

FILOMENO DIZON, PETITIONER, VS. NICASIO YATCO, JUDGE OF THE COURT OF FIRST INSTANCE OF RIZAL, BRANCH V, SHERIFF OF RIZAL PROVINCE AND SAMSON YUTAN, RESPONDENTS.

G. R. No. 12202. April 28, 1958

Ponente: REYES, A., J.

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REYES, A., J.:

In civil case No. Q-2000 of the Court of First Instance of Rizal, which was an action for the recovery of a sum of money, the defendant Filomeno Dizon was declared in default for failure to file an answer, and, after proof was received in support of the complaint, judgment for the sum claimed was rendered against him on November 13, 1956.

Learning of the judgment, the defendant, on January 4, 1957, filed a petition for relief, asking that the order of default be lifted, the judgment set aside, and the case allowed to proceed to trial with the admission of the answer and counterclaim attached to the petition. But the petition was denied on the ground that—to quote the court's own language—"up to the present such order of default has not as yet been lifted and therefore defendant has no personality in this case as yet." An amended petition for relief filed before defendant received notice of the denial of his original petition was likewise denied. And the court having moreover granted plaintiff's motion for execution filed without notice to the defendant during the pendency of the amended petition for relief, the defendant perfected his appeal. But for reasons which do not appear the appeal was disallowed.

A motion for reconsideration was to have been filed, but with the provincial sheriff already trying to execute the judgment by default, the defendant came to this Court with the present petition for certiorari, praying that the order of execution be set aside and that preliminary injunction issue, pendente lite, to restrain its enforcement.

The petition was given due course and the preliminary injunction prayed for issued. But respondents have neither answered nor appeared at the hearing.

The petition must be granted. It is true that a party who has been declared in default loses his standing in Nevertheless, the Rules of Court give that party the right to apply for relief from default in accordance with Rule 38 and, if the application is denied, to appeal from the order of denial. Petitioner did avail of that right by filing his application for relief on time. But the application was denied on the ground that the applicant had as yet no standing in the case as the order of default had not been lifted. Needless to say, the preferred relief under Rule 38 would be but a mockery and a delusion if it could be denied on that ground.

It should not also be overlooked that once a petition for the relief provided for in Rule 38 has been filed by the party declared in default, such party is entitled to notice of all further proceedings (Moran's Comments on the Rules of Court, Vol. 1, 1957 ed., p. 484). And this should be borne in mind in connection with the motion for execution which was granted without notice to the adverse party, who, though already declared in default, had filed his petition for relief. That petition was, it is true, subsequently denied. But the denial was appealed.

In the case of *Monteverde et al. vs. Jaranilla, et al.* (60 Phil., 297), this Court held "that the court which orders the execution of a judgment by default during the pendency of the perfecting of the appeal taken against the order denying the motion in which it is prayed that said judgment by default be annulled, acts in excess of jurisdiction", and also "that the court abuses its discretion in ordering the execution of a judgment from which an appeal is pending, without previous notice to the adverse party and there being no special ground therefor." In principle these pronouncements apply to the present case.

In view of the foregoing, the petition for certiorari is granted and the order of execution complained of annulled and set aside. With costs against the respondent Samson Yutan.

Paras, C. J., Bengzon, Montemayor, Bautista Angelo, Labrador, Reyes, J. B. L., Endencia, and Felix, JJ., concur.

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