5 Phil. 418

[G.R. No. 2422. December 14, 1905]

EL BANCO ESPAÑOL FILIPINO, PLAINTIFF AND APPELLEE, VS. DONALDSON SIM & CO. ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

ARELLANO, C.J.:

The Banco Español Filipino, having made a loan of 110,000 pesos to the firm of Donaldson Sim & Co. for six months' time, from the 9th of May, 1901, the date of the public instrument executed for this purpose, and bearing interest at the rate of 8 per cent per annum, payable at the expiration of each quarter, filed an action against said firm for failure to pay the obligation when it became due. (Clauses 3, 4, and 5 of the contract, pp. 5 and 6 of the bill of exceptions.)

> "On the 25th of March, 1904, judgment in default was pronounced against the said firm of Donaldson Sim & Co., the same being sentenced to pay the sum of P115,894.41, Philippine currency, equivalent at that time to the sum of 127,479.45 pesos, Mexican currency, this being the amount of the principal, 110,000 pesos, Mexican currency, plus stipulated interest." (Point 13 of the facts agreed upon, p. 9 of the bill of exceptions.)

Jointly with the principal debtor, Donaldson Sim & Co., James H. Threw had obligated himself in the instrument concerning said loan, giving as security "*to guarantee the payment of the said principal, of the proper interest thereon, and of whatever obligations the firm of Donaldson Sim & Co. might contract*" three ships owned by him, named *Chow Phya*, *Hercules*, and *Hebe*. (Clause 6, p. 6 of the bill of exceptions.)

The instrument continues:

> "In addition to the security furnished in the preceding paragraph by James H. Threw, the mercantile firm of J. M. Tuason & Co. represented in this act by one of the partners, Juan Tuason y de la Paz, constituted itself joint surety of the firm indebted, Donaldson Sim & Co., for the sum which the said firm should be found to owe, after the partial payment of this loan with the proceeds of the sale of said steamers, or for the total of the obligation if the security of the steamers should disappear before the partial settlement of said obligation." (Clause 7, p. 6 of the bill of exceptions.)
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> "On the 26th of April, 1904, the sheriff of the city of Manila returned the writ of execution without having complied therewith, as there was no property of the firm of Donaldson Sim & Co. which could be attached." (Point 15, facts agreed upon, p. 10.)

"On the same date a judgment by default was rendered against the aforesaid James H. Threw, in the following terms: We therefore decide and direct that the launches herein described, to wit, the steam launch *Chow Phya*, at present called *Aparri*, the steam launch *Hercules*, and the steam launch *Hebe*, be sold at public auctionr and that the proceeds of said sale be applied to the payment of the said sum of P115,890.41, Philippine currency, and that any surplus be paid to the defendant, James H. Threw.'" (Point 16, facts agreed upon, p. 10.)

Further facts agreed upon are the following:

> "That on the 7th of May, 1904, the sheriff of Manila sold at public auction, to the highest bidder, the launches *Hebe* and *Hercules*, after having advertised said sale in the Manila press, and having complied with all the formalities prescribed by the present Code of Civil Procedure, Act No. 190; that the price realized at the sale of

> the launches *Hebe* and *Hercules* was P1,250.00, which sum was paid to the Banco Español Filipino, after deduction of the sheriff's fees, amounting to P16.50; that a writ of execution in terms equal to those of that mentioned in paragraph 19 of this document was issued on the 19th of July, 1904, by the clerk of the Court of First Instance of Manila, addressed to the sheriff of the Province of Cagayan; that on the 27th of September, 1904, the sheriff of Cagayan sold at public auction to the highest bidder, the launch Chow Phya, alias Aparri; after having advertised said sale in the press, and having complied with all the formalities prescribed by the present Code of Civil Procedure, Act No. 190; that the proceeds of the sale of the steam launch *Chow Phya*, *alias Aparri*, after deduction of the sheriff's fees amounted to P3,440, Philippine currency, which sum was paid to the Banco Español Filipino." (Pp. 12 and 13, points 19 to 23 of the bill of exceptions.)

Finally, the most important point of those agreed upon, containing the whole question now submitted to this court for decision by appeal, is that which appears on page 14 of the bill of exeptions, under No. 28, which is as follows :

"From the facts above set forth the following questions of law have arisen, which the parties concerned submit to the court for its decision, each reserving, however, the right to make appeal to the Supreme Court, by means of the proper bill of exceptions, in case of adverse judgment:

> "(*a*) The Banco Español Filipino insists that from the facts represented arises the obligation of the firm of J. M. Tuason & Co., as joint surety of the firm of Donaldson Sim & Co., to pay to the said Banco Espafiol Filipino the total amount of the judgment rendered on the 25th of March, 1904, against the firm of Donaldson Sim & Co., in favor of the bank, in the Court of First Instance of Manila, to wit, the sum of one hundred and fifteen thousand eight hundred and ninety-four pesos and forty-one centavos, Philippine

currency, with interest thereon at the stipulated rate, from the date of said judgment until payment, minus the sum of four thousand six hundred and ninety-three pesos and fifty centavos, Philippine currency, the net proceeds realized by the bank from the sale of the launches pledged, discounting interest on the amount of each of said sales from the date of each auction, and the said Banco Español Filipino petitions the court to render judgment against the firm of J. M, Tuason & Co., sentencing it to pay the sums claimed, and the costs of the trial.

