SUPREME COURT
FIRST DIVISION

PIONEER INSURANCE & SURETY CORP. AND HADJI ESMAYATEN LUCMAN,
***Petitioners-Appellants*,**

-versus-

G.R. No. L-35951
August 31, 1977

THE HON. AGAPITO HONTANOSAS, JUDGE OF THE COURT OF FIRST INSTANCE OF CEBU, BRANCH XI AND THE SPOUSES BEN UY RODRIGUEZ,
***Respondents-Appellees*.**
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D E C I S I O N

GUERRERO, *J.*:

We reverse the Decision of the Court of Appeals[1] promulgated on October 3, 1972 in CA-G.R. No. 00951-R entitled "Pioneer Insurance

& Surety Corp., et al., Petitioners, vs. Hon. Judge Agapito Hontanosas, et al., Respondents," which decision had denied for lack of merit the petition filed therein for certiorari prohibition and/or mandamus with preliminary injunction seeking to nullify the order of default of February 29, 1972 and the decision of March 9, 1972 in Civil Case No. R-12069, entitled "Ben Rodriguez, et al. vs. Allied Overseas Commercial Co., et al." issued by the respondent Presiding Judge of the Court of First Instance of Cebu.

The case commenced on October 12, 1970 when Allied Overseas Commercial Co., Ltd., a foreign corporation domiciled in Hongkong, filed in the Court of First Instance of Manila a complaint against the respondent-appellee Ben Uy Rodriguez for the collection of a sum of money arising out of a transaction between them in the amount of P450,533.00, the agreed peso equivalent of the HK$418,279.60 balance unpaid. Plaintiff therein having prayed for the issuance of a writ of preliminary attachment, the game was granted by the Court against Rodriguez upon the filing by said plaintiff of a bond in the amount of P450,000.00, which petitioner-appellant Pioneer Insurance & Surety Corp. duly posted. The corresponding levy in attachment was made by annotation on the properties of Rodriguez which consisted of 4 pieces of lots; notices of garnishment on different Cebu banks turned out negative, while personal properties found at the Rodriguez residence, although attached, were, however, not removed therefrom.

A motion to dismiss the complaint was thereupon filed by Rodriguez, followed by an application for damages against the bond, praying that he be permitted to present evidence of damages he sustained by reason of the wrongful attachment, and to enforce said claim against the surety on its bond, alleging further that otherwise his claim against the bond will forever be barred as said claim cannot be the subject of an independent civil action under Sec. 20, Rule 57 of the Rules of Court. The court in its order of December 22, 1970 dismissed the complaint on the ground of improper venue since defendant Rodriguez was a resident of Cebu, and lifted the writ of preliminary attachment, setting the hearing on the claim for damages against the bond on January 14, 1971.

With the intention of filing a separate civil action in the Court of First Instance of Cebu, respondent-appellee Rodriguez withdrew his claim for damages against Pioneer Insurance and Surety Corp., which motion for withdrawal was granted by the Court. Thereafter, the respondents-appellees Rodriguez spouses filed a complaint for damages on February 15, 1971 against Pioneer Insurance & Surety Corp. and Allied Overseas Commercial Co. (the Hongkong-based corporation), docketed as Civil Case No. R-12069, Court of First Instance of Cebu presided by respondent Judge Hon. Agapito Hontanosas, the complaint praying that Rodriguez be declared as not in any manner indebted to the defendant Allied Overseas Commercial Co. and that Pioneer Insurance & Surety Corp. be held liable for damages, attorney's fees and expenses of litigation by reason of the wrongful and malicious attachment issued by the Manila Court.

Defendant Pioneer Insurance and Surety Corp. filed its answer to the complaint (Civil Care No. R-12069) alleging affirmative and special defenses. With respect to the other defendant Allied Overseas Commercial Co., summons was coursed thru the Philippine Consulate General in Hongkong which turned it down as it had no authority to serve the process under the Rules of Court.

On April 27, 1971, defendant Pioneer Insurance & Surety Corp. filed a motion for a preliminary hearing of its affirmative defenses of lack of cause of action and bar by prior judgment and/or abandonment, which are grounds for a motion to dismiss. This was denied by the respondent Judge in his Order dated Play 15, 1971, so also was the motion for reconsideration per its Order of June 2, 1971.

On May 5, 1971, the case was called for pre-trial. Plaintiffs with counsel attended; defendant Pioneer Insurance & Surety Corp., thru counsel was present. The other defendant, Allied Overseas Commercial Co. was not yet summoned, hence absent. The parties manifested failure to settle the case amicably, thus the Court set the trial of the case on the merits for June 11, 1971.

