

## LUZON SURETY CO., INC., PETITIONER, VS. THE GOVERNMENT OF THE PHILIPPINE ISLANDS AND GUILLERMO F. PABLO, JUDGE OF THE COURT OF FIRST INSTANCE OF CEBU, RESPONDENTS.

*G.R. No. 44262. September 30, 1935*

Ponente: VILLA-REAL, J.

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### VILLA-REAL, J.:

This is a petition filed with this court by the Luzon Surety Co., Inc., against the Government of the Philippine Islands and Guillermo F. Pablo, Judge of First Instance of Cebu, under the provisions of section 513 of the Code of Civil Procedure, praying, upon the facts alleged therein, that an order be issued nullifying the order of December 3, 1932 and the decision of December 6, 1932, of the Court of First Instance of Cebu in case No. 9371, entitled "Government of the Philippine Islands, plaintiff, vs. Luzon Surety Co., Inc., defendant," and directing that the said case be set for trial, with the costs to the respondents.

The pertinent facts necessary to resolve the question raised in the instant petition are as follows:

On November 14, 1931, His Excellency, the GovernorGeneral ordered the deportation, as an undesirable alien, of the Chinaman Uy Teh Lay on the first available boat (Exhibit C). On December 2, 1931, the said GovernorGeneral temporarily released the Chinaman Uy Teh Lay for a period of thirty days upon filing of a bond for P4,000 in order to enable him to dispose of his property (Exhibit D). On December 5th of the same year, the Luzon Surety Co., Inc., through the manager of its Cebu agency, put up the required bond in favor of the respondent, Government of the Philippine Islands, reading as follows:

"Whereas, His Excellency, the Governor-General of the Philippine Islands, has granted the petition of Uy Teh Lay for suspension of an order of his deportation for thirty days beginning to-day, and has also granted the issuance of a bail bond for his temporary release within the thirtyday period herein mentioned;

"Now therefore, the Luzon Surety Co., Inc., hereby undertakes, binds and obligates to produce and deliver the person of Uy Teh Lay to the Philippine Constabulary of Cebu, Cebu, on the day following the expiration of the thirty-day period. Further, the Luzon Surety Co., Inc., or its duly authorized representative promises to appear before the Philippine Constabulary, Cebu, Cebu, to give account of the principal Uy Teh Lay. Otherwise, upon failure to comply with the obligation alluded to above, the Luzon Surety Co., Inc., binds to pay the Government of the Philippine Islands the sum of four thousand pesos (P4,000) Philippine currency."

On January 12, 1932, Colonel G. B. Francisco, then the commander of the Visayan district, addressed a letter to the Cebu agency of the petitioner Luzon Surety Co., Inc., requiring the delivery, within forty-eight hours, of the person of Uy Teh Lay, which letter was received by said petitioner at 8.22 a. m., on the 13th of the said month and year (Exhibit F). On receipt of said letter, the manager of the petitioner's Cebu agency, on January 13, 1932, wired Colonel C. H. Bowers, Superintendent of the Intelligence Division of the Constabulary at Manila, asking for confirmation of the news that the Chinaman Uy Teh Lay had left for China on January 2, 1932, after reporting at the central office of the Constabulary and that of the Bureau of Customs. The said telegram was, on January 14,

1932, endorsed by the Chief of the Constabulary C. E. Nathorst to the Insular Collector of Customs, asking if it were true that the Chinaman Uy Teh Lay had left for China on January 2d, 1932, inasmuch as he had not reported at this office. On January 22, 1932, the Acting Collector of Customs answered the Chief of the Constabulary to the effect that the Chinaman Uy Teh Lay had left for China on board the boat Anking on January 2, 1932. On the same date, January 22, 1932, the said Chief of the Constabulary transmitted all the papers to the petitioner through the commander of the Visayan district of the Constabulary at Cebu and the Superintendent of the Intelligence Division of said body, Colonel C. H. Bowers. On January 30, 1932, the commander of the Visayan district, Colonel G. B. Francisco, transmitted said papers to the petitioner. On February 19, 1932, the manager of the petitioner's Cebu agency informed the petitioner's central office at Manila that the certificate of clearance of the Chinaman Uy Teh Lay was not a sufficient evidence for the Constabulary and that it was necessary to obtain other evidence set out in his letter.