"(*b*)
The firm of J. M. Tuason & Co. maintains that from the facts represented in this document no action arises in favor of the Banco Español Filipino, for the following reasons, to wit:

"(1)
Because, as it appears from the facts set forth in paragraphs 8 and 9 of this instrument, the time of the obligation of the debtor principally obligated was tacitly extended, without the consent of the surety.

"(2) Because, as it appears from the facts set forth in the eighth clause of the instrument of the 9th of May, 1901, the Banco Español Filipino, in obtaining the sale at public auction of the steam launches given by James H. Threw as security for the indebtedness of Donaldson Sim & Co., should have subjected itself to the prices fixed for said sale in the aforesaid eighth clause of the instrument. Defendant therefore prays for judgment in his favor and the denial of the petition of the Banco Español Filipino, and that the latter be sentenced to pay the costs of the proceedings."

The court having considered the surety responsible, and having sentenced the firm of J. M. Tuason & Co. to pay the unpaid balance of the debt, the said defendant appealed from the said sentence and represents to this court, as errors of law of said sentence, the following points:

> "(1) The court erred in finding that the surety of J. M. Tuason & Co., was not extinguished.
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> "(2)
> The court erred in rendering judgment against J. M. Tuason & Co.
> for the sum of one hundred and eighteen thousand eight hundred and
> thirty-five pesos and thirty three centavos, Philippine currency.
>
> "(3)
> The court erred in deciding that there exists an estoppel against the
> allegation by J. M. Tuason & Co. in alleging as a defense the
> violation of the contract by the Banco Español Filipino in selling the
> launches without fixing a price."

As to the first point, the same is based on numbers 8 and 9 of the facts agreed upon, to wit, upon the expiration of the obligation, on the 9th of November, 1901, the Banco Español Filipino had not required the principal debtor to pay the amount of the loan, nor did it file an action, but continued drawing the stipulated interest until the month of March, 1902, and that all this was done without the express consent of J. M. Tuason & Co., which facts constitute a tacit extension of the obligation. As a legal basis, article 1851 of the Civil Code is given, according to which "*The extension granted to the debtor by the creditor, without the consent of the surety, extinguishes the security.*"

The decisions *en casacion* of the supreme court of Spain is jurisprudence properly interpreting the Spanish Civil Code. The following doctrine is laid down in the judgment of March 22, 1901:

> "The court which pronounced sentence in this case
> has not violated article 1851 of the Civil Code, because the mere
> circumstance that the creditor does not demand the compliance with the
> obligation immediately upon the same becoming due, and that he more or
> less delays his action, does not mean or reveal an intention to grant
> an extension to the debtor, as according to article 1847 the obligation
> of the surety extinguishes at the same time as that of the debtor, and

> for the same causes as the other obligations."

Deferring the filing of the action does not imply a change in the efficacy of the contract or liability of any kind on the part the debtor. It is merely, without demonstration or proof to the contrary, respite, waiting, courtesy, leniency, passivity, inaction. It does not constitute novation, because this must be express. It does not engender liability, because on the part of the creditor such can not arise except from delay, and for this class of delay interpellation on the part of the party who considers himself injured thereby is necessary. In order that this waiting or inaction, of itself beneficial to the parties obligated, can be interpreted as injurious to any of them, it is altogether necessary that this be represented by means of a protest or interpellation against the delay. Without action of this kind it continues to be what it is, merely a failure of the creditor to act, which in itself does not create liability. It can not do so, as we see in the aforesaid *sentencia de casacion*.

> "In accordance with the provisions of number 4 of article 1843, the surety, even before payment, may proceed against the principal debtor when the debt has become demandable because the term in which it should have been paid has expired."

In view of this action, which is a protection against the risk of possible insolvency on the part of the principal debtor, it is very clearly seen that the law does not even grant the surety the right to sue the creditor for delay, as protection against the risks of possible insolvency on the part of the debtor; but in view of the efficacy of the action of the contract against the surety, beginning with the date when the obligation becomes due, his vigilance must be exercised rather against the principal debtor.

The receipt of interest stipulated in the same contract after the obligation has become due does not constitute novation, it being merely a compliance with the obligation itself. It, therefore, does not affect

the efficacy of the contract, the fulfillment of which the creditor has deferred without however, granting any extension thereof. It extends the time for the fulfillment or payment, but not the term of the obligation, which can be made effective at any time, because by his liberality he has not incurred any obligation restricting the exercise of his action. This is not even the case when all the interest received covers a *fixed period*, providing that it be interest due. It would, however, be different if the interest had been.paid in advance, covering a definite period, because in that case his action would be barred during said period by his own act, which would have created a new term of the obligation, and a tacit extension of time. However, we now abstain from discussing this point, as it is not the question now to decide whether or not the obligation of the surety would, become extinguished. However it may be, against this delay on the part of the creditor, in the present case obligatory, the surety could always exercise the preventive action of number 4 of article 1843, to guard himself from any risk which he might run by reason of such act performed without his consent, this being the direct action to which he is entitled by reason of the contract entered into by him.

