

[ G.R. No. 1278. August 01, 1903 ]

**EUGENIO BONAPLATA, PETITIONER, VS. BYRON S. AMBLER, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND J. MOMIOKING, CLERK OF THE COURT OF FIRST INSTANCE OF MANILA, RESPONDENTS.**

**D E C I S I O N**

**MCDONOUGH, J.:**

This was a motion for judgment on the pleadings in a proceeding in which the plaintiff prays that a peremptory order be issued by this court against Judge Ambler, commanding him, as judge of the Court of First Instance of Manila, to immediately cause to be issued and subscribed a writ of execution for the enforcement of plaintiff's judgment against Fulgencio Tan Tonco for the sum of 1,541 pesos, Mexican currency, which judgment was recovered January 13, 1903, and against the defendant J. McMicking, as clerk of the said Court of First Instance of Manila, commanding him to issue and subscribe a writ of execution, sealed with the seal of the Court of First Instance of Manila, for the enforcement of plaintiff's said judgment.

The facts upon which this application is based are undisputed. The plaintiff, on January 13, 1903, recovered a judgment in the Court of First Instance of Manila, in an action for debt against Fulgencio Tan Tonco, amounting to 1,541 pesos, Mexican currency. No exceptions were taken or filed against said judgment, nor was a motion for a new trial made; and the judgment is now in full force and effect.

After the rendition and entry of said judgment the plaintiff repeatedly requested the defendants above named to duly issue a writ of execution to satisfy the judgment of the plaintiff against said Fulgencio Tan Tonco, which request was refused. The defendants, by their attorney, state, as their reason for such refusal, that on the 18th day of December, 1902, one Sergia Reyes instituted a suit against said Fulgencio Tan Tonco, in the Court of First Instance of Manila, for an indebtedness amounting to the sum of \$1,500, Mexican

currency, and in the complaint alleged that the said defendant was insolvent; that several creditors had sued him; that the assets of his business consisted of real estate, contracts for buildings (many partly completed), equities in real estate, and other property of the value of about \$200,000, Mexican currency; that said property was in good condition and that it was in the interest of creditors to retain the actual status of the business; that under proper management the business could be conducted at a good and satisfactory profit, and pay a greater portion of said defendant's creditors, if not all; that the management of the said business was in the hands of the defendant, who was unable to give it necessary care and attention; that for various causes the business had been losing money; that the debts of said defendant amounted to \$250,000, Mexican currency; that the assets of the business were then more than enough to pay the indebtedness, but if said business were managed by the said defendant it will be dissipated and wasted, and therefore the plaintiff in that action prayed for the appointment of a receiver to take charge of the said business and conduct the same subject to the orders of the court.

The said Fulgencio Tan Tonco, personally and by his attorney, appeared in court, on the said 18th day of December, 1902? and accepted service of the complaint in said cause, and thereafter and on the 19th day of December, 1902, Antonio Torres was appointed receiver of the business, property, rights, and credits of said Tan Tonco; and thereafter, having given a sufficient bond and taken the prescribed oath, the said receiver took possession of all the property of said Tan Tonco, and under the direction of and pursuant to an order of said Byron S. Ambler, as judge of the Court of First Instance of Manila, undertook to care for, run, manage, and operate said business the same as theretofore run and operated by said defendant, and to employ such persons and make such payments and disbursements as needed. It was further ordered that the said defendant and other persons be restrained and enjoined from interfering with said property; and the said Tan Tonco was and still continued to be enjoined from taking possession of or in any way interfering with said property, and said J. McMicking, as such clerk, was and is restrained from issuing an execution upon the said judgment of Tan Tonco.

As a general rule the appointment of a receiver is an equitable remedy, and before<sup>1</sup> such remedy is resorted to, except in certain prescribed cases hereinafter mentioned, the legal remedy must be exhausted. Courts of equity do not encourage proceedings or actions which are not in conformity with the usual practice, which are unnecessary, and at the same time are calculated to swell costs and expenses. (Hart vs. Times, 3 Edwards, Chancery, 226; Congden vs. Lee, 3 Edwards, Chancery, 304.)

In the Congden case the plaintiff sought equitable relief in an action for debt after an execution had been returned unsatisfied; but the plaintiff and the sheriff knew that the debtor had real estate which was subject to levy and sale. The court held that it was the duty of the plaintiff to exhaust his legal remedy by selling the real estate on the execution, and it not appearing that there would be a deficiency on the sale, the court had no jurisdiction «\*to appoint a receiver of the rents.

It may be that very special circumstances may exist, in a given case, involving great danger of loss, such as may be caused by a debtor's nonresidence, which will justify the appointment of a receiver, but the case at bar is not one of that character; the claim of the plaintiff, Sergia Reyes, amounted to only \$1,500, Mexican currency, whereas the property of Tan Tonco was valued at \$200,000, Mexican currency, and it does not appear that there were any judgments against him having priority to that of said plaintiff, or that the plaintiff's judgment could not be collected in full. Under these conditions, the allegation in the complaint that the defendant, Tan Tonco, could not give his business "necessary care and attention," that he was "losing money," and that if the business was to be continued under his management it would be "dissipated and wasted," might be cause for applying for an appointment of a committee, but it certainly is not good cause for turning over to a receiver \$200,000 worth of property in an action to recover a debt of \$1,500. What was undertaken, in this action, amounts practically to a bankruptcy proceeding—the placing by the court of the property of the defendant in the hands of a receiver for the purpose, after paying costs, fees, and expenses, of distributing that property among creditors.

Bankruptcy proceedings, however, are forbidden until a law shall be enacted for these Islands. (Sec. 524 of the Code of Civil Procedure.)

The learned counsel for the defendants in this mandamus proceeding claims that section 174 of this Code makes provision for the appointment of a receiver in this case. That section authorizes the appointment of a receiver (1) in certain corporation cases; (2) where the plaintiff has an interest in the *property or fund* which is the subject of the action, etc.; (3) in an action to foreclose a mortgage; (4) and, finally, whenever in other cases it shall appear to the court that the appointment of a receiver is the most feasible means of preserving and administering *the property which is the subject of the litigation during the pendency of the action*.

The subject of the action of the plaintiff Sergia Reyes was an indebtedness of \$1,500 due to her by the defendant. and the legitimate object was the collection of that debt. Until after

judgment and execution, which was not issued, the plaintiff could not have had any interest in any property or fund of the defendant; nor until after the return of the execution unsatisfied could she have had any interest in the preservation of the defendant's property—property which was not the subject of the litigation. The plaintiff in this mandamus proceeding was not a party to the action of Reyes vs. Tan Tonco, and he is not, therefore, bound by the order appointing a receiver made therein.

It is not necessary in this proceeding to determine the further effect of that order, or to decide what its effect may be on all those creditors who consented to the appointment of the receiver, who acquiesced in his control, management, and disposition of the defendant's property, or on other persons who dealt with him as such receiver.

This court simply decides that the plaintiff, Eugenio Bonaplata, is entitled to have an execution issue on his said judgment. The motion for judgment on the pleadings is granted, and judgment for the plaintiff will be entered accordingly, with costs against the respondents.

*Arellano, C. J., Torres, Cooper, Willard, and Mapa, JJ., concur.*

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