

## THIRD DIVISION

[ G.R. No. 113150, March 29, 1999 ]

**HENRY TANCHAN, DOING BUSINESS UNDER THE NAME AND STYLE "FOREMOST INDUSTRIAL SALES", PETITIONER, VS. COURT OF APPEALS AND, PHILIPPINE ROCK PRODUCTS, INC., RESPONDENTS.**

### D E C I S I O N

**PURISIMA, J.:**

At bar is a Petition for Review on *Certiorari* under Rule 45 of the Revised Rules of Court which seeks to set aside the Decision<sup>[1]</sup> of the Court Appeals<sup>[2]</sup>, reversing the Decision<sup>[3]</sup> of the Regional Trial Court of Cebu, Branch 24<sup>[4]</sup>, in Civil Case No. CEB-10026, and remanding the case to the court of origin for further proceedings.

The controversy stemmed from a hauling agreement whereby petitioner Henry Tanchan undertook to haul the construction materials of the private respondent Phil. Rock Products Inc., in Cebu.

On March 18, 1990, petitioner Henry Tanchan brought an action<sup>[5]</sup> against the private respondent for collection of sum of money in the amount of P1,177,367.27 covering the period from March 1990 to September 1990 plus 2% penalty and 2% interest per month and 25% attorney's fees, docketed as Civil Case No. CEB-10026 before Branch 24 of the Regional Trial Court in Cebu City.

On August 22, 1991, the private respondent interposed a motion<sup>[6]</sup> to dismiss on the ground of improper venue, theorizing that the proper court of Rizal had the exclusive jurisdiction thereover pursuant to paragraph thirteen (13) of the contract sued upon which reads:

*"13. Any action arising out of this Agreement shall be submitted to the jurisdiction of the **proper court** in **Rizal** with the prevailing party being entitled to attorney's fees."*<sup>[7]</sup> (emphasis supplied)

On June 3, 1991, after the denial of private respondent's motion to dismiss, the trial court directed the movant to file its answer within fifteen (15) days from notice.

On July 1, 1990, instead of complying with the Order of the trial court the private respondent went to the Court of Appeals on a Petition for *Certiorari* and Prohibition seeking to annul the said Order and to enjoin the trial court from proceeding with the case.

On March 30, 1990, petitioner presented a motion<sup>[8]</sup> to declare the private respondent in default contending that the filing of a petition for *Certiorari* and Prohibition with the Court of Appeals did not suspend the reglementary period within

which to file an answer. In opposition<sup>[9]</sup> thereto, the private respondent theorized that it could not yet file its answer because of the pendency of its Petition before the appellate Court. It was private respondent's stance that to file an answer would amount to submission to the jurisdiction of the court and in turn, would be construed as a waiver of its objection to the venue of the case.

On April 29, 1992, the trial court declared the private respondent in default. The Order<sup>[10]</sup> declaring it in default was received by the private respondent on May 4, 1992. On the other hand, private respondent's Petition for *Certiorari* was dismissed by the Court of Appeals<sup>[11]</sup> on April 30, 1992. Copy of the Decision<sup>[12]</sup> of the Court of Appeals was received by the private respondent on May 19, 1992, on which very day, the petitioner presented his evidence *ex-parte*.

On May 28, 1992, the private respondent filed with the trial court a motion<sup>[13]</sup> to lift the order of default and to admit its answer, copy of which was attached to the said motion.

On June 23, 1992 the trial court *a quo* denied subject motion of private respondent and considered the case submitted for decision on the basis of the evidence adduced by petitioner.

On July 2, 1992, the lower court came out with its decision, disposing thus:

*"WHEREFORE, in view of all the foregoing, judgment is hereby rendered sentencing the defendant to pay the plaintiff the amount of P3,553,896.10 plus interest thereon at 2% per month from May 15, 1992 as well as penalty charge of 2% per month from May 15, 1992 until fully paid and P490,118.52 as attorney's fees.*

*SO ORDERED."*<sup>[14]</sup>

On appeal by the private respondent to the Court of Appeals, it assigned as errors, that:

"A THE LOWER COURT ERRED IN ASSUMING JURISDICTION OVER THE CASE NOTWITHSTANDING THE CLEAR STIPULATION OF THE PARTIES THAT THE VENUE OF ANY COURT ACTION SHALL BE INSTITUTED AT ANY PROPER COURT OF RIZAL.

B. THE LOWER COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO LIFT ORDER OF DEFAULT AND TO AFFORD APPELLANT ITS DAY IN COURT.

C. THE LOWER COURT ERRED IN AWARDING WITHOUT SUFFICIENT BASIS THE PRINCIPAL AMOUNT OF P1,960,474.17.

D. THE LOWER COURT ERRED IN AWARDING THE INTEREST OF TWELVE PERCENT (12%) PER ANNUM DESPITE THE ABSENCE OF ANY STIPULATION AS TO INTEREST IN THE CONTRACT BETWEEN THE PARTIES.

E. THE LOWER COURT ERRED IN AWARDING WITHOUT SUFFICIENT

BASIS PENALTY INTEREST OF TWELVE PERCENT (12%) PER ANNUM AS WELL AS ATTORNEY'S FEES OF TWENTY FIVE PERCENT (25%) OF THE AMOUNT ALLEGEDLY DUE."<sup>[15]</sup>

On November 26, 1993, the Court of Appeals set aside the decision appealed from and remanded the case to the lower court of origin for further proceedings, to wit:

*"WHEREFORE, the Decision appealed from is hereby REVERSED and SET ASIDE and the records of the case will be remanded to the court a quo for further proceedings.*

*SO ORDERED.*"<sup>[16]</sup>

Dissatisfied with the aforesaid decision, petitioner found his way to this court via Petition for Review on *Certiorari* at bar, theorizing that:

I THE RESPONDENT COURT ERRED IN NOT HOLDING THAT THE MOTION TO LIFT ORDER OF DEFAULT WAS FILED LATE AND NOT IN THE PROPER FORM.

II THE RESPONDENT COURT ERRED IN NOT HOLDING THAT PRIVATE RESPONDENT OBSTINATELY REFUSED TO FILE ITS ANSWER TO THE COMPLAINT FOR EIGHT AND A HALF (8 1/2) MONTHS.

III THE RESPONDENT COURT ERRED IN NOT HOLDING THAT PRIVATE RESPONDENT'S DEFENSE WAS SHAM AND FALSE.

IV THE RESPONDENT COURT GRAVELY ABUSED ITS DISCRETION IN REMANDING THE CASE TO THE LOWER COURT FOR FURTHER PROCEEDINGS INSTEAD OF DECIDING THE CASE ON THE MERITS THUS PREJUDICING THE SUBSTANTIAL RIGHTS OF THE PETITIONER WHO HAS NOT BEEN PAID A SINGLE CENTAVO BY PRIVATE RESPONDENT ON HIS CLAIM IN THE SUBSTANTIAL SUM OF P 1,177,376.27 FOR THE PAST THREE (3) YEARS."<sup>[17]</sup>

The petition is not impressed with merit.

The pivot of inquiry here is the propriety of the Decision of the respondent court setting aside the order of default and remanding the case to the court *a quo* for further proceedings.

Section 3, Subparagraph (b), Rule 9, of the Revised Rules of Court, provides:

*"(b) Relief from order of default. - A party declared in default may at anytime after notice 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 and excusable negligence 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."* (emphasis supplied)

It is thus required that the motion must be verified and accompanied by an affidavit of merits.<sup>[18]</sup>