102 Phil. 234

[G. R. No. L-8086. October 31, 1957]

PACIFIC TOBACCO CORPORATION, PLAINTIFF AND APPELLEE, VS. RECARDO D. LORENZANA AND ViSAYAN SURETY & INSURANCE CORPORATION, DEFENDANTS. VISAYAN SURETY & INSURANCE CORPORATION, CROSS CLAIMANT AND THIRD PARTY PLAINTIFF AND APPELLANT, VS. RICARDO D. LORENZANA, CROSS DEFENDANT, CALIXTO D. LORENZANA, JOSE M. LORENZANA AND BENIGNO C. GUTIERREZ, THIRD PARTY DEFENDANTS.

D E C I S I O N

FELIX, J.:

The Pacific Tobacco Corporation is a duly organized domestic corporation with offices at Grace Park, Caloocan, , Rizal, engaged in the business of manufacturing and distributing cigarettes, cigars and other tobacco products. On January 16, 1952, Ricardo D. Lorenzana and said corporation entered into an agreement, the pertinent provisions of which read as follows:

> "WITNESSETH: That
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> "Whereas, the Company manufactures cigarettes, cigars, and other tobacco products which it desires to seil and distribute throughout the Philippines;
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> "Whereas, the Distributor (Lorenzana) *is willing* to sell and distribute the said products of the Company in the territory of *Manila and Rizal Province* under the terms and conditions herein-below set forth;
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> > NOW, THEREFORE, for and in consideration of the premises and stipulations herein contained, the parties hereto have agreed and covenanted, as follows:

"1. The Distributor shall sell and distribute solely the cigarettes, cigars and other tobacco products of the Company in the above-mentioned territory;

"2. The Company shall, from time to time, deliver to the Distributor, for sale, cigarettes and other tobacco products, provided that the balance of the account of the Distributor with the Company shall not at any time exceed THREE THOUSAND ONLY ————————. Pesos (P3,000.00) ;

"3. All accounts of the Distributor with the Company shall be due and payable, in the office of the latter within thirty (30) dayg from and after the date of the sales invoice issued by the Company;

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"8. The DISTRIBUTOR shall only sell the products of the Company and in case he sells the products of other persons or firms, the Company in the case he sells the products of other persons or firms, the COMPANY shall be at liberty to terminate these contract;

"9. The Distributor binds himself to sell for the Company not less than TWENTY THOUSAND PESOS (P20,000.00) worth of cigarettes and other tobacco products every month and should he fail to meet this quota, the Company shall have the option to terminate (20) dys' notice;

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"11. To guarantee the faithful performance on his part of the terms and conditions of this contract, the Distributor shall post a surety bond in favor of the Company in the amount of EIGHT THOUSAND ONLY_____Pesos (P8,000.00) signed by him and a reputable surety

> company acceptable to the Company, THREE THOUSAND PESOS (P300.00) of which bond shall answer for the faithful settlement of the account of the Distributor with the Company, and Six Thousand Pesos (P6,000.00) for the return of the aforementioned truck to the Company in the same condition that the Distributor received it, * * *". (Exhibit A).

In accordance thereto, Lorenzana put up V. S. & I. C. bond No. E-JA-52/101 in the amount of P3,000 with the Visayan Surety & Insurance Corporation, as surety, to guarantee the faithful fulfillment of the principal's (Lorenzana's) part in the contract with the Pacific Tobacco Corporation, which Was "to sell and distribute the latter's cigarettes, cigars and other tobacco products subject to the terms and conditions stipulated in the said contract" (Exhibit B).

The record shows, that on various occasions in 1952, the Philippine Tobacco Corporation delivered to Lorenzana for distribution cigarettes, cigars and other tobacco products amounting to P15,645.64, but out of this amount the latters paid and was only credited with P13,559.33, leaving a balance of P2,086.31. Upon demand by the corporation, Lorenzana proposed to settle his pending obligation by giving P100 a month, which amount was later reduced to P25, to which arrangement the company apparently agreed and Lorenzana actually made installments amounting to P250 (Exhibit G-6). As he failed to make any further payment, the Philippine Tobacco Corporation filed a complaint with the Court of First Instance of Manila on October 30, 1953, against Ricardo D. Lorenzana and the Visayan Surety & Insurance Corporation for the recovery of the sum of P2,086.31, with legal interest thereon from the date of the filing of the complaint until fully paid; attorney's fees in the amount of P500.00; costs, and for such other remedy as may be deemed just and equitable in the premises.

