

SERVICEWIDE SPECIALISTS, INCORPORATED, PETITIONER, VS. THE SHERIFF OF MANILA, DEPUTY SHERIFF ENRIQUITO A. VIOLETA AND ROY DIAZ, RESPONDENTS.

G.R. No. 74586. October 17, 1986

Ponente: FERIA, J.

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FERIA, J.:

This is a petition for mandamus to compel respondents Sheriff and Deputy Sheriff of Manila to proceed with the sale at public auction of the properties of private respondent, which had been levied upon on execution of a final and executory judgment, pending appeal from an order dismissing a petition for relief from said judgment.

On February 25, 1985, petitioner filed with the Regional Trial Court of Manila, Branch L, an action for replevin and damages against private respondent which was docketed as Civil Case No. 85-29444. After private respondent had filed his answer, a pre-trial conference was set by the lower court of which the counsels were duly notified and they were, furthermore, commissioned to secure the presence of the parties they represented. Both private respondent and his counsel failed to appear at the pre-trial and, as prayed for by counsel for petitioner, private respondent was declared as in default.

On August 9, 1985, after petitioner had presented its evidence ex-parte, the lower court rendered a decision the dispositive part of which read as follows:

"WHEREFORE, premises considered, judgment is hereby rendered in favor of the plaintiff and against the defendant Roy Diaz, ordering the latter:

- To pay the plaintiff the amount of P83,412.76, as his total obligation, including attorney's fees, interests, liquidated damages, bonding fee, and repossession expenses; and
- To pay the costs of suit."

On December 10, 1985, after said decision had become final, the lower court granted the motion for execution filed by petitioner.

On December 24, 1985, private respondent filed a petition for relief from judgment which was docketed as Civil Case No. 85-34098 and subsequently assigned to Branch XII of the Regional Trial Court of Manila.

Petitioner filed a motion to dismiss the petition for relief on the grounds that the petition was filed out of time; that it failed to indicate a good and substantial defense; that it failed to show the fraud, accident, mistake or excusable negligence relied upon as basis for the petition; and that it was not filed in the same court and in the same cause as required by Section 3 of Rule 38. Private respondent filed an opposition to said motion to dismiss.

On March 21, 1986, the lower court (Branch XII) issued an order dismissing the petition for relief for lack of jurisdiction to hear and determine the same.

On April 2, 1986, private respondent filed a notice of appeal from the order of dismissal to the Intermediate Appellate Court.

On April 9, 1986, a writ of execution was issued pursuant to the order of execution issued by the lower court (Branch L) on December 10, 1985.

On April 28, 1986, respondent deputy sheriff issued a notice of levy and sale of the properties of private respondent levied on, but on the date of the auction sale, said respondent sheriff refused to proceed with the auction because of the protest of private respondent based on his appeal from the order dismissing his petition for relief.

Hence, petitioner filed the present petition for mandamus. The petition should be granted.

Although private respondent correctly states that "after the decision in Civil Case No. 85-29444 had already become final and executory, and appeal was no longer available and feasible under the ordinary course of law, petition for relief from judgment is the most available remedy," he did not comply with the provision of Section 2 of Rule 38 which reads:

"Petition to Court of First Instance for relief from judgment or other proceeding thereof. -When a judgment or order is entered, or any other proceeding is taken, against a party in a Court of First Instance through fraud, accident, mistake, or excusable negligence, he may file a petition in such court and in the same cause praying that the judgment, order or proceeding be set aside."

In the case of *Braca vs. Tan*, this Court held:

"It is clear from the foregoing provisions of Rule 38 that the petition for relief from judgment of the Court of First Instance must be filed in the same court that rendered the judgment and in the same cause wherein the judgment was rendered; and that if the court finds the allegations of the petition to be true, it shall set aside the judgment and try the principal case upon its merits as if a timely motion for new trial had been granted therein.

"It results therefore, that the Court of First Instance of Rizal has no jurisdiction to hear and decide the petition for relief from the judgment of the Court of First Instance of Negros Occidental not only because section 2 of Rule 38 expressly requires that such petition be filed in the latter court and in the same case but also because, although the principal case could have been originally brought either in the Court of First Instance of Rizal where the defendant has its domicile, or in the Court of First Instance of Negros Occidental where the plaintiffs reside, once the latter court had taken cognizance of said case, it acquired jurisdiction to the exclusion of the former. To permit the Court of First Instance of Rizal to set aside the judgment rendered by the Court of First Instance of Negros Occidental in civil case No. 1007 and to try said case upon its merits, would produce the anomalous effect of depriving the latter court of the jurisdiction which it had already acquired over the case and of transferring that case to another court of the same category at the instance of the losing party." (84 Phil. 582, 584-585)

In the case at bar, private respondent filed his petition for relief also with the Regional Trial Court of Manila, but he did not file it in the same case; he filed it in another case, No. 85-34098. Branch XII of the lower court, to which Civil Case No. 85-34098 was assigned could not take cognizance of the petition for relief, because it was not the same branch of the court which rendered the judgment from which relief was sought. It was Branch L of the lower court which could properly take cognizance of said petition and which, if it found the allegations thereof to be true, could order the judgment complained of to be set aside and proceed to hear and determine the case as if a timely motion for new trial had been granted (Section 6 and 7 of Rule 38).

