

DAMASO FONTANILLA, PLAINTIFF-APPELLEE, VS. NARCISO DOMINGUEZ, DEFENDANT-APPELLANT; DIMAS DOMINGUEZ, INTERVENOR-APPELLANT; DAMASO FONTANILLA ET AL., CROSS-DEFENDANTS-APPELLEES.

G.R. No. 48132. May 20, 1942

Ponente: OZAETA, J.

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OZAETA, J.:

In or about the year 1926 Dimas Dominguez contracted the services of Attorney E. G. Turner to secure Torrens title to his parcel of land designated as lot No. 1744 of the cadastral survey of Rosales, Pangasinan, with an area of 24,793 square meters. On April 26, 1926, he paid P5 to E. G. Turner, which amount the latter receipted for 38 "payment for cadastral lot." On July 25, 1927, he again paid to E. G. Turner P15 "for cadastral lot." On August 17, 1927, he executed and delivered to E. G. Turner at Rosales, Pangasinan, a promissory note in the words and figures following, to wit:

"P50.00

"ROSALES, P. I.

"Agosto 17, 1927

"On or before the 29th day of February, 1938 for value received I jointly and severally promise to pay to the order of E. G. Turner the sum of fifty pesos with interest thereon payable yearly at the rate of 12 per cent per annum until paid, and if not so paid the whole sum of both principal and interest become immediately due and collectible, at the option of the holder and in case action is instituted to collect this note or any portion thereof we submit ourselves to the court of competent jurisdiction in Lingayen, P. I., and jointly and severally promise and agree to pay in addition to the costs provided by law, one hundred pesos as attorney's fee in said suit or action.

(Sgd.) "DIMAS DOMINGUEZ

"Witnesses:

(Sgd.) "ANGEL SANCHEZ

"VALENTIN TEJADA"

The consideration for said promissory note was the same professional services of Attorney Turner, contracted by Dimas Dominguez as aforesaid.

On February 24, 1930, Dimas Dominguez paid P50 to E. G. Turner, which amount the latter receipted for as payment on account.

On April 8, 1932, E. G. Turner sued Dimas Dominguez upon said promissory note in the justice of the peace court of Lingayen, Pangasinan (civil case No. 1660), alleging that the defendant resided in the barrio of Casanicolasan,

Balungao, Pangasinan, and that he had paid only the sum of P20 on account of the interest on said promissory note.[1] On June 26, 1933, after unsuccessful attempts to effect personal service of summons upon the defendant in Balungao, Pangasinan, and Caranglan, Nueva Ecija, E. G. Turner filed a motion in said civil case No. 1660, alleging that the defendant Dimas Dominguez had not been served with summons and that his actual residence or present whereabouts could not be ascertained notwithstanding due diligence on the part of the plaintiff, and praying the court "to order the service of summons upon the defendant Dimas Dominguez * * * by publication in the Pangasinan Review in accordance with section 398 of the Code of Civil Procedure." The affidavit accompanying said motion, signed by E. G. Turner, averred: "that he has a valid and just cause of action against the defendant Dimas Dominguez; that after the exercise of due diligence, the said defendant cannot be found at his former place of residence, nor can his present whereabouts be ascertained or that he conceals himself to avoid the service of summons." Said motion was granted by the court, and accordingly summons by publication in the Pangasinan Review was issued in said case.

On August 29, 1933, judgment by default was entered against Dimas Dominguez in said civil case No. 1660 by the justice of the peace of Lingayen, condemning the said defendant to pay to the plaintiff E. G. Turner the sum of P50 with interest thereon at the rate of 12 per cent per annum from August 17, 1927, until full payment, less P20 already paid on account of the interest, plus P100 as attorney's fees and the costs. Execution upon said judgment was subsequently levied on the same parcel of land for the registration of which Dimas Dominguez had contracted Turner's professional services, and by virtue of said writ of execution the sheriff subsequently levied upon and sold said parcel of land at public auction, adjudicating it to the judgment creditor E. G. Turner for the amount of the judgment.

