

VISAYAN DISTRIBUTORS, INC., PLAINTIFF AND APPELLEE, VS. MARIANO R. FLORES, ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. L-3751. October 25, 1952

Ponente: PARAS, C.J.

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PARAS, C.J.:

On November 9, 1946, the plaintiff-appellee (Visayan Distributors, Inc.), herein to be referred to as appellee, and Mariano R. Flores (doing business under the name of Rizal Investment Corporation), herein to be referred to as Flores, and Teofilo Abeto (doing business under the name of Philippine Investment Co., Ltd), herein to be referred to as Abeto, entered into a contract whereby Abeto and Flores bound themselves to deliver on November 18, 1946, to the appellee at the port of Romblon on board the vessel to be supplied by the appellee 2,000 long tons of copra, to be paid by the appellee at \$103.50 per ton f. o. b. appellee's vessel at Romblon. The contract provided that the appellee, upon satisfactory inspection of the copra, would advance to Abeto and Flores the sum of P10,000 for initial weighing and checking expenses, plus another P10,000 on the first day of loading. The contract also provided that the appellee would furnish Abeto and Flores with 15,000 empty sacks to facilitate the handling, weighing and loading of copra. The purchase price was to be paid as follows:

"(a) 95 per cent of the total cost of copra to be paid upon presentation of the following: Commercial Invoice. On-Board Bills of Lading. Weight Certificate and/or Survey Report. 5 per cent upon acceptance of weight in American port.

"(e) The balance of invoice value payable by an irrevocable confirmed letter of credit with the China Banking Corporation in favor of the sellers."

The appellee, after the execution of the contract, advanced to Abeto and Flores first the sum of P10,000 and later the sum of P3,000.

Under date of November 12, 1946, a surety bond was executed by Abeto and Flores as principals, and by Rizal Surety and Insurance Co., (herein to be referred to as Surety), for the sum of P30,000, to secure the full and faithful performance of the contract of Abeto and Flores with the appellee.

With due notice to Abeto and Flores, the SS. PANAMAN was sent by the appellee to, and arrived at the port of Romblon on November 17, 1946, Abeto and Flores having been advised by the appellee that said steamer would be ready to load the copra on November 18, 1946. Abeto and Flores were, however, unable to deliver any amount of copra on said steamer with the result that the SS. PANAMAN left Romblon without cargo.

The appellee had previously sent to Abeto and Flores in Romblon 26,875 empty copra sacks of which 2,908 were used by the appellee for transporting copra to Cebu on the FS-156.

The appellee instituted in the Court of First Instance of Manila on December 14, 1946, an action against Abeto and Flores and the Surety for breach of contract. In its first amended complaint the appellee sought to recover (1) the sum of P13,000, representing advances; (2) P55,500, representing the value of empty sacks; (3) P150,000, as

damages, and (4) the sum of P4,064, deposited by the appellee with the Bureau of Customs in compliance with the rules and regulations in connection with the sale and delivery of the copra in question.

The Surety filed a cross-claim against Abeto and Flores, and a third-party complaint against Gregorio Gutierrez, in virtue of the indemnity agreement filed by the latter three in favor of the Surety.

After trial, the Court of First Instance of Manila rendered a decision the dispositive parts of which read as follows:

"In view of all the foregoing, judgment is hereby rendered sentencing defendant Teofilo Abeto, Mariano R. Flores, and the Rizal Surety & Insurance Co., Inc., to pay plaintiff, jointly and severally, the sum of P13,000 plus the further sum of P35,950 with interest on both amounts at the legal rate from the date of the filing of the complaint, as well as the further sum of P150,000 as damages, with costs of suit. The liability, however, of defendant Rizal Surety & Insurance Co., Inc., shall be limited to P30,000 only.