Private respondent, however, contends that in his petition for relief from judgment, one of the respondents therein named was the judge himself who presided over Civil Case No. 85-29444, for which reason the petition could not

be filed in his sala. This is erroneous.

The judge who rendered the judgment is not a party in a petition for relief from the said judgment. A petition for relief from judgment is not like a petition for certiorari wherein the judge is made a party respondent because he is alleged to have acted without or in excess of his jurisdiction or with grave abuse of discretion (Sections 1 and 5 of Rule 65). In a petition for relief from judgment, the petitioner claims that due to extrinsic fraud, accident, mistake, or excusable negligence, he has been unjustly deprived of a hearing or has been prevented from taking an appeal.

Private respondent further contends that in view of his appeal from the order dismissing his petition for relief, the final and executory judgment rendered against him in Civil Case No. 85-29444 could no longer be executed. This is untenable. In order to stay execution, it was necessary for private respondent to obtain a writ of preliminary injunction in accordance with Section 5 of Rule 38 which provides:

"Preliminary Injunction pending proceedings. - The court in which the petition is filed, or a judge thereof, may grant such preliminary injunction as may be necessary for the preservation of the rights of the parties pending the proceeding, upon the filing by the petitioner of a bond to the adverse party, conditioned that the petition is dismissed or the petitioner fails on the trial of the case upon its merits, he will pay the adverse party all damages and costs that may be awarded to him by reason of the issuance of such injunction or the other proceedings following the petition; but such injunction shall not operate to discharge or extinguish any lien which the adverse party may have acquired upon the property of the petitioner."

As this Court held in the case of *Asian Surety & Insurance Co., Inc. vs. Relucio*:

"The necessity of securing a writ of preliminary injunction to suspend or stay the execution of the judgment sought to be set aside under Rule 38, stems from the fact that such judgment had already become final and executory (*Veluz v. Justice of the Peace*, 42 Phil. 557; *Anuran v. Aquino*, 38 Phil. 29) otherwise the remedy would be a motion for new trial under Rule 37 of the Rules. There is no question then, that unless restrained such judgment could be executed as it would then be the ministerial duty of the court to issue the writ of execution. (*Buenaventura v. Garcia*, 78 Phil. 759; *Federal Films, Inc. v. Ocampo*, 78 Phil. 479) x x x"

"While it is true that in ordinary cases, by the perfection of an appeal, under section 9 of Rule 41 of the Rules, the trial court loses jurisdiction over its judgment, and cannot order its execution, the judgment adverted to refers to one which has not attained finality because of the timely appeal therefrom. Such is not applicable to an appeal from an order dismissing or denying a petition for relief from judgment, under Rule 38, because the judgment from which relief is sought is already final and executory. And the only way by which the execution of said judgment could be suspended, is that prescribed in section 5 of Rule 38. (*Sanchez v. Serrano and Rodas*, 83 Phil. 838) x x x" (47 SCRA 225, 234-235)

If the lower court does not grant preliminary injunction, the appellate court may grant the same. (See Resolution in *Vda. de Sayman vs. Court of Appeals*, April 28, 1983, 121 SCRA 650.)

Private respondent invokes the second paragraph of Section 2 of Rule 41 which provides:

"A judgment denying relief under Rule 38 is subject to appeal, and in the course thereof, a party may also assail the judgment on the merits, upon the ground that it is not supported by the evidence or it is contrary to law."

and cites the ruling in the case of *Vda. de Sayman vs. Court of Appeals* (120 SCRA 676) to the effect that in an appeal from the denial of a petition for relief, the appellate court is not limited to the issue of whether or not the denial was correct.

We deem it necessary to clarify the second part of the above-quoted provision which has given rise to some confusion.

There is no question that a judgment or order denying relief under Rule 38 is final and appealable, unlike an order granting such relief which is interlocutory (*Samia vs. Medina*, 56 Phil. 613). However, the second part of the above-quoted provision (that in the course of an appeal from the denial or dismissal of a petition for relief, a party may also assail the judgment on the merits) may give the erroneous impression that in such appeal the appellate court may reverse or modify the judgment on the merits. This cannot be done because the judgment from which relief is sought is already final and executory. (See *Villa Rey Transit, Inc. vs. Far East Motor Corporation*, 81 SCRA 298.)

