

BAC MANUFACTURING AND SALES CORPORATION, PETITIONER, VS. COURT OF APPEALS AND WYNNER GARMENTS MANUFACTURING, INC., RESPONDENTS.

G.R. No. 96784. August 02, 1991

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

This is an appeal by certiorari under Rule 45 of the Rules of Court seeking to review and set aside the decision^[1] of the respondent Court of Appeals in C.A.-G.R. SP No. 15647, promulgated on 7 December 1989, the dispositive portion of which reads:

"WHEREFORE, judgment is rendered:

1. Declaring the two (2) orders of respondent Judge dated March 17 and May 20, 1988, respectively, null and void;
2. Dismissing private respondent's complaint;
3. Dissolving the writ of attachment dated October 10, 1986;
4. Ordering the Deputy Sheriff Ruben S. Nequinto to deliver to petitioner all its forty (40) levied and attached machineries per Notice of Levy on Attachment dated December 7, 1987; and
5. Ordering respondent Judge to desist from proceeding with this case.

With costs.

SO ORDERED."

and its resolution^[2] of 4 January 1991, which denied petitioner's motion for the reconsideration of the decision.

In the resolution of 29 April 1991, We gave due course to the petition and required the parties to submit their respective memoranda after the private respondent filed its Comment on 16 April 1991 in compliance with the Resolution of 27 February 1991.

From the challenged decision and the pleadings of the parties, the following facts are not controverted:

On 9 October 1986, petitioner, as assignee of certain rights of one BOFTEX LIMITED under various contracts for ladies shorts, denim pants and men's trousers which the latter entered into on various dates in 1985 with the private respondent, filed a complaint against the latter with the Regional Trial Court of Makati (Branch 145), National Capital Judicial Region. The case was docketed as Civil Case No. 15095. Embodied in the complaint is an application for the issuance of a writ of preliminary attachment. Supporting it is an affidavit of its general manager which is attached to the complaint. A writ of preliminary attachment was issued on 10 October 1986. No summons and a copy of the complaint were, however, served upon private respondent.

On 11 August 1987, the trial court issued an Order directing petitioner, as plaintiff, to take the necessary steps towards the active prosecution of the case, otherwise it would be dismissed for failure to prosecute. On 8 September 1987, petitioner filed a Request for Alias Summons, and on 10 September 1987, the Clerk of Court of the trial court issued an Alias Summons.[3]

Then on 7 December 1987, a levy on attachment was made upon the machineries of private respondent by Deputy Sheriff Ruben S. Nequinto of the aforesaid Branch 145 of the trial court a quo.

Neither the Alias Summons nor the order granting the issuance of the writ of preliminary attachment or the writ of attachment itself was served on the private respondent before or at the time the levy was made.[4]

On 16 February 1988, private respondent filed a motion to dismiss the complaint and to dissolve the attachment[5] for failure of petitioner to prosecute its case for an unreasonable length of time and that no copies of the summons and order of attachment were served upon it. On 14 March 1988, petitioner filed its opposition thereto alleging therein that it could not, inspite of its diligent efforts, locate private respondent's principal office address.[6] On 17 March 1988, the trial court denied the motion to dismiss and ordered private respondent to file its answer. The latter filed a motion for the reconsideration of the Order, but the trial court denied it in its order of 20 May 1988.[7]

On 6 June 1988, private respondent filed an Answer With Counterclaim[8] wherein it prays that the complaint be dismissed for lack of merit, the writ of attachment be discharged and the attached properties be returned to it. On its counterclaim, private respondent prays that petitioner be ordered to pay moral and exemplary damages as may be determined by the court, attorney's fees in the sum of P50,000.00 and the litigation expenses and costs in an amount to be proved at the trial.

The trial court set the pre-trial of the case on 25 July 1988.[9]

However, private respondent filed with this Court a petition to annul the aforesaid Orders of 17 March and 20 May 1988.[10] This Court referred the petition to the respondent Court of Appeals,[11] which the latter docketed as C.A.-G.R. SP No. 15647. In said petition, the private respondent herein contends that the trial court: (a) has not acquired jurisdiction over it as it has not been duly served with summons, and (b) petitioner's failure to cause summons to be served upon private respondent for an unreasonable length of time warrants the dismissal of the complaint for failure to prosecute.

