

SPS. JUAN B. DULOS AND MARIA C. DULOS, PETITIONERS, VS. COURT OF APPEALS, SPS. MARIANO NOCOM AND ANACORETA NOCOM AND SPS. LORENZO ONG ENG CHONG AND CARMEN SOCO, AND DEPUTY SHERI...

G.R. No. 87917. August 07, 1990

Ponente: CRUZ, J.

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CRUZ, J.:

By this special civil action of certiorari and prohibition, the spouses Juan and Maria Dulos would have this Court nullify the resolution of the respondent court dated April 27, 1989, denying their application for a writ of preliminary injunction against the enforcement of the decision of the Metropolitan Trial Court of Las Piñas dated October 4, 1988.

On June 24, 1988, the spouses Dulos were sued for forcible entry by the spouses Mariano and Anacoreta Nocom, private respondents herein, in the Metropolitan Trial Court of Las Piñas. The case was set for a pre-trial conference on August 18, 1988, with due notice to both parties.

Earlier, on August 16, 1988, the petitioners had filed a complaint against the private respondents for annulment of sale, reconveyance of title, and various other reliefs plus a writ of preliminary injunction. This was docketed as Civil Case No. 88-1663 in the Regional Trial Court of Makati. On August 17, 1988, the petitioners filed a motion for the suspension of the proceedings in the forcible entry case on the ground that there was a prejudicial question of ownership involved in the annulment case. The petitioners' counsel, Atty. Pedro S. Ravelo, set August 18, 1988, for the hearing of the motion at the pre-trial conference scheduled on the same date.

Neither petitioners nor their counsel appeared on that date. However, one Ananita Rectra manifested at the hearing that she was duly authorized by virtue of a special power of attorney to represent petitioner Juan Dulos, her brother, who was then confined at the Manila Doctors Hospital after having undergone a femur operation. The petitioners were nonetheless declared in default. Judge Alfredo R. Enriquez denied the motion for the suspension of the proceedings, holding that the issue of ownership was not a prejudicial question in the ejectment case. The evidence of the private respondents was subsequently received in the absence of the petitioners.

On October 4, 1988, judgment was rendered in favor of the private respondents, the dispositive portion reading as follows:

WHEREFORE, the Court finds the eviction of defendants to be warranted and accordingly hereby renders judgment in favor of the plaintiffs, ordering defendants as follows:

1. and all persons claiming right under them to vacate the portion of plaintiffs' property covered by TCT No. S-55015 situated at Bo. Ibayo, Las Piñas, MM and to remove structures and improvements thereon and to restore to plaintiff peaceful possession thereof;
2. ordering defendants to pay the sum of P20,000.00 as reasonable compensation for the use of property

beginning April 1988 and every month thereafter until defendants shall have completely vacated the property;

3. ordering defendants to pay the plaintiffs the sum of P10,000.00; and

4. ordering defendants to pay the cost of the suit.

The petitioners received a copy of this decision on October 10, 1988. They filed a motion for reconsideration on October 18, 1988, which was denied in an order dated November 17, 1988.

Instead of taking an appeal, the petitioners filed on December 9, 1988, a special civil action for certiorari and prohibition with preliminary injunction with the Regional Trial Court of Makati praying for the nullification of the said judgment and the earlier order declaring them in default.

On December 19, 1988, while that case was pending, the private respondents moved for the immediate execution of the judgment of the Metropolitan Trial Court on the ground that no appeal had been filed with the proper court and the decision had become final and executory. The motion was granted, and the writ of execution was issued on February 8, 1989.

On February 16, 1989, the petition for certiorari, etc. was dismissed on the grounds that: (1) the petitioners had been properly declared in default for failure to appear at the scheduled hearing; (2) the filing of the action for nullification in the Regional Trial Court was not a valid reason for the suspension of the hearing in the Metropolitan Trial Court; (3) the motion for reconsideration was fatally defective because it was not verified and accompanied by an affidavit of merit; and (4) the grant of the motion for suspension or postponement was discretionary upon the court.[1]

On March 20, 1989, on motion of the private respondents, the Metropolitan Trial Court issued a writ of demolition.

The petitioners then elevated the matter to the Court of Appeals in a petition for certiorari and prohibition with preliminary injunction. In its order dated April 27, 1989, the respondent court denied the application for preliminary injunction,[2] prompting the petitioners to come to this Court on certiorari.

