

URBANO JACA AND BONIFACIO JACA, PETITIONERS, VS. DAVAO LUMBER COMPANY AND HONORABLE MANASES REYES, AS JUDGE OF THE COURT OF FIRST INSTANCE OF DAVAO, RESPONDENTS.

G.R. No. L-25771. March 29, 1982

Ponente: FERNANDEZ, J.

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FERNANDEZ, J.:

This is a petition for certiorari with a prayer for a writ of preliminary injunction filed by Urbano Jaca and Bonifacio Jaca against the Davao Lumber Company and Honorable Manases Reyes as Judge of the Court of First Instance of Davao seeking the following relief:

"WHEREFORE, petitioners pray—

" 1. That a writ of Preliminary Injunction be immediately issued restraining the respondent Judge from carrying out or enforcing the Orders (Annexes "Z" and "FF") complained of pending the hearing of the merits of the instant petition;

"2. After due hearing, that [his Honorable Court annuls and sets aside the complained Orders (Annexes "Z" and "FF");

"Petitioners further pray for all other reliefs which are just and equitable in the premises.

"Davao City, Philippines, February 5, 1966."[1]

In November, 1963, Urbano Jaca and Bonifacio Jaca filed with the Court of First Instance of Davao a complaint for Accounting, Return of Price Differentials and Damages against the Davao Lumber Company. The case was docketed as Civil Case No. 4189.

The complaint alleges that the plaintiff Urbano Jaca has been, and still is, a licensee of a logging concession located in the City of Davao, and together with his co-plaintiff, Bonifacio Jaca, engaged in the logging business of producing timber and logs for export and/or domestic purposes; that the defendant is a business corporation with which plaintiffs had business dealings covering the sale and/or exportation of their logs; that sometime in 1954, the herein parties-litigants entered into an agreement whereby plaintiffs may secure, by way of advances, either cash or materials, foodstuffs, and/or equipment from the defendant corporation; that the payment of such account was to be made either in cash and/or by plaintiffs turning over all the logs that they produce in the aforesaid concession to the defendant, and in the latter case, the current prices, either export or domestic, of the logs at the time of their delivery was to be considered; that while the aforesaid business relationship between the parties was subsisting, defendant made plaintiff Urbano Jaca execute in its favor a chattel mortgage, a copy of which instrument, however, plaintiffs were never furnished but that as far as they can recollect the primary conditions of such chattel mortgage were that plaintiffs would turn over to defendant corporation all the logs they may produce from the aforesaid concession the same to be priced either as export or domestic and their value to be applied by defendant to, and be credited for, the account of plaintiffs indebtedness, and further that in case of need, plaintiffs

may secure, by way of advances, either cash, foodstuffs, materials or equipment, under an "open credit account"; that under the aforementioned "open credit account" relationship between the plaintiffs and defendant, orders were secured by plaintiffs, by way of advances, from the defendant, this to be paid by them with plaintiffs' production from their concession, liquidating those old accounts and keeping all accounts current; that in pursuance to the agreement, as aforesaid, plaintiff Urbano Jaca executed assignments of letters of credit in favor of the defendant, in order that the latter may be able to use, as defendant corporation did in fact use, the said letters of credit for bank negotiations of the former in the exportation of logs; that the plaintiffs and defendant had this business relationship, as aforementioned; from 1954 up to sometime in August, 1963; that during this whole period of time, the plaintiffs had been faithfully delivering all their log production to the defendant for export or domestic purposes; that before the filing of this complaint, the plaintiff made repeated demands on the defendant for a formal accounting of their business relationship from 1954 up to August, 1963, but that the defendant failed and refused, and still fails and refuses, to effect such formal accounting, asserting that it had no time as yet to examine into all the details of the accounting; that sometime on October 30, 1963, much to their surprise, plaintiffs received letters of demand from the defendant in which they were requested to pay their accounts in favor of defendant, which according to the latter had long been overdue; (Copies of such letters are hereto attached marked as Annexes "A" and "B", and made integral parts of this complaint) that plaintiffs are no longer indebted to the defendant, and as a matter of fact it is their belief that, if a formal accounting be made, there would still appear a claim in their favor in the amount of P250,000.00 more or less, representing the price differentials of logs which they delivered to the defendant from 1954 up to August, 1963; and that further, there was a deliberate fraud practiced by the defendant on them, especially in defendant's under grading and/or reclassification of logs delivered to it by plaintiffs; that further, there were many errors committed in the monthly statements submitted to the plaintiffs, arising from the fact that there were charges of cash, equipments, materials and foodstuffs in said statements never ordered and/or received by plaintiffs; and still further that the proceeds of the letter of credit were not fully applied and/or credited to the account of plaintiffs; that defendant has up to the present denied the plaintiffs the benefits of a formal accounting and inasmuch as the invoices, receipts, vouchers, requisition slips and other pertinent papers and document of their business transactions are in the possession of defendant, it is difficult for plaintiffs to ascertain with accuracy the ledger balance between the parties, unless a detailed examination of the matter is had; that plaintiffs have thereby been constrained to file this case in Court in order to compel defendant to have a formal accounting between them, and that it is the desire of plaintiffs that pending the formal hearing of this case, three commissioners, constituting accountants be judicially appointed for the purpose of examining all the books, pertinent papers and documents and all other data in relation with their business transaction; that in order to protect their interest and to litigate this case, the plaintiffs were compelled to secure and retain the services of attorneys, and that they have thereby suffered damages in the sum of Twenty Thousand Pesos (P20,000.00) by way of attorney's fees.[2]

