

FELIPE AGUASIN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE, “CASA MANILA LUXURY LINER,” PLAINTIFF, VS. ANANIAS VELASQUEZ AND FELIPE VELASQUEZ, DOING BUSINESS UNDER THE FIRM NA...

G. R. No. L-3399. March 16, 1951

Ponente: TUASON, J.

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TUASON, J.:

This is an appeal from an order of execution on a bond.

By order of the court in a suit to recover money and the possession of two trucks, the sheriff seized the latter vehicles and turned them over to the plaintiff upon his filing of a bond for P10,000 couched in these words: "And whereas the plaintiff has commenced action in this court praying for the recovery of the possession of the above described property and has asked that a warrant be issued to the sheriff of Manila for the seizure of same, we, the principal and the undersigned sureties, jointly and severally bind ourselves in the sum of ten thousand pesos only (P10,000)—for the prosecution of the action, for the return of the property to the defendant, if the return thereof be adjudged, and for the payment to * * * of such sum as may in the cause be recovered against the plaintiff, and the costs of the action."

The plaintiff failed to appear when the case came up for trial, whereupon the defendant introduced evidence on his counterclaim and got a judgment "for P 6,010.30, with interest at the rate of six (6%) per centum per annum from the date of the filing of the counterclaim until the amount due has been fully paid, with costs against the plaintiff." The judgment was based on the findings "that the plaintiff ordered three trucks to be constructed by the defendant, in June 1947, in consideration of P10,200; that the construction of the trucks was completed on August 2, 1947; that out of the said sum of P10,200, the plaintiff was able to pay the defendant only the sum of P8,238.10, leaving a balance of P1,961.90 due to the defendant; that in August 1947, the plaintiff again ordered four trucks to be constructed by the defendant in consideration of P13,600; that the construction was duly completed and the plaintiff was again able to pay the defendant the amount of P11,551.60 only, leaving a balance of P2,048.40; and that due to the order for the seizure of personal property which was issued by the court on December 3, 1947, the defendant suffered damages in the sum of P2,000; and that the amount of money due to be paid by the plaintiff, including damages, is P 6,000."

No appeal having been taken from that judgment, execution was issued in due time against the plaintiff and, as the plaintiff turned out to be insolvent, the court, on motion of the execution creditor and against the objection of the surety, ordered "that a writ of execution issued against the Luzon Surety Co. Inc. for the amount of the judgment and costs."

Section 9 of Rule 62, entitled "Delivery of Personal Property," provides:

Judgment.—After a trial of the issues the court shall find in whom is the right of possession and the value of the

property and shall render judgment in the alternative for the delivery thereof to the party entitled to the same, or for the value in case delivery cannot be made, and also for such damages as either party may prove, and for costs.

By the terms of this Rule and of the bond, Luzon Surety Co., Inc. secured the return of the trucks, if their return be adjudged, and/or the payment of damages that might be occasioned by the seizure. (*Calo vs. Roldan*, 42 Official Gazette, No. 12, p. 3120.)[*] Since a replevin bond, it is pointed out, is simply to indemnify the defendant against any loss that he may suffer by being compelled to surrender the possession of the property pending the trial of the action, he can not recover on the bond as for a reconversion when he has failed to have the judgment entered for the return of the property. Nor is the surety liable for payment of the judgment or damages rendered against the plaintiff on a counterclaim or punitive damages for fraudulent or wrongful acts committed by the plaintiffs and unconnected with the defendant's deprivation of possession by the plaintiff. (46 Am. Jur., 85; *Apgar vs. Great American Indemnity Co.*, 18 P. [2nd], 46; 87 A. L. R. 291.) Indeed even where the judgment was that the defendant was entitled to the property, but no order was made requiring the plaintiff to return it or assessing damages in default of a return, it was held that the sureties were not liable for the value of the property; it was declared that until judgment was entered that the property should be restored, there could be no liability on the part of the sureties. (*Munding vs. Michael*, 10 O. C. C. 165; *Stearn*, *The Law on Suretyship* by Nathan P. Feinsinger, 4th ed., 370.) Numerous other decisions and authorities of the same tenor might be cited.

Applying the foregoing rule and principle to the case at bar, levy of execution on the bond was wrong. The defendant did not and does not question the right of the plaintiff to the possession of the trucks, and the decision contains no finding or judgment that the defendant is entitled to such possession, let alone redelivery of the trucks. It is true that part of the damages awarded the defendant is predicated on the seizure of the motor vehicles, but the judgment does not say why and how the seizure injured the defendant. Moreover, it seems odd that the defendant should be allowed damages for the seizure when there is not so much as an insinuation in the counterclaim or in the decision that the seizure was wrongful.

At any rate under the terms of the bond and according to uniform rulings on the subject, an order to return the property is a condition precedent to the recovery of damages from the surety. In other words, damages must result from the refusal or inability of the plaintiff to redeliver the property in pursuance of a judgment. Unless there is such adjudication there is no duty to return, and there being no duty to return there can be no damages for the nonrestitution of the property. Damages are accessory to and never independent of the obligation to return.

This brings up the other ground of objection—that there was no judgment to execute against the surety.

Section 10 of Rule 62 of the Rules of Court provides:

"Judgment to include recovery against sureties.—The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this rule, shall be claimed, ascertained, and granted under the same procedure as prescribed in section 20 of Rule 59."

Section 20 of Rule 59 referred to in section 10 of Rule 62 reads:

"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."

If the surety is to be bound by his undertaking, it is essential, according to the above-quoted rules, that the damages be awarded upon application and after proper hearing and included in the final judgment. As a corollary to these requirements, due notice to the plaintiff and his surety setting forth the facts showing his right to damages and the amount thereof under the bond is indispensable. This has to be so if the surety is not to be condemned or made to pay without due process of law. It is to be kept in mind that the surety in this case was not a party to the action and had no notice of or intervention in the trial. It seems elementary that before being condemned to pay, it was the elementary right of the surety to be heard and to be informed that the party seeking indemnity would hold it liable and was going to prove the grounds and extent of its liability. This case is different from those in which the surety, by law and/or by the terms of his contract, has promised to abide by the judgment against the principal and renounced the right to be sued or cited.

That the liability of the surety and the principal under the term of the bond is joint and several has nothing to do with the case. The objection is purely procedural. The materiality of the question of joint and several obligation does not come into play until both principal and surety have legally been adjudged liable by a lawful judgment entered after due hearing.

The order appealed from is reversed, with costs against the appellee.

Moran, C. J., Paras, Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo and Bautista Angelo, JJ., concur.

[1]76 Phil., 445.

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