Defendant Visayan Surety & Insurance Corporation answered this, complaint, which it later modified With leave of Court by riling an amended answer with cross-claim against Ricardo D. Lorenzana and third party complaint against Calixto D. Lorenzana, Jose Lorenzana and Benigno C. Gutierrez, denying the material allegations of the complaint and setting up the affirmative defense that the bond could not be held liable for damages and attorney's fees; that plaintiff Philippine Tobacco Corporation was barred from presenting this action against

the surety due to laches, waiver of claim and estoppel. It was thus prayed that the complaint be dismissed as against said defendant; in the event that the surety would be sentenced to pay the plaintiff, that a simultaneous order be issued ordering the cross-defendant and the third-party defendants to pay the surety, jointly and severally, for whatever amount the latter may be required to satisfy, with interest thereon at 12 per cent per annum from the date of payment until it was fully reimbursed; that the said cross-defendant and third-party defendants be ordered to pay the surety, jointly and severally, in accordance with the indemnity bond executed by them as counter-guarantors, 20 per cent of the amount involved as attorney's fees, and costs.

In his answer dated December 1, 1953, Ricardo D. Lorenzana denied the allegation of the complaint that he refused or failed to pay the plaintiff, the true fact being that he had tendered to plaintiff certain sums in accordance with their verbal agreement which allowed him to settle his obligation in installments until the entire amount was fully satisfied; set up the defense that the agreement, Annex "A", was partially modified when plaintiffs agreed and allowed him to sell the tobacco products not only in the City of Manila and Rizal province but throughout the island of Luzon; that in virtue of such modification, he sold plaintiff's products in places as far as the northern provinces; that most of defendant's transactions in these provinces were on credit basis; that on August 2, 1952, when defendant arrived from his trip from the Ilocos regions, plaintiff terminated his services on the ground that the corporation was losing without giving him an advance notice of 30 days in accordance with the agreement; that as plaintiff took the delivery truck which he was using in the distribution of plaintiff's products he was prevented from going back to the provinces to collect from his customers their accounts; that he made several payments in small amounts to settle his remaining obligation which wore accepted, but in November, 1953, plaintiff refused to receive the same. Lorenzana claimed that because of plaintiff's failure to notify him in advance that his services were terminated, he incurred and was incurring transportation expenses in order to collect the accounts of his former customers. He, therefore, prayed that the complaint be dismissed and plaintiff be ordered to pay the amount that he incurred as transportation expenses. The third-party defendants likewise filed their answer practically admitting all the averments of the third-party complaint except the claim for 20 per cent of the amount involved as attorney's fees, on the ground that it was excessive and that they should not be held liable for the payment of the pending obligation of Lorenzana.

At the hearing defendant Lorenzana failed to appear and to adduce evidence in support of his defenses in spite of the fact that he was duly notified. After hearing and after the other

parties had filed their respective memoranda, the Court rendered judgment dated May 12, 1954, finding that although on one occasion plaintiff shipped cigarettes to defendant Lorenzana addressed at San Fernando, La Union (Exhibit C-18), this fact alone would not release the surety from liability, for there was nothing in the contract Exhibit A that expressly *prohibited* defendant Lorenzana from selling cigarettes outside Manila and Rizal. The lower Court opined that what was guaranteed by the Visayan Surety & Insurance Corporation was the faithful delivery by defendant Lorenzana of the price of the cigarettes to plaintiff within the time fixed in the contract and as the sending of some cigarettes to San Fernando, La Union, caused the surety no injury, said deviation will not relieve the surety from its liability under the bond. The court thus ordered defendants Ricardo D. Lorenzana and the Visayan Surety & Insurance Corporation to pay, jointly and severally, to the plaintiff Pacific Tobacco Corporation the sum of P2,086.31, with legal interest from the date of the filing of the complaint, plus P500 as attorney's fees and costs. On the strength of the indemnity bond (Exhibit "2") executed by the third-party defendants Calixto D. Lorenzana, Jose M. Lorenzana and Benigno C. Gutierrez as counter-guarantors, they, together with Ricardo D. Lorenzana, were ordered to indemnify the Visayan Surety & Insurance Corporation for the amount which the latter would actually pay plaintiff in case defendant Ricardo D. Lorenzana should fail to make the payment himself; and another sum of P500 as attorney's fees.

