

VICTORIO MERCADO, ET AL., PETITIONERS, VS. THE HON. JUDGE FELIX R. DOMINGO, IN HIS CAPACITY AS PRESIDING JUDGE, COURT OF FIRST INSTANCE OF PAMPANGA, FLORENCIO GAGUI, BERNARDO MA...

G.R. No. L-19457. December 17, 1966

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Petition for certiorari to annul an order of the Court of First Instance of Pampanga, in its Civil Case No. 1588, granting a petition for relief.

The petitioners, Victorio Mercado, Francisco Mercado, Honorata Mercado and Eduarda Mercado, as plaintiffs, on 6 May 1959, filed the said civil case against the respondents, Florencio Gagui, Fermina Gagui, Bernardo Magpayo, Eduardo Bongco and Natividad Bongco, as defendants, to rescind a contract of barter; have plaintiffs declared as the owners of Lot 1, Psu-47213 and Lot 1631, Sexmoan cadastre; oust defendants Gagui therefrom; and to annul the lease of the land to the Bongcos.

The Bongcos, through counsel, Atty. Rufino F. Navarro, filed a motion to dismiss on the ground of pendency of another action for the same cause and for lack of jurisdiction. The Gaguys and Magpayo also filed a separate motion to dismiss through the same counsel on identical grounds, and the additional ground of prescription.

Both motions to dismiss were denied by the trial court in its order of 26 June 1959, Annex "F". The order informed the defendants that they may answer the complaint within the reglementary period.

On motion of the plaintiffs to declare all the defendants in default, the court, in an order dated 5 November 1959, declared only Eduardo and Natividad Bongco in default.

On 13 December 1959, the Bongcos filed a motion to set aside the order of default until such time as their previous motion to dismiss is resolved, the said defendants alleging lack of knowledge or notice of a resolution on the said motion to dismiss.

On 21 December 1959, the court denied the motion to set aside the order of default. The case was set for hearing on 19 January 1960.

On the calendared date for hearing, all the defendants and their counsel did not appear. Noticing that no answer had been filed by the defendants Florencio Gagui, Fermina Gagui and Bernardo Magpayo, the Court declared them in default. The trial then proceeded ex-parte.

On 30 January 1960, the trial court rendered its decision in favor of the Plaintiffs. The defendants received copy thereof or learned about the decision on 29 February 1960.

On 29 March 1960, defendants Florencio Gagui, Fermina Gagui and Bernardo Magpayo moved for

reconsideration and a new trial, alleging, inter alia, that the order of the court denying their motion to dismiss, which was sent by registered mail, was received by their counsel's brother-in-law, but he misplaced it and failed to bring the matter to the attention of said counsel. This motion was neither sworn to nor accompanied by any affidavit of merits.

On 6 April 1960, the court denied the motion for reconsideration and a new trial. Notice of the denial was received by the defendants on 13 April 1960.

On 7 May 1960, all the defendants filed a petition for relief, alleging excusable negligence as ground therefor and stating that their counsel came to know of the lost order (denying their motion to dismiss) on 21 December 1959 upon counsel's personal verification of the records of the case and that they have meritorious defenses. The plaintiffs opposed the petition as belated, having been filed more than sixty days after notice of the decision from which relief was sought.

On 2 September 1960, the respondent court granted the petition for relief, and overruling the objections, reopened the case, vacated the judgment of 30 January 1960, and admitted the defendants' answer. A motion by the plaintiffs for reconsideration was denied on 9 December 1960.

The plaintiffs then resorted to the Court of Appeals, through a petition for certiorari, but their petition was dismissed on 10 October 1961 on the ground that the issues raised involved only questions of law and that the case was not in aid of the appellate jurisdiction of the Court of Appeals. The dismissal was, however, made without prejudice to the petitioners' institution of a proper action in the proper court.

Hence, on 17 February 1962, the Mercados (and Bongcos filed the instant petition for certiorari in this Court, alleging abuse of discretion amounting to lack of jurisdiction on the part of the trial court in granting the defendants' petition for relief in that the petition was filed out of time—more than sixty (60) days from the time they learned of the judgment.

The order complained of ruled that from the time the defendants received the decision, which was on 29 February 1960, to the time they filed their petition for relief, which was on 7 May 1960, more than sixty (60) days had passed, but that the period of fourteen (14) days during which the motion for reconsideration was pending (from its filing until the defendants received the order of denial), should be deducted from the 60-day limit fixed by Rule 38, because a petition for relief is improper until the judgment becomes final; and before finality a motion for reconsideration or new trial under Rule 37 is the appropriate remedy. A contrary view, according to the order, would enable a court to commit the mischief of preventing a petition for relief, because Section 5 of the Judiciary Act of 1948 gives the court ninety (90) days within which to decide a motion for new trial, so that by delaying the denial of the motion for new trial to the 90-day limit, 60 days will have already passed from the time the party concerned learned of the judgment. Upon the foregoing grounds, the respondent court held that the petition was filed on time.

