95 Phil. 637

[G.R. No. L-5513. August 18, 1954]

DOMINGO DEL ROSARIO, PLAINTIFF AND APPELLEE, VS. GONZALO P. NAVA, DEFENDANT, PETITIONER AND APPELLANT. ALTO SURETY & INSURANCE CO., INC., SURETY, RESPONDENT AND APPELLEE.

D E C I S I O N

REYES, J.B.L., J.:

Appeal from an order of the Court of First Instance of Manila in its Civil Case No. 4949, refusing to entertain appellant's application to require the Alto Surety and Insurance Co., Inc. to show cause why execution should not issue against its attachment bond filed in said case.

The facts are undisputed. Domingo del Rosario had instituted an ejectment suit against Gonzalo P. Nava in the Municipal Court of Manila, Civil Case No. 4467, and on January 30, 1948, he secured a writ of attachment upon due application arid the filing of an attachment bond for P5,000, with the Alto Surety and Insurance Co., Inc. as surety. Attachment was levied and after the case was tried, the Municipal Court rendered judgment against the defendant Nava. The latter appealed to the Court of First Instance of Manila, where the case was docketed with number 4949. In the Court of First Instance, Nava filed a new answer with a counterclaim, alleging that the writ of attachment was obtained maliciously, wrongfully, and without sufficient cause, and that its levy had caused him damages amounting to P5,000. No notice of this counterclaim was served upon the surety of the attachment bond, Alto Surety and Insurance Co., Inc.

By decision of July 21, 1950, the Court of First Instance found that the attachment was improperly obtained, and awarded P5,000 damages and costs to the defendant Nava. The judgment having become final, a writ of execution was issued, but it had to be returned unsatisfied on January 19, 1951, because no leviable property of the plaintiff Del Rosario could be found. On November 7, 1951, Nava filed, through counsel, a motion in Court

setting forth the facts and praying that the Alto Surety and Insurance Co., Inc. be required to show cause why it should not respond for the damages adjudged in favor of the defendant and against the plaintiff. The surety company filed a written opposition on the ground that the application was filed out of time, it being claimed that under sec. 20, Rule 59 of the Rules of Court, the application and notice to the surety should be made before trial, or at the latest, before entry of the final judgment. After written reply and rejoinder, the Court of First Instance, on December 10, 1951, issued the assailed order, rejecting Gonzalo P. Nava's motion to require the Alto Surety and Insurance Co., Inc. to show cause, because it was filed out of time. Nava then appealed to this Court.

The issue before us is whether a notice to the sureties made after the award of damages against the principal in the attachment bond has become final, can be considered timely in view of section 20, Rule 59, providing as follows:

> "SEC. 20. *Claim for damages on plaintiff's bond on account of illegal attachment.*—If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court."

Appellant invokes and relies upon the decisions of this court in Visayan Surety and Insurance Corp. vs. Pascual, 85 Phil., 779, and in Liberty Construction Supply Company vs. Pecson, et al., 89 Phil., 50. In the first case cited, this court ruled as follows:

> "(1) That damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety;

"(2) That if the surety is given such due notice, he is bound by the judgment that may be entered against the principal, and writ of execution may issue against said surety to enforce the obligation of the bond; and

"(3) That if, as in this case, no notice is given to the surety of the application for damages, the judgment that may be entered against the principal cannot be executed against the surety without giving the latter an opportunity to be heard as to the reality or reasonableness of the alleged damages. In such case, upon application of the prevailing party, the court must order the surety to show cause why the bond should not respond for the judgment for damages. If the surety should contest the prevailing party, the court must set the application and answer for hearing. The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove. The oral proof of damages already adduced by the claimant may be reproduced without the necessity of an opportunity to cross-examine the witness or witnesses if it so desires.

To avoid the necessity of such additional proceedings, lawyers and litigants are admonished to give due notice to the surety of their claim for damages on the bond at the time such claim is presented."

And in Liberty Construction & Supply Co. vs. Pecson, 89 Phil., 50, this court held:

"The petitioner, in support of his contention that the judgment for damages in favor of the petitioner against the plaintiff in the civil case binds the respondent Alto Surety and Insurance Co., Inc., although the latter was not notified or included as defendant in the petitioner's counterclaim for damages against the said plaintiff, quotes the decision of this court in the case of Florentino vs. Domadag, 45 Off. Gaz., (11) 4937, promulgated on May 14, 1948. But the ruling in said case was abandoned in a later case entitled Visayan Surety and Insurance Corp. vs. Pascual, et al., G. R. No. L-2981, promulgated on March 23, 1950, in which this court held that 'damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety' and 'that if the surety is given such due notice, he is bound by the judgment that may be entered

> against principal, and writ of execution may issue against said surety to enforce the obligation of the bond, and that if no notice is given the surety the judgment cannot be executed against him without giving him an opportunity to present such defense as he may have which the principal could not previously set up."

It will be seen that the ruling above quoted are silent on the question now before us, that is to say, the time within which the application and notice to the surety should be filed in those cases where a judgment for damages has already been rendered against the plaintiff as principal of the attachment bond. Upon mature consideration, we have reached the conclusion that under the terms of section 20 of Rule 59, the application for damages and the notice to the sureties should be filed in the trial court by the party damnified by the wrongful or improper attachment either "before the trial" or, at the latest, "before entry of the final judgment", which means not later than the date when the judgment becomes final and executory (section 2, Rule 35). Only in this way could the award against the sureties be "included in the final judgment" as required by the first part of section 20 of Rule 59. The rule plainly calls for only one judgment for damages against the attaching party and his sureties; which is explained by the fact that the attachment bond is a solidary obligation. Since a judicial bondsman has no right to demand the exhaustion of the property of the principal debtor (as expressly provided by article 2084 of the new Civil Code, and article 1856 of the old one), there is no justification for the entering of separate judgments against them. With a single judgment against principal and sureties, the prevailing party may choose, at his discretion, to enforce the award of damages against whomsoever he considers in a better situation to pay it.

It should be observed that the requirements of section 20 of Rule 59 appear designed to avoid a multiplicity of suits. But to enable the defendant to secure a hearing and judgment against the sureties in the attachment bond, even after the judgment for damages against the principal has become final, would result in as great a multiplicity of actions as would flow from enabling him to sue the principal and the sureties in separate proceedings.

In view of the foregoing, we hold that while the prevailing party may apply for an award of damages against the surety even after an award has been already obtained against the principal, as ruled in Visayan Surety and Insurance Corp. vs. Pascual, G. R. No. L-3694, still the application and notice against the surety must be made before the judgment against the principal becomes final and executory, so that all awards for damages may be included in the final judgment. Wherefore, the court below committed no error in refusing to entertain

the appellant Nava's application for an award of damages against the appellee surety Company ten months after the award against the principal obligor had become final.

The order appealed from is affirmed, with costs against appellant.

Paras, C. J., Pablo Bengzon, Padilla, Montemayor, Reyes A., Jugo, Bautista Angelo, Labrador and *Concepcion, JJ.,* concur..

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