"The court, likewise, sentences defendants Abeto and Flores and third-party defendant Gregorio Gutierrez to reimburse, also jointly and severally, unto said defendant Rizal Surety & Insurance Co., Inc., whatever amount the latter may pay to plaintiff, pursuant to the foregoing judgment, with interest thereon at the rate of 12 percent per annum, plus the further sum equivalent to 15 per cent of said amount as and for attorney's fees."

From this decision Abeto and Flores as well as the Surety, have appealed, the first two having filed their own brief, and the Surety having filed a separate brief.

Abeto and Flores contend that they had the copra called for in their contract with the appellee on November 18, 1946, but that they refused to deliver the same on the ground that the appellee was insolvent and failed to guarantee the payment of the purchase price by a letter of credit called for in the contract,—a contention also availed of by the Surety. It is very significant, however, that Abeto and Flores had not made in their answer even the slightest hint that they had copra in the port of Romblon on November 18, 1946. Upon the other hand, they merely invoked the defense that the contract of November 9, 1946, was cancelled by another agreement made on November 22, 1946, calling for the delivery of only 500 tons of copra,, and that, at any rate, their failure to comply with the contract of November 9, 1946, was excused by force majeure (the abrogation of the copra trade agreement between the United States and the Philippines). Even in their letter to counsel for the appellee (Exhibit 1), Abeto and Flores absolutely failed to mention the alleged fact that they had the necessary quantity of copra on the date specified in their contract.

The conspicuous circumstance that the appellee's vessel SS. PANAMAN left the port of Romblon with its hold empty, without any written notice or advice from Abeto and Flores that they had the necessary copra which they would deliver only upon the payment of its purchase price in accordance with the terms of their contract, militates against the contention of Abeto and Flores and the Surety, that copra was available.

The evidence for Abeto and Flores tends to show that they, thru Ignacio Liso, contracted with copra suppliers for the delivery of some 2,000 tons to the port of Romblon upon the arrival of landing barges; that Liso merely paid the necessary deposit to the suppliers who thereupon signed the necessary contracts and the corresponding receipts for the advance payment; that said copra bought from various suppliers, which were not delivered to the appellee under their contract, were later sold to Escudero & Co., and the Nacoco. The fact, however, that none of the alleged contracts or receipts signed by the copra suppliers, and the invoices of Escudero & Co. and the Nacoco was presented in evidence during the trial, is a strong indication negating the alleged existence of copra on or about November 18, 1946.

The Surety relies upon the provision in the contract between the appellee and Abeto and Flores, to the effect that the bond "can be foreclosed if copra does not exist by the time Buyer's vessel is ready to load." This is complemented by the proposition that 159,834 kilos of copra were delivered by Abeto and Flores to the appellee

under their contract of sale. The Surety's position is evidently erroneous, if we bear in mind the fact that Abeto and Flores have not pretended that the said quantity of copra was a part of the sale under the contract of November 9, 1946. Indeed, in the receipt signed by Abeto and Flores for the partial payment of said 159,834 kilos of copra, it is expressly admitted that the quantity was without prejudice to their contract for 2,000 tons of copra, dated November 9, 1946. The Surety also supposes that the 159,834 kilos of copra delivered to the appellee had been paid by the latter in the total amount of P33,000, represented, first, by the sums of P10,000 and P3,000 advanced by the appellee after the execution of the contract of November 9, 1946, and, secondly, by the sum of P20,000 paid by the appellee upon loading said copra. This supposition is again at war with the theory of Abeto and Flores, who specifically admitted that said copra was in virtue of a separate deal and who, as a matter of fact, still hold the appellee liable for the unpaid balance of P13,000. Indeed, the alleged failure of the appellee to pay the balance of P13,000 is taken by Abeto and Flores as an evidence of appellee's insolvency which justified Abeto and Flores in refusing to deliver the copra called for in the contract of November 9, 1946.

