539 Phil. 377

FIRST DIVISION

[G.R. NO. 155488, December 06, 2006]

ERLINDA R. VELAYO-FONG, PETITIONER, VS. SPOUSES RAYMOND AND MARIA HEDY VELAYO, RESPONDENTS.

D E C I S I O N

AUSTRIA-MARTINEZ, J.:

Before the Court is a petition for review on *certiorari* under Rule 45 of the 1997 Rules of Civil Procedure seeking the reversal of the Decision[1] of the Court of Appeals (CA) dated May 14, 2002 in CA-G.R. CV No. 54434 which affirmed the Decision of the Regional Trial Court, Branch 105, Quezon City (RTC) in Civil Case No. Q-93-17133; and the CA Resolution[2] dated October 1, 2002 which denied petitioner's motion for reconsideration.

The procedural antecedents and factual background of the case are as follows:

On August 9, 1993, Raymond Velayo (Raymond) and his wife, Maria Hedy Velayo (respondents) filed a complaint for sum of money and damages with prayer for preliminary attachment against Erlinda R. Velayo-Fong (petitioner), Rodolfo R. Velayo, Jr. (Rodolfo Jr.) and Roberto R. Velayo (Roberto).[3] Raymond is the half-brother of petitioner and her co-defendants.

In their Complaint, respondents allege that petitioner, a resident of 1860 Alamoana Boulevard, Honolulu, Hawaii, USA, and her co-defendants, who are residents of the Philippines, made it appear that their common father, Rodolfo Velayo, Sr. (Rodolfo Sr.) and petitioner had filed a complaint against Raymond before the National Bureau of Investigation (NBI), accusing Raymond of the crimes of estafa and kidnapping a minor; that petitioner and her co-defendants also requested that respondents be included in the Hold Departure List of the Bureau of Immigration and Deportation (BID) which was granted, thereby preventing them from leaving the country and resulting in the cancellation of respondents' trips abroad and caused all of respondents' business transactions and operations to be paralyzed to their damage and prejudice; that petitioner and her co-defendants also filed a petition before the Securities and Exchange Commission (SEC) docketed as Case No. 4422 entitled "Rodolfo Velayo Sr. et al. v. Raymond Velayo et al." which caused respondents' funds to be frozen and paralyzed the latters' business transactions and operations to their damage and prejudice. Since petitioner was a non-resident and not found in the Philippines, respondents prayed for a writ of preliminary attachment against petitioner's properties located in the Philippines.

Before respondents' application for a writ of preliminary attachment can be acted upon by the RTC, respondents filed on September 10, 1993 an Urgent Motion praying that the summons addressed to petitioner be served to her at Suite 201, Sunset View Towers Condominium, Roxas Boulevard, Pasay City and at No. 5040 P.

Burgos Street, T. Towers Condominium, Makati.[4] In its Order dated September 13, 1993, the RTC granted the said motion.[5]

The Process Server submitted the Officer's Return, to wit:

> THIS IS TO CERTIFY, that after several failed attempts to serve the copy of summons and complaint issued in the above-entitled case at the given addresses of defendant Erlinda Velayo as mentioned in the Order of this Court dated September 13, 1993, finally, on the 23rd day of September, 1993, at the instance of herein plaintiffs through counsel, undersigned was able to SERVED (sic) personally upon defendant Erlinda Velayo the copy of summons together with the thereto attached copy of the complaint, not at her two (2) given addresses, but at the lobby of Intercontinental Hotel, Makati, Metro Manila, right in the presence of lobby counter personnel by the name of Ms. A. Zulueta, but said defendant refused to sign in receipt thereof.
>
> I FURTHER CERTIFY, that on the 27th day of September, 1993, copy of the same WAS SERVED personally upon the other defendant Rodolfo R. Velayo, Jr., at No. Block 57, Lots 17 and 19, G. Sanchez Street, BF Resort Village, Las Piñas, Metro Manila, but who also refused to sign in receipt thereof.
>
> WHEREFORE, original copy of the summons is now being respectfully returned to the Honorable Court DULY SERVED.
>
> Quezon City, Philippines, September 30, 1993.[6]

