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WHEREFORE, the petition should be, as it is hereby DISMISSED for lack of merit. With costs against the petitioners.

SO ORDERED.

Antonio (Actg. Chairman), Aquino, Santos, and *Abad Santos., JJ.*, concur.

SECOND DIVISION

[G.R. No. L-43324. May 5, 1979]

ANDRES PATALINJUG, *petitioner, vs.* **HON. JUDGE E. L. PERALTA, THE SHERIFF OF CEBU CITY and LIBERATION STEAMSHIP CO., INC.,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; PRE-TRIAL; NOTICE TO BOTH PARTY AND COUNSEL IS INDISPENSABLE. — Normally, notice to counsel is notice to parties. However, in pre-trials, the notice must be served separately upon the party affected thereby and his counsel of record, stating therein purpose, time and place of the pre-trial conference and requiring said party and his counsel to appear thereat. The service to the party may be made directly to him or through his counsel who shall be required to serve the notice upon the party. This is so because while the presence of the parties at the trial and other proceedings is not necessary, their presence is a must at the pre-trial because one of the purposes of pre-trial is to explore the possibility of an amicable settlement, and counsel cannot compromise the interest of his client without the latter's expressed and special authority.

2. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; COMMITTED IN CASE DEFENDANT WAS DECLARED IN DEFAULT FOR FAILURE

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TO APPEAR AT PRE-TRIAL CONFERENCE WHERE DEFENDANT WAS NOT NOTIFIED. — It is grave abuse of discretion, correctible by *certiorari*, to declare defendant in default for failure to appear at the pre-trial conference of the case, where it appears that said defendant was not personally served with notice of the pre-trial hearing.

APPEARANCES OF COUNSEL

Cornelio R. Besinga for petitioner.
C. O. Ailes for private respondent.

D E C I S I O N

CONCEPCION JR., *J.*:

Petition for *certiorari*, with a prayer for the issuance of a writ of preliminary injunction, to annul and set aside the order of the respondent judge declaring the petitioner in default for failure to appear at the pre-trial conference of the case, as well as the orders issued subsequent thereto, including the decision and the writ of execution.

The record shows that on August 23, 1973, the herein private respondent, Liberation Steamship Co., Inc., a domestic corporation with principal offices at the PMI Building, David Street, Manila, filed a complaint with the Court of First Instance of Manila, docketed therein as Civil Case No. 91729, against the petitioner, Andres Patalinjug, seeking payment of the sum of ₱20,510,00, representing the demurrages incurred by the plaintiff shipowner, due to the delay in the loading of 14,000 sacks of rice on board the vessel "M/V PMI ALUMNI" in the port of Mariveles, Bataan, as well as punitive and other damages, and costs of suit, and the amount of ₱5,000.00 for attorney's fees.[1] The petitioner filed his answer thereto, claiming that he entered into the contract of carriage with the plaintiff in behalf of the Cebu Transport Facilities, Inc., as sole proprietorship duly registered with the

[1] *Rollo*, p. 11.

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Bureau of Commerce and owned by Rogelio Patalinjug; and that while there may have been some delay in the loading of the cargo of rice on board the vessel, the delay was caused by factors beyond his control and attributable to the failure of the National Grains Authority to comply with its obligation to furnish the petitioner with the necessary laborers to load the cargo of rice on board the vessel in accordance with their contract whereby the National Grains Authority agreed that "NGA shall be responsible for hiring of the necessary laborers or stevedores for the loading and unloading of the rice cargo." and that the actual delay, if any, is only 156 hours for which the petitioner and/or the Cebu Transport Facilities, Inc. may be held liable for the amount of ₱13,370.00 only. Wherefore, he prayed that the plaintiff be ordered to amend its complaint to include the Cebu Transport Facilities, Inc. as party defendant, and, after hearing and trial, to render judgment according to the actual facts and circumstances of the case.[2] The plaintiff filed its reply to the special and affirmative defenses on October 3, 1973, after which the case was set for a pre-trial conference on December 17, 1973.[3]

At the scheduled pre-trial conference on December 17, 1973, the petitioner intimated to the court the possibility of an amicable settlement of the case, so that the pre-trial was reset for January 24, 1974.[4] On January 19, 1974, the petitioner formally proposed to settle the case amicably by offering to pay to the plaintiff the amount of ₱13,370.00 in four monthly installments beginning April 15, 1974.[5] But, the plaintiff rejected the offer. As a result, the petitioner, with previous leave of court, filed an amended answer, by including a counterclaim for the amount of ₱17,280.00, representing the value of undelivered cargo.[6] The pre-trial conference set for January 24, 1974 was consequently cancelled.

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[2] *Id.*, p. 191.

[3] *Id.*, p. 102.

[4] *Id.*, p. 103.

[5] *Id.*, p. 196.

[6] *Id.*, p. 15.