After the motion filed by the surety for the reconsideration of said decision was denied, said defendant brought the matter to this Court on appeal ascribing to the lower Court the commission of several errors. But stripping them of unnecessaries and reducing the same to bare essentials, the only question at issue in the case at bar is whether the delivery by the company of its products to defendant Lorenzana in a place other than that mentioned in the agreement constitutes an alteration of said agreement that would release the surety from its liability under the bond.

It appears on record that cigarettes valued at P1,870 were transported to Ricardo Lorenzana, Mrs. Justo de Leon at San Fernando, Pampanga. Defendant surety tried to capitalize on this single act but it failed to present evidence that these goods were actually sold and distributed in said place. It would have been possible for the distributor to take a sojourn in that place and the company, knowing where he could be reached, sent the merchandise to him. Defendant Lorenzana also alleged in his answer that plaintiff allowed him to sell the latter's products even as far as the northern provinces but this defendant was, not able to substantiate such claim due to his failure to appear and testify to this, effect at the trial, despite the fact that he was duly represented by counsel. But even

granting *arguendo* that the merchandise thus delivered and presumably received at San Fernando, La Union, was actually sold and distributed therein, this may not be considered as a deviation from the terms of the agreement, for such widening of the territory to be covered by the agent or distributor was not prohibited by the agreement itself, nor does the record show that such expansion of the territory was due to instructions from the plaintiff. While it is true that the contract (Exhibit A) states that the distributor is willing to sell and distribute the products, of the company in Manila and Rizal, this specification serves more as a manifestation that Lorenzana entered into the agreement with the understanding that his sphere of activity would be for these places. But certainly nowhere in the same agreement appears a restriction against his acceptance of additional territories, if he so desired.

Appellant surety argues that the bond guarantees only the payment of cigarettes, cigars or other tobacco products that were delivered to and distributed by Lorenzana in Manila and Rizal and at no other place. To adopt this line of reasoning would be to harness a pliant argument to suit appellant's purpose. The agreement required the distributor to post a bond for P8.000, P3,000 of which bond shall answer for the faithful settlement of the account of the distributor with the Company". The bond put up by Lorenzana in the amount of P3,000, undertaken by the Visayan Surety & Insurance Corporation, therefore, was only to secure the prompt and faithful payment of the accounts of the distributor to the company. The mention of Manila and Rizal in said agreement was designed more as a declaration or identification of the places wherein the distributor was expressly authorized and assigned to sell the cigar, cigarettes and tobacco products of the plaintiff, which is no obstacle to the distributor's acceptance or taking *motu proprio* of additional territories in order to better fulfill his obligation to sell *monthly* for the Company not less than P20.000 worth of cigarettes and other tobacco products and could by no means alter his liability to turn over to the company payments therefor, and that is precisely his obligation secured by the bond. Appellant, maintaining that the alleged modification of the agreement released the surety from its liability, invokes the rule of *strictissimi juris* under which, it is claimed, surety bonds must be strictly construed and cannot be extended beyond their terms. Although We might acknowledge that a surety is a favorite of the law and his contract *strictissimi juris*, this rule has no bearing on the case at bar. Anyway, it commonly refers to an accommodation surety and should not be extended to favor a compensated surety, as is appellant in the instant case. The rationale of this doctrine is reasonable; an accommodation surety acts without motive of pecuniary gain and, hence, should be protected against unjust pecuniary impoverishment by imposing on the principal

