45 Phil. 107

[G.R. No. 19493. August 27, 1923]

JOSE MA. CACHO, PLAINTIFF AND APPELLEE, VS. J.A. VALLES ET AL., DEFENDANTS. BALDOMERO ROXAS, APPELLANT.

D E C I S I O N

STREET, J.:

On October 29, 1920, the National Sporting Club, of Manila, obligated itself by a promissory note payable at four months to pay to Jose Ma. Cacho, or order, the sum of P9,360, value received for commercial purposes. Below the signature of said National Sporting Club, as signed by the proper officers of the Club, the following personal guaranty was written: "We guarantee this obligation." (Sgd.) J. A. Valles, J. L. Mateu, G. J. Heffting, Ed. Chesley, Baldomero Roxas. This note was not paid at maturity; and an action was instituted thereon against the National Sporting Club and the guarantors. To this action no defence was interposed either by the Club or any of the guarantors except Baldomero Roxas, who, after denying generally the allegations of the complaint, interposed a defence claiming the right of division as among the cosureties, and asking that in case he should be found liable that he should be held responsible only for his aliquot part of the debt, and praying also that before he should be required to pay such proportionate share the property of the National Sporting Club should first be exhausted. After judgment had been given upon the default of the National Sporting Club as obligor, the court, upon May 9, 1922, entered judgment against the five guarantors requiring each of them to pay his pro rata share of the total debt with interest in case the National Sporting Club itself should not satisfy the debt or should appear to be insolvent upon execution of the judgment.

On June 20, 1922, the trial court upon motion modified the dispositive part of its decision as against the guarantors by declaring that "in case either of

the sureties shall turn out to be insolvent his part shall fall proportionately upon the other sureties." From this order the defendant Baldomero Roxas appealed to this court.

The sole question presented in this appeal is one of law, which is, whether in case of the insolvency of one or more of several simple sureties, those who remain solvent can be made to pay the entire debt. It will be noted that the guaranty with which we are here concerned contains no words making the cosureties solidarily liable either with the principal debtor or among themselves, and accordingly the appellant Baldomero Roxas insists that the trial judge erred, in its order of June 20, 1922, in declaring him responsible for any part of the debt over and above his aliquot proportion.

At the cost of beginning with a proposition that must appear trite to persons acquainted with the Civil Law, we refer, for the general principle, to articles 1137 and 1138 of the Civil Code, where in effect the rule is declared that where there is a concurrence of two or more simple debtors each is liable only for his aliquot part of the obligation. It would seem strange if the benefit of division which is thus conferred upon codebtors in general should be denied to cosureties; and the authors of the Code were careful to express the same general rule with respect to cosureties, in article 1837 of the Civil Code. This article reads as follows:

> "ART. 1837. Should there be several sureties of only one debtor for the same debt, the liability therefor shall be divided among them all. The creditor can claim from each surety only his proportional part unless liability *in solidum* has been expressly stipulated.
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> "The right to the benefit of division against the cosureties for their respective shares ceases in the same cases and for the same reason as that to an exhaustion of property against the principal debtor."

The conditions under which the exhaustion of the property of the principal debtor is required as a condition precedent to the liability of the surety are stated in article 1831. Of the four conditions there stated we are here concerned with the third only, which refers to the case where the debtor has

become bankrupt (*quiebra o concurso del deudor*); and it may be admitted that by the combined force of article 1837 and subsection 3 of article 1831, one of several sureties becomes liable for his proportionate part of the share of any of his cosureties who may be declared bankrupt. But the appealed decision makes the appellant liable in case any cosurety is found to be insolvent. In this we think there was error.

There is a difference between being insolvent, which practically means exhaustion of assets, or that money cannot be made out of a person upon execution, and the condition of a declared bankrupt. The authors of the Code themselves were not unmindful of this distinction. Thus, we note that in subsection 2 of article 1843 it is declared that a surety may proceed against the principal debtor even before paying the debt in case of bankruptcy *or insolvency*; but in subsection 2 of article 1831, with which we are here more especially concerned, the condition named is bankruptcy. None of the sureties, so far as this record shows, has been declared bankrupt. The benefit of division therefore has not been lost, and the rule declaring each surety liable only for his aliquot part of the guaranteed debt, must hold.

