

**SPS. ROBERTO COSIQUIEN AND OLIVIA SY,
PETITIONERS-APPELLANTS, VS. HONORABLE COURT OF APPEALS,
PHIL-CAR SALES CORPORATION, LOTA SANTOS, AND DIRECTORS OF
PHIL-CAR SALES CORPORATIO...**

G.R. Nos. 56073 & 58819. August 20, 1990

Ponente: PARAS, J.

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PARAS, J.:

Civil Case No. C-7942 subject of both petitions has been elevated to this Court on two incidents: the issuance of a “Writ of Preliminary Attachment” in G.R. No. 56073* and the issuance of the Order of Default in G.R. No. 58819** by the trial court, both of which were reversed by the Court of Appeals.

As subject petitions involve the same property and the same parties, they were ordered consolidated in the resolution of the Second Division of this Court of December 2, 1981.

In G.R. No. 56073:

On October 24, 1979 plaintiffs (herein petitioners) filed a complaint against defendants (herein private respondents) in the Court of First Instance of Caloocan City Branch 33 presided by Judge Marcelino N. Sayo docketed as Civil Case No. C-7942 for collection of the sum of P400,000.00 with damages which Jose T. Santos husband of defendant Lota Santos (private respondent) had incurred during his lifetime thereby resulting in an obligation with the plaintiffs (Rollo, G.R. No. 56073; Annex “A” p. 20).

On October 31, 1979 without any notice to adverse party and without any hearing, the respondent Judge issued ex-parte a “Writ of Preliminary Attachment” (Rollo, G.R. No. 56073; Annex “B” p. 33) and the respondent sheriff levied an attachment on certain properties found in the premises of the defendants (Rollo, G.R. No. 56073, p. 52). On January 15, 1980 the respondent judge denied petitioners’ motion to dissolve the writ of attachment and motion to dismiss the same in a single order (Rollo, G.R. No. 56073, p. 64).

On August 20, 1980, plaintiffs filed an ex-parte motion for substitution of sheriff and enforcement of alias writ of attachment (Rollo, G.R. No. 56073, pp. 67-68) and on August 22, 1980, the respondent judge without notice or hearing to adverse party/defendants, issued an alias writ of preliminary attachment (Rollo, G.R. No. 56073, pp. 67-68).

On August 27, 1980 the respondent sheriff levied on attachment certain properties, and all the properties were carted away by the respondent sheriff except certain items under custodia legis. (Rollo, G.R. No. 56073, pp. 69-70)

The respondent sheriff, in carrying out the execution of an alias writ of attachment, also garnished defendant’s account with the Metro Bank (Rollo, G.R. 56073, p. 71). The latter claimed an approximate loss of earnings amounting to Thirty Thousand (P30,000.00) Pesos a day and that unless the writ of preliminary attachment is

dissolved or the properties levied upon returned or restored to defendants, said defendants will continue to suffer a great material injury against their interests (Rollo, G.R. No. 56073; Annex “B”, p. 35).

On September 8, 1980 private respondents filed a petition for certiorari in the Court of Appeals (Rollo, Annex “B”, pp. 32- 41).

On December 16, 1980, respondent Court of Appeals issued the questioned decision, the dispositive part of which reads:

“WHEREFORE, the petition for certiorari is hereby granted and the Orders of October 31, 1979 as well as the subsequent Orders of August 22, 1980 and January 15, 1980 are hereby set aside; declared null and void and are of no legal effect.

Having granted the motion for the issuance of a mandatory preliminary injunction, it is therefore ordered that the respondent sheriff return all the items attached and levied against the herein petitioners specifically all those enumerated in Annex “J”, (Petition, pp. 39-40, Rollo).

Consequently, the Notice of Garnishment dated August 27, 1980 issued by the Deputy Sheriff is hereby set aside and annulled. With costs against the private respondents.

SO ORDERED. (Rollo, G.R. No. 56073; Annex “A”, p. 27)

On December 19, 1980, the Court of Appeals issued a resolution requiring the respondent sheriff to comment on the petitioners’ Manifestation and/or Motion, and to show cause why he should not be held in Contempt of Court by refusing to comply with the Writ of Preliminary Mandatory Injunction issued by the Court of Appeals on December 16, 1980 (Rollo, Annex “A-1”, p. 29). And on January 26, 1981 another resolution was issued by respondent Court of Appeals, the dispositive portion of which reads:

“WHEREFORE, to repeat, (1) the motion for the reconsideration of the aforesaid decision is hereby denied for lack of merit and (2) the respondent Deputy Sheriff Rodrigo C. Saure is hereby ordered to implement and/or execute the writ of preliminary mandatory injunction dated December 16, 1980 and he is hereby given another period of five (5) days from receipt of this Resolution within which to carry the mandate of the Court. Otherwise, disciplinary action will be taken against him accordingly, until compliance is made.