A petition for certiorari and prohibition was then filed by Pioneer Insurance and Surety Corp. on August 3, 1971 in the Court of Appeals, CA-G.R. No. 00369-R (Record on Appeal, p. 133) with prayer to enjoin a hearing scheduled on August 7, 1971, alleging that

respondent Judge committed grave abuse of discretion amounting to lack and/or excess of jurisdiction in denying the motion for preliminary hearing. The Court of Appeals in its Resolution dated August 7, 1971 dismissed this petition for certiorari. (Record on Appeal, pp. 133-137).

An amended complaint was now submitted to and admitted by the Court on August 14, 1971 by impleading petitioner-appellant Hadji Esmayaten Lucman as additional defendant, making allegations tending to show confabulation between the new defendant and the foreign-based corporation to collect a non-existent debt. To the amended complaint, Pioneer Insurance & Surety Corp. filed its answer.

Lucman, having been impleaded as assignee of defendant Allied Overseas Commercial Co., filed a motion to dismiss on the ground of auter action pendant, that is an action pending in the Court of First Instance of Rizal, Civil Case No. 141351 between the same parties, with the same allegations and defenses and counterclaims. On November 25, 1971, respondent Judge denied the motion to dismiss, whereupon Lucman filed his answer to the amended complaint.

Upon an ex parte motion of Rodriguez, the Court declared Lucman in default in its Order of January 10, 1972 and thereafter promulgated a decision dated January 28, 1972 against Lucman only, ordering him to pay damages in the amount of P150,000.00; declaring that Rodriguez was not in any manner indebted to Lucman or to Allied Overseas Commercial Co., and that the Metropolitan Bank & Trust Co. (Cebu Branch) Check No. CB2169 (xerox copy marked Exhibit M) issued by Rodriguez to pay the indebtedness was a forgery.

Lucman moved on February 11, 1972 to set aside the order of default and to admit the answer earlier filed by him to the amended complaint. On February 21, 1972, respondent Judge set aside the order of default against Lucman including the decision against him, the dispositive portion of which order reads as follows:

> "WHEREFORE, the Order of Default dated January 10, 1972 as well as the decision (Re: Hadji Esmayaten Lucman) dated January 28, 1972, are hereby reconsidered and set aside. Let the

hearing of this case on the merits be scheduled as previously set for February 28, 1972 at 8:30 o'clock in the morning.

The parties thru their respective counsels are to be immediately notified of this order. The Clerk of Court is directed to notify defendant Hadji Esmayaten Lucman thru counsel Atty. Eriberto D. Ignacio At Rm. 414, Madrigal Bldg., Escolta, Manila by telegram.

SO ORDERED.

Cebu City, Philippines, February 21, 1972.

(SGD.)
AGAPITO HONTANOSAS
JUDGE"
(Record on Appeal, pp. 297-298)

Forthwith, the clerk of court sent the telegram notices in the following wise:

"YOUR MOTION SET ASIDE ORDER, DEFAULT AND DECLARE PROCEEDINGS NULL AND VOID RE CIVIL CASE BEN RODRIGUEZ ET AL VERSUS HADJI ESMAYATEN LUCMAN GRANTED STOP PRETRIAL SHALL PROCEED AS PREVIOUSLY SCHEDULED FEBRUARY 28 1972 MORNING"
(Record on Appeal, p. 298)

Counsel for the petitioners received the telegram notices on February 21, 1972; and on February 23, 1972 counsel filed an urgent motion for postponement of the pre-trial, claiming that he was not aware of any such pre-trial having been previously set for February 28, 1972 in the morning, as indeed no such pretrial can as yet be set as the issues with respect to the amended complaint are not yet fully joined since plaintiffs have not answered the compulsory counterclaims separately set up by the defendants in said amended complaint; neither has there been a valid service of summons to the foreign corporation Allied Overseas Commercial Co. Ltd. of Hongkong, nor have plaintiffs asked that said foreign corporation be dropped from the amended complaint; that counsel has a hearing in Manila of a criminal case

which is of intransferable character, and prayed that the pre-trial be set at some other date in March preferably either March 22 or 23, 1972 at 9:00 a.m. which were the only free dates for the month of March 1972 in the calendar of the counsel. (Record on Appeal, pp. 301-303)

Apparently, the above urgent motion for postponement although vent through registered airmail special delivery and received by the Dispatching Section of the Post Office of Cebu on February 28, 1972 (Resolution, Court of Appeals, Record on Appeal, pp. 365-366) was not received by the Court for on February 28, 1972 when the case was called, an order was issued by the Court postponing the pre-trial of the case to March 20, 1972 in view of the absence of the defendants and counsel notwithstanding notices of bearing and telegrams sent to them, on the condition that should defendants be found that as of February 28, 1972 or earlier they had received said notices, plaintiffs will be allowed to present their evidence and the defendants will be declared in default for failure to appear at the pre-trial. (Record on Appeal, pp. 304-305).