In its challenged decision, the respondent Court sustains the private respondent, ruling that: (a) Since private respondent was not validly or properly served with summons, the court below did not acquire jurisdiction over it.[12] The fact that the Sheriff and the petitioner herein could not locate the principal office of private respondent is of no consequence, for whenever the address of a defendant is unknown and cannot be ascertained by diligent inquiry, service of summons may, by leave of court, be effected by publication pursuant to Section 16 of Rule 14 of the Rules of Court. The trial court then acted with grave abuse of discretion when he ordered the attachment of the property of private respondent. (b) Settled is the rule that where plaintiff fails to prosecute his action for an unreasonable length of time, the action may be dismissed upon motion of defendant or upon the court's own motion.[13] In the instant case, from 9 October 1986, when the complaint was filed, "up to the present or for more than three (3) years," petitioner and the sheriff of the lower court have not served the summons on private respondent and no effort has been exerted by petitioner to have it served. The trial court should have dismissed the complaint for failure to prosecute; courts should not brook undue delays in the ventilation and determination of cases. It should be their constant effort to assure that litigations are prosecuted and resolved with dispatch.[14] In holding that an unreasonable length of time exists in this case, respondent court makes reference to various cases where this Court sustained dismissals for failure to prosecute for a period of more than one year,[15] or for less

than three (3) months^[16] or for even less than two (2) months.^[17]

On the strength of the foregoing, the respondent Court granted the petition of private respondent and entered the judgment quoted at the exordium of this decision.

Petitioner sought to reconsider the above decision in its motion filed on 4 January 1990 alleging therein that (a) private respondent's voluntary appearance via the filing of its answer and motion to dismiss has rendered the petition, which is founded on lack of summons and failure to prosecute, moot and academic, and (b) private respondent's reliance on technicalities cannot defeat the ends of substantial justice whose issues have been joined by the filing of the answer. The respondent court denied this motion in its resolution of 4 January 1991 on the grounds that the issues raised therein have been submitted to, passed upon and resolved in the decision in question and that, even granting the validity of the first issue raised, still the motion fails to touch upon the other basis of the decision, namely, that the petitioner failed to prosecute its case for an unreasonable length of time.

Unsatisfied with the decision and resolution, petitioner filed the instant petition on 14 February 1991 and urges Us to set them aside because the respondent Court erred in finding that (a) the trial court did not acquire jurisdiction over the person of private respondent, and (b) that petitioner failed to prosecute its case for an unreasonable length of time. As to the first, petitioner contends that the filing by private respondent of an answer in June 1988 and a motion to dismiss on 16 February 1988 constituted a voluntary appearance and rendered moot and academic the issue of lack of service of summons, for, pursuant to Section 23 of Rule 14 of the Rules of Court, voluntary appearance is equivalent to service of summons.^[18] Moreover, as was held in *Tenchavez vs. Escaño*,^[19] even if private respondent objected to the jurisdiction of the court over its person, considering that it filed an answer with counterclaim, which makes it also a plaintiff, it thereby invoked the jurisdiction of the court in the same action and submitted to it. It further claims that the failure to serve summons upon private respondent was largely due to the latter's fraudulent act of concealing its whereabouts, "even up to this day", and despite having been apprised of petitioner's difficulty of locating private respondent's offices, the latter and its counsel refused to disclose its address.

As regards the second ground, petitioner contends that the failure to serve summons on private respondent is solely attributable to the fact that despite diligent efforts on its part and the sheriff, the principal office of respondent could not be located. It has exhausted means to locate it. Furthermore, after the trial court granted its application for a writ of attachment, it posted, without unnecessary delay, the bond and forthwith implemented the writ of attachment through the sheriff. In any event, as held in many cases, dismissal of actions on purely technical grounds should be frowned upon by the courts. At the risk of some delay, a court should not dismiss a complaint where it appears that the plaintiff has a meritorious claim. And since in this case, private respondent has in fact filed its answer, and the issues have been joined, it is proper that the case be allowed to proceed to trial.

In its Comment, private respondent sustains the challenged decision but does not meet squarely the issue of its voluntary appearance, or waiver of service of summons by the filing of the motion to dismiss and the answer.

We have carefully studied the pleadings in this case and upon due deliberation thereon, We find no reversible error which could be attributed to respondent Court.

The first assigned error is merely impressive on its face. In reality, it is hollow. The motion to dismiss the complaint and to dissolve the writ of attachment filed by private respondent on 16 February 1987 was precisely based on failure to prosecute for an unreasonable length of time because summons has not been served even up to that point in time and on the nullity of the attachment for failure to serve summons on private respondent and to furnish it with copies of the writ of attachment and the notice thereof. It claims that failure to serve the summons is sufficient to vacate or annul the writ.

Obviously, this appearance of private respondent was not, contrary to the claim of petitioner, a general appearance, and did not operate as waiver of service of summons. Petitioner's recourse to or reliance on *Salmon and Pacific Commercial Co. vs. Tan Cueco*, supra., and *Tenchavez vs. Escaño*, supra., is completely misplaced -- although not for the disquisitions made by private respondent. In the former, there was a general appearance made by Salmon by virtue of the filing of an answer. In the latter, Escaño did, in fact, file an answer with the counterclaim and the matter of jurisdiction over the person because she is a non-resident defendant was only raised as a special defense. Moreover, after that issue was unfavorably ruled upon by the trial court, it was not properly ventilated either on appeal or by special remedy or even in her brief as appellee.

