

ANTONIO ZARAGOZA, PLAINTIFF-APPELLEE, VS. MARIA ANGELA FIDELINO AND/OR JOHN DOE, DEFENDANTS. MABINI INSURANCE & FIDELITY CO., INC., SURETY-APPELLANT.

G.R. No. L-29723. July 14, 1988

Ponente: NARVASA, J.

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NARVASA, J.:

Involved in this appeal is no more than the procedure to hold a surety liable upon a counter-bond posted by it for the release of an automobile seized from a defendant in a replevin action under a writ issued by the Trial Court at the plaintiff's instance.

The suit for the replevy of the car was brought by Antonio Zaragoza in the Court of First Instance at Quezon City[1] against Ma. Angela Fidelino and/or John Doe. His complaint alleged that the car had been sold to Fidelino but the latter had failed to pay the price in the manner stipulated in their agreement. The car was taken from Fidelino's possession by the sheriff on the strength of a writ of delivery,[2] but was promptly returned to her on orders of the Court when a surety bond for the car's release[3] was posted in her behalf by Mabini Insurance & Fidelity Co., Inc.

The action resulted in a judgment [4] for the plaintiff the dispositive part of which reads as follows:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff and against the defendant, ordering the latter to pay to the plaintiff the sum of P19,417.46, representing the balance of the purchase price of the car sold including interest thereon, collection charges, notarial fees and sheriff's fees and expenses in connection with the recovery of the vehicle sold; to pay liquidated damages in the amount of P6,471.84 equivalent to 33 1/3% of the balance outstanding; and to pay the costs of this suit."

Within the reglementary period for taking an appeal, Zaragoza moved for the amendment of the decision so as to include the surety, Mabini Insurance & Fidelity Co., Inc., as a party solidarity liable with the defendant for the payment of the sums awarded in the judgment.[5] Despite having been duly furnished with copies of the motion and the notice of hearing, neither Fidelino nor the surety company filed any opposition to the motion, nor did either of them appear at the hearing thereof.[6] The Trial Court deemed the motion meritorious and granted it. Its Order of April 16, 1968[7] decreed the following:

"WHEREFORE, the motion is hereby granted, and the dispositive portion of the decision in this case is hereby amended to read as follows:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff and against the defendant, ordering defendant Maria Angela Fidelino and her surety, the Mabini Insurance & Fidelity Co., Inc., to pay jointly and severally to the plaintiff the sum of P19,417.46, representing the balance of the purchase price of the car sold, including interests thereon, collection charges, notarial fees and sheriff's fees and expenses in connection with the recovery of the vehicle sold, liquidated damages in the amount of P6,471.84 equivalent to 33 1/3 % of the balance outstanding; and to pay the costs of this suit."

No motion for reconsideration was filed or appeal taken by the defendant Fidelino as regards either the original or the amended decision. It was the surety which presented a motion for reconsideration, and upon its denial, appealed to this Court.[8] It ascribes to the Court a quo, as might be expected, reversible error in amending the judgment in the manner just described. It argues that the Lower Court never acquired jurisdiction over it since no summons was ever served on it, its filing of a counter-bond not being equivalent to voluntary submission to the Court's jurisdiction; Zaragoza failed to make a proper application with notice before finality of the decision as provided by Section 20, Rule 57 of the Rules of Court; and when the order amending the judgment was promulgated, the judgment had already become final, the running of the period of appeal not having been suspended by Zaragoza's motion to amend decision,[9] and so, the Court no longer had authority to amend it on April 16, 1968.

The appellant surety posits, quite correctly, that the situation at bar is governed by Section 10, Rule 60, in relation to Section 20, Rule 57, of the Rules of Court. Section 10, Rule 60, provides as follows:

"SEC. 10. 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 57."

And Section 20, Rule 57 reads as follows:

"SEC. 20. Claim for damages on account of illegal attachment. — If the judgment on the action be in favor of the party against whom attachment was issued, he may recover, upon the bond given or deposit made by the attaching creditor, any 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 before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.

