

S.C. JOHNSON & SON, INC., PETITIONER, VS. COURT OF APPEALS, COURT OF FIRST INSTANCE OF MISAMIS OCCIDENTAL, BRANCH II, OZAMIS CITY, ASUNCIANO LOMANTA, PROVINCIAL SHERIFF OF RIZAL...

G.R. No. 54040. August 14, 1990

Ponente: FERNAN, C.J.

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FERNAN, C.J.:

Is a party who is declared in default entitled to notice of a motion for execution pending appeal of a judgment by default? The defaulted party, herein petitioner S. C. Johnson & Son, Inc., maintains that it is so entitled while private respondent Asunciano Lomanta contends otherwise.

Petitioner S. C. Johnson & Son, Inc. is a Philippine corporation engaged in the manufacture and marketing of certain products bearing the "Johnson" brand, such as floor wax, floor polishers and accessories, and other allied industrial products. On September 1, 1977, it appointed private respondent Asunciano Lomanta, a businessman doing business under the name of "Solar Educational Supply", as distributor of its products in the cities of Ozamis, Iligan and Cagayan de Oro for a period of one (1) year under terms and conditions embodied in a Distributor Contract.[1] The Distributor Contract was renewed for another year, to expire on September 1, 1979.

However on January 5, 1979, petitioner wrote private respondent a letter cancelling the Distributor Contract effective February 15, 1979 for alleged failure of private respondent to fulfill certain requirements thereunder. In said letter, private respondent was informed that petitioner's district manager and field representative would confer with him shortly on the disposition of his current inventory and liquidation of his outstanding account.[2]

Apparently due to a disagreement on the amount due from one party to the other, private respondent filed before the then Court of First Instance (CFI) of Misamis Occidental a complaint dated May 10, 1979 against petitioner seeking reformation or rescission of the Distributor Contract, accounting and liquidation of accounts between him and petitioner and award of damages for unrealized profits, moral and exemplary damages, attorney's fees and expenses of litigation.[3]

Petitioner, as defendant therein, moved to dismiss the complaint on the ground of improper venue[4] but was denied the relief sought upon a finding that the waiver of venue contained in the Distributor Contract as well as the clauses relating to venue found at the bottom of the delivery receipts and the credit memorandum were merely permissive and not exclusive.[5] Petitioner's recourse to the Court of Appeals proved unavailing as its petition for prohibition with preliminary injunction, docketed as CA-G. R. No. SP-09698-R, assailing the denial order, was dismissed in a decision dated September 12, 1979.[6]

Meanwhile in Civil Case No. 0Z-799, upon motion filed on September 1, 1979 by private respondent, the trial court issued an order[7] declaring petitioner in default for failure to file its responsive pleading within the reglementary period. Private respondent was allowed to present his evidence ex parte.

The lower court thereafter rendered its decision dated October 29, 1979, disposing thus:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff, Asunciano "Arce" Lomanta and against S. C. Johnson & Son, Inc., the original contract (Exh. "A") as renewed is hereby ordered reformed in accordance with the true agreement of the contracting parties and ultimately rescinded with damages against the defendant.

"The defendant is hereby ordered to pay the plaintiff:

- (1) the sum of P139,879.68 representing the overpayment of the plaintiff with legal interest since the filing of the complaint until fully paid;
- (2) the sum of P100,000.00 as the loss of expected profit due to the unwarranted termination of the contract;
- (3) the sum of P75,000.00 as actual and compensatory damages;
- (4) the sum of P50,000.00 as moral damages;
- (5) the sum of P25,000.00 as exemplary damages;
- (6) the sum of P50,000.00 as attorney's fee; and
- (7) the cost of the suit.

"SO ORDERED." [8]

Petitioner received a copy of the decision on November 8, 1979. It filed on November 26, 1979, a notice of appeal, cash appeal bond and a complete record on appeal, which were received by the trial court on December 3, 1979.

On the following day, December 4, 1979, private respondent filed an ex-parte motion to execute judgment pending appeal. Said motion was granted by the trial judge on December 5, 1979.

On December 19, 1979, petitioner filed with the Court of Appeals a petition for certiorari with preliminary injunction questioning the issuance of the writ of execution and seeking to restrain its enforcement. On May 22, 1980, the Court of Appeals rendered judgment dismissing said petition for lack of merit.[9] Hence, this petition.

We hold that a party declared in default is entitled to notice of the motion for execution pending appeal. This interpretation is consistent with the nature and effects of being in default as well as with what has been jurisprudentially laid down with respect to executions pending appeal.