Upon *ex-parte* motions[7] of respondents, the RTC in its Order dated November 23, 1993 and January 5, 1994, declared petitioner and her co-defendant in default for failure to file an answer and ordered the *ex-parte* presentation of respondents' evidence.[8]

On June 15, 1994, the RTC rendered its Decision in respondents' favor, the dispositive portion of which reads:

> WHEREFORE, premises considered, judgment is hereby rendered ordering the defendants to pay the plaintiffs:
>
> 1. the amount of P65,000.00 as actual damages;
>
> 2. the amount of P200,000.00 as moral damages;
>
> 3. Attorney's fees in the amount of P5,000,00 it being a judgment by default; and
>
> 4. cost of suit.
>
> SO ORDERED.[9]

On September 1, 1994, petitioner filed a Motion to Set Aside Order of Default claiming that she was prevented from filing a responsive pleading and defending

herself against respondents' complaint because of fraud, accident or mistake; that contrary to the Officer's Return, no summons was served upon her; that she has valid and meritorious defenses to refute respondents' material allegations.[10] Respondents opposed said Motion.[11]

In its Order dated May 29, 1995, the RTC denied petitioner's Motion ruling that the presumption of regularity in the discharge of the function of the Process Server was not sufficiently overcome by petitioner's allegation to the contrary; that there was no evident reason for the Process Server to make a false narration regarding the service of summons to defaulting defendant in the Officer's Return.[12]

On September 4, 1995, respondents filed a Motion for Execution.[13] On September 22, 1995, petitioner filed an Opposition to Motion for Execution contending that she has not yet received the Decision and it is not yet final and executory as against her.[14]

In its Order dated January 3, 1996, the RTC, finding that the Decision dated June 15, 1994 and the Order dated May 29, 1995 were indeed not furnished or served upon petitioner, denied respondents' motion for execution against petitioner and ordered that petitioner be furnished the said Decision and Order.[15]

On March 28, 1996, the RTC issued an Order directing the issuance of the writ of execution against petitioner's co-defendant.[16]

On May 23, 1996, petitioner, through her counsel, finally received the Decision dated June 15, 1994 and the Order dated May 29, 1995.[17]

Petitioner filed an appeal with the CA questioning the propriety and validity of the service of summons made upon her. Respondents opposed the appeal, arguing that the petition should be dismissed since it raised pure questions of law, which is not within the CA's jurisdiction to resolve under Section 2 (c) of Rule 41 of the Revised Rules of Court; that, in any case, petitioner's reliance on the rule of extraterritorial service is misplaced; that the judgment by default has long been final and executory since as early as August 1994 petitioner became aware of the judgment by default when she verified the status of the case; that petitioner should have filed a motion for new trial or a petition for relief from judgment and not a motion to set aside the order of default since there was already a judgment by default.

On May 14, 2002, the CA rendered its Decision affirming the Decision and Order of the RTC[18] ruling that it (CA) has jurisdiction since the petition raised a question of fact, that is, whether petitioner was properly served with summons; that the judgment by default was not yet final and executory against petitioner since the records reveal and the RTC Order dated January 3, 1996 confirmed that she was not furnished or served a copy of the decision; that petitioner was validly served with summons since the complaint for damages is an action *in personam* and only personal, not extraterritorial service, of summons, within the forum, is essential for the acquisition of jurisdiction over her person; that petitioner's allegations that she did not know what was being served upon her and that somebody just hurled papers at her were not substantiated by competent evidence and cannot overcome the presumption of regularity of performance of official functions in favor of the Officer's

Return.

