

[G. R. No. 18952. June 20, 1922]

B. A. GREEN, PETITIONER, VS. HONORABLE SIMPLICIO DEL ROSARIO, AS JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, RICARDO SUMMERS, EX-OFFICIO SHERIFF OF THE CITY OF MANILA, AND FRED. C. FISHER, RESPONDENTS.

D E C I S I O N

OSTRAND, J.:

This is a petition for a writ of prohibition commanding the respondents to desist and refrain from levying upon the property of the petitioner under a writ of execution issued in civil cause No. 16620 of the Court of First Instance of Manila in which the respondent Fisher is the plaintiff and one George C. Sellner is the defendant.

It appears from the record that on January 21, 1919, the respondent Fisher recovered a judgment against the defendant in said cause No. 16620 for the sum of P21,594.44 with interest and costs. On the same date the parties entered into the following agreement:

“Whereas a judgment was entered in the above entitled cause under date of January 22, 1919, in favor of plaintiff for the sum of P21,594.44, interest and costs, and

“Whereas, defendant has requested plaintiff to refrain from executing said judgment for a term of two years from the date thereof, to remit all the interest which has accrued to the obligation to date, and to reduce the interest to accrue upon the principal sum of said judgment hereafter.

“*Now, therefore*, in consideration of the premises plaintiff and defendant have stipulated and agreed as follows:

“1. Plaintiff hereby agrees that no execution shall issue upon the judgment

entered herein for two years from the date thereof.

“2. Plaintiff further agrees that if defendant shall pay the sum of twenty thousand pesos (P20,000) at any time within one year from the date thereof such payment shall constitute a full and complete discharge and satisfaction of the said judgment, interest and costs; and further agrees that if the said sum of P20,000 is not paid within the said period of one year, but it is paid within the period of two years, then such payment, together with interest thereon at the rate of seven per cent per annum for the second year, or such part thereof as shall have elapsed prior to such payment, shall constitute a full and complete discharge and satisfaction of the said judgment, interest and costs.

“3. None of the securities heretofore given for the payment of the promissory note upon which said judgment was rendered shall be released or modified until said judgment w satisfied.”

On the date of the execution of the foregoing document the petitioner herein, B. A. Green, entered into the following undertaking in writing:

“In consideration of the stay of the execution of the judgment rendered in favor of F. C. Fisher against Geo. C. Sellner in case No. 16620 of the Court of First Instance of Manila, upon the terms and conditions set forth in the stipulation for such stay, a copy of which is hereunto annexed, marked Exhibit A, and made a part hereof, I hereby undertake and agree that if the said judgment is not wholly satisfied and discharged by the said Sellner within the term specified in said stipulation I will pay said judgment or any part thereof which may be then unpaid.”

Sellner failed to pay any part of the judgment mentioned, but the petitioner herein, Green, in partial compliance with the undertaking executed by him, paid the sum of P6,622.77, leaving an unpaid balance of P15,000 together with interest thereon at the rate of 10 per cent per annum from October 1, 1921.

Green having failed to pay said balance after repeated demands, Fisher, on January 27, 1922, filed a motion in the aforesaid case No. 16620 asking that execution be issued against Green by virtue of the judgment rendered against Sellner. The motion was granted by Judge

Simplicio del Rosario and execution issued.

A motion filed by Green February 24, 1922, and asking that the execution be declared null and void and that it be recalled was denied by the Court of First Instance and Green thereupon filed the present petition in this court.

Counsel for the respondents argue "that by reason of the undertaking hereinbefore set forth, the petitioner Green became a party to the aforesaid case No. 16620 of the Court of First Instance of Manila and that said undertaking was a confession of judgment by said petitioner as stayor, for the amount of the judgment stayed, and that at the expiration of the stay the issuance of the execution was a mere ministerial duty; and that said execution may issue against the stayor as well as against the original judgment debtor." In support of this contention counsel cites decisions of the courts of Arkansas, Nebraska, Iowa, Indiana, and Tennessee.

We are unable to agree with counsel for the respondents. Execution in the sense it is employed here is the act of carrying into effect the final judgment or decree of a court and there can be no execution without such judgment or decree against the defendant in execution.

There is no final judgment or decree directly against the petitioner herein, Green, and in this jurisdiction we have no statutory provision making a surety or guarantor in an undertaking for the stay of execution a judgment debtor. The theory advanced by the respondents is unknown to our system of procedure and in order to have an execution against a surety on a supersedeas bond in a civil case a judgment or decree must first be obtained in the manner provided for in the Code of Civil Procedure.

The decisions cited by counsel for the respondents are based on special statutory provisions essentially different from ours and are not in point. In Arkansas and Tennessee the statutes prescribe that "If the judgment shall not be discharged at the time the stay of execution has expired, then any justice of the peace of the county, having such judgment in his possession, may issue execution against the principal and his sureties, without any intermediate process." In Nebraska the statute reads: "At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein." In Iowa the statute provides that the bond for stay of execution shall be taken as a judgment confessed against the persons executing the same and against their sureties, and that execution may issue thereon accordingly. The statutes

under which the Indiana cases were decided provided that a recognizance as a surety should have the force and effect of a judgment.

The petition is therefore granted, the writ of execution issued against the property of the petitioner B. A. Green under the judgment rendered in civil cause No. 16620 of the Court of First Instance of Manila is declared null and void, and of no effect, and the respondent judge is prohibited from proceeding further against the property of said petitioner under said judgment.

No costs will be allowed. So ordered.

Araullo, C. J., Avanceña, Villamor, Johns, and Romualdez, JJ., concur.