On February 26, 1932, the petitioner's central office at Manila answered the letter of the manager of its Cebu agency enclosing certificate No. 209 issued by the Bureau of Customs on February 4, 1932, to the effect that the Chinaman Uy Teh Lay really left on January 2, 1932, on board the boat Anking. By a letter of March 1, 1932, the petitioner through its Cebu agency, transmitted to the office of the Constabulary of the Visayan district the aforesaid certificate No. 209 issued by the Bureau of Customs, which certificate was received by said office of the Constabulary of the Visayan district on January 12, 1932. On February 25, 1932, the provincial fiscal of Cebu, in behalf of the Government of the Philippine Islands, filed with the Court of First Instance of Cebu a complaint against the Luzon Surety Co., Inc., et al., civil case No. 9371 of said court, for the recovery of the sum of P4,000 with legal interest thereon and the costs, in view of the violation of the conditions of the bond put up by the said petitioner. The said violation was made to consist in that the defendant Uy Teh Lay had not reported up to said date either to the Constabulary at Cebu or to the Intelligence Division of the Constabulary at Manila, for the execution of the order of deportation, notwithstanding the expiration of the thirtyday period granted him for his temporary release, nor has the defendant Luzon Surety Co., Inc., presented or delivered the person of Uy Teh Lay to the Constabulary at Cebu or any branch or department of the Government of the Philippine Islands notwithstanding repeated requirements to that effect; and in that said petitioner Luzon Surety Co., Inc., has not paid the amount of the bond of P4,000, filed by it notwithstanding repeated demands to do so, and has refused and still refuses to pay.

On February 29, 1932, the central office at Manila addressed a letter to petitioner's Cebu agency asking for confirmation of the news item published in La Revolucion, a newspaper published in Cebu, relative to the filing by the provincial fiscal of Cebu of a complaint against the Luzon Surety Co., Inc., for the execution of the bond filed by it for the temporary release of the Chinaman Uy Teh Lay.

On March 3, 1932, the petitioner, Luzon Surety Co., Inc., was served with the complaint through the manager of its Cebu agency in Cebu, Fructuoso Villarosa, who endorsed the summons and copy of the complaint to Attorney Miguel Raffinan in order that the latter may appear in behalf of the petitioner and answer said complaint.

In reply to the aforesaid letter of the central office of February 29, 1932, the manager of the petitioner's Cebu agency informed the said central office in a letter of March 4, 1932, that the news item published in the newspaper La Uevolucion was true, and that the provincial fiscal, upon instructions of the Attorney-General, had filed the complaint but was ready to withdraw the same at any time the cancellation of said bond is presented. On March 8, 1932, petitioner's central office at Manila addressed another letter to the manager of its Cebu agency informing the latter of its negotiations with the Constabulary which led the latter's chief to communicate with the Attorney-General in order to instruct the provincial fiscal of Cebu to withdraw the complaint filed against the petitioner inasmuch as the latter had conclusively established that the Chinaman Uy Teh Lay had already been

deported.

Upon motion of the provincial fiscal dated November 18, 1932, and filed on December 2d of the same year, Guillermo F. Pablo, Judge of First Instance of Cebu, on December 3, 1932, entered an order declaring the petitioner in default for failure to file its answer within the statutory period.

When the case was called for trial and the evidence for the respondent, Government of the Philippine Islands, was presented, the other respondent, Judge of First Instance of Cebu, on December 6, 1932, rendered a decision ordering the defendant therein and petitioner herein, Luzon Surety Co., Inc., to pay the plaintiff therein and respondent herein, Government of the Philippine Islands, the sum of P4,000, with legal interest from February 25, 1932, until fully paid, and the costs.

Every time Fructuoso Villarosa, manager of petitioner's Cebu agency, conferred with Attorney Miguel Raffinan about the aforesaid case, the latter invariably told him that the case had been settled, and in view of the sundry correspondence that had passed relative to said bond, he did not for a moment doubt the truth of the information given by said attorney.

On August 5, 1935, the petitioner Luzon Surety Co., Inc., was informed for the first time of the order of default and of the decision upon default when the provincial sheriff served on it a copy of the order of execution of the judgment.

The only question to determine in the present petition is whether the petitioner Luzon Surety Co., Inc., is entitled to the remedy provided in section 513 of the Code of Civil Procedure.

