

**CEBU ENG HONG CO., PLAINTIFF AND APPELLEE, VS. STATE
COMMERCIAL CO. INC., AND LUZON SURETY CO. INC., DEFENDANTS,
LUZON SURETY CO. INC., DEFENDANT AND APPELLANT.**

G.R. No. L-27563. May 30, 1972

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

This appeal by the Luzon Surety Company, Inc., from the decision of the Court of First Instance of Cebu in its Civil Case No. R-5233 was originally instituted in the Court of Appeals but was subsequently certified to this Court, there being no question of fact involved.

On May 26, 1956 the Cebu Eng Hong Company and the State Commercial Company, Inc., entered into an agreement which reads as follows:

"THIS AGREEMENT entered into by and between the CEBU ENG HONG CO. of Cebu City, PARTY OF THE FIRST PART as Principal and the STATE COMMERCIAL CO., INC. of Zamboanga City, represented by its Manager, Mr. Manuel Chua, PARTY OF THE SECOND PART as one of their Dealers for tires, tubes and other goods, in Zamboanga City, have on this 26th day of May 1956 agreed as follows:

1. That the PARTY OF THE FIRST PART will ship tires, tubes and other goods to the PARTY OF THE SECOND PART on credit with a credit limit not to exceed THREE THOUSAND PESOS (P3,000.00) in a single month;

2. That the PARTY OF THE SECOND PART hereby promise and agree to pay for such goods shipped to them on credit within a period of 30 to 60 days and to put up a Surety Bond as security for such credit;

3. That the PARTY OF THE FIRST PART hereby promise and agree to give the PARTY OF THE SECOND PART the following discounts on tires and tubes:

(a) Five per cent (5%) discount on goods shipped by them to the PARTY OF THE SECOND PART if account is paid within 30 days from the date of shipment or date of Invoice;

(b) Three per cent (3%) discount if account is paid within 60 days from date of shipment or date of Invoice;

(c) No discount will be allowed if payment is made after 60 days;

4. That the PARTY OF THE FIRST PART agree to sell Triple-A batteries to the PARTY OF THE SECOND PART on a 30 days credit, provided the account is paid within 30 to 45 days from date of shipment or date of Invoice;

5. That the PARTY OF THE SECOND PART hereby promise and agree that accounts not paid within 60 days must bear interest at the rate of one per cent (1%) a month until paid.

IN WITNESS WHEREOF, we have hereunto affixed our signatures to this agreement this 26th day of May

1956."

To secure the payment of the goods to be shipped on credit under the terms of the foregoing agreement, the State Commercial Company, as principal, and the Luzon Surety Company, as surety, posted a bond for P3,000.00 in favor of the Cebu Eng Hong Company. The provision of the surety bond which is pertinent to this appeal states as follows:

"WHEREAS, the above bounden principal on day of May, 1956 entered into an Agreement with said CEBU ENG HONG CO., of Cebu City to fully and faithfully 'comply with the obligations specified in the above-stated document, otherwise, pay the damages sustained thereon; that the Surety shall be notified in writing within ten (10) days from moment of default, otherwise this undertaking is null and void.'" (Italics supplied)

On May 21, 1956 the State Commercial Company transmitted to the Cebu Eng Hong Company the surety bond, together with a purchase order, dated May 15, 1956, for six (6) tires with tubes. The latter acknowledged receipt thereof but expressed regret for its inability to serve the purchase order, there being no tires then in stock. It promised to fill the order as soon as it received the shipment which was expected to arrive sometime during the second half of June. On July 14, 1956, the Cebu Eng Hong Company eventually shipped to the State Commercial Company four (4) sets of tires with tubes under Invoice No. 1573 and twelve (12) sets of brake lining under Invoice No. 1574, with a total value of P1,614.28. The aforementioned invoices remained unpaid even after the lapse of sixty days from date of shipment.

On October 3, 1956 the Cebu Eng Hong Company, through its Assistant Manager, sent a letter to the State Commercial Company, as follows:

"We are pleased to enclose herewith our official receipts covering your recent payment together with the invoices fully paid.

In compliance with your request through our Mr. Julian Sy we are pleased to enclose herewith also the unpaid invoices which you claimed to have received no copies together with a statement of your account to date. You will note from the attached statement of account that these two invoices have long been overdue and, naturally, we would appreciate your kind cooperation towards settlement of this account at your earliest convenient time.

Thanking you in anticipation for this kind request, and assuring you of our earnest desire to be of service to you at all times, we are * * * ."

On December 31, 1956 the Cebu Eng Hong Company received a post-dated PNB check for P614.28 from the State Commercial Company as partial payment of its account, but when the check was presented for payment it was dishonored and returned to the payee. On January 24, 1957 the Cebu Eng Hong Company wrote the State Commercial Company informing the latter that the check had been dishonored and that demand for the settlement of its outstanding account had been made on the surety. On the same date it formally notified the surety company that the principal had defaulted in the payment of its account amounting to P1,614.28 and demanded that the surety remit a checks in said amount plus interest or make its principal settle said account immediately. A copy of the letter was furnished to the State Commercial Company. In reply, the Zamboanga agency of the surety company transmitted to the creditor the information it had received from the principal that the latter had already remitted a check for P614.28 as partial payment, and gave the assurance that it was "again inviting the attention of the above-named principal with the hope that they will see their way clear of settling the balance of P1,000.00 soon." When apprised that the check referred to had been returned by the PNB, the Zamboanga agency in a letter dated April 27, 1957 informed the Cebu Eng Hong Company that the matter had been referred to their principal with a demand for immediate payment. At the same time, however, the surety favorably indorsed a letter of the

principal requesting for time within which to settle the obligation. On April 29, 1957 the main office of the surety company, through its assistant secretary, wrote the Cebu Eng Hong Company requesting that it be allowed to thresh out the matter with its Zamboanga agency and the State Commercial Company so that "as soon as this is straightened out, we may take steps for the settlement of this account."

