43 Phil. 472

[G. R. No. 17536. June 09, 1922]

VICENTE DIAZ AND TEODORA RUBILLOS, PLAINTIFFS AND APPELLANTS, VS. SECUNDINO MENDEZONA AND WILLIAM DE POLI, DEFENDANTS. SECUNDINO MENDEZONA, APPELLANT.

D E C I S I O N

VILLAMOR, J.:

In an action for the foreclosure of a mortgage in the amount of P10,000, the plaintiffs obtained a judgment by default from the Court of First Instance of Leyte against the defendant.

The complaint was filed on November 18, 1918. The defendant Secundino Mendezona not having appeared nor answered the complaint, the plaintiffs asked the court on January 14, 1919, to declare him in default, which the court did by an order issued January 18th of the same year, holding that the appearance entered by the defendant Mendezona by means of a telegraphic message sent on January 17th, but received by the clerk of the court on the night of the 18th of January, was not within the period of forty days fixed by the rules of court.

The order for judgment contained in the decision rendered on the 11th of February, 1919, is as follows:

> "All the allegations in the complaint have been fully established by the said proofs, and, consequently this court finds that it must, as it does, decide this case, ordering the defendant Secundino Mendezona to pay unto the plaintiffs within ninety (90) days the sum of ten thousand pesos (P10,000) with legal interest thereon from this date until it is fully paid; failing which, the property that was mortgaged by virtue of the document marked Exhibit A to guarantee the payment of said sum would be ordered sold at public auction; plus the costs of

this action."

On the 10th of February, 1919, the attorneys for the defendants Secundino Mendezona and William de Poli petitioned the court to set aside the order for default and allow them to file an answer and proceed with the case as usual, which petition was denied by an order dated March 9, 1919.

On March 24, the clerk of the court issued to the provincial sheriff the following writ of execution:

"*Greetings*:

"We hereby command you, upon payment of your lawful fees, that you execute the decision rendered in this case on the 11th of February, 1919, which contains an order for judgment as follows: 'this court finds that it must, as it does, decide this case, ordering the defendant Secundino Mendezona to pay unto the plaintiffs within 90 days the sum of P10,000, with legal interest thereon from this date, "February 11, 1919," until it is fully paid, failing which, the property that was mortgaged by virtue of the document marked Exhibit A to guarantee the payment of the said sum would be ordered sold at public auction.'

"We also command you that from the personal property of the defendants Secundino Mendezona and William de Poli you cause to be made the sum of P46 for costs of suit, or if sufficient personal property cannot be found, you cause it to be made from the, lands and buildings of the defendants, paying all the amounts unto the plaintiff or his attorney, Mr. E. Benitez, in Philippine currency, and returning this writ into court within 60 days from this date with your proceedings endorsed thereon."

On June 18, the provincial sheriff notified the court, stating that on May 12, 1919, in compliance with the writ of execution, he had attached the mortgaged properties and notified the defendant Mendezona by telegraph that if at the expiration of the period of ninety days the judgment in favor of Vicente Diaz for ten thousand pesos (P10,000), with legal interest thereon and costs was not satisfied, the mortgaged properties would be sold on the 31st of May, 1919.

On May 15, the defendant Mendezona answered the telegram of the sheriff of the 12th of the same month, saying that he had not been notified of the judgment which ordered him to pay his debt within ninety days, and requesting that the auction sale be suspended until he was notified of said judgment.

On May 31, 1919, the sheriff proceeded with the sale of the mortgaged properties, and no bidder having presented himself until 5 o'clock p. m. of that day, at the petition of the judgment creditor, he struck it to him for the sum of P10,576.07 the amount of the judgment, interest, costs, and sheriff's expenses and fees.

On the 21st of May, 1919, the defendant filed a motion with the court, asking, for the reason therein set forth, that: (a) The clerk of the Court of First Instance of Leyte be ordered to notify the mover of the judgment rendered in this case in order that from the date of said notification the period within which the defendant may exercise his right of appeal as well as the ninety days allowed for satisfying the judgment might be computed; (b) the provincial sheriff of Leyte be ordered to suspend the proceedings for the sale of the mortgaged properties until the said ninety days, which should be computed from the date of the notification, shall have elapsed; (c) in the event that this motion was received by the court after the sheriff had sold the mortgaged property, said sale be disapproved, and the orders prayed for in paragraphs (a) and (b) be issued, and (d) such further relief be granted the defendant as might be deemed just and equitable.

Pending the decision upon this motion, the attorney for the plaintiffs in turn filed two motions dated June 25 and July 15, asking that the sale made by the sheriff be approved, and an order issued to the registrar of deeds for the registration of the deed of sale executed by the sheriff in the registry of deeds.

The court passed upon these motions of the plaintiffs in connection with that of the defendant Mendezona, and by an order dated the 22d of February, 1920, denied the plaintiffs' motions and annulled all the proceedings had after the rendering of the decision in this case, and ordered the clerk of the court to notify the defendants Secundino Mendezona and William de Poli of the judgment in the manner prescribed by article 2 of the Rules of the Courts of First Instance.