Petitioner filed a Motion for Reconsideration[19] but the CA denied it in its Resolution dated October 1, 2002.[20]

Hence, the present petition anchored on the following grounds:

I

THE COURT OF APPEALS PATENTLY ERRED IN NOT RULING THAT PETITIONER WAS NOT VALIDLY SERVED WITH SUMMONS.

II

THE COURT OF APPEALS PATENTLY ERRED IN NOT RULING THAT PETITIONER WAS PREVENTED FROM FILING RESPONSIVE PLEADING AND DEFENDING AGAINST RESPONDENTS' COMPLAINT BECAUSE OF FRAUD, ACCIDENT AND MISTAKE.[21]

Parties filed their respective Memoranda on September 8 and 9, 2005.

Petitioner argues that summons should have been served through extraterritorial service since she is a non-resident; that the RTC should have lifted the order of default since a default judgment is frowned upon and parties should be given their day in court; that she was prevented from filing a responsive pleading and defending against respondents' complaint through fraud, accident or mistake considering that the statement in the Officer's Return that she was personally served summons is inaccurate; that she does not remember having been served with summons during the said date but remembers that a man hurled some papers at her while she was entering the elevator and, not knowing what the papers were all about, she threw back the papers to the man before the elevator closed; that she has a valid and meritorious defense to refute the material allegations of respondents' complaint.

On the other hand, respondents contend that petitioner was validly served with summons since the rules do not require that service be made upon her at her place of residence as alleged in the complaint or stated in the summons; that extraterritorial service applies only when the defendant does not reside and is not found in the Philippines; that petitioner erred in filing a motion to set aside the order of default at the time when a default judgment was already rendered by the RTC since the proper remedy is a motion for new trial or a petition for relief from judgment under Rule 38; that the issue on summons is a pure question of law which the CA does not have jurisdiction to resolve under Section 2 (c) of Rule 41 of the 1997 Rules of Civil Procedure.[22]

The Court finds it proper to resolve first whether the issue involved in the appeal filed with the CA is a question of law and therefore not within the jurisdiction of the CA to resolve.

In *Murillo v. Consul*,[23] which was later adopted by the 1997 Rules of Civil Procedure, the Court clarified the three modes of appeal from decisions of the RTC,

namely: (a) ordinary appeal or appeal by writ of error, where judgment was rendered in a civil or criminal action by the RTC in the exercise of original jurisdiction; (b) petition for review, where judgment was rendered by the RTC in the exercise of appellate jurisdiction; and (c) petition for review to the Supreme Court.

The first mode of appeal, governed by Rule 41, is taken to the Court of Appeals on questions of fact or mixed questions of fact and law. The second mode of appeal, covered by Rule 42, is brought to the Court of Appeals on questions of fact, of law, or mixed questions of fact and law. The third mode of appeal, provided for by Rule 45, is elevated to the Supreme Court only on questions of law.

A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts.[24] For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them.[25] The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact.[26] Thus, the test of whether a question is one of law or of fact is not the appellation given to such question by the party raising the same; rather, it is whether the appellate court can determine the issue raised without reviewing or evaluating the evidence, in which case, it is a question of law; otherwise it is a question of fact.[27]

Respondents' claim that the issues raised by petitioner before the CA are pure legal questions is not tenable.

A scrutiny of petitioner's petition before the CA reveals that it raised two issues: (a) the propriety of the service effected on a non-resident; and (b) the validity of the service made upon her. The first is a question of law. There is indeed a question as to what and how the law should be applied. The second is a question of fact. The resolution of said issue entails a review of the factual circumstances that led the RTC to conclude that service was validly effected upon petitioner. Therefore, petitioner properly brought the case to the CA via the first mode of appeal under the aegis of Rule 41.

How may service of summons be effected on a non-resident?

Section 17,[28] Rule 14 of the Rules of Court provides:

> Section 17. *Extraterritorial service* – When the defendant does not reside and is not found in the Philippines and the action affects the personal status of the plaintiff or relates to, or the subject of which, is property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the property of the defendant has been attached in the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under section 7; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or