Upon verification from the Radio Communications of the Philippines that the telegrams mentioned above were delivered and received by the addresses or February 21, 1972, the Court on February 29, 1972 declared the defendants in default and allowed the plaintiffs to present their evidence in support of their complaint before the Clerk of Court (Record on Appeal, pp. 306-307). The evidence was thereupon presented and on March 9, 1977 the respondent Judge promulgated his Decision declaring that the plaintiff Rodriguez is not in any manner indebted to defendant Lucman or to Allied Overseas Commercial Co., declaring the personal check of the plaintiff to be a forgery; that the attachment of the properties of plaintiff in the Manila case was wrongful and malicious, and ordering defendant Pioneer Insurance and Surety Co. to pay P350,000.00 as moral damages, P50,000.00 as exemplary damages and P50,000.00 for expenses of litigation in Manila. Defendant Lucman was also ordered to pay plaintiffs the sum of P50,000.00 as exemplary damages and P30,000.00 as attorney's fees.

Within the 30 days reglementary period to perfect the appeal, defendants Pioneer Insurance & Surety Corp. and Hadji Esmayaten

Lucman filed the Notice of Appeal and the Original Record on Appeal, the latter ordered corrected and amended but finally approved by the Court on July 31, 1972.

Meanwhile, petitioners filed on April 4, 1972 before the Court of Appeals a petition for certiorari, prohibition and/or mandamus with preliminary injunction (CA-G.R. No. 00951-R) seeking to nullify the order of default of February 29, 1972 and the Decision of March 9, 1972 of respondent Judge, to command said Judge to elevate the records of the case for review and to prohibit him from enforcing his decision and from taking further action in the case, No. 12069.

On April 13, 1972, the Court of Appeals promulgated its resolution dismissing the petition aforestated and ruled among others as follows:

> "Furthermore, petitioners instant remedy is not proper because of their own admission that appeal is available from the decision of respondent Judge (Discussion, pp. 12-13 of their Petition). This is shown by the handwriting at the upper right hand corner of Annex R (Decision) when they received the decision on March 25, 1972 and the period to appeal will expire on April 24, 1972.
>
> We are not, therefore, convinced that the remedy of appeal is inadequate, considering that whatever errors respondent Judge might have committed can be assigned as specific errors on appeal. It has been consistently held that certiorari is not available where the remedy of appeal is present."
> (Record on Appeal, p. 373)

On a motion for reconsideration, the Court of Appeals reconsidered the resolution cited above, and issued another resolution dated July 25, 1972 giving due course to the petition and required the respondents to answer the petition (not a motion to dismiss), and among others, stated, to wit:

> "Upon this fact alone, we believe, as petitioners contend that although appeal is available, such remedy is not sufficiently speedy and adequate to cure the defects in the proceedings

> therein or to remedy the disadvantageous position of petitioners because, since they were deprived of raising any issue or defense that they have in the respondent court by reason of the order of default, they cannot raise said issues or defenses for the first time on appeal."
> (Rollo, p. 98)

The petition having been given due course, the respondents herein answered the same, and on October 30, 1972, the Court of Appeals rendered its Decision denying the petition for lack of merit, and held among others, thus —

> "Finally, we are not also convinced that the remedy of appeal is inadequate under the circumstances obtaining in the principal case. Whatever errors respondent Judge might have committed in his order or judgment may be assigned as specific errors in their appeal. This Court can review any and all such errors of fact and law in the appeal."
> (Rollo, p. 138)

Petitioners filed a motion for reconsideration which was denied, hence this appeal by certiorari from the decision of the Court of Appeals and is now before Us being assailed and faulted on three principal issues: 1. the illegality of the order of default and the decision arising therefrom; 2. the inadequacy of the remedy of appeal; and 3. the lack of jurisdiction of the Court in the principal case.

The petitioner's main thrust in this legal attack is directed to the order dated February 29, 1972 declaring defendants (now the petitioners) in default at the second pre-trial hearing and allowing the plaintiffs (the present private respondents) to present evidence ex parte before the Clerk of Court, which evidence uncontradicted and unrebutted was lifted almost en toto as the basis of the decision granting damages so enormous and so huge in amount as to exceed the bounds of reason and fairness.

The procedure for the pre-trial of a case is laid down by Rule 20, Revised Rules of Court, which provides, to wit:

Sec. 1. Pre-trial mandatory. — In any action, after the last pleading has been filed, the court shall direct the parties and their attorneys to appear before it for a conference to consider':

(a) The possibility of an amicable settlement or of a submission to arbitration;

(b) The simplification of the issues;

(c) The necessity or desirability of amendments to the pleadings;

(d) The possibility of obtaining stipulations or admissions of facts and of documents to avoid unnecessary proofs;

(e) The limitation of the number of witnesses;

(f) The advisability of a preliminary reference of issues to a commissioner;

(g) Such other matters as may aid in the prompt disposition of the action.

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

Sec. 3. Allows the court to render judgment on the pleadings or a summary Judgment as justice require. Sec. 4 directs that a record of the pre-trial results be made; and Sec. 5 requires the court to prepare a pre-trial calendar of cases for consideration as above provided, and that upon the submission of the last pleading in a particular case, it shall be the duty of the clerk of court to place case in the pre-trial calendar.

