

DONATO BAÑARES, PETITIONER, VS. TOMAS FLORDELIZA, JUDGE OF FIRST INSTANCE OF SORSOGON, AND JULIAN GAVITO, RESPONDENTS.*G.R. No. 29355. July 20, 1928*

Ponente: VILLA-REAL, J.

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This petition for the writ of mandamus prays that an order be issued by this court to the Honorable Tomas Flordeliza, Judge of the Court of First Instance of Sorsogon, commanding him to set aside the order of default against the herein petitioner Donato Bañares, defendant in civil case No. 2191 of the Court of First Instance of Sorsogon, to admit the answer filed by said defendant in said case, and to give him his day in court.

From the instruments of record it appears that the necessary facts pertinent to the solution of the present proceeding, are as follows:

In the month of November, 1916, by virtue of a writ of execution issued by the justice of the peace of Barcelona, Province of Sorsogon, in the suit filed by Eugenio Fortuno against Julian Gavito covering a sum of money, a piece of rice, hemp, and coconut land belonging to the defendant was levied upon on October 16, 1916. On November 4, 1916, the municipal sheriff of Barcelona, in compliance with said order, sold the said land at public auction, the highest bidder being the herein petitioner, Donato Bañares. The one-year period for redemption having expired, the municipal deputy sheriff, Isaac Camposano, executed the proper deed of sale in favor of said purchaser.

On October 18, 1927, Julian Gavito, whose property had been levied upon in said case, filed a complaint in the Court of First Instance of Sorsogon against Donato Bañares, the purchaser of the land which was the subject matter of the execution, praying that said defendant be ordered to permit the plaintiff to redeem the land in question, to restore the ownership and possession of the same to the latter, and to pay damages at the rate of P100 a year, plus the , costs of the action.

On November 15, 1927, and within the regulation period, the defendant filed an answer to the complaint. Because a copy of said answer was not furnished the plaintiff, the latter, on December 12, 1927 filed a motion for default of said defendant, Donato Bañares.

On December 17, 1927, the Honorable Tomas Flordeliza, Judge of the Court of First Instance of Sorsogon, passing on said motion, issued an order declaring the defendant in default and authorizing the plaintiff to present his evidence in the absence of the former.

On February 9, 1928, and before the assignment of a date for the hearing of the case on its merits, the plaintiff, Donato Bañares, filed a motion, duly sworn to, for setting aside the order of default, wherein it appears that he has a just and valid defense; and attached to said motion as integral parts thereof, were copies of documents alleging that the failure to furnish the plaintiff with a copy of his answer was due to the fact that he believed that

the doctrine laid down in the case of *Gochangco vs. Dean* (47 Phil., 687), which held that the mere failure of the defendant to furnish the plaintiff with a copy of his appearance and answer, cannot, in itself, constitute sufficient ground for a declaration of default, was still in force.

The court, passing upon said motion, issued an order denying the same, considering the defendant's failure an inexcusable error, there existing later jurisprudence in the case of *Gonzalez and Mauricio vs. Francisco* (49 Phil., 747), to the effect that:

"As far as the record shows, no copies neither of the appearance nor of the answer, were served upon the plaintiffs; the documents were therefore not filed in accordance with the rules of the court and the defendant was in default when the case was tried and the judgment rendered."

The only question to decide in the present appeal is whether the respondent judge abused his discretion in refusing to set aside the order of default and in not permitting the petitioner to take part in the trial.

As we have seen, the only ground for the order of default was the petitioner's failure to furnish the other respondent, Julian Gavito, with a copy of his answer. There can be no doubt that such a failure is sufficient for a court to declare the defendant in default, and to refuse to set it aside when a motion to that effect is presented without a sworn statement of merit and evidence to establish them, as has been held in the last cited case. But when the motion to set aside the order of default was made without any loss of time and before a date was set for the hearing of the case on its merits, and is accompanied by a sworn statement of merit and copies of documents which constitute *prima facie* a just and valid defense, such failure is insufficient to deprive a defendant of his rights, as in the present case, and the refusal to set aside the order of default constitutes an abuse of discretion, and especially when such setting aside of the order of default will in no way prejudice the plaintiff.

In conclusion, we are of the opinion, and so hold, that under the circumstances of the case the respondent judge committed an abuse of discretion in refusing to set aside the order of default here in question.

In virtue whereof, the remedy sought is hereby granted, and it is ordered that the respondent judge, the Honorable Tomas Plordeliza, set aside his order of default of December 17, 1927, against the herein petitioner, Donato Bañares, as defendant in civil case No. 2191 of the Court of First Instance of Sorsogon, wherein Julian Gavito, one of the herein respondents, was plaintiff; to admit the answer filed by said petitioner, and to permit him to be heard at the trial, with the costs against said respondent Julian Gavito. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Ostrand, and Romualdez, JJ., concur.

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