The error in the reasoning of the court of origin lies in the unexpressed assumption that respondents Gagui, et al., had to wait for the finality of the decision on the merits before filing a petition for relief under Rule 38. This Position was decidedly incorrect, because under section 3 of old Rule 38, which the was in force when/order in question was issued, the petition for relief could be filed within sixty days "after the petitioner learns of the judgment, order or other proceeding to be set aside: and not more than six months after such judgment or order was entered, or such proceeding was taken". Plainly, this language is broad enough to allow a party to seek relief from the order of default, as soon as he learns of it, without waiting for the finality of the judgment on the merits. And this is what the defendants Mercado (petitioners now) should have done. In fact, it was their duty to act thus without delay: for under the doctrines in force before the present Revised Rules went into effect (on January 1,

1964) a defaulted party could not appeal from the judgment on the merits unless he first files a motion under Rule 38 to set aside the order of default,[1] and such motion is denied.

The proper procedure that should have been followed by petitioners was clearly outlined by former Chief Justice Moran in his Comments on the old Rules of Court (1957 Ed., Vol. 1, p. 485; 1952 Edition, Vol. 1, p. 705):

"The defendant who is declared in default can not appeal[38] unless he files a motion under Rule 38 asking that the order of default be set aside, upon the ground of fraud, accident, error or mistake or excusable neglect, and his motion is denied, in which case he may appeal from the order denying such motion, and he may, in the meantime, apply for a writ of preliminary injunction to stay the execution of the judgment rendered on the merits.[39] And if the motion for a stay of execution is denied, the motion may be renewed on appeal.[40]

"33. Lira Toco vs. Go Fay 80 Phil. 166; Rodrigo vs. Cabrera, 95 Phil. 790; Carballo vs. Encarnacion, 92 Phil. 974.

39. Tecson, et al. vs. Melendres, 88 Phil. 704; Gequillana vs. Buenaventura, 87 Phil. 300.

40. Sanchez vs. Serrano, 83 Phil. 839."

It is thus beyond controversy that the herein petitioner's motion for relief under section 38, filed on 7 May 1960, came too late, more than 60 days having elapsed since they learned on 29 February that they had been declared in default.

But there is more. The defendants had ample opportunity to seek relief even from the final judgment of the court of origin, yet unreasonably delayed seeking remedy.

Insofar as the" defendants Bongcos are affected, the decision became final on 30 March 1960, since they were notified of it on 29 February 1960. However, they could have filed such a petition for relief from 30 March 1960 until 29 April 1960, after the decision had already become final, yet still within sixty (60) days from notice of the judgment. Hence, the filing of the petition for relief on 7 May 1960 was late by eight (8) days.

The remaining defendants, Florencio Gagui, Fermina Gagui and Bernardo Magpayo, received the decision on 29 February but on 30 March 1960 (the last day for the decision to have become final) they filed a motion for reconsideration and a new trial; this motion was denied and they received the order of denial on 13 April 1960. Since the period for the finality of the judgment had been exhausted, the decision, with respect to these defendants, became final on the same day, 13 April 1960. Thereafter, but not beyond 29 April 1960, the filing of a petition for relief was open to them; during this period, there was no legal impediment because the decision had become final, but it was still within sixty days from notice of judgment. They failed to do so until 7 May 1960.

It thus appears that all the defendants had the chance, under the circumstances, to avail of the remedy provided for under Rule 38 but they neglected the opportunity.

It was error and a grave abuse of discretion by the trial court to subtract from the sixty-day period the period when the motion for reconsideration and a new trial was pending because it has been constantly held that the periods fixed by Rule 38 are mandatory and non-extendible, and are not subject to any condition or contingency, as the rule was itself devised to meet a condition or contingency (Palomares, et al. vs. Jimenez, et al., 90 Phil. 773; Quijano vs. Tameta, L-16473, 20 April 1961; Salvatierra vs. Carlitos, L-11442, 23 May 1958). The filing of the motion for reconsideration and a new trial, while it suspended the period for the finality of the judgment, as regards the Gaguys and Magpayo, did not suspend the sixty-day period provided for in Rule 38.

The respondents contend that their motion for reconsideration and a new trial should be considered a petition for relief and their petition for relief be considered a supplementary motion or motion to reconsider the denial of the

motion for new trial. This cannot be done; for the motion for reconsideration was insufficient for relief purposes, not being accompanied by affidavits of merit, or even sworn to. And the alleged supplement, as has been earlier shown, was presented out of time, and hence not entitled to be considered at all.

Finally, the ground alleged for relief, that respondents' counsel's brother-in-law misplaced the mail and forgot to inform counsel about it, is incredible and not constitutive of excusable negligence (C.f. *Gaerlan vs. Bernal*, L-4039, 29 January 1952; 1 *Moran* 510, 1957 ed.).

For the foregoing reasons, the writ prayed for is hereby granted, and the orders of 2 September 1960 and 9 December 1960 (Annexes "Q" and "T" of the Petition) of the respondent Court of First Instance of Pampanga are hereby set aside and declared null and void, and its judgment on the merits, dated January 30, 1960, is hereby declared final and executory. Costs against the private respondents, Gagui, Magpayo and Bongco.

Concepcion, C.J., Barrera, Dizon, Regala, Makalintal, Bengzon, J.P., Zaldivar Sanchez, and Ruiz Castro, JJ., concur.

[1] *Lim Toco vs. Go Fay*, 80 Phil. 166; *Rodrigo vs. Cabrera*, 95 Phil. 790; *Carballo vs. Encarnacion*, 92 Phil. 974.

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