

LUNETA MOTOR COMPANY, PLAINTIFF AND APPELLE, VS. ANTONIO MENENDEZ AND CARLOS BARANDA, DEFENDANTS, LUZON SURETY CO. INC., DEFENDANT AND APPELLANT.*G. R. No. L-16880. April 30, 1963*

Ponente: REGALA, J.

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Appeal from an order of the Manila Court of First Instance directing the Luzon Surety Co., Inc. to pay the Luneta Motor Co. the amount of P3,098.00 plus 12% interest thereon from July 29, 1953 and another 20% thereof for attorney's fees, plus costs of suit.

It appears that Antonio Menendez obtained a loan from the Luneta Motor Co. in the amount of P6,200.00 with which to complete payment for a motor vehicle which the former had purchased from a certain Salud vda. de Vergara. A promissory note was executed to evidence the loan secured, by a chattel mortgage on the same motor vehicle. Of the said loan, only P3,012.00 and interest up to July 29, 1953 was paid by Menendez, and as he failed to settle the balance of P3,098.00, plus interest, in spite of repeated demands, the Luneta Motor Co., on October 6, 1953, instituted action for foreclosure of the chattel mortgage to satisfy the indebtedness and for replevin. Co-defendant of Menendez in this action was Carlos Baranda who was in actual possession of the car, claiming ownership thereof thru purchase prior to the execution of the chattel mortgage in favor of the plaintiff.

For the manual delivery of the motor car, pending trial, the plaintiff Luneta Motor Co. posted a bond of P8,000.00. Hence, the sheriff of Manila, on October 8, 1953, by order of the court, seized the said motor vehicle for delivery to the plaintiff. Whereupon, Baranda, to regain possession thereof, filed a counterbond of P8,000.00 subscribed by the Luzon Surety Co., Inc. to secure delivery of the car if adjudged, and to pay whatever amount may be awarded in favor of the plaintiff, plus costs of suit. Accordingly, the order of seizure was set aside by the court and the car was returned to Baranda.

The case came up for hearing, although, apparently, trial was had without notice to the surety. On October 21, 1955, judgment was rendered against defendants Menendess and Baranda, the dispositive part of which reads as follows:

"For the foregoing, the court orders the defendant Antonio Menendez to pay the plaintiff Luneta Motor Co., Inc. the sum of P3,098 00 plus 12% interest per annum from July 29, 1953, until the sum is fully paid, plus 20% of this amount as attorney's fees and plus costs. Defendants Antonio Menendez and Carlos S. Baranda are hereby ordered to deliver the car in question to the Sheriff of Manila who shall proceed to sell it as the law directs and the net proceeds of the sale shall be paid in payment of the sum adjudged to the plaintiff in this decision. If the proceeds of the sale is not enough or the car cannot be delivered to the Sheriff, the amount adjudged to the plaintiff in this decision or any unpaid balance, shall be satisfied by the levy on the counterbond put up by the defendant Carlos S. Baranda and subscribed by his bondsman, Luzon Surety Co., Inc. The said Luzon Surety Co., Inc. shall be notified and served a copy of this decision." (Italics supplied.)

Despite the last statement in the above quotation, the Luzon Surety was not furnished a copy of the decision.

Not satisfied with said decision, Baranda interposed an appeal to the Court of Appeals. On August 14, 1959, said court affirmed the decision in toto. Again, the record does not show that the surety was served a copy of the same.

Pending finality of the Court of Appeals decision (copy of which was furnished plaintiff on August 17, 1959, so that it was to become final on September 2, 1959), the plaintiff filed with the trial court a motion for leave to claim damages from the Luzon Surety Co. Against the surety's opposition, the claim was admitted by the trial court on August 29, 1959, but action thereon was held in abeyance until the record of the case was returned from the Appeals Court. On September 1, 1959, or a day before the decision was to be final and executory, the plaintiff filed with the Court of Appeals a motion to have the record of the case remanded to the trial court for proper action on the claim. The said court, however, allowed first the decision to become final and executory on September 2, before remanding the record of the case to the lower court. This was effected only on September 5, 1959.