Unquestionably, the present Rules make pre-trial mandatory. And the reason for making pre-trial mandatory is that pre-trial conferences bring the parties together thus making possible an amicable

settlement or doing away with at least the non-essentials of a case from the beginning. (Borja vs. Roxas, 73 Phil. 647).

Philippine jurisprudence has laid down the legal doctrine that while it is true that it is mandatory for the parties and their attorneys to appear before the trial court for a pre-trial conference to consider inter alia the possibility of an amicable settlement, the rule was by no means intended as an implacable blugeon but as a tool to assist the trial court in the orderly and expeditious conduct of trials. The rule is addressed to the sound discretion of the trial court. (Rice and Corn Administration vs. Ong Ante, et. al., G. R. No. L-30558, Oct. 4, 1971).

Both client and counsel must appear at the pre-trial. This is mandatory. Failure of the client to appear is a ground for dismissal. (American Ins. Co. vs. Republic 1967D Phil. 63; Hone Ins. Co. vs. United States Lines Co., 1967D Phil. 41, cited in Saulog vs. Custombuilt Manufactures Corp. No. L-29612, Nov. 15, 1968; Taroma vs. Sayo, L-37296, Oct. 30, 1975 (67 SCRA 508).

In the case of Insurance Co. of North America vs. Republic, et. al., G. R. No. L-26794, Nov. 15, 1967, 21 SCRA 887, the Supreme Court, speaking thru Justice Bengzon, held that Sec. 1, Rule 20 of the Rules requires the court to hold a pre-trial before the case is heard and since in this case, a pre-trial has already been had, the fact that an amended complaint was later filed, did not necessitate another pre-trial. It would have been impractical, useless and time-consuming to call another pre-trial.

Under the rules of pleading and practice, the answer ordinarily is the last pleading, but when the defendant's answer contains a counterclaim, plaintiff's answer to it is the last pleading. When the defendant's answer has a cross-claim, the answer of the cross-defendant to it is the last pleading. Where the plaintiff's answer to a counterclaim contains a counterclaim against the opposing party or a cross-claim against a co-defendant, the answer of the opposing party to the counterclaim or the answer of the co-defendant to the cross-claim is the last pleading. And where the plaintiff files a reply alleging facts in denial or avoidance of new matter by way of defense in the answer, such reply constitutes the last pleading. (Francisco, The Revised Rules of Court, Vo. II, pp. 2-3).

The above citations and authorities are the ground rules upon which the conflicting claims of the opposing parties' may be resolved and decided.

First, the legality of the order of default dated February 29, 1972 and the decision dated March 9, 1972. There is spread out in the Record on Appeal, pp. 92-93 that on May 5, 1971, pre-trial was conducted by the court between the plaintiff Ben Uy Rodriguez spouses and the defendant Pioneer Insurance & Surety Corp. The record or results of said pre-trial is found in the order of the court dated May 5, 1971, which states:

> "When this case was called for pre-trial today, the plaintiffs and their counsel, Atty. Hilario Davide, Jr. appeared. On the other hand, the defendant Pioneer Insurance & Surety Corp. represented by its counsel, Atty. Amando Ignacio also appeared.
>
> When asked by the Court if there is any possibility of settling this case amicably, the counsel for the defendant answered in the negative. Both counsel, agreed that the only issue to be resolved by the Court is whether the bonding company is liable or not, and if so, how much?
>
> Atty. Hilario Davide, Jr. caused the markings of the following exhibit.
>
> Exhibit "A-pre-trial", the financial report of Ben Rodriguez as of December 31, 1969; and
>
> Exhibit "B-pre-trial", the affidavit of handwriting expert Perfecto Espina, and thereafter he reserved his right to mark additional exhibits during the trial on the merits.
>
> The counsel for the defendant also reserved his right to object to the Exhibits of the plaintiffs and mark his exhibits during the trial on the merits of the case.
>
> Both counsels are given ten (10) days from today within which to file their simultaneous memoranda or authorities in support

of the motion for preliminary hearing and its objection thereto. and thereafter his incident will be resolved by the Court.

Following agreement of the parties, the trial on the merits of this case is set for June 11, 1971 at 8:30 o'clock in the morning.

The parties thru their respective counsels are notified in open court of this order.

SO ORDERED.