* * *

* * *

* * *." [10]

It would seem at first blush that Section 20, Rule 57 above quoted is not relevant. Its title and first sentence speak [1] of an illegal attachment, and [2] of a judgment "in favor of the party against whom (said illegal) attachment was issued." In the case at bar, the writ of delivery was not illegal; and the judgment was for, not against, the party in whose favor the writ of delivery was issued. In other words, it would appear that for Section 20, Rule 57 to apply to the instant action,¹ the judgment should have been "in favor of" defendant Fidelino (the party "against whom" the writ of delivery was issued). This however was not the case. The judgment was in fact against, NOT in favor of Fidelino.

It thus seems indeed that that first sentence of Section 20 precludes recovery of damages by a party against whom an attachment is issued and enforced if the judgment be adverse to him. This is not however correct. Although a party be adjudged liable to another, if it be established that the attachment issued at the latter's instance was wrongful and the former had suffered injury thereby, recovery for damages may be had by the party thus prejudiced by the wrongful attachment, even if the judgment be adverse to him. Slight reflection will show the validity of this proposition. For it is entirely possible for a plaintiff to have a meritorious cause of action against a defendant but have no proper ground for a preliminary attachment. In such a case, if the plaintiff nevertheless

applies for and somehow succeeds in obtaining an attachment, but is subsequently declared by final judgment as not entitled thereto, and the defendant shows that he has suffered damages by reason of the attachment, there can be no gainsaying that indemnification is justly due the latter. So has this Court already had occasion to rule, in *Baron v. David*, 51 Phil. 1, and *Javellana v. D.O. Plaza Enterprises*, 32 SCRA 261.

Be all this as it may, the second and third sentences of Section 20, Rule 57, in relation to Section 10, Rule 60, are unquestionably relevant to the matter of the surety's liability upon a counter-bond for the discharge of a writ of delivery in a replevin suit.[12] Under Section 10, Rule 60 (which makes reference "to either party upon any bond filed by the other in accordance with the provisions of this rule" [60]), the surety's liability for damages upon its counter-bond should "be claimed, ascertained, and granted under the same procedure as prescribed in section 20 of Rule 57;[13] and said section 20 pertinently decrees that "(s)uch damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment * * * (which means that the) application must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof." Stated otherwise, to hold a surety on a counter-bond liable, what is entailed is (1) the filing of an application therefor with the Court having jurisdiction of the action; (2) the presentation thereof before the judgment becomes executory (or before the trial or before appeal is perfected); (3) the statement in said application of the facts showing the applicant's right to damages and the amount thereof; (4) the giving of due notice of the application to the attaching creditor and his surety or sureties; and (5) the holding of a proper hearing at which the attaching creditor and the sureties may be heard on the application. These requisites apply not only in cases of seizure or delivery under Rule 60, but also in cases of preliminary injunctions under Rule 58,[14] and receiverships under Rule [15]

It should be stressed, however, that enforcement of a surety's liability on a counter-bond given for the release of property seized under a writ of preliminary attachment is governed, not by said Section 20, but by another specifically and specially dealing with the matter: Section 17 of Rule 57 which reads as follows:

"SEC. 17. When execution returned unsatisfied, recovery had upon bond.— If the execution be returned unsatisfied in whole or in part, the surety or sureties on any counter-bond given pursuant to the provisions of this rule to secure the payment of the judgment shall become charged on such counter-bond, and bound to pay to the judgment creditor upon demand, the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

The record shows that the appellant surety company bound itself "jointly and severally" with the defendant Fidelino "in the sum of PESOS FORTY EIGHT THOUSAND ONLY (P48,600.00), Philippine Currency, which is double the value of the property stated in the affidavit of the plaintiff, for the delivery thereof if such delivery is adjudged, or for the payment of such sum to him as may be recovered against the defendant and the costs of the action.[16]

This being so, the appellant surety's liability attached upon the promulgation of the verdict against Fidelino. All that was necessary to enforce the judgment against it was, as aforesaid, an application therefor with the Court, with due notice to the surety, and a proper hearing, i.e., that it be formally notified that it was in truth being made responsible for its co-principal's adjudicated prestation (in this case, the payment of the balance of the purchase price of the automobile which could no longer be found and therefore could not be ordered returned),[17] and an opportunity, at a hearing called for the purpose, to show to the Court why it should not be adjudged so responsible. A separate action was not necessary; it was in fact proscribed.[18] And again, the record shows substantial compliance with these basic requirements, obviously imposed in deference to due process.