Also, the filing of the Answer by private respondent does not appear to have been squarely raised in the proceedings before the respondent court. The petition in C.A.-G.R. SP No. 15647[20] does not refer to it. Petitioner makes no direct and specific allegation in its petition in the instant case that it had initially raised and pursued with vigor this matter in any of the pleadings it filed before the promulgation of the challenge decision. The latter does not mention it. Not having been properly and seasonably raised, the respondent Court could not have considered the legal effects of the filing of the Answer in its decision of 7 December 1989. Moreover, as impliedly ruled by respondent Court in its resolution of 4 January 1991, the filing of the Answer did not affect the issue of failure to prosecute for an unreasonable length of time. We agree with the respondent Court in this regard for to rule otherwise is to reward petitioner for its inaction and to punish private respondent for complying with the trial court's order of 20 May 1988 which denied the motion to reconsider the Order of 17 March 1988 and required it to file its Answer. That its answer was filed solely for that purpose is made manifest by its filing of a petition for certiorari precisely to annul said Order and the previous Order of 17 March 1988 denying the motion to dismiss and to dissolve the writ of attachment. A dismissal for failure to prosecute for an unreasonable length of time puts an end to the case and it would be unjust and unfair to compel a defendant to abort such a result by filing an answer. As a matter of fact, the trial court committed grave abuse of discretion when it ordered private respondent to file the Answer despite the fact that it was not yet served with summons and a copy of the complaint.

The trial court then did not validly acquire jurisdiction over the person of private respondent. And the implementation of the writ of attachment against the property of private respondent is null and void. While it is true that under Section 1 of Rule 57 of the Rules of Court the property of the defendant may be attached, as security for the satisfaction of any judgment that may be recovered in the cases therein enumerated, upon application by the plaintiff at the commencement of the action or at any time thereafter, a court which has not acquired jurisdiction over the person of the defendant cannot bind the defendant, whether in the main case or in the proceedings for the ancillary remedy of attachment. In the relatively recent case of *Sievert vs. Court of Appeals, et al.*, [21] We ruled:

"Attachment is an ancillary remedy. It is not sought for its own sake but rather to enable the attaching party to realize upon relief sought and expected to be granted in the main or principal action. A court which has not acquired jurisdiction over the person of the defendant, cannot bind that defendant whether in the main case or in any ancillary proceeding such as attachment proceedings. The service of a petition for preliminary attachment without the prior or simultaneous service of summons and a copy of the complaint in the main case - and that is what happened in this case - does not of course confer jurisdiction upon the issuing court over the person of the defendant.

Ordinarily, the prayer in a petition for a writ of preliminary attachment is embodied or incorporated in the main complaint itself as one of the forms of relief sought in such complaint. Thus, valid service of summons and a copy of the complaint will in such case vest jurisdiction in the court over the defendant both for purposes of the main case and for purposes of the ancillary remedy of attachment. In such case, notice of the main case is at

the same time notice of the auxiliary proceeding in attachment. Where, however, the petition for a writ of preliminary attachment is embodied in a discrete pleading, such petition must be served either simultaneously with service of summons and a copy of the main complaint, or after jurisdiction over the defendant has already been acquired by such service of summons. Notice of the separate attachment petition is not notice of the main action. Put a little differently, jurisdiction whether *ratione personae* or *ratione materiae* in an attachment proceeding is ancillary to jurisdiction *ratione personae* or *ratione materiae* in the main action against the defendant. If a court has no jurisdiction over the subject matter or over the person of the defendant in the principal action, it simply has no jurisdiction to issue a writ of preliminary attachment against the defendant or his property."

The second assigned error is equally without merit. We are not unmindful of the rule that the dismissal of an action for failure to prosecute for an unreasonable length of time rests upon the sound discretion of the court,[22] and that as to what constitutes "unreasonable length of time", this Court has ruled that it depends upon the circumstances of each particular case; and that the sound discretion of the court in the determination of said question will not be disturbed in the absence of patent abuse.[23] We agree with the respondent court -- although not necessarily for the authorities cited since a closer examination thereof reveal that they do not involve similar factual background or causes of action as this case -- that it was error for the trial court not to dismiss petitioner's complaint for failure to prosecute for an unreasonable length of time.