Cebu City, Philippines, May 5, 1971

(SGD.)
AGAPITO HONTANOSAS
JUDGE"
(Record on Appeal, p. 93)

The defendant Pioneer Insurance & Surety Corp. having complied with the order of the Court to appear and attend this pre-trial, and had manifested its opposition to settling the case amicably, said party may no longer be compelled to attend a second pre-trial hearing, and neither may it be punished by the court by its order declaring said defendant as in default. The mandatory character of a pre-trial and the serious consequences confronting the parties in the event that each party fails to attend the same must impose a strict application of the Rule such that where we find no authority for the Court to call another pre-trial hearing, as in fact there is none in said Rule, the conclusion is inescapable that the respondent Judge committed a grave and serious abuse of discretion and acted in excess of jurisdiction in declaring defendant Pioneer Insurance & Surety Corp. "as in default" for failure to attend the second pre-trial called by the Judge on February 29, 1972. In other words, there is nothing in the Rules that empowers or authorizes the court to call a second pre-trial hearing after it has called a first pre-trial duly attended by the parties, and lacking such authority, the court perforce lacks the authority to declare a failure to prosecute on the part of the plaintiff for failing to attend such second pre-trial; it also lacks the authority to declare the defendant "as in default" by reason of the latter's failure to be present at the said second pre-trial.

It serves no purpose for the court to call again another pre-trial where the parties had previously agreed to disagree, where the issues had been joined and where the court itself had been satisfied that a hearing on the merits is the next step to conduct as in the instant case where the court, after the pre-trial on May 5, 1971, set the trial of the case on its merits for June 11, 1971. Indeed, a second pre-trial is impractical, useless and time-consuming.

We have not lost sight of the fact that when the first pre-trial was called and conducted, the party litigants were the Ben Uy Rodriguez spouses as plaintiffs, while Pioneer Insurance & Surety Corp. and Allied Overseas Commercial Co. (although not yet summoned) were the defendants, whereas at the time the second pre-trial was called the original complaint had been amended to implead Hadji Esmayaten Lucman as additional defendant. The amendment of the complaint to implead Lucman did not, however, alter the impracticability, the uselessness and the absence of authority to call a second pre-trial hearing since the amended complaint merely impleaded Lucman as the assignee of the original defendant Allied Overseas Commercial Co. and no additional cause of action was alleged; the prayer was the same and the amount of damages sought was the same as that in the original complaint.

Second, the prematureness of the pre-trial called on February 28, 1972, assuming that there was need to have another pre-trial. The records (Record on Appeal, p. 293) show that the notice of the clerk of court setting the case for pre-trial on February 28, 1972 was issued and dated February 7, 1972. As of this date, February 7, 1972, the complaint had been amended on August 27, 1971 by impleading the defendant Hadji Esmayaten Lucman who filed has answer on December 24, 1971, interposing therein a compulsory counterclaim. (Record on Appeal, pp. 239-240). Before this date of February 7, 1972, the court had already promulgated the Decision dated January 28, 1972 as against Lucman only.

Likewise, as February 7, 1972, defendant Pioneer Insurance & Surety Corp. had also filed its answer to the amended complaint, interposing too a compulsory counterclaim. But as of February 7, 1972, the plaintiff have not yet filed their answer to the compulsory

counterclaim of the defendants which is necessarily the last pleading to be filed in order that the case is ready and ripe for the pre-trial). It was only on February 22, 1972 that plaintiffs made their reply to the answer, and their answer to the compulsory counterclaim of defendant Lucman. (Record on Appeal, p. 299-301).

The records do not disclose any reply of the plaintiffs to the answer of Pioneer Insurance & Surety Corp. nor any answer to the compulsory counterclaim of the Corp. The above state of the case as far as the pleadings are concerned clearly and manifestly show that the case was not yet already for pre-trial; that it was as yet premature because the last pleading had not yet been filed by the plaintiffs.

Event the state of the pleadings as of February 21, 1972 when the telegrams were sent notifying the parties of the pre-trial for February 28, 1972 reveals the prematureness of calendaring the case for pre-trial. As of February 21, 1972, the complaint was already amended to implead Lucman who submitted his answer to with compulsory counterclaim. But plaintiffs had not yet filed their reply and their answer to the counterclaim, because the records indicate that the plaintiffs' answer to the counterclaim is dated February 22, 1972. (Record on Appeal, pp. 299-301). And to the compulsory counterclaim of defendant Pioneer Insurance & Surety Corp., plaintiffs made no answer whatsoever.

Third, the notices given by the clerk of court thru telegrams on February 21, 1972 notifying the parties of the pre-trial on February 28, 1972 were insufficient, in law and jurisprudence.

We have carefully noted the telegraphic notices sent by the clerk of court and we find this omission which is fatal to the respondents' cause: no telegram was sent to the defendant Pioneer Insurance & Surety Corp. The telegram was sent to the counsel of this defendant, but none to the defendant itself.

The Court had directed the clerk of court to sent notice by the telegram to the parties for the February 28 pre-trial. The clerk did sent the telegram to Atty. Eriberto Ignacio, counsel for Pioneer Insurance & Surety Corp., but omitted and failed to sent another telegram to the party itself, the corporation, as required strictly by

law. Notice to the counsel is not enough. We reiterate — that this failure is a jurisdictional defect.

