4 Phil. 97

[G.R. No. 1429. December 31, 1904]

MACARIA ASUNCION ET AL., PLAINTIFFS AND APPELLEES, VS. MANUEL NIETO, DEFENDANT AND APPELLANT.

D E C I S I O N

TORRES, J.:

On July 17, 1876, Don Felipe Llopis, by a public document, acknowledged a debt of eight hundred and thirty-nine pesos in favor of Don Tomas G. Gonzalez San Robles, giving as security for his debt a mortgage on a parcel of land owned by him. Don Tomas G. Gonzalez San Robles assigned his credit in favor of Don Justo Guivara, who, in turn, assigned it to Don Manuel Nieto. On February 18, 1902, Don Manuel Nieto, the last assignee of the credit of eight hundred and thirty-nine pesos against Llopis, instituted an action to foreclose the mortgage on the real estate which had already been surrendered to him by its owner in order to satisfy the debt, with the interest thereon. On the 21st day of May, 1902, the court rendered judgment by default against the debtor, Llopis, and on August 12 of the same year the land was sold on execution by the sheriff of Manila for the sum of ten thousand pesos to said plaintiff, Nieto, whose claim was for a larger sum. The same day, August 12, 1902, Macaria Asuncion, the debtor's widow, and his children, Candido, Felisa, and Ricardo Bias Llopis, filed a motion to stay the execution and at the same time to declare the right of foreclosure exercised by Nieto extinguished and that all the subsequent proceedings in the case, including the attachment of the property, be also declared null and void on the following ground: That the debtor, Llopis, died long before the executory action was taken against him by his creditor, Nieto; that the petitioners at the time the action was brought in May, 1902, resided in the town of Mariquina, and, there being no means of communication between that town and this city, they could not come to Manila, and, finally, that Felipe Llopis died on the Island of Jolo in the year 1883, according to use burial

certificate which was put on record in the case. The court declared the subsequent proceedings null and void and that the defendant had a right to continue in possession of the property until the plaintiffs should pay to him the sum of one thousand five hundred and eighty-two pesos with the legal interest from the date of the judgment, and after payment was made by the plaintiffs they be put in possession of the property from which the defendant should be ousted in such case.

The action taken by Nieto was, therefore, brought twenty years after the death of the defendant debtor and yet this defendant was summoned by publication and the case was tried *ex parte* because of his default, when the creditor could very well have gotten information from Llopis's family as to the whereabouts of the latter, if it be true that he really was in ignorance of his death. As he did not endeavor to obtain the information, assumed the risk of the results of his action, and acted with notorious carelessness, because the widow and children of the debtor were alive and we'll known, and he can not allege that he was in ignorance of the whereabouts of the latter. This is a different case from that provided for in section 398 of the Code of Civil Procedure, Granting that with the assignment of that credit Nieto was subrogated to all the rights under it, including the mortgage on the property (art. 1528, Civil Code) and granting that the right to foreclose the mortgage had not been extinguished, still the action should have been brought against the administrator or the legal representatives of the debtor. Nieto did not do so, however, and brought his action against Felipe Llopis, who had been dead for the last twenty years, and obtained judgment by default, in express violation of the strict provisions of sections 114 and 708 of the Code of Civil Procedure. This nullifies the whole proceeding. Had section 255 of the Code of Civil Procedure been complied with, the proceeding would not have been null and void, as is the case now. Section 255 of the Code of Civil Procedure provides that in an action for foreclosure of a mortgage on real estate, or, rather, an incumbrance on real estate, the complaint shall set forth, among other things, the names and residence of the mortgagors and mortgagees. This has not been complied with by Nieto, because, without having used any diligence to learn the whereabouts of Llopis, he risked the statement that he did not know, when he could not be ignorant of the fact that he had been banished to the Island of Jolo, At all events, Llopis's family could have informed him. For this reason he should not have obtained judgment by

default against the defendant, because service of the summons should have been made personally upon him. (Sees. 391, 394, and 396, Code of Civil Procedure.)

The question In this case is not to set aside the judgment and grant a new trial on the ground stated in section 145 of the Code of Civil Procedure. The widow and heirs of the deceased, Llopis, ask to have the case dismissed and the attachment of the real estate declared null and void, because it was made without previously summoning and hearing the legal representative" of the .estate of the deceased debtor. The widow and heirs of the deceased Llopis, were not summoned or heard nor did they intervene as parties in the suit brought by Nieto against the said Llopis, and, therefore, if the proceedings and judgment can not be sustained against him, much less can they be sustained against those who have not appeared in the suit.

From the proceedings in this case it appears in an in contestable manner that besides the mortgage existing on the property attached this property had been surrendered to the creditor by the debtor, perhaps by virtue of a contract of antichresis. But it also appears that the counsel for the appellees, without having interposed any proceedings against the said judgment, asks in his brief in this second instance that the judgment be affirmed, as it is in accordance with the principles of justice. Taking into consideration the provisions of section 496 of the Code of Civil Procedure, and by virtue of the reasons stated, it is our opinion that the appealed judgment of December 24, 1902, should be affirmed, with the costs to the appellant, and that after the term of ten days from this date judgment be rendered accordingly. So ordered.

Arellano, C, J., Mapa, Johnson, and *Carson, JJ.,* concur.

Date created: April 23, 2014