7 Phil. 104

**[ G.R. No. 2718. December 04, 1906 ]**

**JOSE EMETERIO GUEVARA, PLAINTIFF AND APPELLANT, VS. HIPOLITO DE OCAMPO ET AL., DEFENDANTS AND APPELLEES.**

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

**ARELLANO, C.J.:**

This case was prosecuted to final judgment in accordance with the provisions of the former Code of Civil Procedure and the appeal was taken and allowed in conformity therewith. The parties have agreed in this court to submit themselves to the provisions of the present Code of Procedure in Civil Actions.

The case having been duly argued and submitted to this court, we find as follows:

First. That on the fifth day of July, 1887, the partnership of "Guevara Hermanos" was organized as a mixed, general, and limited copartnership by the five heirs under the will of Timotea Andres, who died possessed of certain real estate which became the joint property of the said five heirs and was by them contributed to the partnership, aggregating a "total value of 47,096 pesos according to the respective deeds, free of all incumbrances, and that part of the said property mortgaged in favor of the church and J. M. Tuason & Co., being valued at 17,155 pesos, all according to the inventory submitted by the executor, Laureano * * * (Clause 4, record, p. 27.)

Second. That the manager was vested with "special power and authority to dispose, with the advice and consent of the executor of the will of the deceased, Timotea Andre's, of the whole or a part of the partnership property in connection with the operation of the business, and not otherwise, and for this purpose to mortgage or sell the real property of the estate * * *." (Clause 3, p. 27.)

Third. That in clause 9 provision is made as to the duration of the partnership as follows:

"The period of duration of this partnership will be five years, and it shall not be dissolved on account of the death of one or more of its members, nor by the mere will of one or more of them." Clause 10 contains the following provision: "The provisions of this agreement shall be effective from the date of the death of the deceased, Timotea Andre's, the members of this partnership obligating themselves to discharge the obligations contracted by the former partnership." (Record, p. 28.)

The former partnership referred to is that which was organized by Remigio Guevara and Jose" Estiarte, the owners of the mercantile establishment known as *La Industrial*. That is to say, the same business which was thereafter continued by the members of the partnership of Guevara Hermanos.

Fourth. That "in Manila according to the minutes (record, p. 44), this second day of June, 1890, at a meeting held by the manager of the partnership of Guevara Hermanos, Quintin Zalvidea, the general partners Laureano Guevara, Jose" Guevara, and Enrique Navarro, and the limited partner, Leandro Ibarra, in behalf of his wife Carmen Guevara, it was resolved as follows: That for the purpose of discharging as soon as possible the indebtedness of the establishment *La Industrial* in favor of J. M. Tuason & Co. the latter be requested to take over all the real property of the estate of the deceased Timotea Andres de Guevara, with the exception of the large stone and brick building, which constitutes a part of the partnership property; any difference between the value of the said real estate and the amount of the indebtedness to be paid to them in cash; and that in case that they do not accept this proposition and wish to sell the real estate in question, that they be empowered to do so, with our consent, the proceeds to be applied to the payment of the debt; that in case J. M. Tuason & Co. accept the above proposition and sell the property, if there still be a balance in their favor, as we anticipate, everything possible will be done to liquidate this balance, and for this purpose the manager of the partnership is hereby directed to enter into negotiations with the said J. M. Tuason & Co. in pursuance of this resolution. (Signed) Quintin Zalvidea, Laureano Guevara, Leandro Ibarra, Jose Guevara, Enrique Navarro."

Fifth. That on the 3d day of July, 1890, the members of the partnership of Guevara Hermanos, Laureano, Jose Emeterio, Enrique Navarro, Macario and Carmen, the last two accompanied by their respective husbands, Quintin Zalvidea, and Leandro Ibarra, agreed asv follows in a notarial instrument: "That they appoint as manager of the partnership of 'Guevara Hermanos,' Laureano Guevara, who shall have the administration of the business, the use of the firm name, the management of the establishment belonging to the partnership known as La. Industrial with the same power and authority granted him under

the terms of clause 3 of the articles of copartnership * * *. Laureano, on his part, accepts the appointment as manager of the partnership for the purpose of liquidation." (Record, p. 30.)