Lastly, even if the delay in the present case were due to an extension of the term of the obligation, expressly granted by the creditor to the principal debtor, the surety could nevertheless not consider himself relieved from the security, deeming the same extinguished. The surety was one of the parties to the contract, and one of the clauses of the contract, the fourth, reads as follows:

> "The term of duration of this contract is six months, beginning with this date, and may be extended at the will of the creditor."

In view of this knowledge and consent, the surety ought to have been prepared for any delay, and it should not have surprised him if such delay had been the effect of this clause of the contract- that is, an express extension of the term of the obligation.

As to the second point, the fact on which the same is based in the brief is the eighth clause of the contract, which reads as follows:

> "That by agreement with the manager of the Banco Español Filipino of this city, James H. Threw fixes th value of the vessels pledged as security as follows: 70,000 pesos for the launch *Chow Phya*, and 25,000 pesos for each of the launches denominated *Hercules* and *Hebe*, and declares that said values shall be the prices for the sale of the said launches, which must take place if this loan has become due and an extension thereof has not been agreed upon, for the nonpayment of the amount of said loan, waiving, therefore, any other valuation of said vessels, and any action in this respect."

The legal grounds on which this point is based are the interpretation of the above clause of the contract, and of the provisions of law concerning pledges.

One of the facts agreed upon, designated with the number 24, is as follows:

> "When the sale of said launches at public auction took place, no price was fixed, but they were adjudged to the highest bidder, the proceeds of said sales being the real value of said launches in the condition in which they were at the dates of the respective sales."

The two security clauses of the contract, and the eighth clause thereof, which serves as basis for the appeal, having been reproduced literally, it will be clearly seen that this eighth clause took the place of a formality prescribed by the Code of Civil Procedure then in force (article 1465), which they endeavored to avoid by making use of the right granted by the same article. The debtor therefore merely declares the value of his property pledged as security, waiving the aforesaid proceedings of valuation, and the action to which he would be entitled in default thereof. The purpose of said clause was also to fix beforehand the lowest price for which the notary could sell the things

pledged in extrajudicial public auction, but this we need not discuss at present.

This formality being repealed by the present Code of Civil Procedure, to which the sale at public auction of the launches furnished as security had to be adjusted, and the sale having taken place in the manner ordered by the judge and prescribed by law, without the sentence ordering said sale having been objected to in any manner, no one has infringed any law or violated any contract. Besides the creditor did not bind himself in the contract not to request a sale except under a fixed price.

Even if the creditor had obligated himself, it was not his fault that the sale was carried out in a different manner, as the sale was made in accordance with existing legal procedure. James H. Threw himself could not have sued, even if he had not waived his action against a different manner of carrying out the sale, because the aforesaid eighth clause did not give him any right to place a mere declaration or even stipulation above forms of legal procedure, which are of a public nature and interest, and can not be repealed, altered, or modified by private citizens by means of contracts. The efficacy of the contract is merely to secure the compulsory power of the public authorities for its enforcement.

Supposing that the eighth clause constitutes an obligation on the part of the creditor, which was violated by the form and manner in which the sale of the launches given as security was carried out, then the exception would, at all events, have to be made by the owner of the launches, who gave them as security. The surety, J. M. Tuason & Co., had the right to set up all the exceptions pertaining to the principal debtor and inherent in the debt (article 1853) but not those pertaining to the other surety.

In reality, according to the fact agreed upon which has been lastly referred to, the proceeds of said sales represented the real value of said launches in the condition in which they were at the dates of the respective sales, and it would therefore have been useless to fix a

minimum price, because if this could and would have been done, the result would have been the name, but would have required repeated proceedings to arrive at it. This being so it is evident that under clause 7, J. M. Tuason responded for the sum which Donaldson Sim & Co. should be found to owe after the *payment of part of said loam, with the proceeds of the sale of said steamers*. This is the case, explicitly mentioned in the contract, which has occurred.

We do not deem it necessary to examine the last of the questions brought up in this instance against one of the findings of the sentence appealed from, regarding the estoppel alleged by defendant. Even if this finding was erroneous, which we neither affirm nor deny, the two preceding questions, which are those brought up in the first instance, were rightly decided in the sentence by the other findings and considerations therein contained.

We therefore affirm the sentence appealed from in all its parts, with the costs of this instance against appellant. After the expiration of twenty days judgment will be entered in these terms and this case returned to the court below for execution. So ordered.

Torres, Mapa, Johnson, and *Willard, JJ.,* concur.

Carson, J., did not sit in this case.

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