On September 8, 1959, the Luzon Surety Co., Inc. moved for the reconsideration of the trial court's order of August 29, 1959 admitting plaintiff's claim for damages. The motion was denied, but movant's attorney was allowed to file his answer to plaintiff's claim for damages. Hearing was had after the decision in the main case had already become final and executory, and it was only several months thereafter, or on January 7, 1960, that an order for damages against the Luzon Surety Co. was issued. The said order is now the subject of the present appeal interposed by the said surety.

Appellant surety prays for the annulment of the order holding it liable for damages upon the bond subscribed by it for defendants on the grounds that (1) the plaintiff-appellee has not sufficiently complied with the procedure prescribed for the recovery of damages against sureties; and that (2) the Court of First Instance has no jurisdiction to pass upon appellee's claim against the said bond.

We find merit in the appeal.

The procedure for the enforcement of the surety's liability, under a bond for delivery of personal property is described in section 10, Rule 62, in connection with Section 20, Rule 59 of the Rules of Court, said provisions reading as follows:

"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 10, Rule 62)

"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 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 the 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. (Italics supplied.) (Section 20, Rule 59)

Under these provisions, in order to recover on a replevin bond, the following requisites must be complied with:

- Application for damages must be filed before trial or before entry of final judgment;
- Due notice must be given the other party and his surety; and

- There must be proper hearing and award of damages, if any, must be included in the final judgment. (Alliance Surety Co., Inc. vs. Piccio, et al., 105 Phil., 1192.)

There is no question that the plaintiff-appellee here, in claiming damages against the surety, has complied with the first two requisites above stated. But although there was a hearing on the claim, the award of damages was not included in the decision of the Court of Appeals, which became final and executory on September 2, 1959.

The purpose of the Rules in requiring notice and hearing before the entry of final judgment on a bond is to include in said judgment the award, if any, that the claimant may recover from both or either the principal and the surety.

"* * * 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, 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." (Alliance Insurance & Surety Co., Inc. vs. Piccio, supra.)

In other words, it is not only the filing of the claim before final judgment that is required. The claimant on the bond must see to it that the award against the surety be included in the final judgment. In *Joseph Abelow vs. de la Riva*, 105 Phil., 159, this Court has ruled that the surety may only be held liable if, before the judgment becomes final, an order against the surety is entered after a hearing with notice to the surety (See also *Cajefe, etc., et al. vs. Fernandez, etc., et al.*, 109 Phil., 743.)

The plaintiff-appellee could have very well obtained an award for damages in the main decision had it taken the right step in filing its claim against the surety. It was improper for said appellee to file its claim with the Court of First Instance after the case had been appealed to the Court of Appeals. At that stage, the trial court had no more jurisdiction over the case than to adopt conservatory measures to protect the rights of the parties. It has been settled in the case of *Rivera vs. Talavera*, G. R. Nos. L-16280 and L-16805, promulgated on May 30, 1961, that application for damages against the surety may not be made to the Court of First Instance when the case is pending with the appellate court, unless expressly allowed by the latter: and that without express permission from, or reference by, the appellate court, the Court of First Instance can not validly hear or determine such claims against the surety.

It is true that the appealed case was, on September 5, 1959, remanded by the Court of Appeals to the trial court, upon request of the plaintiff-appellee, for the purpose of holding a hearing on its claim against the Luzon Surety. But the hearing, which was held thereafter, can have no effect on the final decision of the Court of Appeals on the main case which became final and executory on September 2, 1959. The non-incorporation of the award for damages against the appellee Luzon Surety Co. in the main decision has been brought about by plaintiff-appellee's own mistake of filing its claim therefor with the Court of First Instance few days before the finality of the decision of the Court of Appeals.

In summary, the application for damages against the surety must be filed in the Court of First Instance before trial, or even after trial, but before judgment becomes executory; and if appeal is taken, then application must be made in the appellate court, but always before judgment of the latter becomes final and executory so that the award, if any, may be included in said judgment.

The plaintiff-appellee having failed to comply with the procedure above-summarized, the appealed order is declared null and void and the same is hereby set aside. Costs against the plaintiff-appellee.

Benqzon, C.J., Labrador, Concepcion, Paredes, and Makalintal, J.J., concur.

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