In December, 1963, the Davao Lumber Company filed its Answer with Affirmative Defenses and Counterclaim.[3]

In its counterclaim, the Davao Lumber Company alleged that Plaintiffs Urbano Jaca and Bonifacio Jaca are the ones indebted to the defendant in the sum of P756,236.52 and P91,651.97, respectively; that on January 24, 1961, the plaintiff Urbano Jaca executed a chattel mortgage in favor of the defendant to secure the payment of any and all obligations contracted by him in favor of the defendant covering several chattels valued at P532,000.00; that said obligation of Urbano Jaca totalling P756,236.52 is overdue and unpaid despite repeated formal demands for settlement thereof made by defendant; that the action brought by the plaintiffs is purely baseless and malicious for which the plaintiffs should be required to pay defendant damages and attorney's fees amounting to at least P20,000.00.[4]

In June, 1965, the respondent Judge rendered a decision the dispositive portion of which reads:

"CONSIDERING THE FOREGOING, judgment is hereby rendered in favor of defendant and against the plaintiff, ordering that:

"1. The complaint for accounting, return of price differentials and damages filed by plaintiffs Urbano Jaca and Bonifacio Jaca versus defendant Davao Lumber Company is dismissed, as it is hereby dismissed;

"2. Ordering Urbano Jaca to pay defendant the amount of P756,236.52 with legal interest from the date of the filing of the counterclaim;

"3. Ordering plaintiff Bonifacio Jaca to pay defendant the amount of P91,651.00 with legal interest;

"4. Ordering that the chattel mortgage executed by Urbano Jaca in favor of defendant Exhibit "3", be foreclosed as it is hereby foreclosed;

"5. Ordering plaintiffs to pay jointly and severally P20,000.00 as attorney's fees in favor of defendant.

"6. With cost against plaintiffs.

"SO ORDERED.

"Given at Davao City, on this 11th day of June, 1965."[5]

In September, 1965, the Davao Lumber Company filed a motion for execution pending appeal on the following grounds:

"3. There are good reasons to authorize an order of execution pending appeal pursuant to Rule 39, Section 2 of the Rules of Court, which provides:

"SEC. 2. Execution pending appeal.— On motion of the prevailing party with notice to the adverse party the court may, in its discretion, order execution to issue before the expiration of the time to appeal, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the motion and the special order shall be included therein.

"(a) In this same civil case, the court issued an Order dated November 17, 1964 directing the plaintiffs 'to deliver to the receiver all the properties, chattels and equipment covered by the Chattel Mortgage, the delivery to be made within thirty (30) days,' but plaintiffs did not comply with said Order of November 17, 1964.

"(b) Defendant's counsel filed a 'Motion to Implement Order ordering Urbano Jaca to deliver Chattels to Receiver' dated July 28, 1965, but up to this date, plaintiffs have not complied with the said Order.

"(c) That there are various reports from the receiver, one of them date April 19, 1965, stating that the Receiver has not taken custody of the mortgaged chattels due to the refusal or inability of mortgagor Urbano Jaca to deliver the same to him.

"(d) Despite the long lapse of time from the Order of November 17, 1964, the court in its Order of September 1, 1965, directed said mortgagor Urbano Jaca to comply forthwith with the Order dated November 17, 1964 'fifteen (15) days upon receipt of this Order,' but up to this date there has been consistent refusal or failure to comply with said order of delivery.