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The plaintiff files its answer to the counterclaim on February 13, 1974, but, because of the creation of a vacancy in the court, it was not until April 23, 1975 that the case was again set for a pre-trial conference. On the scheduled date, neither the plaintiff nor its counsel appeared, but counsel for the petitioner, "in the spirit of fair play, did not avail of the occasion to move for the dismissal of the complaint, either for failure of respondent Liberation to prosecute under Sec. 3 of Rule 17, or to move to have said party considered non-suited or in default for failure to appear at said pre-trial, pursuant to Sec. 2, Rule 20 of the Rules of Court." Instead, counsel for the petitioner asked for the postponement of the pre-trial hearing, which the respondent judge set for June 10, 1975.[7]

At the pre-trial conference on June 10, 1975, the petitioner and his counsel failed to appear and, upon motion of the plaintiff, the respondent judge declared him in default, ordered his amended answer expunged from the records, and allowed the plaintiff to present its evidence before the Branch Clerk of Court, *ex-parte*,[8] and on August 20, 1975, judgment was rendered sentencing the petitioner, Andres Patalinjug, to pay the Liberation Steamship Co., Inc., the amounts of ₱20,510.00, with interests thereon at 6% per annum from July 26, 1973, until payment, and ₱3,000.00, as attorney's fees; plus the costs of suit.[9]

Upon being informed that he had been declared in default, the petitioner filed a motion to set aside the order of default and for leave to file a third party complaint on September 9, 1975, claiming that his failure to appear at the pre-trial conference set for June 10, 1975 is excusable because he was not duly notified of said hearing by his counsel who abandoned the case without informing him of its status, and besides, he was sick at the time and could not have attended the pre-trial. In asking for leave to file a third party complaint, the petitioner alleged the following:

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[7] *Id.*, p. 104.

[8] *Id.*, 25.

[9] *Id.*, p. 22.

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xxx xxx xxx

"4. That plaintiff in the above-entitled case seeks to collect from defendant the payment of demurrages under and pursuant to the contract of carriage of alleged defendant's rice shipment in bags from Mariveles, Bataan to Dumaguete City aboard M/V PMI ALUMNI, as well as damages, attorney's fees and other reliefs;

"5. That defendant, in entering into a contract with plaintiff for the carriage of the alleged rice shipment, acted for and in behalf and as a mere agent of the National Grains Authority who is the real owner of the rice shipment and who has contracted with defendant for the transportation of NGA rice in bags to different parts in the country, which contract specifically provides that:

> 'NGA shall be responsible for hiring of the necessary laborers or stevedores for the loading and unloading of the rice cargo.'

"6. That while it is admitted that there was delay in the loading of M/V PMI ALUMNI at the Port of Mariveles, Bataan, it was caused by factors beyond the control of the defendant and are attributable to the National Grains Authority which failed to comply with its contractual obligation of hiring and furnishing promptly the necessary laborers or stevedores for the loading and unloading of the rice cargo;

"7. That said National Grains Authority is not made a party to this action, although defendant is entitled to indemnity and or subrogation against said entity, and in respect to plaintiff's claim."[10]

Then, upon learning that a decision had already been rendered in the case, the petitioner filed an urgent manifestation praying that the motion to set aside order of default and for leave to file a third party complaint be considered as a petition for relief from judgment under Section 2, Rule 38 of the Revised Rules of Court.[11] The respondent judge, however, denied the motion, stating that he was not "persuaded by the arguments contained in the urgent manifestation to reconsider its decision."[12]

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[10] *Id.*, p. 27.

[11] *Id.*, p. 32.

[12] *Id.*, p. 35.

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Consequently, the petitioner filed an urgent motion for partial reconsideration of the denial order, contending that "if the denial of the urgent manifestation is premised on the fact that this Honorable Court was not persuaded by the arguments contained therein, then it would be to the best interest of justice if the hearing previously set for November 7, 1975 be pushed through in order to afford the defendant further chance to buttress his arguments in support of the prayer to set aside the default judgment and to allow the filing of a third-party complaint."[13] But, the respondent judge denied this motion, stating:

"In his urgent motion for partial reconsideration which he filed, through a new counsel, defendant insists that he has 'meritorious defense by way of a counterclaim representing the value of the short-deliveries' and that 'he is also entitled to subrogation of demurrage by the National Grains Authority' against which he seeks to file a third-party complaint. Aside from the fact that the alleged counterclaim is a tardy afterthought, for nothing of the sort was set forth in the answer of the defendant, is too late in the day for him to ask that the National Grains Authority should be impleaded.