Nothing on record supports the claim of petitioner that it had exerted diligent efforts to serve the summons and a copy of the complaint on private respondent. All that it can offer to invite a sympathetic ear are the self-serving claim that it had exerted such efforts to locate private respondent's principal office address and an insinuation that private respondent and its counsel deliberately concealed such address from petitioner and the court. The claim and the reality are oceans apart. There is absolutely no showing at all that an attempt was made to serve both the original summons with a copy of the complaint and the alias summons, which petitioner asked to be issued not on its own accord as indication of a sincere effort to bring the defendant within the jurisdiction of the court, but as a reluctant reaction to the trial court's order of 11 August 1987 directing petitioner to take the necessary steps toward the active prosecution of the case, otherwise it would be dismissed for failure to prosecute. The standard practice in trial courts, which is in conformity with Rule 14 of the Rules of Court, is for the Clerk of Court to issue at once the summons upon the filing of the complaint. It is the duty of a plaintiff or his counsel to see to it that the sheriff or a process server immediately cause its service, together with a copy of the complaint, on the defendant. Moreover, plaintiff is invariably furnished with a copy of the return of service. If no such return is furnished him, it is incumbent upon plaintiff or his counsel to inquire from the Clerk of Court as to the status of the summons not only to take appropriate action if it had not been served, but to know when the period to answer expired if service was properly made. In the instant case, petitioner did not make any concrete appropriate step to have the alias summons served. Under Section 13 of Rule 14 of the Rules of Court, service of summons on a defendant corporation may be made on the president, manager, secretary, cashier, agent or any of its directors. Petitioner should have verified from the Securities and Exchange Commission as to the names of the officers and directors of the private respondent and as to its principal office address. It did not assert in the petition that it did. Moreover, it could have availed itself of the procedure provided for in Section 16 of the same Rule on summons by publication. It cannot place the blame on private respondent or its counsel, for if indeed petitioner were genuinely serious about knowing from either the principal office address of private respondent, petitioner could have, if it could not get it through an informal request, filed a motion for an order directing private respondent and/or its counsel to give to petitioner such principal office address. It does not appear, however, that petitioner did so. From its allegations, it seems clear that it merely waited for private respondent or its counsel to volunteer the information. Worse, even after private respondent filed its motion to dismiss precisely on the ground of failure to prosecute for an unreasonable length of time because of the non-service of summons, petitioner did nothing --

absolutely nothing -- to remedy the situation.

WHEREFORE, the instant petition is DENIED for lack of merit with costs against petitioner.

SO ORDERED.

Fernan, C.J., Gutierrez, Jr., Feliciano, and Bidin, JJ., concur.

[1] Annex "A" of Petition; Rollo 31-34. Per Associate Justice Hector C. Fule, and concurred in by Associate Justices Nathanael P. de Pano, Jr. and Asaali S. Isnani.

[2] Annex "G" of Petition; Rollo, 81-82.

[3] Rollo, 31.

[4] Id., 32.

[5] Annex "C" of Petition; Id., 48-52.

[6] Rollo, 16.

[7] Id., 32.

[8] Annex "D" of Petition; Id., 53-58.

[9] Id., 17.

[10] Annex "E" of Petition; Id., 59-69.

[11] Id., 32.

[12] Citing Paramount Insurance Corp. vs. Luna, 148 SCRA 478; Trimica, Inc. vs. Polaris Marketing Corp., 60 SCRA 321.

[13] Citing Lirag vs. Galano, G.R. No. 46244, August 18, 1988; Olivares vs. Gonzales, G.R. No. 34500, March 18, 1988; Section 3, Rule 17, Rules of Court.

[14] Citing Padua vs. Ericta, G.R. No. 38570, 24 May 1988.

[15] Citing Ortega vs. de Guzman, 19 SCRA 391; Villanueva vs. Secretary of Public Works and Communications, 16 SCRA 422; Chuan vs. De la Fuente, 90 Phil. 813.

[16] Citing Montejo vs. Urotia, 40 SCRA 41; Masiglat vs. Mayor of Pasay City, 55 O.G. 9660; Sunico vs. Villapando, 14 Phil. 352.

[17] Citing Montejo vs. Urotia, supra., citing Bautista vs. Teodoro, 101 Phil. 701.

[18] Citing Salmon and Pacific Commercial Co. vs. Tan Cueco, 36 Phil. 556.

[19] 17 SCRA 674.

[20] Annex "E" of Petition; Rollo, 59-69.

[21] 168 SCRA 692.

[22] *Smith Bell & Co. vs. American President Lines, Inc.*, 94 Phil. 880; *Bautista vs. Teodoro*, 101 Phil. 701; *Montelibano vs. Banares*, 103 Phil. 106; *Flores vs. Philippine Alien Property Administrator*, 107 Phil. 773; *Montejo vs. Urotia*, *supra*.

[23] *Montejo vs. Urotia*, *supra*.

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