"(2) Another good reason for execution pending appeal (Rule 39, Section 2) is the fact that plaintiff Urbana Jaca, the mortgagor in the deed of chattel mortgage dated January 24, 1961, has violated Article 319 of the Revised Penal Code, for he has sold some of the mortgaged properties to third persons, particularly, a wrecker, to Teodoro M. Alagon of Davao City on February 12, 1962 for P10,000.00. A copy of the letter-complaint addressed by defendant's counsel to the City Fiscal of Davao, dated February 5, 1964 is attached hereto and

made an integral part of this Motion as Annex "A".

"(3) Moreover, plaintiffs have not only failed to comply with the Order of the Honorable Court for the delivery of the properties under receivership to the Receiver (par. 3 of this Motion) and in fact has violated the Chattel Mortgage contract (Par. 4 of this Motion), but plaintiffs have no properties or assets with which to satisfy the judgment of this Honorable Court, which amounts to principal items of P756,326.52, P91,651.00 and P20,000.00, or a total of P867,887.52.

"(4) Obviously, the appeal interposed by the plaintiffs is to delay the enforcement and/or execution of the decision rendered by this Honorable Court, so that when the Decision correctly rendered by this Honorable Court should be affirmed on appeal, the judgment will become nugatory."[6]

The respondent judge granted the motion for execution pending appeal in an order dated November 29, 1965.[7]

Urbano Jaca and Bonifacio Jaca filed a motion for reconsideration of the order granting execution pending appeal in December, 1965,[8] but the same was denied in an order dated January 10, 1966.[9]

Petitioners Urbano Jaca and Bonifacio Jaca contend that the respondent Judge acted in excess of jurisdiction and/or with grave abuse of discretion in issuing the order granting execution pending appeal and the order denying the motion for reconsideration of the order granting execution pending appeal because said orders were issued in complete disregard of the applicable provisions of the Rules of Court, the laws, and the settled decisions of the Honorable Supreme Court.

Petitioners assail the order granting execution pending appeal and the order denying the motion for execution pending appeal on the following grounds:

"1) granting that execution pending appeal will issue in a foreclosure proceedings—

"the respondent Judge acted in excess of jurisdiction when he considered, over the objection of petitioners, in the motion for reconsideration of the Order granting premature execution (Annex "AA") the alleged sale by Florentina Perez, wife of petitioner, Urbano Jaca, of the two (2) Chevrolet trucks which- were not part of the mortgaged chattels to Atty. Raul Nengasca as a reason for execution pending appeal in his Order (Annex "FF") denying the motion for reconsideration, since this matter is not among the grounds stated in the motion for execution pending appeal (Annex "X"), neither has it been brought out during the hearing of said motion, nor is it one of the reasons stated in the Order of execution pending appeal (Annex "Z") which is the Order sought to be reconsidered and it is a cardinal rule in pleadings that a motion should state the grounds upon which it is based (Section 3, Rule 15 of the Rules of Court) and the order sought to be obtained and that no other grounds can be entertained, passed upon and considered by the court over the objection of the adverse party;

"2) the respondent Judge acted with grave abuse of discretion equivalent to lack of jurisdiction in finding that there exists special or good reasons for execution pending appeal because discretionary execution under Section 2, Rule 39 of the Rules of Court will only issue if there are superior circumstances demanding urgency which outweigh the injury or damage that the losing party may suffer upon securing a reversal of the judgment on appeal, considering the merits of his appeal (Moran, Com. on the Rules of Court Vol. 2, Part II, 1963 ed., p. 239 and p. 242, citing *Aguilos vs. Barrios*, et al., 72 Phil. 285; *Ledesma vs. Teodoro*, 52 O.G. 784; *De Leon, et al. vs. Soriano, et al.*, L-7684, Sept. 17, 1954; *City of Bacolod vs. Enriquez*, 55 O.G. p. 10545), and in the instant case, the reasons ultimately relied upon by the respondent Judge in granting execution pending appeal as stated in the Order (Annex "FF"), denying petitioner's motion for reconsideration of the Order granting execution, are not such superior circumstances demanding urgency of execution because:

(a) "the first reason that petitioner Urbano Jaca sold a wrecker to Teodoro M. Alagon is alleged to have been made yet on February 12, 1962, or about over one and a half years prior to the filing of the instant case on November 22, 1963, and such sale would not show a fraudulent design on the part of petitioner Urbano. Jaca to

defeat the judgment against him by disposing of the mortgaged chattels and thus would demand urgency of execution of the judgment;

(b) "the second reason regarding the sale of the two Chevrolet trucks (not alleged to be a part of the mortgaged chattels to the respondent Davao Lumber Company) to Atty. Raul Nengasca does not refer to the property of either of the petitioners, neither does it refer to a sale made by anyone of them; rather, it refers to a sale made by Florentina Perez (wife of petitioner Urbano Jaca), who is not a party to the action, regarding her own property;