Later, E. G. Turner assigned all his right, title, interest, action, and participation in said parcel of land to Damaso Fontanilla, who obtained a final certificate of sale from the sheriff after the lapse of one year from the date of the sale to Turner, and, by virtue of said final deed of sale, procured from the register of deeds of Pangasinan the cancellation of original certificate of title No. 46433" in the name of Dimas Dominguez and the issuance to him (Damaso Fontanilla) of transfer certificate of title No. 11397 covering said lot No. 1744 of the cadastral survey of Rosales. Shortly after the issuance of said transfer certificate of title on December 26, 1936, Damaso Fontanilla took possession of the southern portion of said lot. The rest of the land, that is to say, one-third of the area on the northern part, remained in the possession of Narciso Dominguez, brother and tenant of Dimas Dominguez, who refused to yield the same to Damaso Fontanilla.

To recover the possession of the said one-third of the land from Narciso Dominguez, Damaso Fontanilla instituted the present action in the Court of First Instance of Pangasinan. Dimas Dominguez intervened in this action, and in his complaint in intervention against the plaintiff and the legal guardian of E. G. Turner (who had in the meantime become incapacitated) he assailed the validity of the judgment and all the proceedings had in civil case No. 1660 of the justice of the peace court of Lingayen, alleging in substance, among other things, that he had paid: in full the promissory note sued upon and that Turner had procured the service of summons against him by publication in the Pangasinan Review thru false representation of his last-known place of residence as being Balutigao instead of Rosales, Pangasinan.

The trial court rendered judgment declaring the plaintiff Damaso Fontanilla owner of the entire parcel of land in question, condemning the defendant Narciso Dominguez to vacate the portion occupied by him and to deliver the possession thereof to the plaintiff, and absolving the plaintiff and the cross-defendant Philippine National Bank, as guardian of E. G. Turner, from the complaint in intervention presented by the intervenor Dimas Dominguez, with costs against the latter and the defendant Narciso Dominguez. From that judgment both the defendant and the intervenor appealed to the Court of Appeals, which indorsed the case to this Court pursuant to section 138 of the

Revised Administrative Code, as amended by section 2 of Commonwealth Act No. 3.

The sole question raised by both the defendant and the intervenor as appellants is "whether or not the proceedings taken against the debtor Dimas Dominguez in civil case No. 1660 of the justice of the peace court of Lingayen, Pangasinan, are valid, and as a consequence thereof, whether or not the levy and sheriff's sale of his property made thereunder are also valid."

The resolution of that question hinges on whether or not the publication of the summons issued in said case was authorized by law. Section 51 of the Code of Civil Procedure then in force provides as follows:

"SEC. 51. Summoning of defendants.—Defendants in suits before justices of the peace may be summoned to appear in the manner provided in articles seven hundred and four, seven hundred and five, seven hundred and six, seven., hundred and seven, seven hundred and eight, and seven, hundred and nine of the Code of Civil Procedure of the Philippine Islands, in force in the year eighteen hundred and ninety-eight,' before the American occupancy. They may likewise be lawfully summoned in the manner provided in Chapter Fifteen of this Code. "But the time of appearance shall be regulated not by the latter, but by the former code, unless the defendant shall reside more than fifteen kilometers from the poblacion."

As plaintiff in said civil case No. 1660 of the justice of the peace court of Lingayen, Turner elected to have the therein defendant Dimas Dominguez summoned in the manner provided in chapter 15 of Act No. 190 (sections 389-400). Section 398 of said Act, which was invoked by Turner in his motion for the issuance of summons by publication, reads as follows:

"SEC. 398. Service upon absent or unknown defendants.—Where the person on whom service is to be made resides out of the Philippine Islands, or has departed therefrom, or can not, after due diligence, be found within the Islands, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the Islands, and the fact appears by affidavit to the satisfaction of the judge of the court where the action is pending, and it also appears by such affidavit that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; and when it appears by such affidavit, or by the complaint on file that it is an action which relates to, or the subject of which is, real or personal property within the Islands, in which such person defendant or foreign corporation defendant, has or claims a lien or interest, actual or contingent, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such judge may make an order that the service may be made by publication of the order which shall fix the date on which the defendant is required to appear."

It will be noted from the above-quoted section that in order that a defendant— whether he be a resident or a nonresident of the Philippines—may be served, with summons by publication, it must appear by affidavit, or by the complaint on file, "that it is an action which relates to, or the subject of which" is, real or personal property within the islands, in which such person defendant * * * has or claims a lien or interest, actual or contingent', or in which the relief demanded consists wholly or in part in excluding such person * * * from any interest therein." In other words, the action in which such summons is issued must be one in rem or quasi in rem. This Court has held that in an action in personam the court cannot acquire jurisdiction over the person of the defendant thru service of summons by publication and that the judgment entered and all proceedings had in such a case are void (*Nelson vs. Platon* [May 11, 1933], G. R. No. 38987; *Lumbreras vs. Sison* [April 14, 1939], G. R. No. 45583).

