

**QUIRINO CAVILI, PRIMITIVO CAVILI, AND PERFECTA CAVILI,
PETITIONERS, VS. HON. CIPRIANO VAMENTA, JR. AS PRESIDING
JUDGE, BRANCH III, COURT OF FIRST INSTANCE OF NEGROS
ORIENTAL; UL...**

G.R. No. 57771. May 31, 1982

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

This petition for certiorari seeks: (a) the nullification of the order of the respondent Judge of the Court of First Instance of Negros Oriental, dated July 21, 1981, which, among other things, set aside the previous orders granting a new trial in Civil Case No. 6880 and ordered the execution of the judgment by default rendered against the defendants (the petitioners herein); (b) the revival of the order of Executive Judge Alejandro R. Boncaros (not the public respondent herein), dated April 23, 1980, which granted a new trial in the aforementioned civil case; and (c) the issuance of a writ of preliminary injunction to enjoin further proceedings in said civil case.

On August 31, 1981, We required the respondents to comment. Later, on October 12, 1981, We issued a temporary restraining order over the objection of the respondents. Still later, on November 25, 1981, We dismissed the petition for lack of merit and lifted the temporary restraining order. The petitioners sought reconsideration of the order of dismissal as well as the lifting of the temporary restraining order by motion filed on January 25, 1982. On February 3, 1982, We re-issued the temporary restraining order and required the respondents to comment on the motion for reconsideration which they did.

We now resolve jointly both the petition and the motion for reconsideration in the interest of justice.

The main thrust of the petition and of the present motion for reconsideration is that the order of July 21, 1981, should be set aside — thereby allowing a new trial to be conducted - for the reasons that the defendants-petitioners Quirino and Primitivo Cavili have been deprived of procedural due process (not having been served with summons) and that said defendants-petitioners have a meritorious defense since the properties sought to be partitioned by plaintiffs-respondents have already been the subject of a written partition agreement among the parties' predecessors-in-interest. The petitioners have attached to their motion for reconsideration xerox copies of documents allegedly proving that the subject properties have already been partitioned way back in April 6, 1937.

As shown in the return of the service of summons (Annex "B" of Petition), which is not contested by the respondents, summons was served on defendant Perfecta Cavili in Bayawan, Negros Oriental, but not on defendants Quirino and Primitivo Cavili who were then staying in Kabankalan, Negros Occidental. While Perfecta Cavili's counsel, Atty. Jose Alamillo, filed in behalf of all the three defendants a motion for extension of time to file an answer upon assurance of Perfecta Cavili that she would summon her brothers Quirino and Primitivo to Bayawan to authorize him to represent them in the case, said counsel later on manifested before the Court of First Instance of Negros Oriental that he desisted from further appearing in the case since Perfecta Cavili's assurance that he would be authorized by the other two defendants to represent them in the case was never

carried out. The motion for extension of time to file an answer cannot, thus, be construed as a voluntary appearance in the case by the defendants Quirino and Primitivo Cavili.

Neither can the motion for new trial filed later by Atty. Reuben A. Espancho on behalf of the Cavili brothers cure the jurisdictional defect brought about by the non-service of summons on them precisely because the motion was predicated on such lack and was intended to secure for said defendants the opportunity to be heard in a new trial. It cannot be construed as a waiver of the right to be heard.

Thus, aside from the fact that there is prima facie credibility to the petitioners' claim that they have a meritorious defense -- having been able to submit copies of documents allegedly showing that the properties sought to be partitioned had already been partitioned by the parties' predecessors-in-interest way back in 1937, the petitioners contention that the decision and the order sought to be set aside because of jurisdictional infirmity is im-pressed with merit. The more prudent thing to do in the premises is to give the petitioners their day in court.

WHEREFORE, Our resolution dismissing the petition is hereby reconsidered; the petition is granted; and the order dated July 21, 1981, is set aside while that of April 23, 1980, is revived. No special pronouncement as to costs.

SO ORDERED.

Barredo, (Chairman), Aquino, Concepcion, Jr., Guerrero, De Castro, and Escolin, JJ.,concur.

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