The attorney for the plaintiffs moved for a reconsideration of this ruling, but the court denied the motion by an order dated the 28th of February, and said:

> "The court having refused to confirm the sale of the mortgaged properties, and annulled the same by an order dated September 22, 1920, on the grounds therein set forth, it is the order of the court that they be sold in the manner prescribed by the law if, within ninety (90) days from September 24, 1920, when said defendant Secundino Mendezona was notified of the decision rendered in this case, he fails to pay unto the plaintiffs the ten thousand pesos (P10,000), with legal interest thereon and the costs of this suit, which must be deposited with the clerk of this court."

From this order the plaintiffs have appealed to this court.

The attorney for the defendant Mendezona, on the other hand, took an exception to the decision rendered in this case and moved for a new trial on the 27th of September, 1920, on the ground that the evidence does not justify the decision and that it is contrary to law, and on the 23d of December, 1920, filed another motion, asking that the plaintiffs make an accounting and indemnify the defendant for the damages he has sustained by reason of having been deprived of the possession of the properties mortgaged. By an order dated January 4, 1921, these motions were denied by the court. Exception having been taken to the order denying the new trial, the defendant also appealed by means of a bill of exceptions.

From the foregoing it is clear that this action is one for the foreclosure of a mortgage. A judgment by default was rendered against the defendants, sentencing them to pay unto the plaintiffs, within the period of ninety days, the sum of P10,000 with legal interest thereon from the date of the judgment (Feb. 11, 1919), failing which, the property mortgaged would be sold at public auction.

On March 24 following, that is, before the expiration of the ninety-day period given in the judgment, the clerk of the court, executing a ministerial act, it not appearing that the judge had ordered it specifically, issued the corresponding order of execution. We hold that this is in violation of section 257 of the Code of Civil Procedure. The fact that the sheriff notified the defendant Mendezona by telegraph on May 12, that the mortgaged properties would be sold at public auction on May 31 following, and that the judgment was not satisfied within the said ninety days, does not render the proceedings legal in view of the fact that the defendant had not been notified of the judgment rendered by the court on February 11. It appears from the record that the defendant Mendezona was on January 18, 1919, declared

in default because he did not appear in court and did not answer the complaint within the required period. However, after he had submitted to the jurisdiction of the court on February 10 by asking the annulment of the order of default and that he be permitted to answer and take part in the proceedings, he had the right to the notice provided by section 257 of the Code of Civil Procedure. The sheriff's telegram of May 12 was only a notice to the defendant that the ninety-day period for the satisfaction of the judgment had expired—but it must be borne in mind that the defendant had not been notified of the judgment.

Plaintiffs' counsel cites the case of Montinola vs. Tuason and Locsin (35 Phil., 113), in support of his contention that in a proceeding for the foreclosure of a mortgage under section 256 of the Code of Civil Procedure, it is optional with the creditor whether to ask for the execution of the judgment as in ordinary proceedings or avail himself of the special procedure followed in the foreclosure of mortgages. This question was not raised nor discussed in that case. The decision of this court was only concerned with the question whether or not the appellant in that case had the. right of redemption over his property which had been sold, as in ordinary execution proceedings. The court said:

> "When a mortgagee obtains a judgment upon his mortgage on real property and recovers the amount due thereon by an execution upon said judgment, instead of by the methods provided for the recovery of such judgments, and the land is sold under said execution, the mortgagor, or his successors in interest, are entitled to redeem the land in accordance with the provisions of Act No. 190."

The court did not make any declaration as to the nullity of the procedure of that execution because the appellant did not assign it as an error. Supposing that the property had been sold under the ordinary procedure, the debtor had the right to redeem it within the one year prescribed by the Code of Civil Procedure. In the instant case the defendant assails the validity of the procedure: (a) Because the writ of execution was issued before the expiration of the ninety days time allowed for the satisfaction of the debt; (b) because he had not been required or requested to make payment; and (c) because he was not notified of the judgment against him.

It is alleged that the procedure followed in this case is more advantageous to the defendant, for after the property had been sold under the ordinary procedure of execution, the defendant retained the right of legal redemption; whereas if the property had been sold under the special procedure for the foreclosure of mortgages, the defendant would be

completely divested of all right over the property sold and the title of the purchaser to the property would become absolute.

We are aware of the soundness of this argument, but the court is of the opinion that there is a strong point to be considered and that is section 257 of the Code of Civil Procedure which provides as follows:

> "When the defendant, after being directed to do so, as provided in the last preceding section, failed to pay the principal, interest, and costs at the time directed in the order, the court shall order the property to be sold in the manner and under the regulations that govern sales of real estate under execution: but such sale shall not affect the rights of persons holding prior incumbrances upon the same estate or a part thereof. The sale, when confirmed by decree of the court, shall operate to divest the right of all the parties to the action and to vest their rights in the purchaser. Should the court decline to confirm the sale, for good cause shown, and should set it aside, it shall order a resale in accordance with law."

It is a rule repeatedly stated by the courts that the parties litigant may not alter the procedure established by law and much less when it curtails any right granted by that law to any of the parties.

In view of the foregoing, the order appealed from dated September 22, 1920, as modified by that of September 28, 1920, is hereby affirmed with the costs against the plaintiffs-appellants; it being understood that the period of ninety days within which judgment must be satisfied shall begin to run from the date of the notice of this decision. So ordered.

Araullo, C. J., Malcolm, Avanceña, Ostrand, and *Johns, JJ.*, concur.

Date created: October 07, 2014