The purpose of the rule is to enable the appellate court to determine not only the existence of any of the grounds relied upon whether it be fraud, accident, mistake or excusable negligence, but also and primarily the merit of the petitioner's cause of action or defense, as the case may be. If the appellate court finds that one of the grounds exists and, what is of decisive importance, that the petitioner has a good cause of action or defense, it will reverse the denial or dismissal, set aside the judgment in the main case and remand the case to the lower court for a new trial in accordance with Section 7 of Rule 38.

On the other hand, if the petition for relief is against an order disallowing an appeal for having been filed out of time and the petition is denied or dismissed, in the appeal from the denial or dismissal the appellate court must also be apprised of the merit of the case of the party who assails such denial or dismissal. If the appellate court finds a justifiable ground and a meritorious case, it will reverse the denial or dismissal and allow the appeal from the decision in the main case. (See *Vda. de Sayman vs. Court of Appeals*, February 21, 1983, 120 SCRA 676, 684-685.)

Petitioner in its Reply urges this Court to make a finding that the petition for relief from judgment was filed out of time as this would render the discussion on the merits of the petition moot and academic. It maintains that a copy of the decision against private respondent must have been received by the latter's counsel on August 29, 1985, the date when its counsel received a copy thereof; that the 60-day period for filing a petition for relief should be counted from said date; and that when the petition for relief was filed on December 24, 1985, 117 days had elapsed.

On September 1, 1986, the Court required private respondent to file a Rejoinder to petitioner's Reply, particularly specifying the date on which his counsel received a copy of the decision dated August 9, 1985. Unfortunately, private respondent did not file a Rejoinder and merely reiterated the evasive and confusing allegation in his petition for relief, as follows:

"8. The aforesaid Decision/Judgment, Annexes A, A-1 and A-2, of respondent Judge, actually came to the knowledge of herein petitioner on November 29, 1984, when he himself instead of his counsel of record, was requested by the latter to sign a pleading 'Omnibus Motion' with like date, after said counsel of record informed petitioner of the existence of plaintiff's Motion for issuance of writ of execution, dated October 3, 1985, and set for hearing on November 29, 1985."

The failure of private respondent to comply with the resolution requiring him to specify particularly the date on which his counsel received a copy of the decision supports petitioner's contention that the petition for relief was filed way beyond the reglementary period of sixty days after the petitioner learns of the judgment (Section 3 of Rule 38), inasmuch as said period begins to run from the date the petitioner's lawyer is notified of the decision. (See *Olivares. vs. Leola*, 97 Phil. 253; *Mercado vs. Domingo*, 18 SCRA 961.)

Moreover, an examination of the record also supports petitioner's contention that private respondent has resorted to dilatory tactics in the case at bar.

The main ground of the petition for relief is that no notice of the scheduled pre-trial conference was sent to private

respondent himself and such notice was sent only to the counsels who were furthermore commissioned to secure the presence of the parties they represented. Private respondent claims that this is not the notice of pre-trial contemplated by law.

This claim has no merit. As early as October 30, 1975, this Court en banc ruled in the case of Taroma vs. Sayo:

"For the guidance of the bench and bar, therefore, the Court in reaffirming the ruling that notice of pre-trial must be served separately upon the party and his counsel of record, restates that while service of such notice to party may be made directly to the party, it is best that the trial courts uniformly serve such notice to party through or care of his counsel at counsel's address with the express imposition upon counsel of the obligation of notifying the party of the date, time and place of the pre-trial conference and assuring that the party either appear thereat or deliver to counsel a written authority to represent the party with power to compromise the case, with the warning that a party who fails to do so may be non-suited or declared (as) in default." (67 SCRA 508, 512)

The attached affidavit of merit does not state facts showing a good and substantial defense. Private respondent does not claim payment of his obligation; he merely questions the assignment of the credit in favor of petitioner.

Finally, to make matters worse, private respondent merely filed a notice of appeal to the Intermediate Appellate Court from the order of the lower court which dismissed his petition for relief from judgment "for lack of jurisdiction to hear and determine the same". The appeal should have been made to this Court through a petition for review on certiorari in accordance with the Judiciary Act of 1948 as amended by Republic Act No. 5440 and Section 25 of the Interim Rules.

The writ of execution in this case was issued on April 9, 1986 pursuant to the order dated December 10, 1985 granting the motion for execution. The levy on execution was made within the reglementary period of sixty days after its receipt by respondent Deputy Sheriff Section 11 of Rule 39), as shown by the Notice of Levy and Sale dated April 28, 1986. Consequently, the sale on execution may properly proceed. It is the ministerial duty of the lower court to order the execution of its final and executory judgment (*Far Eastern Surety & Insurance Company, Inc. vs. Hernandez*, October 3, 1975, 67 SCRA 256) and it is the legal duty of respondent sheriffs to enforce the order of execution.

WHEREFORE, respondents Sheriff and Deputy Sheriff of Manila are directed to proceed with the sale at public auction of the properties of private respondent which had been levied upon on execution. Costs against private respondent.

SO ORDERED.

Fernan, Alampay, Gutierrez, Jr., and Paras, JJ., concur.

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