Sixth. That on the 14th day of December, 1891, Laureano Guevara, as the manager of the partnership of "Guevara Hermanos" and Gonzalo Tuason, in his capacity as manager of J. M. Tuason & Co., entered into a contract of liquidation whereby the former assigned to the latter, in payment of the debt aforesaid, all the real estate and the establishment known as *La Industrial*. Laureano Guevara agreed as follows: "That he hereby transfers and assigns to J. M. Tuason & Co., as payment of 31,564.01 pesos on the total indebtedness of 54,055.66 pesos due from the partnership of Guevara Hermanos all the real estate referred to in the 8th paragraph of this instrument so that they may dispose of it as they may see fit; and for this purpose he also transfers to them all rights of action that the partnership of Guevara Hermanos, which he represents, has or may have in relation to said property, J. M. Tuason & Co., assuming, however, the liability for the payment of the mortgages now existing upon some of the aforesaid property in favor of Obras Pias of the Sagrada Mitra of this archdiocese.

> "The party .of the first part further declares that the aforesaid establishment known as *La Industrial*, the printing plant annexed thereto, and the *camarin* in which the machinery and printing presses are installed have been sold for the sum of 14,257.03 pesos, which said sum the purchaser will retain and deliver to J. M. Tuason & Co. to be by them applied to the payment of the total sum of 54,055.66 pesos, which the said Guevara Hermanos owe to J. M. Tuason & Co., and in consideration of the aforesaid amount, the payment of which is hereby acknowledged, they transfer to Hipolito Ocampo y Flores all rights of action which the said Guevara Hermanos have or may have with relation to the establishment *La Industrial*, stock, fixtures, and appurtenances and the printing plant annexed thereto, together with the machinery, presses, etc., belonging to it, as well as the eatnaHn where the said machinery and presses are now installed so that the said Ocampo y Flores may dispose of the same as he sees fit and exercise such rights as are inherent in the OAvnership of the same."

Gonzalo Tuason, in his aforesaid capacity, and Hipolito de Ocampo declare that they accept the terms of this instrument in so far as it concerns them, the former acknowledging the delivery of the property assigned to the partnership which he represents, and the latter the

receipt of the articles and fixtures of the establishment known as La Industrial as well as the delivery of the *camarin* aforesaid. Hipolito do Ocampo pays the purchase price of *La Industrial* with three promissory notes, the receipt of which is hereby acknowledged by Gonzalo Tuason, who declares that by the assignment of the real estate aforesaid, for the sum of 31,564.01 pesos, and the promissory notes of the said Ocampo, aggregating 14,257.03 pesos, the partnership of J. M. Tuason & Co. acknowledge the payment by Guevara Hermanos of the sum of 45,821.04 pesos on the total indebtedness of 54,055.66 pesos due the said Tuason & Co. (Record, pp. 33-64.)

Seventh. That on the 30th of December, 1891, Laureano Guevara died, as appears from a notarial instrument executed for the purpose of showing that "the general partners of the firm of Guevara Hermanos, Jose E. Guevara, Enrique Navarro, and Eusebia Mendoza, widow of Guevara, the latter in her own right and in behalf of her minor child, Felicisima Guevara, by her deceased husband, Laureano Guevara, during1 their marriage, and the limited partner, Macaria Guevara, with the consent of her husband Quintin Zalvidea * * *, has appointed Jose E. Guevara as the manager of the business in place of the deceased Laureano Guevara, conferring upon him all the power and authority which the latter had as such manager, Jose E. Guevara having accepted the said appointment" (Record, pp. 7-12.)

Eighth. That on the 27th of January, 1892, the said Jose E. Guevara was appointed executor of the will of his deceased mother Tiinotea Andres. (Record, pp. 1-6.)

Ninth. That on the 14th of December, 1895, Jose E. Guevara questioned the validity of the instrument executed on the 14th of December, 1891, in a complaint filed by him in this action.

The purpose of the action was to have the said instrument declared null and void, or otherwise to have the same rescinded, the instrument referred to being the one executed by Laureano Guevara as the manager of the firm of Guevara Hermanos assigning the said firm's property to J. M. Tuason & Co. in payment of their claim, and in either case to recover the real estate so assigned to the defendant firm, as well as the establishment and plant sold to Hipolito de Ocampo.