(c) "the third and last reason that the Orders of the court directing petitioner Urbano Jaca to deliver all the mortgaged chattels to the receiver are valid and must be complied with could not even be considered any reason at all for immediate execution, as it does not supply at all any element of a superior circumstance requiring urgency of execution for there is, in fact, no legal connection whatsoever in the validity of such Orders and their compliance with the propriety of an immediate execution of the judgment pending appeal;

"furthermore, the appeal of petitioners are based on good grounds and could never be said to be intended merely for delay, and that the amount involved in the judgment is, huge;

"3. That there are, in fact, good reasons for not allowing execution pending appeal considering—

(1) that the amount involved in the judgment is huge;

(2) that the petitioners have challenged the Counterclaim, under which the judgment sought to be executed is rendered, for lack of cause of action;

(3) that the petitioners have challenged the chattel mortgage, under which the judgment of foreclosure has been rendered, as null and void ab initio and that no cause of action can arise therefrom;

(4) that the petitioners have challenged the Commissioner's Report to be null and void which is the primary, if not in fact the sole, evidence of said respondent on its Counterclaim and upon which the judgment sought to be executed is based;

"4) no execution pending appeal, in fact, can issue on foreclosure proceedings because the ninety-day period provided in Section 2, Rule 68 of the Rules of Court is a substantive right granted to the mortgagor-debtor which may not be omitted and that upon taking an appeal, said period is suspended and is not revived until the judgment is affirmed by the appellate court and the case returned to the trial court, and in the instant case, the respondent judge acted in excess of jurisdiction in allowing execution pending appeal when the Counterclaim under which the judgment sought to be executed is rendered, is for a foreclosure of chattel mortgage and that petitioners have taken an appeal to the judgment rendered against them . . .;

"5) granting arguendo, that the foreclosure proceedings is only against petitioner Urbano Jaca, as mortgagor, but the action against petitioner Bonifacio Jaca is for a collection of a sum of money, the respondent Judge acted with grave abuse of discretion equivalent to lack of jurisdiction in allowing execution pending appeal as against said petitioner Bonifacio Jaca because in so far as said petitioner is concerned there is no showing of any special or good reasons, in fact, there is no showing of any reason at all anywhere in the records of the case, including the Orders complained of, as a basis for which discretionary execution may be issued against him." [10]

The" private respondent maintains that the respondent judge acted in full compliance with the Rules of Court, the law and applicable decisions of this Honorable Court because:

"1) The present case is an action for accounting and not a foreclosure proceeding. Therefore, execution pending appeal can be issued pursuant to Sec. 2 of Rule 39, Rules of Court. This provision of the Rules of Court applies in the present case for there are good and valid reasons for the issuance of a writ of execution

pending appeal as stated in respondents Motion (Annex "X"). Moreover, petitioners have no properties or assets with which to satisfy the judgment of P867,887.52 plus other items stated in the Decision. The respondent Judge, therefore, was correct in ordering the issuance of a writ of execution (Annex "1"). Furthermore, to stay execution, petitioners should have filed a supersedeas bond in accordance with Sec. 3 of Rule 3.

"a) Respondent denies the erroneous and gratuitous conclusion of alleged 'excess of jurisdiction' as alleged in par. 44(a) of the Petition. It further denies the other misleading statements alleged therein, the truth of the matter being the grounds enumerated in the Motion for Execution Pending Appeal (Annex "X") and the reasons mentioned in the Order of (Annex "Z") granting said motion

"b) Respondent denies the erroneous conclusion that the respondent Judge acted with grave abuse of discretion, equivalent to lack of jurisdiction as alleged in par. 44(b) of the Petition, and states that the respondent Judge correctly acted in accordance with Sec. 2, Rule 39 of the Rules of Court. It further denies the misleading statement therein that the reasons ultimately relied upon by the respondent Judge are those stated in the Order (Annex "FF"), which is false, because the good and valid reasons relied upon by the respondent Judge are those stated in his Order (Annex "Z") granting the Motion for Execution Pending Appeal (Annex "X")

"(1) Respondent admits the allegation that petitioner Urbano Jaca sold a wrecker to Teodoro M. Alagon on February 12, 1962 for P10,000.00; and denies the statement that such sale would not show a fraudulent design on his part to defeat the judgment against him. It further alleges that it is one of the good and valid reasons for execution pending appeal (Rule 39, Sec. 2), because said petitioner, the mortgagor in the deed of chattel mortgage dated January 24, 1961, has violated Article 319 of the Revised Penal Code in selling the said mortgaged property;

