46 Phil. 885

[G.R. No. 20662. November 14, 1923]

SILVESTRE T. BAUTISTA, PLAINTIFF AND APPELLEE, VS. LEOCADIO JOAQUIN, DEFENDANT. ANTERO ESCRIBA AND FELIPE CAPIÑA, SURETIES AND APPELLANTS.

D E C I S I O N

VILLAMOR, J.:

In an action instituted by Silvestre T. Bautista against Leocadio Joaquin for the recovery of a certain amount of money a writ of attachment was issued against the property of the defendant.

On January 4, 1921, the trial court ordered the dissolution of the attachment, because the sureties Antero Escriba and Felipe Capiña gave a bond in the sum of P7,150.

Judgment was rendered against the defendant Leocadio Joaquin for the sum of P6,100, plus P1,000 as damages, legal interest and costs. This judgment was appealed to this court and affirmed in a decision promulgated May 8, 1922.[1]

The case having been remanded to the court whence it had come, a writ of execution was issued by that court against the property of the defendant Leocadio Joaquin. The writ was returned unsatisfied, because no property of the defendant was found with which to pay the judgment against him.

A petition was then presented for the issuance of a writ of execution against the sureties Antero Escriba and Felipe Capiña. By an order of September 29, 1922, said petition was set for hearing in the trial court to determine the value of the property of the defendant that was released from the attachment, and the trial court denied the motion for the issuance of a writ of execution, citing sections 428 and 440 of the Code of Civil Procedure in support of said

ruling.

The value of the property attached having been fixed at P14,000 by the trial court by an order dated January 23, 1923, the trial court ordered the sureties Antero Escriba and Felipe Capiña to pay the plaintiff the sum of P7,150, which was the amount of the bond given by them, but refused to issue a writ of execution against said sureties.

From this order the attorney for the sureties appealed, alleging: (*a*) That the trial court erred in ordering the introduction of evidence for determining the value of the property attached; (*b*) in holding that the value of the property attached amounted to the sum of Pl4,000; (*c*) in allowing the plaintiff to enforce his rights against the sureties in the same proceeding; (*d*) in ordering the sureties to pay the plaintiff the sum of P7,150; and (*e*) in denying the motion for new trial.

The trial court ordered the appraisal of the property attached, after the dissolution of the attachment.

According to section 440 of the Code of Civil Procedure, this appraisal should have been made at the time the bond was given for the dissolution of the attachment. However, the fact that said appraisal was made after that time is not an error justifying the reversal of the order appealed from, inasmuch as the sureties cannot be compelled to pay more than the amount of the bond given, although the property attached may be worth double said sum.

The true question to be decided in this appeal is whether or not, under the circumstances of this case, a writ of execution should issue against the sureties, who had given a bond for the dissolution of the attachment levied upon the property of the defendant in view of the insolvency of the latter.

Section 440 of the Code of Civil Procedure provides:

> "At any time, after the commencement of an action upon which an order of attachment has been made, the defendant may upon reasonable notice to the plaintiff, apply to the judge or justice of the peace who granted the order of attachment, or to the judge of the court in which the action is pending, for an

> order to discharge the attachment, wholly or in part; and the judge or justice of the peace shall, after hearing, on due notice to both parties, discharge the order of attachment provided the defendant shall execute an obligation to the plaintiff with surety to be approved by the judge, or justice of the peace, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the officer of the court, to be applied to the payment of the judgment, or, in default thereof, that the defendant and surety will, on demand, pay to the plaintiff the full value of the property released. The judge or justice of the peace making such order may fix the sum for which the undertaking must be executed, and for that purpose may take such steps as he finds necessary to determine the value of the property attached, which obligation shall be filed with the other papers in the cause, and upon its approval by the judge or justice of the peace and the making of the order by him for a discharge of the attachment, all of the property so released, and all of the proceeds of the sales thereof, shall be delivered to the defendant, the obligation aforesaid standing in place of the property so released."

In the case of Molina *vs*. De la Riva (7 Phil., 345), a judgment was rendered in favor of the plaintiff, which was appealed to this court and affirmed with a slight modification. The trial court issued a writ of execution against the defendant which was not satisfied because no property of the defendant subject to execution was found. In view thereof the attorney for the plaintiff petitioned the court that an order be issued requiring the sureties of the defendant to show cause why a writ of execution should not be issued against them.

The sureties having appeared and being heard, the trial court entered an order for the execution of the judgment against the sureties. From this order the sureties took an appeal. This court held:

> "That under the facts stated in the opinion, the sureties on the supersedeas bond given in this particular case, were jointly and severally liable with the principal debtor and that an execution might issue against their property concurrently with the execution against the property of the

principal."

And this court adds: "The nature of the bond is very plain. Its heading reads as follows: 'Appellant's bond to stay execution of judgment.' This bond is, therefore, a judicial bond, and article 1856 of the Civil Code provides that a judicial surety cannot demand a levy on the property of the principal debtor."

In the instant case, the bond given by the sureties-appellants is for the purpose of obtaining the dissolution of the attachment upon the property of the defendant, and the undertaking of the sureties is that the property would be returned to the officer of the court, or they will pay their value, in case the plaintiff wins the case.

We are not unmindful of the fact that in the case of Green *vs*. Del Rosario (43 Phil., 547) this court held that in order that an execution may issue against a surety on a bond to stay execution, a judgment must first be obtained against him in an ordinary manner. This case, however, differs from Molina *vs*. De la .Riva, *supra*, and it is clear that the rule of law in each case must be different. The bond in question in the case of Green was a purely contractual one unlike the bond in the case of Molina, which was of a judicial nature. The facts in the Green case are: In a case between Fisher, plaintiff, and Sellner, defendant, a judgment was rendered against the defendant. A writ of execution was issued to make the sum awarded in the judgment. The parties, however, agreed to stay the execution of the judgment for a certain period and upon certain conditions stipulated by them. Green offered to guarantee the compliance of the parties' agreement, and to pay the amount of the judgment should Sellner fail to comply with his part of the said contract. This bond being purely contractual between the parties, it is evident 'that the surety must be defeated in the proper action before an execution may be issued against him on his bond.

As above stated, the bond in question in this appeal is of the same nature as that involved in the Molina case, *supra*. It was given, to the satisfaction of the court, to secure the right of the plaintiff, should he become victorious, to recover the debt of the defendant from the property

attached. It is a bond of a judicial character and, therefore, the property attached having disappeared, a writ of execution must issue against the property of the sureties up to the amount of their bond to answer for the value of said property.

The plaintiff did not appeal from the order of January 23, 1923, as regards the refusal of the court to issue a writ of execution against the sureties. However, to do complete justice to the parties and to avoid the institution of a new litigation upon the same matter, we declare that, in case the appellants fail to comply with the order of January 23, 1923, the trial court may very well order the execution of the judgment against the sureties, who have given a bond in the sum of P7,150 for the dissolution of the attachment levied upon the property of the defendant, taking into account that their liability, according to section 440 of the Code of Civil Procedure, is for the delivery of the property released, or the payment of its value up to the amount of the bond.

Not finding in the record anything to support the errors assigned by the sureties, the order appealed from is affirmed with costs against the appellants. So ordered.

Johnson, Street, Malcolm, Avanceña, Johns, and *Romualdez, JJ.,* concur.

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[1] R. G. No. 18025, not reported.

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