The Surety maintains that the recital in the receipt signed by Abeto and Flores covering the partial payment of 159,834 kilos of copra, to the effect that said quantity was without prejudice to 'their obligation to deliver 2,000 tons of copra, should be construed as meaning merely that Abeto and Flores did not waive the stipulation requiring the appellee to obtain a letter of credit. Such construction is not borne out by the terms of the receipt which protects expressly the rights of the appellee under the contract of November 9, 1946, and would be tenable only if the receipt provided that the delivery of 159,834 kilos of copra was without prejudice to the right of Abeto and Flores regarding the letter of credit called for in their contract.

The alleged absence of a letter of credit to secure the payment of the purchase price is invoked both by Abeto and Flores and by the Surety. In the first place, there is evidence to the effect that a letter of credit was available, although it was not actually assigned to Abeto and Flores, in the absence of copra ready for loading on the SS. PANAMAN. In the second place, the alleged fact, constituting a defense, was not pleaded by Abeto and Flores and the Surety, so much so that, when an attempt was made during the trial to prove the absence¹ of the letter of credit, counsel for the appellee objected, and the objection was sustained by the trial court; and although the Surety was allowed to amend its answer to plead the absence of the letter of credit as an excuse for the failure of Abeto and Flores to comply with their contract, no amended answer was filed by the Surety. The latter, however, contends that amendment was no longer necessary because its answer already alleged violation on the part of the appellee of its contract, and because counsel for the appellee admitted "that the letter of credit has not been established for lack of compliance by defendants, Mr. Mariano Flores and Mr. Teofilo Abeio and the companies they represent with the terms and conditions of the contract." The alleged violation by the appellee of its contract, set up as a defense in the Surety's answer, is a mere conclusion. As to the admission of counsel for the appellee, it may be stated that the same must be taken in conjunction with the previous testimony of Peter Cang Hocho, a witness for the appellee, that the letter of credit was available, though not assigned to Abeto and Flores.

Moreover, it appears that under the terms of the contract of November 9, 1946, it is only the balance of the invoice value which should be payable by an irrevocable letter of credit, and the contract called for payment of 95 per cent of the total purchase price upon presentation of the commercial invoice, on board bills of lading, wage certificate and/or survey report, and 5 per cent upon acceptance of weight in American port. Said balance of the invoice value appears to be merely 5 per cent of the contract price, and the same could not of course be accurately determined before the quantity of copra to be loaded on November 18, 1946, was known. At any rate, Abeto and Flores admit in their brief (p. 14) that the contract did not obligate the appellee to secure the payment of the purchase price.

Abeto and Flores, on the other hand, contend that they were excused from delivering copra on November 18,

1946, because the appellee was insolvent, in that part of the purchase price of the 159,834 kilos of copra delivered to the appellee remained unpaid, reliance being placed on articles 1466 and 1467 of the old Civil Code. The contention is untenable, it appearing that there is no conclusive proof showing that Abeto and Flores, in definite terms, had warned the appellee that they would not deliver the copra called for in their contract until they were sure of being paid in accordance with said contract. Moreover, even assuming that the appellee still owed Abeto and Flores something upon account of the 159,834 kilos of copra delivered before November 18, 1946, said fact is not a positive evidence of insolvency,[1] not to mention the circumstance that the contract is essentially a cash transaction, 95 per cent of the purchase price being required to, be paid in cash and only 5 per cent by an irrevocable letter of credit. Of course, the appellee was not to be expected to tender payment before the presentation of the documents called for in the contract, namely, commercial invoice, on board bills of lading, and wage certificate and/or survey report.

The Surety also claims that it "was released from liability under its bond because Abeto and Flores and the appellee novated their contract of November 9, 1946, without the consent of the Surety. In the main, the Surety alleges that the appellee advanced P10,000 to Abeto and Flores before the inspection of copra, and thereafter made another advance payment of P3,000, in addition to the fact that the manner of payment was changed from a letter of credit to cash, and that 26,875 empty copra sacks were delivered to Abeto and Flores instead of only 15,000 as stipulated in the contract. With reference to the payment of P10,000, it appears that the same was made with the knowledge of the Surety, as shown by Exhibit A which contains a recital added in the handwriting of Andres U. Cang, Treasurer and General Manager of the appellee, worded as follows:

"N. B.