SO ORDERED. (Rollo, G.R. No. 56073; Annex “A-2”, p. 31)

Hence, this petition for certiorari in G.R. No. 56073 seeking to annul, modify and amend the above quoted decision and resolution of respondent Court of Appeals.

A temporary restraining order was issued by this Court in GR No. 56073, enjoining respondents from enforcing the questioned decision of December 16, 1980 and the resolutions dated December 19, 1980, and January 26, 1981 all issued in CA-G.R. No. 11201-SP entitled “Phil-Car Sales Corporation, et al. vs. Hon. Judge Marcelino N. Sayo, etc. et al. (Rollo, GR No. 56073, pp. 116-117).

In G.R. No. 58819:

In the same Civil Case, on January 25, 1980, defendants filed their answer, and on February 4, 1980, a notice or pre--trial was issued while on February 25, 1980, Judge Sayo issued an order terminating the pre-trial and setting the case for trial on the merits on March 25, 1980. (Rollo, G.R. No. 58819, Ibid., p. 27).

A hearing was set for June 2, 1980, which was reset for June 24, 1980. (Rollo, G.R. No. 58819; Annex “B”, p. 18). The plaintiffs with their counsel appeared but there was no appearance for defendants (herein private respondents). The defendants were declared as in default and plaintiffs were allowed to present their evidence

ex-parte on the ground that “defendants or their counsel failed to appear despite due notice”. (Rollo, Ibid.)

Defendants’ (private respondents) new lawyer filed a “Motion for Reconsideration and/or For New Trial (Rollo, G.R. No. 58819, Ibid., pp. 19-20) which was denied by the trial court in its Order dated June 2, 1981 on the ground that the motion for reconsideration and/or for new trial is pro-forma and cannot even be considered as a motion for new trial (Rollo, G.R. No. 58819, Ibid., p. 20).

The decision rendered by the lower court on January 30, 1981 was decreed by it as final and executory. And the judge issued a writ of execution and levy was made on June 8, 1981 on the properties of the defendants and the sheriff had set the auction sale of the levied properties on June 18, 1981, at 10:00 o’clock in the morning (Rollo, G.R. No. 58819, Ibid., p. 21).

Meanwhile, on June 17, 1981, defendants filed a petition for certiorari in the Court of Appeals docketed as CA G.R. No. 12561-SP (Rollo, Annex “C”, pp. 25-49).

On August 26, 1981, the Court of Appeals rendered its decision, the dispositive portion of which reads:

“IN VIEW OF THE FOREGOING CONSIDERATION, We hereby give due course to this petition, and consequently, the orders and decision, subject of this petition, are hereby set aside for being null and void. Let the respondent court set the re-trial of this case with notice to all the parties and their counsel.

With costs against private respondents.

SO ORDERED. (Rollo, G.R. No. 58819, p. 24)

On November 4, 1981 respondent Court of Appeals issued the questioned resolution which reads:

“The writ of execution (Annex “K” to Petition) issued by the respondent judge has been declared null and void in our decision of August 26, 1981, consequently all seizures and levies made under each authority were also null and void.

WHEREFORE, the respondents are hereby directed to forthwith return to petitioners all properties seized and levied upon under and in pursuance with the writ of execution (Annex “R” to petition), specifically those described and listed in Annex “P” to the petition.

SO ORDERED.” (Rollo, p. 15)

Hence, this petition for certiorari, GR No. 58819, seeking to annul and set aside the questioned decision and resolution of the Court of Appeals.

The pivotal issue in G.R. No. 56073 is whether or not the respondent Court of Appeals acted with grave abuse of discretion and/or in excess of and without jurisdiction in annulling the Writ of Preliminary Attachment issued by the trial court while in G.R. No. 58819, the issue is whether or not the private respondents could be declared as in default on June 24, 1980 when they failed to appear for trial on the merits on said date although they have already filed an answer.

In G.R. No. 56073:

An act of a court or tribunal may only be considered as in grave abuse of discretion when the same was performed in a capricious or whimsical exercise of judgment which is equivalent to lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or personal hostility (Intestate Estate of Carmen de Luna vs. IAC, 170 SCRA 254 [1989]).

The writ of attachment under Rule 57, Section 1 of the Rules of Court can be issued ex parte if a sufficient cause of action exists and this is shown by the allegations in the affidavit supporting the issuance thereof. Section 3 of the rules as specified requires that the affidavit must establish such facts and in the establishment thereof, general allegations do not qualify for the issuance of the writ.

Thus, this Court ruled that the failure to allege in the affidavit the requisites prescribed for the issuance of the writ of preliminary attachment, renders the writ of preliminary attachment issued against the property of the defendant fatally defective. The judge issuing it is deemed to have acted in excess of his jurisdiction. In fact, the defect cannot even be cured by amendment. Since the attachment is a harsh and rigorous remedy which exposes the debtor to humiliation and annoyance, the rule authorizing its issuance must be strictly construed in favor of defendant. It is the duty of the court before issuing the writ to ensure that all the requisites of the law have been complied with. Otherwise, a judge acquires no jurisdiction to issue the writ (*Jardine-Manila Finance, Inc. vs. CA*, 171 SCRA 636 [1989]).