Tenth. That on the 22d of December, 1808, the case was decided by the court below dismissing the complaint with the costs against the plaintiff. An appeal was duly taken from said judgment but it was not allowed until the 3d of May, 1905, when certain persons, who, alleging an interest in the prosecution of the same, made a motion to the court that the

appeal be allowed, to which the appellees did not object.

In this court the appellant has only insisted upon the nullification of the said instrument, basing his claim on various grounds, some of which were not urged in the court below.

There are tAvelve assignments relied upon by the appellant.

The fifth assignment, which should have been the *first* following the natural order of things, is based upon the ground that, "The partnership of Guevara Hermanos, as such, was never vested with title or possession of the property of the estate and could not transfer the same nor authorise any person to do it." This allegation is contrary to the acts of the plaintiff himself and is in conflict with the evidence according to the *first* finding above referred to. In a public instrument the plaintiff, Jose Erneterio Guevara, was one of those who subscribed to the facts set out in the *first* finding. Said instrument contains the following statement: "The undersigned partners being the only heirs under the will of Timotea Andres * * * contribute to the partnership * * * the total value of all the property of the estate aggregating a total of 47,096 pesos etc. It is a well-settled principle of law, recognized by the Spanish authorities, and perfectly applicable to the case at bar, that all property of whatsoever nature partners contribute to a partnership becomes the property of such partnership. (Judgments of the supreme court of Spain of the 12th of July, 1883, and the 23d of February, 1884.)

Under the second assignment it is insisted that the partnership of GueVara Hermanos, as such, had no property which it could transfer because, as it is alleged, "the articles of copartnership were not accompanied by an inventory of the property as required by law," which according to the appellant is found in article 1668 of the Civil Code, and which according to them went into effect in these Islands on the 8th of December, 1889. This provision of the Civil Code refers to civil copartnerships and is therefore not applicable to mercantile partnerships, and the said code having gone into effect on the 8th of December, 1889, could not, under any circumstances, have any application to a partnership organized on the 6th of July, 1887, even though it were a civil partnership. Moreover, the last sentence of the fourth clause of the articles of copartnership of'Guevara Hermanos, referred to in the *first* finding, is as follows: "All according to the inventory, submitted by the executor, Laureano, consisting of three pages, which was exhibited to the parties (the notary speaking) * * *, the said inventory remaining in the possession of the manager."

Under the *first* assignment, which should have been the third, following the natural order of

things, it is contended that "the mercantile partnership of Guevara Hermanos, as such, was prohibited by law from dealing in real estate." The only transactions of this nature consisted of the contribution of the real estate in question to the capital stock of the partnership of Guevara Hermanos by those who organized the same, one of the latter being Jose Emeterio Guevara, and the assignment of this same real estate made by the manager of the partnership to J. M, Tuason & Co. Such transactions are not prohibited, either by the Code of Commerce of 1829, under the provisions of which the said partnership was organized, or under the present code, in accordance with the provisions of which it has continued to exist, or under any law prior or subsequent to these codes, particularly if the payment, as in the present case, was made for the purpose of liquidating and winding up the affairs of the partnership.

Under the third and fourth assignments, as set out in the brief and which should have been the fourth and fifth, following the natural order of things, it is contended that "Laureano Guevara had no power to transfer all the property of Guevara Hermanos and of the estate of Timotea Andres de Guevara, and could not have transferred all the real estate left by the deceased without the consent of the executor."

In the second and fifth findings as above set out reference has been made to the *special* powers of which the manager, Laureano Guevara, made use. If he did not seek the advice and consent of the executor, it was because he himself was such executor, Jose Emeterio Guevara not having succeeded him until after the former's death, to wit, on the 27th of January, 1892. (8th finding.) The *special* power to dispose of the property of the partnership had not only been conferred upon him by the members of the partnership in the articles of incorporation, but in a special agreement between them as well. He was particularly empowered to liquidate and wind up the affairs of the partnership. It was just for this purpose that Laureano Guevara was appointed manager of the firm. "Don Laureano," so winds up the instrument executed on the 3d of July, 1890, "on his part, accepts the appointment as manager of the partnership for the purpose of *liquidation*." (5th finding.) Jose Emeterio Guevara was one of those who had conferred upon him the appointment of manager "witb, the same power and authority granted him under the terms of clause 3 of the articles of copartnership," which said third clause is quoted in the second finding. Under this clause the manager was vested with "special poaver and authority to mortgage or sell the real property of the estate."

