

LUZON SURETY COMPANY, INC., PETITIONER, VS. HON. JUDGE JOSE TEODORO, SR., ET AL., RESPONDENTS.

G. R. No. L-10710. May 29, 1957

Ponente: BENGZON, J.

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BENGZON, J.:

This is a petition for certiorari to annul the order of the respondent judge directing execution of the supersedeas bond filed by the Luzon Surety Company, in Civil Case No. 3450 of the Negros Occidental court of first instance.

In that case it appears, judgment "was rendered on September 5, 1955, in favor of therein plaintiff Rieardo Nolan against defendant Marino P. Rubin, rescinding the lease between the parties of Lot No. 1500 of the Cadastral Survey of Pontevedra, declaring plaintiff's right to re-possess it, and ordering defendant to pay him P5,000.00 plus 100 cavans of palay on or before the end of March 1956.

From such, decision defendant Marino P. Rubin took steps for an appeal; but before the approval thereof the plaintiff applied for immediate execution which the respondent judge authorized in his order dated October 13, 1955.

Upon being informed of the above order, the defendant Marino P. Rubin immediately filed a motion to stay the execution, attaching thereto a supersedeas bond, Annex C, subscribed by the Luzon Surety Co. as surety, the pertinent portions of which stipulated:

"Whereas, in the above-entitled case the Honorable Court of First Instance of Negros Occidental, Branch II, has ordered under date of October 13, 1955 the discretionary execution of the Decision in the above-entitled case rendered on September 5, 1955, notwithstanding the appeal taken by the defendant to the Court of Appeals; * * *

Whereas, the defendant desires the stay of the execution of the judgment ordered on October 13, 1955 by filing a sufficient supcrsedeas bond in accordance with the provisions of Sec. 2 of Rule 39 of the Rules of Court, in order to preserve the status quo of the parties pending the appeal to the Honorable Court of Appeals,

Now Therefore, in consideration of the premises and of such appeal by the defendant, I, Marino P. Rubin, as principal, and the LUZON SURETY COMPANY, INC., of Manila, thru its Bacolod Agency, at the City of Bacoiod, a corporation duly organized and existing under and by virtue of the laws of the Philippines, hereby undertakes and promise to pay the sum of six thousand pesos (P6,000.00) Philippine currency, to the plaintiff, to stay and prevent the immediate execution of the said judgment of the Court in the above-entitled case of September 5, 1955, and to pay all interests and costs down to the time of the final judgment of the action, if any."

When Rubin's motion was called for hearing on October 15, 1955 some negotiations took place between the contending attorneys, as a result of which an order was issued by respondent judge which as amended later (October 21,1955), read as follows:

"When said motion was called for hearing on October 15, 1955, Atty. Plaridel Katalbas, appeared for the defendant and Atty. Rieardo Nolan, for and in behalf of himself, as plaintiff. Both attorneys stated in open court that they have agreed on the suspension of the execution of the judgment until the end of March, 1956, to give the defendant an opportunity to harvest the palay from the land of the plaintiff; that in said month of March, 1956, or March 31, 1956, the said defendant would likewise pay the plaintiff the amount of P5,000.00 and deliver the 100 cavans of palay to said plaintiff or their corresponding value; that the supersedeas bond already filed by the defendant, and approved by the Court, to be declared cancelled and said defendant to withdraw the appeal interposed by him in this case, and, finally, that the plaintiff would ask the sheriff to cancel the writ of execution of the judgment which said sheriff is in the process of executing, provided that the defendant shall pay to the plaintiff the sum of P6,000.00 and deliver to him 100 cavanes of palay on or before March 31, 1956,"

Allegedly in pursuance of the above understanding Marino Rubin did not insist in the approval of his appeal papers, and complied with the decision by surrendering the land on February 20, 1956; but unfortunately at the end of March 1956 he failed to deliver to plaintiff P5,000.00 and twenty cavans of palay.

Whereupon plaintiff Nolan submitted on April 10, 1956 a motion praying for execution of the bond (Annex C). The Luzon Surety opposed the motion, calling the court's attention to the fact that no appeal had taken place as contemplated by the bond, and that anyway it had already been cancelled as per order of October 21, 1955 supra.

On May 16, 1956, the respondent judge ordered execution against the Luzon Surety; wherefore the latter instituted the present petition. We issued, at petitioner's request, a preliminary injunction restraining the enforcement of such order.

The responsibility of a surety never extends beyond the terms of the bond signed by it.[1] The bond here Annex C was avowedly to stay and prevent the immediate execution "in order to preserve the status quo of the parties pending the appeal to the Honorable Court of Appeals" and "in consideration of such appeal"; all "in accordance with the provisions of Sec. 2 of Rule 39 of the Rules of Court". Assuming that by the reference to such section it became a part of the bond, Annex C, then the Luzon Surety in this case bound itself "for the performance of the judgment or order appealed from in case it be affirmed wholly or in part".