The above-cited section 513 of the Code of Civil Procedure provides as follows:

"SEC. 513. Procedure in cases of defaults caused by fraud, accident, or mistake,—When a judgment is rendered by a Court of First Instance upon default, and a party thereto is unjustly deprived of a hearing by fraud, accident, mistake, or excusable negligence, and the Court of First Instance which rendered the judgment has finally adjourned so that no adequate remedy exists in that court, the party so deprived of a hearing may present his petition to the Supreme Court within sixty days after he first learns of the rendition of such judgment, and not thereafter, setting forth the facts and praying to have such judgment set aside. The court shall summarily on notice to both parties hear such petition, upon oral or written testimony as it shall direct, and the judgment shall be set aside and a trial upon the merits granted, upon such terms as may be just, if the facts set forth in the complaint are found to be true, otherwise the complaint shall be dismissed with costs.

"If a trial on the merits is granted, the order shall forthwith be certified to the Court of First Instance. Pending such petition, any judge of the Supreme Court for cause shown, may order a suspension of further proceedings to enforce the judgment complained of, upon taking sufficient security from the petitioner for all costs and damages that may be awarded against him in case the petition is dismissed."

There is no question that the herein petitioner Luzon Surety Co., Inc., was declared in default on December 3, 1932, and judgment upon default rendered against it on December 6th of the same year. There is likewise no question that the order of execution was not issued until July 6, 1935, and was executed by the provincial sheriff of Cebu on August 5th of the same year. All the remedies granted by the Code of Civil Procedure to a party who believes him self aggrieved by an order or judgment of a court to ask for the revocation or annulment of the said order or judgment have elapsed or expired: that established by section 145, because of the expiration of the thirty days provided by the Code of Civil Procedure within which to ask for a new trial; and that established by section 113, because of the expiration of six months from the date the decision was rendered. The only remedy, therefore, left to the petitioner is that provided for in section 513 of the said Code, fixing the period of sixty days within

which a party interested in a judgment rendered upon default in the Court of First Instance may petition to have said judgment set aside and a new trial granted. The said period is counted from the date he first learns of the order or judgment and whenever he is unjustly deprived of a hearing by fraud, accident, mistake or excusable negligence, and the Court of First Instance which rendered the judgment has finally adjourned so that no adequate remedy exists in that court.

In the instant case counsel for the respondents contends that the manager of the petitioner's Cebu agency was informed of the decision upon default rendered against it on December 6, 1932, when said manager interviewed the then provincial fiscal of Cebu, Lope Consing, asking the latter to give the company time within which to pay the judgment. The affidavit of the said provincial fiscal on this point has been contradicted and denied under oath by the said manager, Fructuoso Villarosa. In view of the official communications that passed between the petitioner, the office of the Constabulary and the Bureau of Customs, showing that the said petitioner has substantially complied with the conditions of the bond filed by it in favor of the Government of the Philippine Islands; of the information given by Miguel Raffinan, attorney for said petitioner, to the effect that the case was settled, and of the delay in issuing the order of execution of the judgment upon default, the petitioner Luzon Surety Co., Inc., was left under the belief that having complied with the conditions of the bond the case for the forfeiture thereof had actually been settled. That is the reason why it took no steps to set aside the judgment rendered against it upon default, of which it had no knowledge until August 5th of the present year when the provincial sheriff of Cebu wanted to enforce a writ of execution issued on July 5th of the same year. On August 21st of the same year it filed the petition which is now before us.

Petitioner's failure, therefore, to file with the Court of First Instance of Cebu a petition to set aside the decision rendered against it upon default was an excusable negligence, and it is entitled to the remedy under section 513 of the Code of Civil Procedure.

For the foregoing considerations, we are of the opinion and so hold that the failure of a surety to file a petition to set aside an order or judgment upon default, ordering it to pay the amount of the bond filed by it for the temporary release of a Chinaman who was ordered deported by the Governor-General, and rendered while it was negotiating to be relieved from the consequences of said bond in view of the fact that it has already complied with the conditions thereof by the deportation of the Chinaman within the period granted, by virtue of its reliance on the information of its attorney to the effect that the case for the forfeiture of the bond had already been settled, which information is corroborated by the non-issuance of the order of execution until after the lapse of more than two years, constitutes excusable negligence, and having filed the petition within sixty days from the time it first learned of the judgment upon default, the said surety is entitled to the remedy provided for in section 513 of the Code of Civil Procedure.

Wherefore, the petition prayed for is granted, and the order of default of December 3, 1932, and the decision upon default of the 6th of said month and year, are annulled and set aside and a new trial ordered, without special pronouncement as to the costs. So ordered.

Malcolm, Hull, Imperial, and Goddard, JJ., concur.

Petition granted.

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