"Urgent motion is hereby denied."[14]

On November 14, 1975, the respondent judge, upon motion of the plaintiff,[15] directed the issuance of a writ of execution.[16] However, the writ was returned unsatisfied as no visible property belonging to the petitioner could be found.[17]

On December 3, 1975, the petitioner filed a second motion for reconsideration and/or petition for relief from judgment, claiming that the filing of a counterclaim is not a *tardy afterthought* since said counterclaim is incorporated in the amended answer, admitted on January 10, 1974; and that it is

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[13] *Id.*, p. 36.

[14] *Id.*, p. 39.

[15] *Id.*, p. 41.

[16] *Id.*, p. 46.

[17] *Id.*, p. 83.

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not too late in the day to ask that the National Grains Authority be impleaded because "the third-party complaint seeks to bring into the case the real owner of the rice cargo who is answerable for the demurrages, rather than bringing a separate action later on," and "plaintiff will not be prejudiced if the National Grains Authority is impleaded as a third-party defendant, on the contrary it would work to its benefit because then it is assured of recovering from whatever demurrage judgment it secures" because the "NGA has the means, while the defendant herein is moribund to the point of bankruptcy after his series of business reverses suffered since then — so much so that depriving the defendant of his right to seek relief from the default judgment and to implead the real party liable for the demurrage claimed would be to exercise the coercive process in futility for nothing can be extracted anymore from defendant just as 'no blood can be squeezed from *sincamas*.'"[18] When the respondent judge denied this motion on January 20, 1976,[19] the petitioner instituted the present recourse. As prayed for, a temporary restraining order was issued on March 26, 1976, restraining the respondents from enforcing and/or carrying out the decision dated August 20, 1975, and the writ of execution dated November 14, 1975 issued pursuant to the aforesaid decision.[20]

The principal issue for determination is whether or not the respondent judge acted with grave abuse of discretion in declaring the petitioner in default for his failure to appear at the pre-trial conference held on June 10, 1975.

The petitioner contends that the respondent judge acted with grave abuse of discretion in declaring him in default for his failure to attend the pre-trial conference of the case on June 10, 1975 for the reason that he was not duly informed of the holding of the pre-trial conference on that day since his counsel abandoned the case without informing him of its status, after

[18] *Id.*, p. 48.

[19] *Id.*, p. 67.

[20] *Id.*, p. 70.

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asking for the postponement of the pre-trial conference set on April 23, 1975.

Indeed, the record shows that the petitioner was not notified of the pre-trial conference set for June 10, 1975. This is apparent from the decision dated December 20, 1975 wherein the respondent judge made the following observations:

"In view of the absence of plaintiff's counsel when this case was called for pre-trial on April 23, 1975, and, because the counsel for the defendant intimated the possibility of an amicable settlement, the Court dictated an order part of which reads: 'x x x *let the pre-trial to be followed immediately by the trial, should no compromise be made, be reset to June 10, 1975, at 8:30 in the morning, of which date and hour defendant's counsel is already notified in open court.*' For failure of defendant and counsel to appear on June 10, 1975, the Court, on plaintiff's motion, declared him in default, considered his amended answer stricken from the records, and allowed plaintiff to present, as it did, its evidence *ex parte* before the Branch Clerk of Court."[21] (Italics ours)

Since only the attorney for the petitioner was notified of the pre-trial conference set for June 10, 1975, the order declaring the petitioner in default for non-appearance at the pre-trial conference of the case is null and void.

The private respondent, Liberation Steamship Co., Inc., argues, however, that the petitioner was duly notified of the pre-trial conference set for June 10, 1975 since his counsel was notified thereof, and notice to counsel is sufficient. The private respondent argues, thusly:

"In an attempt to get a reversal of the order declaring him in default in the pre-trial of June 10, 1975 in Civil Case No. 91729, the defendant (petitioner herein) offered in evidence a doctor's certificate attesting to his illness prior to the pre-trial of April 23 — which certificate advised him to rest for at least thirty (30) days from April 18, 1975. His non-appearance, therefore, on June 10 was inexcusable. Even granting further that your petitioner, because of his sickness, was

[21] *Id.*, p. 25.

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unable to attend the pre-trial set for June 10 or was not notified thereof, yet, his counsel was notified of said date prior thereof. And, said notice to him is sufficient. Settled is our jurisprudence that 'When a party is represented by a counsel, notice should be made to the latter.' (*Pabiling vs. Parinacio,* No. L-22682, July 23, 1968 — 24 SCRA 100); And, in *Palanca vs. American Food Mfg. Co.*, (L-22822, August 30, 1968 — 24 SCRA 819), it was held that 'Notice to counsel is also notice to client.' And, when his counsel failed to inform petitioner the status of his case, said act or mistake of his lawyer is borne by him, for, as likewise held: 'Client is bound by the acts and mistakes of his counsel' (*Manila Pest Control, Inc. vs. Workmen's Compensation Commission,* No. L-27662, October 29, 1968 — 25 SCRA 700). Also, in *Saulog vs. Custombuilt Manufacturing Corporation,* (No. L-29612, November 15, 1968 — 26 SCRA) it was held that 'Client and counsel may be non-suited or considered in default for failure to appear at pre-trial.' This requirement is mandatory under Sec. 1, Rule 20 of the Revised Rules of Court."[22]