"(2) The misleading allegations contained in sub-paragraphs 2 and 3 of par. 44(b) of the Petition are false, for they are matters that arose in the petitioners' Motion for Reconsideration of the Order granting execution pending appeal. Respondent further states that they are not the original and valid reasons given by the respondent Judge in his Order (Annex "Z");

"c) There are good reasons for allowing execution pending appeal considering that—

"(1) the amount involved in the judgment in favor of respondent Davao Lumber Company is P867.887.52 plus attorney's fees of P20,000.00, and the petitioners admitted at the hearing of the Motion for Execution Pending Appeal that they are insolvent (See Order, Annex "Z");

"(2) the petitioners have never challenged the Counterclaim of respondent Davao Lumber Company during the hearing on the merits;

"(3) the petitioners failed to present any evidence challenging the chattel mortgage under which' the counterclaim for foreclosure has been rendered;

"(4) the petitioners have not disproved the Commissioner's Report (Annex "K"). In fact, they failed to present their own evidence before the Commissioner which might tend to controvert the undisputed documentary evidence of respondent Davao Lumber Company;

"(5) execution pending appeal was properly issued in the present case, which is an ordinary civil action for accounting and not primarily a foreclosure of chattel mortgage. The respondent Judge, therefore, acted in full compliance with the law and jurisprudence in allowing execution pending appeal;

"(6) the judgment sought to be executed pending appeal sentences petitioner Urbano Jaca to pay respondent Davao Lumber Company the amount of P756,236.52 with legal interest; sentences petitioner Bonifacio Jaca to pay said respondent the amount of P91,651.00 with legal interest; orders the Chattel Mortgage executed by

Urbano Jaca in favor of said respondent foreclosed; orders petitioners to pay, jointly and severally, the amount of P20,000.00 as attorney's fees and costs; the said judgment was rendered after hearing on the merits of this action for accounting, which is not a proceeding for foreclosure of chattel mortgage; the provisions of the Rules of Court on foreclosure" proceeding invoked by petitioners do not find any application in the case at bar; the respondent Judge, therefore, in allowing execution pending appeal, precisely acted in full compliance with Sec. 2 of Rule 39;

"(7) as above pointed out, the judgment rendered in this case is joint and several, and consequently, the respondent Judge was correct in ordering the execution thereof as against both petitioners who have no properties or assets to satisfy the judgment in favor of respondent company." [11]

The basic issue in this case is whether or not there are good reasons justifying the issuance of an order granting premature execution.

Section 2, Rule 39 of the Rules of Court provides that on motion of the prevailing party with notice to the adverse party the court may, in its discretion, order execution to issue even before the expiration of the time to appeal, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the motion and the special order shall be included therein. The discretionary power of the Court of First Instance to grant or deny a motion for execution before the expiration of the time to appeal will not be interfered with by the appellate court, unless it be shown that there has been an abuse thereof or a subsequent change of conditions. [12]

As provided in Sec. 2, Rule 39 of the New Rules of Court, the existence of good reasons is what confers discretionary power on a court of first instance to issue a writ of execution pending appeal. [13] The reasons allowing execution must constitute superior circumstances demanding urgency which will outweigh the injury or damage should the losing party secure a reversal of the judgment on appeal. [14]

The decision in Civil Case No. 4189 requires petitioners to pay the enormous amount of P867,887.52. Clearly, premature execution of said decision will result in irreparable damage to petitioners as the collection of said amount may be enforced through the seizure of money and/or sale of properties used in the logging business of petitioners. In other words, execution of the decision in Civil Case No. 4189 may result in the termination of petitioner's business. Thus, any damage to the petitioners brought about by the premature execution of the decision will be justified only upon a finding that the appeal is being taken only for the purpose of delay and of rendering the judgment nugatory.

The facts of record show that the petitioner's appeal is not frivolous and not intended for delay. The findings of the respondent judge that the petitioners are indebted to the respondent Davao Lumber Company are based solely on the report submitted by Estanislao R. Lagman, the commissioner appointed by the court. This report was assailed by the petitioners as null and void in a motion to strike out the report from the records of the case. According to petitioners, the report is null and void because:

"... the so-called 'findings of the Commissioner in his report filed before this Honorable Court is the result of the exercise of certain highly irregular function not contemplated by the Rules of Court and, therefore deprived Plaintiffs' their constitutional right to their day in court.'

ARGUMENTS:

"1. That among other things, Section 3, Rule 33 of Rules of Court, provides:

'Section 3: ... Subject to the specifications and limitations stated in the order the commissioner has and shall exercise the power to regulate the proceedings in every hearing before him and to do all acts and take measures necessary or proper for the efficient performance of his duties under the order, . . . The trial or hearing before him shall proceed in all respect as though the same had been had before the Court.