Appellant surety undoubtedly received copy of Zaragoza's Motion to Amend Decision.[19] That motion made

clear its purpose — that the decision "be amended, or an appropriate order be issued, to include ** (the surety) as a party jointly and , severally liable with the defendant to the extent of the sums awarded in the decision to be paid to plaintiff" — as well as the basis thereof — the counter-bond filed by it by the explicit terms of which it bound itself "jointly and severally (with the defendant) * * * for the payment of such sum to him (plaintiff) as may be recovered against the defendant and the cost of the action." The motion contained, at the foot thereof, a "notice that on Saturday, March 23, 1968, at 8:30 a.m., or as soon thereafter as the matter may be heard, the * * * (plaintiff's counsel would) submit the foregoing motion for the consideration of the Court." And likewise indubitable is the fact that, as the Court a quo has observed, "neither ** * (Fidelino's) counsel nor the surety company filed any opposition to said motion, nor did they appear in the hearing of the motion on March 23, 1968 * * * (for which reason) the motion was deemed submitted for resolution.[20] The surety's omission to appear at the hearing despite notice of course constituted a waiver of the right to be heard on the matter.

The surety's theory that never having been served with summons, it never came under the Lower Court's jurisdiction, is untenable. The terms of the counter-bond voluntarily filed by it in defendant's behalf leave no doubt of its assent to be bound by the Court's adjudgment of the defendant's liability, i.e., its acceptance of the Court's jurisdiction. For in that counter-bond, it implicitly prayed for affirmative relief: the release of the seized car, in consideration of which it explicitly bound itself solidarity with said defendant to answer for the delivery of the car subject of the action "if such delivery is adjudged," i.e., commanded by the Court's judgment, or "for the payment of such sum as may be recovered against the defendant and the costs of the action," the reference to a possible future judgment against the defendant, and necessarily against itself, being certain and unmistakable. The filing of that bond was clearly an act of voluntary submission to the Court's authority, which is one of the modes for the acquisition of jurisdiction over a party.[21]

The same theory as that espoused by appellant surety in this case was, in substance, passed upon and declared to be without merit in a 1962 decision of this Court, *Dee v. Masloff*. [22] There, a surety on a counter-bond given to release property from receivership, also sought to avoid liability by asserting that it was not a party to the case, had never been made a party, and had not been notified of the trial. The Court overruled the contention, and upheld the propriety of the amendment of the judgment which ordered the appellant surety company to pay — to the extent of its bond and jointly and severally with defendant — the judgment obligation. The Court ruled that since such "amended judgment * * * (had been) rendered after the appellant surety company as party jointly and severally liable with the defendant * * * for the damages already awarded to the appellees, to which the appellant surety company filed its 'Opposition' and 'Rejoinder' to the 'Reply to Opposition' filed by the appellees, without putting in issue the reasonableness of the amount awarded for damages but confining itself to the defense in avoidance of liability on its bond that it was not a party to the case and never made a party therein and was not notified of the trial of the case, and that the appellees were guilty of laches, the requirement of hearing was fully satisfied or complied with; * * * (in any case,) appellant surety company never prayed for an opportunity to present evidence in its behalf."

The appellant surety's last argument that by the time the Court amended its decision, the decision had already become final, and therefore unalterable, is also untenable. The motion for amendment of the decision was unquestionably in the nature of a motion for reconsideration under Section 1 (c), Rule 37 of the Rules of Court which, having been filed within "the period for perfecting an appeal," had the effect of interrupting said period of appeal.[23]

WHEREFORE, judgment is hereby rendered AFFIRMING in toto the Decision of the Court a quo dated February 12, 1968, as amended by the Order of April 16, 1968. Costs against the appellant surety.

