

**RAFAEL PAGUIA, PETITIONER, VS. SIMPLICIO DEL ROSARIO, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND FELISA VIUDA DE M. F. CARDENAS, AS ADMINISTRATRIX OF THE ESTATE OF M. F...***G.R. No. L-22653. August 14, 1924*

Ponente: OSTRAND, J.

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This is a petition for a writ of mandamus to compel the respondent judge to order the sheriff of the City of Manila to deliver to the petitioner certain personal property of which said sheriff has taken possession under section 24 of the Insolvency Act (No. 1956). The case is now before the court upon a demurrer to the petition.

In substance, the petitioner sets forth that on or about October 6, 1920, one Silverio E. Diaz executed in favor of the petitioner a chattel mortgage for the sum of P5,000 on the personal property in question, described as follows in said chattel mortgage:

"All household goods, furniture, wearing apparel, and personal and private effects including jewelry, the property of the insured, whilst contained in the upper story of the two-story building constructed of stone below and wood above under galvanized iron roof, situated and forming No. 912, Calle R. Hidalgo, Quiapo, Manila, P. I., adjoining building of Class D construction on the West occupied as a Lodging House and Sari-Sari Shop, on the East by a Class D building occupied as dwelling, on the south space. Subject to Warranty B and Ordinary Short Period Scale attached hereto."

The chattel mortgage was duly registered in the office of the register of deeds in the City of Manila on July 21, 1921. The mortgaged property was subsequently, with the consent of the mortgagee, the herein petitioner, removed to the house at No. 1038 Rizal Avenue in the City of Manila. The mortgage fell due on October 6, 1922, and no part of the amount secured by it has been paid".

It is further alleged that on February 18, 1924, the mortgagor, Silverio E. Diaz, petitioned the Court of First Instance of Manila to be declared insolvent; that in pursuance of said petition the respondent Judge of the Court of First Instance of Manila declared him insolvent and ordered the sheriff of the City of Manila to take possession of the property of the insolvent pending the election of an assignee for the insolvent estate; that thereupon the sheriff of the City of Manila in compliance with said order took possession of said property, including the personal property mortgaged to the petitioner and that the said mortgaged property is now under the custody of Jorge B. Delgado, as deputy sheriff of the City of Manila.

The petitioner further sets forth that on March 24, 1924, he presented a motion in the insolvency case asking that the respondent judge order the sheriff of the City of Manila to deliver the mortgaged property to him in order that the aforesaid chattel mortgage might be foreclosed; that this motion was opposed by the respondent Felisa Viuda de M. F. Cardenas as administratrix of the estate of the deceased M. F. Cardenas, one of the creditors of the insolvent Silverio E. Diaz; that on April 26, 1924, the aforesaid judge denied the said motion on the ground that the mortgaged property was so imperfectly described in the chattel mortgage that it was impossible to identify it;

that by the denial of said motion the respondent judge is unlawfully interfering with the right of the petitioner to have the mortgaged property foreclosed; that up to the present time no assignee has been elected or appointed and that, therefore, the property in question remains in the custody of the deputy sheriff, Jorge B. Delgado, who is, and always has been, disposed to deliver the property to the petitioner as soon as ordered to do so by the respondent judge, and that, therefore, the petitioner prays that this court issue a writ of mandamus against the respondent judge ordering him to authorize and direct the deputy sheriff, Jorge B. Delgado, to deliver to the petitioner all of the property in said deputy sheriff's possession and covered by the aforesaid chattel mortgage.

To this petition, the respondent administratrix of the estate of M. F. Cardenas demurs on the ground that the alleged facts do not constitute a cause of action. The demurrer is well taken. In the first place, section 24 of the Insolvency Act makes it mandatory upon the court, in the order declaring a person insolvent, to direct the sheriff, or a receiver, as the case may be, to take possession of "all his (the insolvent's) real and personal property, estate and effects, except such as may be by law exempt from executions." And the same section also provides that the sheriff or receiver shall deliver to the assignee as soon as one is elected or appointed, "all the property, estate and belongings of the insolvent which have come into his possession."

As will be seen, under the terms of the statute, the sheriff is in duty bound to keep the property of the insolvent and to deliver it to the assignee and to no one else. It is true that the sheriff is subject to the orders of the court, but the court cannot undertake to determine the title to the property, or the right of possession thereof, until the creditors and the estate can be properly represented. This representation devolves upon the assignee and it follows that unless the insolvency proceedings are dismissed the judge who, under the mandatory provision of section 24 of the Insolvency Act directed the sheriff to seize the property of an insolvent, cannot very well order the delivery of the property to a claimant until an assignee has been elected and qualified.

In the second place, it is evident that the petitioner herein had another and adequate remedy by appeal and that, therefore, a writ of mandamus will not issue. In insolvency proceedings, an appeal lies from an order denying a claim for goods or chattels wrongfully withheld by the insolvent. (See subsec. 3 of sec. 82 in connection with subsec. 9 of sec. 48 of the Insolvency Act.)

The demurrer to the petition must accordingly be sustained, and unless within five days after notification hereof the petitioner shall so amend his petition as to show sufficient cause of action, an order absolute will be entered dismissing the same with costs. So ordered.

Johnson, Street, Malcolm, Villamor, and Romualdez, JJ., concur.

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