When he declared that the solvent sureties should be liable proportionately for the part of any insolvent surety, the trial judge in all probability had in mind the second paragraph of article 1844 of the Civil Code; but we think this article inapplicable for more than one reason. In the first place, that article deals with the situation which arises when one surety has paid the debt to the creditor and is seeking contribution from his cosureties. In the case before us the debt has not been paid by any surety. In the second place, it is required in the third paragraph of said article, that the surety paying the debt should have made payment by virtue of judicial proceedings or when the principal debtor should have become insolvent or bankrupt. Nothing of the kind has here happened. The article referred to is thus automatically excluded from operation.

In passing upon a question of the kind now before us it is to be remembered that the obligation of the surety cannot be extended beyond its specified limits (Civ. Code, art. 1827); and it is not legitimate for the court to adopt doubtful intendments against him.

In his comment on article 1837 of the Civil Code, Manresa suggests that the

analogy of the rule stated in article 1832 should be followed with respect to the stage of the proceedings at which the surety should claim the benefit of division; which implies that the surety should claim the benefit of division when first sued by the creditor. In the case before us the appellant claimed the benefit of division in his answer. This was sufficiently opportune.

A few loose expressions may be found in the commentators which would seem to indicate that the solvent sureties may be required to pay their proportionate part of the share of any insolvent surety. These expressions seem to be in part mere reverberations, or echoes, from the comment of French authors, commenting upon provisions of the French Code. But the pertinent provisions of the French Code are very different from those found in the Spanish Civil Code. (Cf. art. 2026, French Civil Code; art. 3049, Merrick's Revised Civil Code of Louisiana.) We observe that Manresa does not fall into this error in the passage where he defines the law upon this point most explicitly, as where he says:

"In resume, a cosurety is entitled to the benefit of division from the very moment that he contracts the obligation, except where there is stipulation to the contrary; but if any of the circumstances enumerated in article 1831 should take place either because he expressly waives such a benefit after making the contract of suretyship, or because he later binds himself solidarity with the debtor or any of the other cosureties, or any of the cosureties becomes bankrupt or insolvent or cannot be sued within the kingdom; and again, if such right is not availed of in due time, the benefit of division will cease in any of these cases, as would the benefit of exhaustion of the debtor's property. This is what the Code intended by inserting in the article under comment the provision of paragraph 3, containing the reference therein made." (12 Manresa, 284, 285.)

For the reasons stated the order of June 20, 1922, which is the subject of appeal in this case, by which the lower court amended its prior judgment of May 9, 1922, is hereby reversed and set aside; and the judgment will remain as fixed in the decision of May 9, 1922. So ordered, without costs.

Araullo, C.J.,
Johnson, Avanceña, Villamor, and *Romualdez, JJ.,* concur.

CONCURRING

MALCOLM, J.:

Considering that Baldomero Roxas is a guarantor of the obligation, I concur.

SPECIALLY CONCURRING

JOHNS, J.:

Legally speaking, neither of the defendants J. A. Valles, J. L. Mateu, G. J. Heffting, Ed. Chesley and Baldomero Roxas are makers or sureties of the promissory note in question. Neither of them signed the note itself. The only thing which they did was to sign the following writing:

"We guarantee this obligation."

Hence, their liability was that of guarantors and guarantors only, and, as such, the law defines and specifies their liability.

Ruling Case Law, vol. 12, p. 1053, says:

> "1. *Definition and scope of article*.—A guaranty has been defined by statute to be 'a promise to answer for the debt, default, or miscarriage of another person.' This definition substantially conforms to the judicial conception of a guaranty, which may fairly be summed up as a promise to answer for the payment of some debt or the performance of some obligation, on default of such payment or performance, by a third person who is liable or expected to become liable therefor in the first instance. * * *"
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> "2. * * * The fact that both contracts are written on the same paper or instrument does not affect their separate nature. If there is but a single

> obligation, the persons bound thereby are sureties or original promisors; they are not guarantors. * * *"

The parties who signed the writing in question are guarantors for the payment of the note, and are not makers or sureties. As guarantors, on default of the payment of the note by the principal, they became jointly and severally liable for the payment of the note.

For such reasons, I concur in the result of the opinion written by Mr. Justice Street.

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