Under the Rules of Court, a defendant is declared in default if he fails to answer the complaint within the period provided therein. The court makes the declaration of default upon motion of the plaintiff and proof of defendant's failure to answer.[10] When a defendant is declared in default, he loses his standing in court. He is considered out of the court. He cannot appear therein, adduce evidence and be heard, and for that reason he is not entitled to notice of subsequent proceedings or take part in the trial.[11]

"Loss of standing" has been explained in *Cavili vs. Florendo*,[12] to mean "only the forfeiture of one's right as a party litigant, contestant or legal adversary. A party in default loses his right to present his defense, control the proceedings, and examine or cross-examine witnesses. He has no right to expect that his pleadings would be acted upon by the court nor may he object to or refute evidence or motions filed against him. x x x" But "being declared in default does not constitute a waiver of rights except that of being heard and of presenting evidence in the trial court. x x x In other words, a defaulted defendant is not actually thrown out of court. While in a sense it may be said that by defaulting he leaves himself at the mercy of the court, the rules see to it that any judgment against him

must be in accordance with law."[13]

Furthermore, a defendant who has been declared in default is entitled to service of substantially amended or supplemental pleadings and final orders or judgments of the court, even if he fails to file a motion to set aside the order of default.[14]

The remedy of the defaulted party is to file a motion to set aside the order of default if no judgment has been rendered yet. If there is already judgment, the defendant's recourse is to file a motion for new trial, or a petition for relief from judgment, or appeal the judgment, or file a special civil action for certiorari. This is the reason why a defaulted defendant is entitled to notice of final orders or judgments.

Consistent with this right to notice of final order or judgment is the right to notice of the motion for execution pending appeal of the default judgment. Without such notice, the various recourse available to the defaulted party after judgment would be rendered illusory. For once a judgment has been executed, restitution, although provided for in case of reversal, is oftentimes incomplete and unsatisfactory as damages may arise which cannot be fully compensated.[15]

Moreover, in the same case of *Aguilos vs. Barrios*,[16] this Court held that "a party has a right to rely upon the rules of court and to expect that she would be given notice as required thereby." As being in default does not imply a waiver of rights, as aforesaid, the defaulted party has the right to expect compliance with the requisites for executing a judgment pending appeal under Section 2 of Rule 39, thus:

"Sec. 2. Execution pending appeal. - On motion of the prevailing party with notice to the adverse party the court may, in its discretion, order execution to issue even before the expiration of the time to appeal, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the motion and the special order shall be included therein."

More so when we consider that as early as the case of *Monteverde vs. Jaranilla*,[17] involving defaulted defendants, this Court has ruled "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." This doctrine was restated in the subsequent case of *Aguilos vs. Barrios*,[18] where we emphatically said: "The requirement about motion by the prevailing party and notice to the adverse party, which was not complied with in the instant case, is mandatory and is precisely an innovation introduced in the new rules to remove the doubt suggested in *Gamay vs. Gutierrez David*[19]* and to restate the doctrine laid down in *Monteverde vs. Jaranilla*." [20]

In view of the foregoing, we find a discussion of the other issues raised unnecessary.

WHEREFORE, the instant petition is hereby GRANTED. The assailed decision of the Court of Appeals in C. A.-G.R. No. 10160-SP and the order of December 5, 1979 in Civil Case No. OZ-799 are reversed and set aside. No pronouncement as to costs.

SO ORDERED.

Gutierrez, Jr., Feliciano, Bidin, and Cortes, JJ., concur.

[1] p. 209, Rollo.

[2] p. 210, Rollo.

[3] Civil Case No. OZ-799, pp. 72-88, Rollo.

[4] pp. 243-253, Rollo.

[5] pp. 240-242, Rollo.

[6] Penned by Justice Edgardo L. Paras, concurred in by Justices Ramon G. Gaviola, Jr. and Hugo E. Gutierrez, Jr., pp. 256-261, Rollo.

[7] pp. 89-91, Rollo.

[8] pp. 171-172, Rollo.

[9] CA G.R. No. 10160-SP, penned by Justice Jorge R. Coquia and concurred in by Justices Samuel F. Reyes and Mariano A. Zosa.

[10] Section 1, Rule 18.

[11] Section 2, Ibid.

[12] 154 SCRA 610.

[13] Lim Tanhu vs. Ramolete, 66 SCRA 425.

[14] Section 9, Rule 13.

[15] Aguilos vs. Barrios, 72 Phil. 285.

[16] Ibid.

[17] 60 Phil. 297.

[18] 72 Phil. 285.

[19] 48 Phil. 768.

* Gamay vs. Gutierrez David gives the impression that the court may on its own initiative order execution of a judgment pending appeal, thus: "To avoid misunderstanding, let it be said that this decision does not decide that the court may not on its own initiative order execution or grant a stay of execution." (at p. 771)

[20] 60 Phil. 297, 307. (Underscoring supplied).

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