Cruz, Gancayco, Griño-Aquino and Medialdea, JJ., concur.

[1] Branch 5, the case being docketed as Civil Case No. Q-9979.

[2] Secs. 3 and 4, Rule 60, Rules of Court

[3] Sec. 5, Rule 60, provides that the bond be "in double the value of the property as stated in the plaintiff's affidavit (to guarantee) * * * the delivery of the property to the plaintiff, if such delivery be adjudged, and for the payment of such sum to him as may be recovered against the defendant"

[4] Rendered February 12, 1968: pp. 64 et seq. Rec. on Appeal (Rollo, p. 8).

[5] Rec. on Appeal, pp. 68-72.

[6] Order, April 16, 1968 (Rec. on App.: Rollo, p. 8).

[7] Pp. 74-76, Rec. on App.; italics supplied.

[8] The appeal was taken in accordance with Section 2, Rule 42 of the Rules of Court, prior to the effectivity of R.A. No. 5440, which required that appeals on pure questions of law be taken by petition for review on certiorari, as under Rule 45.

[9] Mabini says that Zaragoza received notice of the decision on March 7, 1968; the 30-day period of appeal was not interrupted by the motion to amend decision dated March 20, 1968 and therefore the judgment became final and executory on April 7, 1968 and hence could no longer be amended on April 16, 1968 when the Order of amendment was promulgated. (Pp. 96-97, Rec. on App.)

[10] Emphasis supplied.

[11] In relation to said Sec. 10, Rule 60.

[12] This is precisely the appellant surety's thesis, as already pointed out.

[13] The distinctions between a bond given as security for an attachment and a counter-bond for the discharge thereof, is treated of in some detail in *Leelin Marketing Corp. v. C & S Agro Dev. Co.*, 121 SCRA 725, 728-730.

[14] Sec. 9, Rule 58.

[15] Sec. 9, Rule 59; SEE *Material Distributors (Phil.) Inc. v. Miles Timber and Transport Corp., et al.*, 103 Phil. 162, upholding the order of the Trial Court which declared a surety liable upon its counter-bond for the release of property under receivership (which counter-bond took "the place of the properties released"), the order having "issued after due notice and hearing."

[16] Pp. 59-60 Rec. on App.: Rollo, p. 8.

[17] P. 67, Rec. on App.

[18] In *Del Rosario v. Nava*, 95 Phil. 637, 642-643, the Court declared inter alia that the rule "plainly calls for only one judgment for damages against the * * * (losing) party and his sureties; * * * (s)ince a judicial bondsman has no right to demand the exhaustion of the property of the principal debtor * * *, there is no justification for the entering of separate judgments against them; * * * (and) while the prevailing party may apply for an award of damages against the surety even after an award has been already attained against the principal, as ruled in *Visayan Surety and Insurance Co. 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." SEE, also, *Asian Surety & Insurance Co., Inc. v. Nolasco*, 79 SCRA 472; Cruz

v. Manila Surety & Fidelity Co., Inc., 92 Phil. 699; Japco v. City of Manila, 48 Phil. 851; 855; cf. Pajarito v. Señeris, 87 SCRA 275

[19] Pp. 69-73, Rec. on App.

[20] P. 74, Rec. on App.

[21] Sec. 23, Rule 14, Rules of Court; 21 C.J.S., 122, 123; SEE Feria, Civil Procedure, 1969 ed., pp. 19-20, and Moran, op. cit., Vol. 1, p. 55

[22] G.R. Nos. L-15836 and 16220, Sept. 29, 1962, 6 SCRA 98, citing Visayan Surety & Insurance Corp. v. Pascual, et al., 85 Phil. 779 (referring to cases of wrongfully issued writs of preliminary injunction, receivership, and seizure of personal property), and Material Distributors (Phil.) Inc. v. Miles Timber and Transport Corp., et al., 55 O.G. 1025, 103 Phil. 162, supra (relating to receivership)

[23] Sec. 3, Rule 41, Rules of Court

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