A member of the Court suggested during our deliberation in this case that the doctrine laid down in the two cases last cited be abandoned insofar as it refers to a defendant who resides in the Philippines but whose whereabouts is unknown or who conceals himself to avoid the service of summons, on the ground that such doctrine may give rise to a situation where a resident debtor can evade his obligation by wilfully and maliciously avoiding personal

service of summons upon him. But the majority of the Court without expressing an opinion based upon such a hypothetical situation—which, be it remarked, does not obtain in the instant case—maintain that the said cases correctly interpret section 898 of Act No. 190. (Cf. *Banco Español-Filipino vs. Palanea*, 37 Phil., 921.) At any rate, we believe Rule 7 of the new Rules of Court has forestalled such contingency. Section 16 of said Rule 7 provides that whenever the defendant is designated as an unknown owner, or the like, or, whenever the address of a defendant is unknown and cannot be ascertained by diligent inquiry, service may, by leave of court, be effected upon him by publication in such places and for such time as the court may order; and section 17 of the same rule provides that when the defendant does not reside and is not found in the Philippines and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 7; or by registered mail; or by publication in such places and for such time as the court may order. In other words, under the new Rules of Court a distinction is made between a resident and a nonresident defendant: as to the former, service of summons by publication may be made even in a personal action; but as to The latter, the action must be one in rem of quasi in rem in order that service of summons by publication may be authorized.

Had the plaintiff Turner in civil case No. 1660 elected to have the defendant served with summons in the manner provided in section 708 of the Spanish Code of Civil Procedure, as authorized in section 51 of Act No. 190, such service of summons could have been made by means of edicts posted at the place where the action was pending and at the last-known place of residence of the defendant, and also by publishing said edicts "in the official or local newspapers, if there be any, and if the judge deems it proper." But, as already stated, the said plaintiff chose the manner of service by publication provided for in section 898 of Act No. 190; and he having failed to comply with the requirements thereof, in that he did not show either by affidavit or by the complaint that the action related to real or personal property within the Philippines, the service of summons thus effected by publication was null and void. Consequently, the court did not acquire jurisdiction over the person of the defendant and was powerless to render personal judgment against him.

It results, therefore, that the levy and sale on execution of the intervenor-appellant's land in favor of Turner was null and void, and so was the assignment made by him to the plaintiff-appellee of all his "right, title, interest, action and participation" in and to the land in question.

Wherefore, the judgment appealed from is reversed and another judgment will be entered ordering the cancellation of transfer certificate of title No. 11397 in the name of Damaso Fontanilla and the reinstatement of original certificate of title No. 46433 or the issuance of a new transfer certificate of title for the same land in the name of Dimas Dominguez, and requiring the plaintiff Damaso Fontanilla to deliver the possession of the land in question to the intervenor Dimas Dominguez. The claim of the latter against the plaintiff for damages-is denied. The appellees shall pay the costs in both instances. So ordered.

Yulo, C.J., Paras, and Bacobo, JJ., concur.

[1] The rest of the payments made by Dominguez m applied by Turner to the interest of another promissory note of P85 not Involved in this case.

CONCURRING**MORAN, J.,**

Under the peculiar circumstances of the case, I concur in the result. The judgment sought to be annulled is apparently unjust, shocking to conscience. The Pangasinan Review where the summons was published does not seem to satisfy the requirement of due process, it being of general circulation in the Province of Pangasinan but not in the Province of Isabela where the party sought to be summoned was residing. And though the construction of the law given in *Nelson vs. Platon* (G. R. No. 38987), is evidently wrong in the light of the well-known principles laid down in *Pennoyer vs. Neff* (95 U. S., 714, 24 Law. ed., 565); *Banco Español Filipino vs. Palanea* (37 Phil., 921), and *Perkins vs. Dizon* (G. R. No. 45031), it will have no application in the future, it having been definitely abandoned by this Court in Rule 7, section 16 of the new Rules of Court. The majority admits that under the said provision of the new Rules, summons may be served by publication even in personal actions.

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