With due agreement of Rizal Investment Corp., it is agreed that upon delivery of thirty thousand pesos (P30,000) BOND, the P10,000 cash will be delivered to Mr. M. Flores of the Rizal Investment Corp.

(Sgd.) "A. U. C."

It is noteworthy that a duplicate copy of Exhibit A (Exhibit D-1), attached to the bond Exhibit D and referred to therein as forming part thereof, contains said recital and bears the dry seal of the Surety, initialed by one of its officials.

As to the advance payment of P3,000, suffice it to state that said payment could not adversely affect the position of the Surety or render the obligation more onerous, and therefore could not have the effect of releasing the bond (*Bank of the Philippine Islands vs. Albaladejo y Cia.*, 53 Phil., 141; *Bank of the Philippine Islands vs. Gooch and Redfern*, 45 Phil., 514).

In respect of the 26,875 empty sacks, it may be pointed out that although the contract bound the appellee to furnish Abeto and Flores with only 15,000 sacks, the excess could likewise have no adverse effect insofar as the Surety was concerned, it appearing that the Surety is not being charged with the value of such excess intended to be used by the appellee for any proper purpose. Indeed, the liability of the Surety under the bond is limited to P30,000, easily covered by the first advance payment of P10,000 and the value of 15,000 empty copra sacks, at the proven price of P1.50 per sack.

The allegation that the manner of payment of the purchase price was altered, is patently without merit, since, as already hereinbefore noted, the payment under the contract of November 9, 1946, was essentially in cash, and the letter of credit could not be assigned to Abeto and Flores without first determining the amount of copra to be loaded on the appellee's vessel on November 18, 1946.

As to the amount of damages awarded by the lower court, there seems to be no room for controversy. The sum of

P150,000 has been positively established by the testimony of Peter Gang Hocho, as profits which the appellee lost as a result of the breach of contract on the part of Abeto and Flores. The evidence for the appellee to the effect that there was already a contract of sale for the entire amount of copra which Abeto and Flores covenanted to deliver to the appellee under the contract of November 9, 1946, which would give the appellee such profits, remains uncontradicted in the record. On the other hand, the receipt by Abeto and Flores, thru their representatives Ignacio B. Lizo and Isaias Ruiz, of the 23,957 empty copra sacks, is conclusively shown by Exhibits I and E-2, in addition to the bills of lading covering the shipment of said sacks (Exhibits L and M) admitted by Abeto and Flores.

It is contended for Abeto and Flores that their liability for damages, if any, is limited to the sum of P30,000 fixed in the Surety bond. This contention is patently without merit, because while the bond was intended to secure the full and faithful performance by Abeto and Flores of their obligations under the contract of November 9, 1946, the amount of P30,000 specified in the bond did not limit the extent of the damages to be recovered by the appellee in case of breach on the part of Abeto and Flores. However, the liability of the Surety is limited to said amount.

Wherefore, the appealed judgment is affirmed, and it is so ordered with costs against the appellants.

Pablo, Bengzon, Padilla, Montemayor, Jugo, Bautista Angelo, and Labrador, JJ., concur.

[1] The insolvency referred to by the law may be before or after the sale, provided it is discovered after the perfection of the contract. It must be a judicially declared insolvency, or one inferred from such acts as petitioning for suspension of payments, or as a result of all his properties having been attached in a civil or criminal proceeding. Anything short of this will not be sufficient to exempt the vendor from making the delivery of the thing (Tolentino, Commentaries and Jurisprudence on the Civil Code, 1947, Vol. II, p. 862, citing Manresa, pp. 140-142.

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