G.R. No. 2598

[G.R. No. 2598. April 11, 1906]

N. N. BASITA BROS., PLAINTIFFS AND APPELLANTS, VS. FARES ACKAD ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

WILLARD, J.:

The original complaint in this action alleged that the plaintiffs had sold certain goods to Fares Ackad and Abraham Gantous, who were partners in business at Tacloban, Gapiz, and Iloilo; that of the value of these goods, 6,820 pesos, only 1,078.79 pesos had been paid. There is no allegation in the complaint that the defendant Abraham Ackad was a partner of the other two defendants, or that he ever had anything to do with the purchase of these goods, or ever in any way had bound himself to pay for the same at the time they were purchased. The only allegations in the complaint which relate to Abraham Ackad are found in the fifth paragraph thereof, which alleges that after the purchase of the goods of the plaintiffs made by the. defendants Fares Ackad and Abraham Gantous, the latter transferred all their business to the defendant Abraham Ackad, with intent to defraud their creditors. This complaint was presented on the 1st day of October, 1904. The answer of Abraham Ackad was presented on the 7th day of the same month.

On the 1st day of November of that year the evidence of certain witnesses was taken at Iloilo by deposition in accordance with the provisions of the Code of Civil Procedure. The trial of the action was commenced in Manila on the 11th day of November. The testimony taken at Iloilo tended to show that there had been no transfer of property by the defendants Fares Ackad and Abraham Gantous to Abraham Ackad. During the course of the trial in Manila and on the 14th day of November the plaintiffs obtained leave of the court to amend their complaint, and they amended the same by adding thereto an allegation that on the 7th day of March, 1904, one of the plaintiffs went to Iloilo for the purpose of investigating the condition of the partnership of Fares Ackad and Abraham Gantous, and to make some

arrangement for the payment of the balance due the plaintiffs; that at that time he had an interview with the three defendants; that as a result of that interview a promissory note for the amount due to the plaintiffs was made out and signed by Fares Ackad; that the plaintiff, who was present, requested the defendant Abraham Ackad to sign the note with Fares Ackad, but Abraham Ackad declined to do so, but admitted his liability thereon and promised to pay the same.

Judgment was entered in the court below in favor of the plaintiffs and against the defendants Fares Ackad and Abraham Gantous. Judgment was also entered against the plaintiffs and in favor of the defendant Abraham Ackad. The court below in its decision found that Abraham Ackad did promise to pay the debt, but held that the promise, not being in writing, could not be enforced, by virtue of the provisions of section 385 of the Code of Civil Procedure.

After an examination of the evidence we believe that it preponderates in favor of the contention of Abraham Ackad, and that it is not sufficient to show that he made a verbal promise to pay this debt. The evidence in favor of the plaintiffs upon this point is the testimony of one of them as to what took place at the conversation in Iloilo. So far as the testimony of witnesses is concerned, this proof is balanced by the denial of the defendant Abraham Ackad, who states positively that he never made any promise of the kind mentioned in the testimony of the plaintiff.

The only other testimony in favor of the plaintiffs is found in two letters written by Abraham Ackad to the plaintiffs, one on the 14th day of June, 1904, and the other on the 12th day of July of the same year. Fares Ackad and Abraham Ackad were brothers. At the time the letters in question were written by Abraham Ackad he was engaged in business of his own, independent of that of Fares Ackad and Abraham Gantous. Upon his own account he bought goods of the plaintiffs, and at the time the letters were written was indebted to them for such goods. The plaintiffs kept in their books of account one account against Abraham Ackad and another account against Fares Ackad and Abraham Gantous. Taking into consideration these circumstances it can not be said that the two letters in question are sufficient to show that Abraham Ackad was bound to pay the debt of Fares Ackad and Abraham Gantous. So far as they tend to corroborate the testimony of one of the plaintiffs relating to the conversation at Iloilo, their effect is overcome by the other circumstances in the case.

It is admitted by the plaintiffs that at the time the promissory note was signed by Fares

Ackad, Abraham Ackad was asked to sign it, and that he refused to do so. This shows conclusively, to our minds, that he did not intend to bind himself for the payment of the debt, and it is improbable that after having so refused he should at the same time and place bind himself verbally. Moreover, it is to be noted that this conversation took place on the 7th of March, 1904, before the complaint was presented. If the plaintiffs understood that by this conversation the defendant Abraham Ackad had bound himself to pay the debt, it is not apiparent why an allegation to that effect was not made in the original complaint. Nothing is said about it, however, and the only liability sought to be charged upon Abraham Ackad is a liability growing out of an alleged fraudulent transfer made to him of the property of Fares Ackad and Abraham Gantous: It was only after the trial had been entered upon and after evidence had been presented tending to show that no such transfer had taken place that the plaintiff made any allegation or claim that in the conversation at Iloilo Abraham Ackad had bound himself to pay the debt. We hold that the evidence is not sufficient to show such promise.

Considerable space is devoted in the brief of the appellants to an attempt to show that Abraham Ackad was a partner in the business of Fares Ackad and Abraham Gantous. No such relation is alleged, either in the original complaint or the amended complaint.

The judgment of the court below is affirmed, with the costs of this instance against the appellant. After the expiration of twenty days let judgment be entered accordingly and ten days thereafter the record be remanded to the court below for proper action. So ordered.

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