The aforesaid account having remained unsettled, the Cebu Eng Hong Company on September 23, 1957 filed in the Court of First Instance of Cebu a complaint against the State Commercial Company and the Luzon Surety Company for the collection of the sum of P1,614.28 with the corresponding interest. Both defendants filed their respective answers but only the Luzon Surety Company appeared at the trial and presented evidence.

On March 23, 1957 the trial court rendered its decision of which dispositive portion reads as follows:

"WHEREFORE, and in the light of all the foregoing, judgment is hereby rendered against the defendants State Commercial Co., Inc. and Luzon Surety Co., Inc., and in favor of the herein plaintiff -

- 1) Sentencing the herein defendants to pay to the plaintiff, jointly and severally, the sum of P1,614.28 with interest at the rate of 12% per annum from August 14, 1956 until complete payment thereof;
- 2) Sentencing them likewise to pay jointly and severally to the plaintiff the full amount of P500.00 as attorney's fees; and
- 3) To pay the costs."

The defendant Luzon Surety Company moved to reconsider but was turned down; hence, this appeal.

In seeking the reversal of the decision of the trial court, two grounds are relied upon by the appellant, namely: (1) that it was relieved from liability by reason of the failure of the appellee to give a written notice of default within 10 days from date thereof as required by the bond; and (2) that the account in question is not covered by the bond.

With respect to the first ground, the appellant claims that its principal, the State Commercial Company, defaulted in the payment of its account on September 12, 1956, sixty (60) days after the date of the two invoices and/or date of shipment of the goods, or at the latest, on October 3, 1956, when the appellee allegedly made the first demand for payment. It then argues that since no written notice of default, as required by the bond, was made within 10 days from either date, but only on January 24, 1957, the appellee is barred from recovering under the bond, the ten-day notice of default being a condition precedent to its liability.

The appellant's first ground is without merit. The written agreement between the appellee and the State Commercial Company does not expressly provide that the debtor will incur in default upon failure to pay its account within sixty (60) days from the date of the invoice or date of shipment of the goods without the necessity of demand. What is provided is that goods shipped to the State Commercial Company should be paid within a period of 30 to 60 days from the date of the invoice or date of shipment and that "accounts not paid within 60 days will bear interest at the rate of one per cent (1%) a month until paid." Consequently, demand is necessary to put the debtor in default, as provided in Article 1169 of the Civil Code.[1]

The letter dated October 3, 1956 of the appellee, however, was not a demand for payment but only a reminder that the payment for the "two invoices have (sic) long been overdue," as well as a request for the debtor's "kind cooperation towards settlement" of the account.[2]

Considering that the actual letter of demand was sent to the State Commercial Company on January 24, 1957 and that on the same day the surety was formally notified of the default, such notice was within the ten-day period presented in the surety bond. Consequently, the appellant is not discharged from liability.

The second ground relied upon by the appellant, is likewise devoid of merit as correctly found by the trial court, thus:

"The other contention of the defendant Luzon Surety Co., Inc. that the account in question is not covered by the surety bond allegedly because it was contracted under a purchase order, dated May 15, 1956 (Exhibit "C") which is three days ahead of the execution of the Surety Bond, dated May 18, 1956 (Exhibit "B"), and eleven days ahead of the written agreement, dated May 26, 1956 (Exhibit "A") is of no merit. It will be noted that the purchase order in question (Exhibit "C") was transmitted to the plaintiff company by defendant State Commercial Co., Inc. on the same date, May 21, 1956, and in the letter Exhibit "H", when the surety bond in question Exhibit "B" was also transmitted. While the date of the purchase order appears to be May 15, 1956, still the fact remains that the order was only received by the plaintiff company from the defendant State Commercial Co. Inc., on May 21, 1956, together with the very surety bond in question, and on top of that, there is the added consideration that the actual delivery of the plaintiff to the defendant State Commercial Co., Inc., of the tires with tubes, valued at P1,614.28 was made on July 14, 1956."

As regards the award of attorney's fees in the sum of P500.00, we are satisfied that it is fully justified, considering the refusal of the appellant to satisfy a valid claim.

WHEREFORE, the decision appealed from is hereby affirmed, with costs against the appellant.

Reyes, J. B. L., Acting C.J., Zaldivar, Fernando Teehankee, Barredo, Makasiar, and Antonio, JJ., concur.

Castro, J., did not take part.

Concepcion, C.J., on leave.

[1] Art. 1169. Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extra-judicially demands from them the fulfillment of their obligation.

However, the demand by the creditor shall not be necessary in order that delay may exist:

(1) When the obligation or the law expressly so declares; or

(2) When from the nature and the circumstances of the obligation it appears that the designation of the time when the thing is to be delivered or the service is to be rendered was a controlling motive for the establishment of the contract; or

(3) When demand would be useless, as when the obligor had rendered it beyond his power to perform.

* * * * *

[2] " * * *, no seria intimacion un simple recuerdo particular o un acto que no pueda calificarse de exigencia de pago, puesto que lo que desea elCodigo es que se demuestre haber acabado la tolerancia o benevolencia del acreedor (Valverde)." 2 Castan 528.

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