Praying for a nullification of the said order and the proceedings held before the MTC, they argue that:

(a) The pre-trial conference of August 18, 1988, was the first hearing set for the purpose and with the appearance of the representative in the person of Mrs. Rectra, duly armed with a notarized hospital certification attesting to the confinement of petitioner Juan Dulos and a special power-of-attorney authorizing her to appear as representative of petitioner Juan Dulos during the conference, Judge Enriquez should not have outrightly declared petitioners in default.

(b) An affidavit of merit under the circumstances was no longer necessary since the default order was anchored upon petitioners' failure to appear during the pre-trial (citing the case of *Lucero v. Dacayo*, 22 SCRA 1004).

(c) Petitioners have been in actual physical possession of the subject land from the time the said property was acquired in 1979 by petitioner Maria Dulos from her co-heirs by virtue of the sale of hereditary rights until the same was assigned to Dulos Realty in 1973 long before the execution of the simulated sale in favor of private respondents in 1977.

(d) As the August 18, 1988 Order was issued without or in excess of jurisdiction, the same is null and void and all proceedings subsequent thereto were also a nullity, there is no judgment to speak of, hence there is nothing to appeal.

For their part, the private respondents assert that: (1) Rectra did not file her special power of attorney with the Metropolitan Trial Court; (2) the petitioners did not do anything to have the order of default set aside; (3) the deed

of sale sought to be nullified was executed way back on July 1, 1977, and the complaint for nullification was filed only eleven years and nine months later; (4) petitioner Maria Dulos could have appeared at the pre-trial hearing but failed to do so without any explanation whatsoever; and (5) certiorari cannot be a substitute for the lost right of appeal.

The Court gave due course to the petition and required the parties to submit simultaneous memoranda. After considering the issues and their arguments in their respective memoranda, we find the petition to be without merit.

First of all, it is clear that a case may be dismissed for failure of a party to appear at the pre-trial conference, as authorized by Rule 20, Section 2, of the Rules of Court, thus:

Sec. 2. A party who fails to appear at a pre-trial conference may be non-suited or considered as in default.

Rectra did appear at the scheduled hearing but did not present to the court her power of attorney to represent Juan Dulos or even the medical certificate of his operation. In their memorandum, the petitioners say Maria Dulos did not appear for herself because the spouses Dulos had long been separated. However, the Dulos lawyer did not show up either although it was he who had asked that his motion to suspend proceedings be set on the date of the pre-trial conference. The averment that Atty. Ravelo was already 73 years old at the time is a flimsy excuse for carelessness nor do we accept the explanation that he was then attending to several detention prisoners. At any rate, the petitioners could have availed themselves of other counsel if their counsel then was unable to represent them at the conference.

Secondly, the denial of the application for preliminary injunction was justified because the petitioners did not employ the proper remedy prescribed by the Rules of Court. As enumerated in *Lina v. Court of Appeals*,^[3] the remedies available to a defendant declared in default are:

1. The defendant in default may, at any time after discovery thereof and before judgment, file a motion under oath to set aside the order of default on the ground that his failure to answer or appear on the date set for pre-trial was due to fraud, accident, mistake or excusable negligence, and that he has a meritorious defense;
2. If the judgment has already been rendered when the defendant discovered the default, but before the same has become final and executory, he may file a petition for new trial under Sec. 1(a) of Rule 37;
3. If the defendant discovered the default after the judgment has become final and executory, he may file a petition for relief under Sec. 2, Rule 38; and
4. He may also appeal from the judgment rendered against him as contrary to the evidence or the law, even if no petition to set aside the order of default has been presented by him.

The petitioners did not avail themselves of any of the above remedies. Instead, after taking no action whatsoever for all of sixty days, they filed a motion for reconsideration of the decision dated October 4, 1988, and, when this was denied, went to the Regional Trial Court on certiorari and prohibition. As we held in the *Lina* case:

x x x where the judgment rendered by the respondent court is the one sought to be annulled, a petition for relief, under Rule 38, which is a remedy in the ordinary course of law, could have been just as plain, adequate and speedy as certiorari x x x.

No less significant is the fact that the judgment of the metropolitan trial court had already become final and executory because of the petitioners' failure to appeal therefrom on time. They were served with notice of the judgment on October 10, 1988, and filed a motion for reconsideration on October 18, 1988, which was denied on November 17, 1988. They therefore had until December 10, 1988, within which to perfect their appeal. They did not.

Instead, they filed the petition for certiorari in the Regional Trial Court, which correctly dismissed it. It is settled that the special civil action of certiorari is not and cannot be made a substitute for an appeal, where the latter remedy is available,[4] as in this case. The filing of the petition for certiorari did not therefore suspend the period for appeal or prevent the judgment from becoming final.