The appellant contends that the manager of a partnership can not select one particular creditor and transfer to him all of the property and business of a partnership as occurred in

this case, thus nullifying the very object and purpose of its organization. But there is no law or principle prohibiting this and it is natural that such a thing should happen where there is only one creditor and his claim covers all the assets of the ooncern. There would be some objection to this if such assignment were made to defraud other creditors. In such case, however, these creditors would be the only ones who would have a right to bring an action to set aside such fraudulent act on the part of the manager, and not the members of the partnership, who themselves were bound by the terms of the articles of copartnership in favor of the assignee. Each partner is bound by the acts of the manager, whom he himself was instrumental in electing for the management of the business, particularly in a case like this where the concern is a general partnership, and the partner is, like the plaintiff in this case, a general partner.

Under the sixth and eighth assignments, which should have been the sixth and seventh, following the natural order of things, it is alleged that the partnership of Guevara Hermanos had been completely dissolved long before the 14th of December, 1891, and that the partners could not, by agreement made on the 2d of June, 1890, have vested Laureano Guevara with the power to make an assignment of the property subsequent to the total dissolution of the concern. But assuming all this to be true, yet there would be nothing on which to base the latter contention, because then for the purpose of the liquidation the manager would have been able to do that for which authority was granted him by the partners under that agreement; that is to say, to wind Up the affairs of the partnership.

As a matter of fact the appellant can not, without misconstruing the articles of copartnership, contend that the duration of the partnership according to the said articles of incorporation would be five years from the death of the deceased Timotea Andres de Guevara. They could not merge in one the two clauses of the articles of copartnership set out in the third finding.

Assuming that their assertion is true and that such merger is possible, the death of Timotea Andres having occurred on the 23d of April, 1886, the five years duration from that date would expire on the 23d of April, 1891. Consequently the claim that on the 2d of June, 1890, the partners could not enter into the agreement which they made authorizing the manager to assign and transfer the real property of the partnership because the same had already been dissolved, can not be sustained. Moreover, clause 9, in which the duration of the partnership was expressly stipulated, means that the same having been organized on the 6th of July, 1887, for a period of five years, such period should expire on the 6th of July, 1892. We can not consider as existing prior to the 6th of July, 1887, something which did

not actually exist. The stipulation contained in the twelfth clause, to wit, that the articles of copartnership would be considered as effective from the death of the deceased Timotea Andre's, was a special stipulation for a special purpose; that is to say, for the purpose of "discharging the obligations contracted by the former partnership." The intention was to avoid any legal interruption in the existence of the partnership as to the liabilities incurred by *La Industrial* which were taken over by the new firm of Guevara Herinanos, although as a matter of fact there was lapse of time between the extinction of the partnership that established *La Industrial* and the. organization of the firm of Guevara Hermanos.

The eighth, ninth, tenth, and eleventh assignments taken in the same order in which they appear in the brief, with the exception of the seventh, which appears here as the eighth, referred to the authority contained in the instrument of the 2d of June, 1890, and it is alleged by the appellant that there was no real estate to be transferred or assigned; that the partnership did not authorize Laureano Guevara to make an assignment of the property; that the latter transferred and assigned more property than was necessary; that the authority to assign could not be for any sum other than that which was "contemplated by the partners at the said meeting;" and that such authority did not contemplate the assignment of the said real property for any sum less than its actual value and could not be extended so as to permit the manager to reduce the value 25 per cent. The agreement in question appears on page 44 of the record. Reference is made to its contents in the fourth finding herein. This agreement was undoubtedly the basis of the deed of transfer or assignment in payment and it was an express authority to the manager to pay what the partnership owed J. M. Tuason & Co. That autliority was conferred by the partners upon Quintin Zalvidea, at that time manager of the firm, who attended the meeting and was one of those who adopted such resolution. Thereafter, and on the 3d of July of the same year Zalvidea was succeeded by Laureano Guevara, with the same autliority conferred upon the former, at another meeting of the partners (5th finding), who expressly authorized the manager to propose to J. M. Tuason & Co. that the latter take over all the real property of the estate, or sell the same, and keep the proceeds; the manager being authorized to enter into negotiations for this purpose with the said Tuason & Co., the partnership to pay to the said Tuason & Co. any balance there might be between the value of the said property and the amount of the indebtedness as the said J. M. Tuason & Co. might decide. We fail to see that the partners had in contemplation any particular sum, and we do not find any limitation in the powers conferred upon the manager. It is very evident that the purpose was to wind up the affairs of the partnership and to pay all its debts with the proceeds of the real property and other funds thereof, and if there should be any balance still due to pay that

balance, the partners having anticipated that the value of the property at that time would not be sufficient to pay the whole indebtedness.