duties akin to those of a fiduciary. This cannot be said of a compensated corporate surety which is a business association organized for the purpose of assuming classified risks in large numbers, for profit and on an impersonal basis, through the medium of standardized written contractual forms drawn by its own representatives with the primary aim of protecting its own interests (See Steam's The Law of Suretyship, 4th ed., 402-403). American courts in refusing to apply this rule on compensated sureties have expressed themselves in varying language. Sometimes it is said that a corporate compensated surety is not entitled to the benefit of the rule of *strictissimi juris* (U. S. vs. Gao, P. Pawling & Co. 297 F. 65) ; or that the contract is to be construed against the surety and in favor of the promisee (Consolidated Indem. & Ins. Co. vs. State, 184 Ark. 581, 43 S. W. [2d] 240) ; or that the contract is like one of insurance, hence one or the other of the above rules is to be applied (Lassetter vs. Backer, 26 Ariz. 224, 224 P. 810; Md. Cas. Co. vs. Dunlap, 68 F. [2d] 289), and it was even said:

> "The law does not have the same solicitude for corporations engaged in giving indemnity bonds for profit as it does lor individual surety who voluntarily undertakes to answer for the obligations of another. Although calling themselves sureties, such corporations are in fact insurers, and in determining their rights and liabilities the rules peculiar to suretyship do not apply" (Metropolitan Casualty Insurance Co. vs. United Brick & Tile Co. [19S4], 29 P. [2d] 771).

Even assuming, however, for the sake of argument that the delivery of the merchandise at a place other than that appearing in the contract constitutes an alteration of the same, is it a material deviation that would release the surety from its liability?

A material alteration of a contract is such a change in the terms of the agreement as either imposes some new obligation on the party promising or takes away some obligation already imposed. A change in the form of the contract which does not effect one or the other of these results is immaterial, and will not discharge the surety (Steam's The Law of Suretyship, 4th ed., p. 98). To be material an alteration must change the legal effect of the original contract (New Amsterdam Casualty Co. vs. W: T. Taylor Const. Co., 12 F. [2d] 972).

It cannot be denied that the obligation of the principal remained the same—to settle his accounts to the company at the specified time. The addition or diminution of the territories covered by his previous assignment will not alter or affect that duty to make payments on time. Apart from the fact that the alteration, in the instant case, if there was airy, is not

material as to relieve the surety from its liability under the bond, there is not even an iota of proof that such deviation caused the surety any loss or injury or that such delivery caused the distributor's failure to pay his accounts. The weight of authority is to the effect that:

> A corporation engaged in the business of suretyship for profit cannot successfully defend a suit merely by showing a change in the contract, whether beneficial or otherwise, as is the rule in ordinary suretyship, but must prove that the change is material and prejudicial (City of Philadelphia vs. Kay., 286 Pa. 345; 109 Ait. 689).
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> It is well-settled that the rule of *strictissnni juris*, ordinarily applied in relief of an individual surety, is not applied in case of compensated sureties; and that where a bonding company, for a monetary consideration, has insured against failure of performance of a contract, it must show that it has suffered some injury by reason of departure from the strict terms of the contract, before it can for that reason be discharged from its liability (Piekens County vs. National Surety Co. 13 F. [2d] 758 [C. C. A.] 4th, 1926).
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> A departure from the terms of tho contract will not have the effect of discharging a compensated surety unless it appears that such departure has resulted in injury, loss or prejudice to the surety (Chapman vs. Hoage, 296 U. S. 526).
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> It has been said that to allow compensated surety companies to collect and retain premiums for their services, graded according to the nature and extent of the risk, and then to repudiate their obligations on slight pretests which, have no relation to the risk, would, be moat unjust and immoral, and would be a perversion of the wise and just rules designed for the protection of voluntary sureties (M. H. Waller Realty Co. vs. American Surety Co., 60 Utah, 435).

Wherefore, the decision appealed from is hereby affirmed, "with copts against appellant. It is so ordered.

Paras, C. J., Padilla, Montemayor, Btmtista, Angelo, Labrador, Concepcion, Reyes, J, B. L., and *Endencia, JJ.*, concur.

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