It is also noteworthy that the petitioners made no move to set aside the order of default rendered by the Metropolitan Trial Court although they were aware of it. Rectra was present when the said order was dictated in open court on August 18, 1988. It is reasonable to assume she immediately informed her brother, who had sent her there precisely to represent him at the proceedings. Even so, the petitioners did nothing until the judgment by default was rendered against them by Judge Enriquez on October 4, 1988. All of forty-six days had elapsed from the order of default when the judgment of default was rendered.

The petitioners now contend that they could not have taken any action prior to the rendition of the judgment because they had never been furnished with copies of the order declaring them in default. This is unacceptable. It is obvious the petitioners have failed to take into account the following pertinent provisions of the Rules of Court concerning notices in case a party is declared in default:

Rule 18, Sec. 2. Effect of order of default. - Except as provided in Section 9 of Rule 13, a party declared in default shall not be entitled to notice of subsequent proceedings, nor to take part in the trial.

Rule 13, Sec. 9. Service upon party in default. - No service of papers other than substantially amended or supplemental pleadings and final orders or judgments shall be necessary on a party in default unless he files a motion to set aside the order of default in which event he shall be entitled to notice of all further proceedings regardless of whether the order of default is set aside or not.

Rule 18, Sec. 3. Relief from order of default. - A party declared in default may at any time after discovery thereof and before judgment file a motion under oath to set aside the order of default upon proper showing that his failure to answer was due to fraud, accident, mistake or excusable neglect and that he has a meritorious defense. In such case the order of default may be set aside on such terms and conditions as the judge may impose in the interest of justice.

The term used in the last quoted section is discovery, not notice. And this is so because the defendant declared in default is not entitled to "notice of subsequent proceedings" under the preceding rules.

In *Suzara v. Caluag*,[5] this Court held that a motion for reconsideration of a judgment of default may be considered a petition for relief under Section 2 of Rule 38 only if the following requisites are present: (1) it must be verified; (2) it must be filed within 60 days from the time petitioner learns of the decision but not more than 6 months from entry thereof; and (3) in case of failure to file an answer, the motion must be accompanied by affidavits of merit showing the fraud, accident, mistake and excusable negligence relied upon.

We held in *Yap v. Tañada*[6] that a motion for reconsideration may be considered a motion for new trial under Sec. 2, Rule 37, if it is accompanied by an affidavit of merit. Since petitioners assert that their rights were impaired because they were prevented from presenting evidence of their defenses, it was a fatal omission for them not to attach to their motion an affidavit of merit, i.e., an affidavit showing the facts constituting the valid defense which the movant may prove in case a new trial is granted. The requirement of such an affidavit is essential because a new trial would be only a waste of the time of the court if the complaint turns out to be groundless or the defense ineffective.

The motion for reconsideration filed by the petitioners on October 18, 1988, with the Metropolitan Trial Court, and which is Annex "H" of the petition, was not verified. It does not appear also that it was accompanied by an affidavit of merit as required by the Rules.

While this Court did declare in *Continental Leaf Tobacco v. Intermediate Appellate Court*,^[7] "that judgments by default are not looked upon with favor," the default judgment in that case was set aside because there was excusable neglect. Besides, the petitioners had a meritorious defense which justified a relaxation of the procedural rules to allow full hearing on the substantive issues raised. Such circumstances have not been clearly shown in the case before us.

A little more familiarity with our rules of procedure could have avoided the predicament in which the petitioners now find themselves. Unfortunately, the Court cannot give them any relief. They have not justified a relaxation of the said rules. While it is true that a litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure, to insure an orderly administration of justice. It is this symbiosis between form and substance that guarantees that desirable result.

WHEREFORE, the petition is DISMISSED, with costs against the petitioner. It is so ordered.

Narvasa, (Chairman), Gancayco, Griño-Aquino, and Medialdea, JJ., concur.

[1] Annex "R," Rollo, pp. 156-158.

[2] Annex "S," Rollo, p. 159; Pronove, J., ponente, Melo and Benipayo, JJ., concurring.

[3] *Lina v. Court of Appeals*, 135 SCRA 637.

[4] *D. D. Comendador Construction Corp. v. Sayo*, 118 SCRA 590; *Sarmiento v. IAC*, 153 SCRA 104; *Acain v. IAC*, 155 SCRA 100; *Limpot v. CA*, 170 SCRA 367.

[5] 4 SCRA 1060.

[6] 163 SCRA 464.

[7] 140 SCRA 269.

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