"2. That on August 22, 1964, without the proper notice to their respective counsels, the Plaintiffs received the following letter from the Commissioner, pertinent portions of which reads-as follows: and, copy of which letter is attached hereto, forming an integral part in this Opposition, marked Annex "A"—

'In compliance to the above order, I am now to proceed, as ordered by the Court, to examine your books of accounts and other records for the year 1962 and 1963.

'I will be dropping at your office on August 25, 1964. Kindly have your records ready.

"3. That on August 25, 1964, the Commissioner went to Plaintiffs' office and asked to see the Books, and if possible to bring the same with him to his office; that, the plaintiffs' counsel refused to have said records examined in such manner;

"4. That the Counsel for the Plaintiffs reminded the Commissioner on many occasions that, the examination of books and records of Accounts should be done in a manner provided for under the Rules of Court and, that in pursuance of said mandate, a hearing and/or proceedings be conducted in the presence of all parties, their witnesses and, their counsels and, the hearing be conducted as/if it were taken before the court of justice, as said accounts being one controversial and contested in issues;

"5. That said commissioner refused to conduct said hearing in accordance to law"

"6. That report is void in law." [15]

In an order dated November 17, 1964, the respondent judge approved the commissioners' report in toto. As to the allegation of the plaintiffs that they were denied Their day in court, the respondent judge stated that "plaintiffs deliberately ignored to comply with the lawful order of the court directing them to present the pertinent books of accounts on the 12th day of October, 1964, at 2:00 P.M. Saia of Branch II, and therefore, their position that they are-denied their day in court is clearly untenable." [16]

The petitioners filed their motion for reconsideration of the order approving the commissioner's report in November, 1964, explaining that their failure to appear was due to the fact that they received the order requiring them to appear on October 12, 1964 already after said date when it was too late for them to comply with the order of appearance.[17] Notwithstanding the reasonable explanation of their absence in the hearing of October 12, 1964, the respondent judge denied the motion for reconsideration in an order dated December 4, 1964.[18]

It is obvious that the refusal of the respondent judge to order a hearing before the commissioner was in clear violation of Section 3, Rule 33, Revised Rules of Court, which specifically provides "... that the trial or hearing before a commissioner shall proceed in all respects as though the same had been had before the court." For this purpose Section 5 of the same Rule provides that "upon receipt of the order of reference, unless otherwise provided therein, the commissioner shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within ten (10) days after the date of reference Pertinent also is Section 10 of Rule 33 which provides that ". . . Objections to the report based upon grounds which were available to the parties during the proceedings before the commissioner, other than objections to the findings and conclusions therein set forth, shall not be considered by the court unless they were made before the commissioner."

The respondent judge's refusal to order the commissioner to conduct a hearing in accordance with Section 5, Rule 33 was fatal to the cause of the petitioners. Under Section 10 of Rule 33, objections to the report based upon grounds which were available to the parties during the proceedings before the commissioner other than objections to the findings and conclusions therein set forth shall not be considered by the court, unless they were made before the commissioner. Objections to the report which were available to the parties during the proceedings refer to objections to the admissibility or non-admissibility of evidence to be considered by the commissioner. Since no

meeting was held before the commissioner, petitioners never had the opportunity to object to the admissibility of evidence of cash, equipment, materials and foodstuff, which they alleged in their complaint, were never received by them. Also, they failed to question the failure of the commissioner to include in his examination the price quotations of the logs which, as claimed in the complaint, were under-classified and undergraded.

The records show that respondent Davao Lumber Company was able to prove its claim against petitioners because respondent judge refused to order the commissioner to hold a hearing as required by the rules. Thus, objections which petitioners may have against the claims of respondent were never considered. In the same manner, the claim of petitioner that respondent Davao Lumber Company is indebted to them was not also considered. The commissioner limited his examination to the following:

MR. URBANO JACA 'S ACCOUNTS:

"(a) From Feb. 17, 1961 to Oct. 31, 1962, Urbano Jaca purchased on account from the Merchandise Dept. of Davao Lumber Co. per statement attached, marked schedule 1 P190,010.41

"(b) From July 2, 1960 to Oct. 31, 1962, Urbano Jaca purchased on account from the Sawmill Dept. of Davao Lumber Co. per statement hereto attached, marked schedule 2 P 75,075.73

"(c) Old vales or cash advances prior to July 25, 1963 which Urbano Jaca replaced with four (4) BPI Checks Nos. D-236619 to D-236622 P50,000.00 each as alleged by DLC P200,000.00

