENDANT-APPELLEE.

G.R. No. L-20990. February 29, 1968

Ponente: ZALDIVAR, J.

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ZALDIVAR, J.:

This is a direct appeal from the decision of the Court of First Instance of Manila, dated January 17, 1963, in its Civil Case No. 46448, dismissing the complaint filed by herein plaintiff-appellant, said court having declared the action barred by the statute of limitations.

The facts of this case are simple. In Civil Case No. 7417 between the same parties in the present case, entitled "Philippine National Bank vs. Agustin Pariña," the Court of First Instance of Manila, after declaring defendant in default, rendered its decision, under date of November 28, 1950, with the following dispositive portion:

"WHEREFORE, defendant Agustin R. Pariña is hereby sentenced to pay to the plaintiff the amount of: on the first cause of action, P4,966.22 plus interest at the rate of 7% on the amount of P4,440.00 from December 14, 1948 to the date of payment plus 10% of the amount due as at-torney's fees; on the second cause of action P16,777.81 plus interest at the rate of 7% on the amount of P15,000.00 from December 14, 1948 to the date of payment, plus 10% of the amount due as attorney's fees, plus the costs of this suit."

The foregoing decision having become final, writs of execution were issued to enforce it, but because judgments thereof remained unsatisfied, on February 28, 1961, herein plaintiff-appellant instituted the present action (Civil Case No. 46448) before the same Court of First Instance of Manila to revive the judgment aforesated, and prayed that defendant be ordered to pay to plaintiff the amount of P43,355.03,[1] as of February 8, 1961, with the stipulated interest from February 9, 1961 until fully paid, plus 10% attorney's fees, and costs of suit.

On account of the failure to locate defendant at his known address, upon motion of plaintiff, summons publication was ordered by the court below. When defendant failed to file his answer within the period provided for in the summons plaintiff moved that the defendant be declared in default, which motion for default was acted favorably by the court a quo. Subsequently, Federico T. Beltran, the Deputy Clerk of the Court of First Instance of Manila, was commissioned by the court to receive the evidence of the plaintiff.

On January 16, 1963, Commissioner Beltran sub-mitted his report to the court, recommending the dismissal of the complaint upon the ground of prescription, it appearing that plaintiff filed the same only on February 28, 1961, or more than ten years from the time the decision of November 28, 1950, sought to be revived, had become final. On January 17, 1963, the lower court, presided over by Judge Francisco Geronimo, rendered a decision approving the commissioner's report and dismissing plaintiff's complaint, the action having been barred by the statute of limitations.

In this appeal, plaintiff-appellant does not deny that an action to revive a judgment under Section 6, Rule 39 of the Rules of Court, in relation to Articles 1144 and 1155 of the Civil Code, must be instituted within ten years from the time the judgment became final. Appellant does not likewise question the finding of the trial court that the

instant case was filed more than ten years from the time the judgment rendered by the same court, dated November 28, 1950, had become final. But the plaintiff contends that the lower court erred in dismissing the complaint upon the ground that plaintiff's action was barred by the statute of limitations. It is the position of the plaintiff that the defense based on the statute of limitations must be pleaded, and because the defendant was declared in default the defendant is considered as having waived that defense.

We agree with the plaintiff that the defense based on the statute of limitation, or on prescription, may be considered only if pleaded, and failure to plead such a defense constitutes a waiver of the defense. In the particular circumstance of this case, however, this contention of the plaintiff cannot be sustained. The record shows that the whereabouts of the defendant was unknown, so that upon motion by the plaintiff the lower court ordered that the defendant be summoned by publication. Summons by publication is a constructive process and it is simply assumed that the defendant had notice of the summons and of the complaint that was filed against him. It cannot be said, therefore, that the defendant by his failure to answer the complaint had waived the defense based on the statute of limitation or on prescription because it is not shown that he was actually aware of the complaint that was filed against him. It would be different if the defendant had been summoned by personal service - and it is actually shown that the defendant had received the summons and the complaint - that when he failed to file his answer it can be considered that he waived the defenses that he is required to plead under the rules of court.

Since in the present case it is shown by plaintiff's own evidence that its action had already prescribed, the court may act *motu proprio* to extend to the defendant the benefits of the defense based on the statute of limitations even if he did not plead that defense. We have before Us a case where it clearly appears that a party has a right but is at a disadvantage and could not assert his right, and so the court has to take the initiative in protecting that right.[2]

We find that the lower court correctly dismissed plaintiff's complaint.

WHEREFORE, the decision appealed from is affirmed, without pronouncement as to costs.

IT IS SO ORDERED.

Concepcion, C.J., Reyes, J.B.L., Makalintal, Bengzon, J.P., Sanchez, Ruiz Castro, Angeles, and Fernando, JJ., concur.

Dizon, J., reserves his vote.

[1] Total indebtedness of defendant has accumulated as of February 8, 1961.

[2]Article 24, New Civil Code.

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