Reading the order of the court dated February 29, it appears in black and white (Record on Appeal, pp, 306-307, Annex W, Rollo, p. 194) that only two telegraphic messages were sent by the clerk of court, thus — (1) the message addressed to Atty. Eriberto Ignacio delivered to the given address at 3:45 P.M. the same day it was filed but the signature of the recipient was unreadable; (2) the other message addressed to Hadji Esmayaten Lucman per RCPI San Juan also delivered on the same day, February 21, 1972 and personally received by the addressee himself. This was the official advice received by the Court from the Radio Communications of the Philippines thru which the telegrams were wired.

This is also confirmed by the Order of the Court dated April 11, 1972 denying the defendants' Urgent Motion for Reconsideration. The order states:

> "Per advice from the Radio Communications of the Philippines, Inc. these two messages were received by the addressess, Atty. Eriberto Ignacio and Hadji Esmayaten Lucman on the same day it was filed, that is on February 21, 1972."
> (Record on Appeal, p. 357)

Decidedly, there was no telegram sent to party defendant Pioneer Insurance & Surety Corp., informing it of the February 28 pre-trial hearing. The reason for requiring in the case of Home Insurance Co. vs. United Lines Co. (L-25593, November 15, 1967, 21 SCRA 863), where the Court, speaking thru Justice Bengzon, said that:

> "A party who fails to appear at a pre-trial conference may be non-suited or considered as in default. This shows the purpose of the Rules to compel the parties to appear personally before the court to reach, if possible, a compromise. Accordingly, the court is given the discretion to dismiss the cased should plaintiff not appear at the pre-trial."

Fourth, denial of the motion for postponement was a grave abuse of discretion. We grant the court the discretion to postpone any hearing,

pre-trial or on the merits of the case, but the exercise of discretion must be based on reasonable grounds which are meritorious and not frivolous nor intended for delay, which are — 1. no formal order of the court scheduling the February 28 pre-trial had been received; 2. pre-trial cannot be had as yet be set as the issues are not yet fully joined; 3. counsel has a hearing previously set in Manila in a criminal case which was of an intransferable character. We are also concede that counsel may not presume nor take for granted that his motion for postponement and the proposed setting to March 22 or 23, 1972 will be granted by the court but where the court had actually postponed the hearing on February 28, 1972 due to the absence of the defendants and their counsel, and rescheduled the pre-trial to March 20, 1972 at 8:30 o'clock in the morning (Record on Appeal, pp. 304-306), we find no reason nor fairness in the court's order of February 29, 972 finding defendants as in default since the pre-trial was moved to a later date in March as prayed in the motion.

The motion for postponement was received on February 28, 1972 at the Cebu Post Office, as shown in the postmarks on the envelope (photographed on p. 322, Record on Appeal) but was not immediately delivered to the court although the envelope bore the words, "Registered Air Mail/Special Delivery with Return Card." If the letter containing the motion was not yet delivered to the Court the next day, February 29, 1972 when the court made the order declaring defendants in default, this was clearly a postal neglect and omission to perform its duty, not attributable to defendants. The Court, in the exercise of wise discretion, could have restored their standing in court and given them an even chance to face their opponents.

For refusing to set aside said order of default and the decision, we hold the Court of Appeals in reversible error therefor. The respondent Court of Appeals has ignored established rulings of the Supreme Court in Pineda vs. Court of Appeals, 67 SCRA 228, that a party may not be declared in default for failure to attend the pre-trial where only his counsel was notified of the pre-trial schedule; in Sta. Maria, Jr. vs. Court of Appeals, 45 SCRA 596 that a pre-trial is unnecessary where the case could not be settled and that the fact that an amended complaint was later filed with leave of court did not, under the circumstances, necessitate another pre-trial; and in Pineda vs. Court

of Appeals, 67 SCRA 288 that Courts should be liberal in setting aside default judgment.

At this juncture, it is necessary to emphasize once more the pronouncement of this Court speaking through Justice Teehankee in Taroma vs. Sayo, 67 SCRA 509, pp. 512-513, that:

> "For the guidance of the bench and bar, therefore, the Court in reaffirming the ruling that notice of pre-trial must be served separately upon the party and his counsel of record, restates that while service of such notice to party may be made directly to the party, it is best that the trial courts uniformly serve such notice to party through or care of his counsel at counsel's address with the express imposition upon counsel of the obligation of notifying the party of the date, time and place of the pre-trial conference and assuring that the party either appear thereat or deliver to counsel a written authority to represent the party with power to compromise the case, with the warning that a party who fails to do so may be non-suited or declared in default."