"(d) From Nov. 3, 1962 to Aug. 30, 1963, Urbano Jaca purchased on accounts from the Sawmill Dept. various goods, per attached statement, marked schedule 3 P 57,459.27

"(e) From Nov. 3, 1962 to Aug. 30, 1963, Urbano Jaca purchased from Mdse. Dept. of DLC various goods, per attached statement,, marked schedule 4 P 68,857.07

"(f) From July 25, 1963 to Sept. 16, 1963 Urbano Jaca obtained cash advances or vales per attached statement, marked schedule 5 P164,844.45

"(g) Purchase of gasoline made by Urbano Jaca from Shell Co., under Davao Lumber Co.'s guaranty P 2,523.60

"Total amount due Davao Lumber Co. from Urbano Jaca P758,770.53"

"The amount of P2,523.60 due Shell Co. may be deducted from the total amount if Urbano Jaca can show proof that the account has been paid.

MR. BONIFACIO JACA 'S ACCOUNTS:

"(a) From Nov. 3, 1962 to Aug. 8, 1963 Bonifacio Jaca purchased on account various goods from the Sawmill Dept. of DLC, per attached statement, marked schedule 6 P 39,999.69

"(b) From Feb. 4, 1963 to Aug. 8, 1963 Bonifacio Jaca purchased on account from the Mdse. Dept. various goods, per attached statement marked schedule 7 P 48,319.08

"(c) Purchases of gasoline from Shell Co., guaranteed by Davao Lumber Co P 5,252.12

"(d) From Aug. 6, 1963 to Aug. 23, 1963, Bonifacio Jaca obtained cash advances or vales, per attached statement marked schedule 8 P 3,333.20

"Total amount due Davao Lumber Co. from Mr. Bonifacio Jaca P96,904.09." [19]

Clearly, the examination was only made on advances made to petitioners. There was not even an attempt to examine receipts of payments made by petitioners. It is hard to believe that the petitioners had not paid any amount for the advances made to them. In fact, the respondents stated in paragraph 4 of its answer. to the complaint that the plaintiffs stopped delivering logs in August, 1963,[20] indicating that from 1962 to 1963, the years included in the report of the commissioner, the petitioners had delivered logs to the Davao Lumber Company.

There is doubt that petitioners are really indebted to respondent Davao Lumber Company in such a big amount as found by the trial court. The appeal of the petitioner appears to be meritorious. The fear of respondent that the judgment of the trial court might not be satisfied if not executed at once is not well founded. If the judgment is executed now, and on appeal the same is reversed, although there are provisions for restitution, damages incurred by petitioners can not be fully compensated.[21]

The reasons stated in the order of execution pending appeal are not well founded.

The first reason stated in the order was the consistent refusal of petitioner to deliver the mortgaged chattels to the receiver.[22]

The records disclose that respondent Davao Lumber Company is not even entitled to the appointment of a receiver. It is an established rule that the applicant for receivership must have an actual and existing interest in the property for which a receiver is sought to be appointed.[23] The Davao Lumber Company's proof of interest in the property is the deed of chattel mortgage executed by Urbano Jaca in favor of the Davao Lumber Company on January 24, 1961. This deed of chattel mortgage is void because it provides that the security stated therein is for the payment of any and all obligations herein before contracted and which may hereafter be contracted by the Mortgagor in favor of the Mortgagee.[24] In the case of *Belgian Catholic Missionaries vs. Magallanes Press* this Court held:

"A mortgage that contains a stipulation in regard to future advances in the credit will take effect only from the date the same are made and not from the date of the mortgage (11 CJ, 448; 5 R.C.L. 420-421). . . . Where the statute provides that the parties to a chattel mortgage must make oath that the debt is a just debt, honestly due and owing from the mortgagor to the mortgagee, it is obvious that a valid mortgage cannot be made to secure a debt to be thereafter contracted. (11 CJ. 448)"[25]

The second reason stated was the fact that petitioner Urbano Jaca violated Article 319 of the Revised Penal Code by selling to a certain Teodoro Alagon some of the mortgaged properties.[26] As already discussed, the deed of chattel mortgage executed by Urbano Jaca in favor of the Davao Lumber Company is void. Hence, petitioner Urbano Jaca could not have violated Article 319 of the Revised Penal Code. Moreover, the respondent Davao Lumber Company has not successfully refuted the allegation of the petitioners that the sale of the wrecker to Teodoro Alagon, was exclusively negotiated by the lumber company's managing partner, Tian Se, and that the latter caused Urbano Jaca to sign the deed of sale because he was the owner of the wrecker.