An examination of plaintiffs' complaint shows that it does not meet the requirements laid down by Sec. 3 Rule 57. In fact only paragraph 13 of the complaint speaks of an alleged fraudulent transfer which is however couched in generalities, thus:

"13. The defendants are about to transfer if not at all doing some ultra vires acts by transferring some assets if not putting in the name/s of their close relatives who are not members of the Phil-Car Sales Corporation, the consignment and/or sale of brand new, re-possessed or old cars to defraud not only herein plaintiffs but probably all the defendants Phil-Car Sales Corporation's creditors." (Rollo, G.R. No. 56073, p. 45)

A hearing should have been conducted

As held by this Court, when a judge issues a writ of preliminary attachment ex-parte, it is incumbent on him, upon proper challenge of his order to determine whether or not the same was improvidently issued. If the party against whom the writ is prayed for squarely controverts the allegation of fraud, it is incumbent on the applicant to prove his allegation. The burden of proving that there indeed was fraud lies with the party making such allegation. This finds support in Section 1, Rule 131 Rules of Court. In this jurisdiction, fraud is never presumed (*Benitez vs. IAC*, 154 SCRA 41 [1987]).

Section 13 of Rule 57 provides that "(T)he party whose property has been attached may also, at any time either before or after the release of the attached property, or before any attachment shall have been actually levied, upon reasonable notice to the attaching creditor apply to the judge who granted the order, or to the judge of the court in which the action is pending, for an order to discharge the attachment on the ground that the same was improperly or irregularly issued (*Mindanao Savings & Loan Association, Inc. vs. CA*, G.R. No. 84481, April 18, 1989).

When an abuse of discretion has been committed by the respondent Judge, a mandatory preliminary injunction under Rule 58 of the Rules of Court will lie. (*Gacutan vs. Sacultido*, 164 SCRA 255 [1988]).

Accordingly respondent Court of Appeals cannot be faulted for issuing the questioned decision and subsequent resolutions. On the contrary it is the orders of the lower court which are null and void because they were issued with grave abuse of discretion.

In G.R. No. 58819:

As correctly ruled by the Court of Appeals, there is only one instance when a party defendant can properly be declared in default, and also only one instance under our rules of procedure when a party can be declared as in default. The only instance when a defendant can properly be declared in default is when he fails to file his answer within the reglementary period, or within such extended time as he is allowed by the Court, under Section 1, Rule

18, of the Revised Rules of Court (Rollo, G.R. No. 58819, p. 22).

Then, the only instance when a party can be declared “as in default” is when he fails to appear, inspite of notice to him, at a pre-trial conference (Section 2, Rule 20, Revised Rules of Court). (Ibid.)

In no other situation can a party be declared in default or as in default, as the case may be. Mere non-appearance of defendants at an ordinary hearing and to adduce evidence does not constitute default, when they have already filed their answer to the complaint within the reglementary period (*Violago vs. Campos*, 114 SCRA, 269 [1982]). It is error to default a defendant after the answer has already been filed. It should be borne in mind that the policy of the law is to have every litigated case tried on the merits as much as possible. It is for this reason that judgments by default are frowned upon (*Cathay Pacific Airways, Ltd. vs. Romillo, Jr.*, 141 SCRA 455 [1986]).

In the case at bar, an answer was filed by the private respondents; the pre-trial conference was already terminated, and what was scheduled on June 24, 1980 was a hearing or trial on the merits. It was, therefore, improper for the lower court to have declared private respondents as in default and then deprived them of notice of further proceedings.

The pertinent provision of the Rules on Default cannot be interpreted to mean that the court can just disregard the answer before it, which has long been filed for that would be nothing less than illogical, unwarranted, and unjust (*Director of Lands vs. Santiago*, 160 SCRA 186 [1988]).

PREMISES CONSIDERED, the petitions filed by petitioners in both cases (GR No. 56073 and GR No. 58819) are hereby DISMISSED for lack of merit; the assailed decisions and resolutions issued by respondent Court of Appeals are AFFIRMED; and the temporary restraining order issued by this Court in G.R. No. 56073 is LIFTED.

SO ORDERED.

Melencio-Herrera, (Chairman), Padilla, and Regalado, JJ., concur.
Sarmiento, J., on leave.

* Penned by Associate Justice Milagros A. German and concurred in by Associate Justices Emilio A. Gancayco and Lino M. Patajo.

** Penned by Associate Justices Elias B. Asuncion and concurred in by Associate Justices Porfirio V. Sison and Onofre A. Villaluz.

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