The second point at issue is whether the remedy of ordinary appeal in the case is plain, speedy and adequate such that the writ of certiorari will not lie. We have adverted to previously that the Court of Appeals in its extended Resolution dated July 25, 1972 ruled that although appeal was available, such remedy is not sufficiently speedy and adequate to cure the defects in the proceedings therein or to remedy the disadvantageous position of petitioners because, since they were deprived of raising any issue or defense that they have in the respondent court by reason of the order of default, they cannot raise said issue or defense for the first time on appeal. Yet, on October 30, 1972, the Court in its decision held that the remedy of appeal is not inadequate in that whatever errors respondent Judge might have committed in his order or judgment may be assigned as specific errors in their appeal before said tribunal, and that it can review any errors of fact and of law in the appeal.

This conflicting stand of the Court of Appeals issuing from the same case is as difficult to resolve as it is to reconcile them. We have but to

rule on them, hold one to be correct and dislodge the other as an error.

On general principles, the writ of certiorari will lie where there is no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law. The existence of an appeal is a bar to writ of certiorari where such appeal is in itself a sufficient and adequate remedy, in that it will promptly relieve the petitioner from the injurious effects of the order or judgment complained of. (Silvestre vs. Torres, 57 Phil. 885, 890; Pachoco vs. Tumangday, L-14500, May 25, 1960; Lopez et al. vs. Alvendia, et al. L-20697, Dec. 24, 1964). Courts ordinarily do not deny the writ if the result would be to deprive a party of his substantial rights and leave him without remedy, and in those instances wherein the lower court has acted without jurisdiction over the subject matter, or where the order or judgment complained of is a patent nullity, courts have gone even as far as to disregard completely the question of petitioner's fault, the reason being, undoubtedly, that acts performed with absolute want of jurisdiction over the subject matter are void ab initio and cannot be validated by consent, express or implied, of the parties. (Moran, Comments on the Rules of Court, Vol. 3, 1970 ed., pp. 169-170).

There are numerous cases where the Supreme Court has granted the writ notwithstanding the existence of an appeal. Thus, the Supreme Court to avoid future litigations, passed upon a petition for certiorari though the proper remedy was appeal. Writs have been granted despite the existence of the remedy of Appeal where public welfare and the advancement of public policy so dictate, the broader interests of justice so require, or where the orders complained of were found to be completely null and void, or that the appeal was not considered the appropriate remedy. (Fernando vs. Varquez, No. L-26417, Jan. 30, 1970).

As to what is an adequate remedy, it has been defined as "a remedy which is equally beneficial, speedy and sufficient, not merely a remedy which at some time in the future will bring about a revival of the judgment of the lower court complained of in the certiorari proceeding, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal." (Silvestre vs. Torres, 57 Phil. 885, 11 CJ., p. 113).

Now, to the case at bar, We find here a number of special facts and circumstances which address themselves to the wise discretion of this Court with such force to induce Us to grant the writ in order to prevent a total or partial failure of justice, to, redress or prevent the wrong done. We are satisfied that petitioners are cornered into a desperate position where they have been ordered to pay damages over and above the amount of the bond posted for the attachment of private respondents' properties as ordered by the decision of the court based on evidence presented ex parte by reason of the order of default, and more than that, plaintiff Rodriguez is relieved from civil liability on an inexplicable and unprecedented finding that the plaintiffs' check was a forgery, (when the check exhibited was only a xerox copy of the original, which original was in the records of the case filed in the Court of First Instance of Rizal, Civil Case No. 14499 entitled "Hadji Esmayaten Lucman vs. Benjamin Rodriguez, et al.," (Record on Appeal, pp. 49-55). Again, the conflicting notices as to the hearing ordered, pretrial in one and on the merits in the other, is not the doing of the petitioners of their standing in court was in effect a failure of justice. Petitioners can no longer present their evidence to rebut the claim of damages, or reduce the unconscionable and excessive damages or question the release of plaintiff's debt, for the same may not be submitted nor raised for the first time on appeal. We, therefore, hold that the Court of Appeals erred in holding that the appeal is adequate. The court erred in ignoring the doctrine laid down in Omico vs. Villegas, 63 SCRA 285, that appeal is not an adequate remedy where party is illegally declared in default.

Petitioners assail the jurisdiction of the Court of First Instance of Cebu in Civil Case No. 12069-R filed by the Rodriguez spouses, seeking damages for the alleged malicious and unlawful issuance of the writ of preliminary attachment against the latter's properties granted by the Court of First Instance of Manila upon the posting of a security bond in the amount of P450,000.00 given by the petitioner Pioneer Insurance & Surety Corp. The petitioners contend that under Sec. 20, Rule 57 of the Revised Rules of Court, the claim for damages against a bond in an alleged wrongful attachment can only be prosecuted in the same court where the bond was filed and the attachment issued.