Now, it seems to us that as there had been no appeal, and the judgment had never been affirmed by the appellate court, liability of the surety never arose. Insisting in the surety's liability, the respondents cite the case of *Dugas vs. New York Casualty Co.* 181 La. 322, 159 So. p. 572-575 wherein it was said in connection with a similar bond,

"the appellant may render the surety liable as well by abandoning the appeal, as by prosecuting the appeal and then failing to satisfy whatever judgment may be rendered against him."

From a reading of the case it appears that "abandoning the appeal" meant perfecting the appeal, and then in the appellate court, commit such neglect as to be considered an abandonment. The ruling is correct of course, because such abandonment will justify dismissal of the appeal, which according to our precedents "amounts to an affirmance of the judgment". (*Vacani vs. Llopis*, 12 Phil. 754-758.)

But that situation does not obtain here. Rubin never perfected his appeal; never "abandoned" it and therefore no affirmance of the judgment could be spelled out to impose liability on the surety. Besides, the Louisiana Code contained this expression "that the surety shall be liable in his place" meaning "that the surety shall be liable for whatever judgment the principal on the bond shall be liable for". This expression is found neither in the Luzon Surety's bond nor in sec. 2 of Rule 89.

From all the foregoing one may conclude, (1) because Rubin desisted from appealing with the consent of Nolan,

the consideration for the surety's promise failed and therefore the bond never became binding; and (2) supposing the bond had become binding, the surety's liability never arose because its obligation was to perform the judgment "in case it be affirmed wholly or in part" and such judgment was never affirmed, since it never reached the appellate court.[1]

"A contract of indemnity, and the obligation of a surety are strictly construed." (Asiatic Petroleum vs. De Pio, 46 Phil. 167; Standard Oil Co. vs. Cho Siong, 62 Phil. 612.)

The respondents seem to entertain the belief that because on March 30, 1956 Marino P. Rubin failed to pay plaintiff (Nolan) P5,000.00 and to complete delivery of 100 cavans the surety became liable. Nothing in the bond executed by the Luzon Surety would justify such belief. It does not mention the amounts, nor the date. The agreement of "both attorneys" at the hearing of October 15, 1955[2] did not operate to change the terms of the bond. It is true that the attorney of the surety was present at the hearing; but he denies having given his assent thereto and bearing in mind that a bond must be in writing[1] any idea of amendment must be rejected.

In fact as we read the order of October 21, 1955, hereinabove transcribed, we incline to the view that it cancelled the bond—as petitioner contends—because Rubin agreed to withdraw his appeal and promised to deliver on or before March 31, 1956, to plaintiff P5,000.00 and 100 cavans of palay. It says, both attorneys have agreed on the suspension of the execution; they also agreed that on March 31, 1956 the defendant would pay (money and palay); that the supersedeas bond already filed by defendant " (to) be declared cancelled" and said defendant to withdraw the appeal interposed etc.

The respondents argue that the order meant such cancellation and withdrawal shall take place only after Rubin shall have paid on March 31, 1956. That is not the tenor of the order." Besides it couldn't have been the idea to incorporate a surplusage after payment, both the bond and the appeal become functus officio, automatically set aside.

Consequently, for the reason that the Luzon Surety never became liable under the terms of its bond and/or said bond had been discharged by the order of October 21, 1955, it is our opinion that the order directing execution constituted a clear error amounting to excess of jurisdiction or grave abuse of discretion corrigible by certiorari.[2] Such order of execution is revoked, even as the preliminary injunction heretofore issued is made permanent. Costs against respondent Ricardo Nolan. So ordered.

Montemayor, Reyes, A. Baustista Angela, Labrador, Concepcion, Reyes, J. B. L., and Felix, JJ., concur.

[1] Art. 2055 New Civil Code. Socony vs. Milaflores 67 Phil. 304.

[1] The bond was filed pursuant to sec.

[2] Rule 39. Well the next section says: "The bond given under the preceding section may be executed on motion before the trial court after the case is remanded to it by the appellate court." * Described in the order of Oct. 21, 1955.

1 Art. 1403 New Civil Code.

2 See cases cited in Moran Comments, Vol. 2 (1952 Ed. pp. 154, 155. Encarnacion vs. Prov. Sheriff, 36 Off. Gaz. 26; Erana vs. Vcra, 74 Phil., 272, 1 Off. Gaz. (March 1944) 678, Francisco Special Civil Actions p. 74.

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