Notice to counsel alone is not adequate nor sufficient for purposes of pre-trial. In the case of *Pineda vs. Court of Appeals,*[23] the Court, per Mr. Justice Makasiar, said:

"It may be true that normally, notice to counsel is notice to parties (*Palanca vs. American Food Manufacturing Co.*, L-22822, August 30, 1968, 24 SCRA 819, 824; *People's Homesite and Housing Corp. vs. Tiongco,* L-18891, Nov. 28, 1964, 12 SCRA 471, 476; *Vda. de Potenciano vs. Gruenberg,* L-16956, January 30, 1962, 4 SCRA 127, 130). And while this doctrine has 'beneficient effects upon the prompt dispensation of justice, its application in a given case, however, should be looked into and adopted, according to the surrounding circumstances; otherwise, in the courts's desire to make a shortcut of the proceedings, it might foster wittingly or unwittingly, dangerous collusions to the detriment of justice. It would be easy for one's lawyer to sell one right down the river, by just alleging that he forgot every process of the court affecting his clients, because he was busy. Under this circumstance, one should not insist that a notice to such irresponsible lawyer is also notice to his clients' (*People's Homesite and Housing Corp. vs. Tiongco, supra*).

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[22] *Id.*, p. 168.

[23] G.R. No. L-35583, September 30, 1975, 67 SCRA 228

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"Considering, therefore, the mandatory character of the pre-trial conference and the disastrous result of the failure of a party to appear thereat, WE believe that when the Rule says 'shall direct the parties and their attorneys' as WE ruled in *Lim versus Animas, supra*, it means that notice of the pre-trial must be served separately upon the party affected thereby and his counsel of record, stating therein the purpose, time and place of the pre-trial conference and requiring said party and his counsel to appear thereat. The service to the party may be made directly to him or through his counsel who shall be required to serve the notice upon the party (Vol. 63, pp. 408, 411). And this is so because while the presence of the parties at the trial and other proceedings is not necessary, their presence is a *must* at the pre-trial because one of the purposes of the pre-trial is to explore the possibility of an amicable settlement, and counsel cannot compromise the interests of his client without the latter's expressed and special authority (*Jacinto vs. Montesa, et al.*, L-23098, February 28, 1967, 19 SCRA 513, 518)."

In any case, the reason advanced by the petitioner for his failure to appear at the pre-trial conference on June 10, 1975, *i.e.*, that he was sick and could not have attended the pre-trial conference even if he were notified thereof, is plausible and excusable. Since no substantial right of the plaintiff therein could have been affected, the respondent judge should have set aside its judgment of default and given the petitioner his chance to ventilate his claim in court.

Under the circumstances, it would also be to the best interests of justice to allow the petitioner to file a third-party complaint against the National Grains Authority in order to simplify procedure, expedite the litigation, avoid multiplicity of suits, and reduce expenses.

WHEREFORE, the petition is granted and the order of the respondent judge dated June 10, 1975 in Civil Case No. 91729 of the Court of First Instance of Manila, entitled: "*Liberation Steamship Co., Inc.*, plaintiff, *versus Andres Patalinjug,* defendant," as well as the orders issued subsequent thereto, including the decision rendered on August 20, 1975, and the writ of execution issued on November 14, 1975, are hereby annulled and set aside. The temporary restraining order heretofore

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issued is hereby made permanent. With costs against the respondent Liberation Steamship Co., Inc.

SO ORDERED.

Barredo (Actg. Chairman), Aquino, Santos, and *Abad Santos, JJ.*, concur.

Antonio, J., concurs.

ANTONIO, *J., concurring:*

I concur. In my opinion for the Court in *Lim v. Animas* (63 SCRA 408), We ruled that in pre-trials, the party involved and his counsel must be notified of the date of pre-trial hearings, and before the party is non-suited or considered in default, it must be shown that the party and his counsel were duly served with notice of such pre-trial conference. This was reiterated in *Taroma v. Sayo* (67 SCRA 508) and *Pineda v. Court of Appeals* (67 SCRA 228).

SECOND DIVISION

[G.R. No. L-43372. May 5, 1979]

ALFONSO A. CHAN, *petitioner, vs.* **THE HON. JUDGE OTILLO G. ABAYA, as Presiding Judge of Branch II, Court of First Instance of Surigao del Sur, and SOFRONIA AGAO,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; PRE-TRIAL CONFERENCE; PREMATURE WHEN HELD BEFORE THE LAST PLEADING HAD BEEN FILED. — Pursuant to Section 1, Rule 20, Revised Rules of Court, the court is directed to