Under the twelfth assignment it is alleged that the appellant, Macaria Guevara, the wife and now the widow of Quintin Zalvidea, and Carmen Guevara, the wife and now the widow of Leandro Ibarra, were not parties to the agreement of the 2d of June, 1890, and therefore did not authorize Laureano Guevara to execute the deed which they now contest, but the general partners could not have permitted Quintin Zalvidea and Leandro Ibarra to take any part in the agreement of the 2d of June, 1890, in any capacity other than as husbands and legal representatives of their respective wives, Macaria and Carmen, the limited partners, the said Leandro Ibarra having been considered in the said agreement as a limited partner in behalf and as a representative of his wife. One thing is certain that the husband, as such, can not administer the separate property of liis wife, and another thing is that he is and should be her legal representative even with relation to such property. Moreover the said Macaria and Carmen took part in the execution of»the deed of the 1st of July following wherein Laureano was appointed manager, the latter having accepted the appointment expressly for the purpose of winding up the affairs of the partnership. Laureano was vested by all the partners without exception with the same powers as his predecessor, Quintin, and in clause 3 of the articles of copartnership he was expressly authorized to dispose of the partnership property.

According to the settled jurisprudence of the supreme court of justice of Spain and the express provisions of the old Code of Civil Procedure under which this action was prosecuted and decided, the parties were required to set out in their pleadings the issues of fact and law which they desired to submit to the determination of the court, and if any provisions of law were subsequently invoked which could not be considered because they had not been set out in the pleadings the court disregarded the same and the appellant was not permitted to base his appeal upon the alleged violation of such provisions. Consequently the exceptions and defenses not set out in the pleadings can not now be taken into consideration even though the laws and doctrines applicable thereto were violated by the trial court. Such violations could not be the base of a writ of error. (Judgments of the 16th of November, 1861; 13th of June, 1863; 31st of December, 1864, and 8th of June, 1866.)

None of the facts and provisions of law upon which is based the subsidiary prayer of the complaint relating to the rescission of the contract in the manner in which they were set out in the *replica* have been urged as a ground for the reversal of the judgment of the court below.

And of the facts and provisions of law upon which the prayer that the said contract be declared null and void is based only two have been urged, to wit, that the manager acted without the advice and consent of the executor and that the duration of the partnership of Guevara Hermanos was counted from the date of the death of Timotea Andres de Guevara.

This last exception or defense is set up in the *replica* and not in the complaint in order to support the contention that when Laureano Guevara executed the instrument dated December 14, 1.891, the partnership had already ceased to exist and consequently there could be no manager who might validly make the assignment of the property herein sought to be annulled.

If this were so, then the plaintiff, Jose Emeterio Guevara, could not have been the manager and liquidator of the firm on December 31, 1891, and if Laureano Guevara could not on December 14, 181)1, legally represent a partnership which, according to the plaintiff, had ceased to exist on the 23d of April, 1891, much less could he represent it on the 31st of December of the same year.

What seems more evident, although the court is of the opinion that it is not necessary to decide this question which has been raised in both instances, is that the whole management and partnership had ceased to exist after the 14th of December, 1891, on account of the absolute disappearance of the capital. (Art. 329 of the Code of Commerce of 1829.)

After considering, however, all the questions raised on this appeal in the form of assignments of error, this court is of the opinion that no legal cause has been shown why the instrument executed on the 14th of December, 1891, should be declared void and consequently there is no reason why the judgment of the court below should be reversed.

The judgment appealed from is accordingly hereby affirmed in all respects with the costs against the appellant. After the expiration of twenty days let judgment be entered in accordance herewith and ten days thereafter the case be remanded to the court below for execution. So ordered.

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

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