The third reason stated is the fact that petitioners have no properties and assets to satisfy the judgment.[27] The basis of respondent judge's conclusion that petitioners do not have sufficient assets is an unsubstantiated allegation in the motion for execution pending appeal of respondent lumber company.[28] To rectify this omission, respondent lumber company, in its opposition to the motion for reconsideration of the order of execution pending appeal, tried to point out that the sale of two Chevrolet trucks by Urbano Jaca and their failure to file a counterbond indicate that they are without sufficient assets.[29] This later attempt to substantiate a baseless allegation in the motion for execution pending appeal is futile. The trucks alleged to be sold are not properties of petitioner Urbano Jaca. They are paraphernal properties of his wife, Florentino Perez, and the same

trucks were in fact sold by her. And even if said trucks were owned by Urbano Jaca, their sale to Atty. Raul Nengasca does not totally indicate insolvency. As has been repeatedly observed, petitioner Urbano Jaca is engaged in business. Sale of property used in business does not establish insolvency. The sale may have been prompted by the need for more modern equipment on account of obsolescence, or the need of cash to be directed to more profitable endeavor. The same reason applies to their failure to file a counterbond. The cash needed for the counterbond may be utilized for the continuance of the business or to increase business profits. In short, the acts of petitioners can not always be interpreted as signs of insolvency but may also indicate sound business judgment prompted by the need to have a liquid reserve of cash.

In its answer to the petition,[30] respondent lumber company contends that petitioners, having availed of the remedy of appeal are barred from filing a petition for certiorari. Although Section 1, Rule 65 of the Rules of Court provides that the special civil action of certiorari may only be invoked when "there is no appeal, nor any plain speedy and adequate remedy in the course of law," this rule is not without exception. The availability of the ordinary course of appeal does not constitute sufficient ground to prevent a party from making use of the extraordinary remedy of certiorari where the appeal is not an adequate remedy or equally beneficial, speedy and sufficient,[31] It is the inadequacy—not the mere absence—of all other legal remedies and the danger of failure of justice without the writ, that must usually determine the propriety of certiorari.

In the case at bar, the remedy of appeal is inadequate. It will not immediately relieve petitioners from the injurious effect of the order granting execution. The slow and inexpensive remedy of appeal will not prevent respondent judge from executing his decision requiring petitioners to pay the huge amount of P867,887.52. Moreover, to dismiss the petition on the ground that petitioner has already availed of the remedy of appeal will only aggravate the patent injustice already inflicted on petitioners.

The reasons stated in the order granting execution pending appeal are not sufficient.

WHEREFORE, the petition for writ of certiorari is granted and the orders granting execution pending appeal dated November 29, 1965 and the order denying the motion for reconsideration of the order granting execution pending appeal dated January 10, 1966 are nullified and set aside, without pronouncement as to costs.

SO ORDERED.

Makasiar, Guerrero and Melencio-Herrera, JJ., concur.

Teehankee (Chairman), J., took no part.

Plana, J., concurs in the result.

[1] Petition, Rollo, p. 29.

[2] Rollo, pp. 31-35.

[3] Ibid., pp. 38-43.

[4] Ibid., pp. 41-43.

[5] Ibid., pp. 103-104.

[6] Ibid., pp. 112-114.

- [7] Ibid., pp. 126-128.
- [8] Ibid., pp. 129-137.
- [9] Ibid., pp. 162-165.
- [10] Petition, Rollo, pp. 25-29.
- [11] Ibid., pp. 176-178.
- [12] Naredo, et al. vs. Yatco, et al., 80 Phil. 220.
- [13] Lusk v. Stevens, 64 Phil. 154.
- [14] City of Bacolod, et al. vs. Judge Enriquez, et al., 101 Phil. 644.
- [15] Rollo, pp. 71-72.
- [16] Rollo, p. 76.
- [17] Ibid., p. 79.
- [18] Ibid., p. 82.
- [19] Rollo, pp. 67-68.
- [20] Ibid., p. 39.
- [21] City of Bacolod vs. Enriquez, 101 Phil. 644.
- [22] Rollo, p. 127.
- [23] Vlarde vs. Eririquez, 78 Phil. 528.
- [24] Rollo, p 44
- [25] Belgian Catholic Missionaries vs. Magallanes Press, 49 Phil. 647; 655-656.
- [26] Rollo, p. 127.
- [27] Ibid.
- [28] Ibid., pp. 113-114.
- [29] Ibid., pp. 139-140.
- [30] Ibid., pp. 168-169.
- [31] Silvestre v. Torres, 57 Phil. 885.

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