Rule 57, Sec. 20 of the Revised Rules of Court provides, to wit:

> "Claim for damages on account of illegal attachment. — If the Judgment on the action be in favor of the party against whom attachment was issued, he may recover, upon the bond given or deposit made by the attaching creditor, any damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.
>
> X x x"

On the other hand, the private respondents argue that the above rule is not applicable to the case at bar, citing Moran, Vol. 3, Rules of Court, 1963 ed., pp. 51-52, to wit:

> "the rule that a claim for damages arising from the issuance of a writ of attachment, injunction, receivership and replevin should be presented in the same action is not applicable where the principal case has been dismissed for lack of jurisdiction and no claim for damages could therefore have been presented in said case."

The position of the petitioners is correct. The ruling in the case of Santos vs. Court of Appeals, et al., 95 Phil. 360 advanced by respondents to support their stand, is not controlling here, for We find that no claim for damages against the surety bond in support of a preliminary attachment was ever presented or filed. The latest decisions of this Court in Ty Tion, et al., vs. Marsman & Co., et al., L-17229, July 31, 1962, 5 SCRA 761 reiterating the rulings in Del Rosario vs. Nava, 50 O.G. 4189; Estioco vs. Hamada, L-11079, May 21, 1958; Neva Espana vs. Montelibano, 58 Phil. 807; Tan Suyco vs. Javier, 21 Phil. 82; Raymundo vs. Carpio, 33 Phil. 894; Santos vs. Moir, 36 Phil. 350; lay down the proper and pertinent rule that the claim for damages against a bond in an alleged wrongful attachment

can only be prosecuted in the same court where the bond was filed and the attachment issued.

Moreover, the records show that private respondent Rodriguez filed an Application for Damages Against Bond dated December 3, 1970 (Record on Appeal, pp. 77-81) praying that —

> "WHEREFORE. it is respectfully prayed that in the event the motion to dismiss and the motion to discharge attachment were granted, the defendant be allowed to present evidence to prove damages sustained by him by reason of the attachment against the Pioneer Insurance & Surety Corp. in a hearing that may he conducted for the purpose with due notice to the plaintiff and the surety, and that after due notice and hearing judgment be rendered against the Pioneer Insurance and Surety Corp. for such amount of damages as may be proved and established for defendant.
>
> The defendant further prays for such other reliefs and remedies consistent with law, justice and equity.
>
> Cebu City, December 3, 1970.
>
> ESTANISLAO FERNANDEZ
> JOSE D PALMA
> *Attorney for Defendant*"

The Court of First Instance of Manila in its order dated December 22, 1970, after dismissing the complaint and lifting the writ of preliminary attachment, ordered that the hearing of the application for damages against the bond be set aside on January 14, 1971 at 8:30 a.m. (Record on Appeal, pp. 82-86).

In other words, defendant Rodriguez sought that judgment be rendered against the surety for such amount of damages as may be proved or established by him, and was granted by the court the opportunity to prove damages against the bond of the surety company. He even cited the very provision of the Revised Rules of Court, Rule 57, Sec. 20 to justify his application, and the cases supporting his application, for otherwise his claim will forever be

barred. In effect, at this point in time, defendant Rodriguez waived the lack of jurisdiction on his person, by seeking an affirmative relief from the court, which he cannot now complain before this Court.

Thus, Francisco, in his Revised Rules of Court, Vol. 1, p. 130 citing 21 C.J.S. writes that:

> "Objections to lack of jurisdiction of the person, and other objections to jurisdiction not based on the contention that there is an absolute want of jurisdiction of the subject matter, are waived by invoking the court's jurisdiction, as by a counterclaim, consent, or voluntary submission, to jurisdiction, or conduct amounting to a general appearance."

In Soriano vs. Palacio, 12 SCRA 557, this Court held that even if jurisdiction was not originally acquired by the Court over the defendant due to allegedly defective services of summons, still when the latter filed a motion for reconsideration of the judgment by default, he is considered to have submitted to said court's jurisdiction.

We agree with the petitioners that the Court of Appeals erred in not dismissing the complaint with respect to the petitioner Pioneer Insurance & Surety Corp., over which respondent-appellee Judge had not acquired jurisdiction pursuant to Sec. 20, Rule 57 of the Revised Rules of Court.

IN VIEW OF THE FOREGOING, the judgment of the Court of Appeals is reversed and another one is entered declaring the order of default dated February 29, 1972 and the decision rendered by the respondent Judge on March 9, 1972 null and void, holding that the Court of First Instance of Cebu lacks Jurisdiction to hear and determine the claim for damages arising from the alleged wrongful attachment issued by the Court of First Instance of Manila and ordering the dismissal of that case (Civil Case No. 12069 of the Court of First Instance of Cebu), as well as the pending appeal of the judgment herein annulled in the Court of Appeals which has been rendered moot.

Petition granted.

SO ORDERED.

Teehankee, *C.J.*, *(Chairman)*, Makasiar, Martin and Fernandez, *JJ.*, concur.
Muñoz Palma, *J.*, took no part.

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[1] Special Fourth Division, penned by Justice Juan O. Reyes and concurred by Justice Hermogenes Concepcion, Jr., and Cecilia Muñoz Palma.
