

HEIRS OF JOSE A. ARCHES, PLAINTIFFS-APPELLANTS, VS. MARIA B. VDA. DE DIAZ, DEFENDANT-APPELLEE.*G.R. No. L-27136. April 30, 1973*

Ponente: MAKALINTAL, ACTING CJ.

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This is an appeal from the order dated September 8, 1966 of the Court of First Instance of Capiz dismissing the complaint in its Civil Case No. V-2903 and from the order dated October 3, 1966 denying the motion for reconsideration.

On July 6, 1966 the heirs of Jose A. Arches filed a complaint against Maria B. Vda. de Diaz in the court a quo, alleging inter alia: that on January 21, 1954 the defendant executed in favor of the Sate Jose A. Arches a deed of sale with pacto de retro[*] over a parcel of land known as Lot No. 2706 of the Cadastral Survey of Capiz for and in consideration of P 12,500.00; that Jose A. Arches during his lifetime filed a petition on November 20, 1958 in Cadastral Case No. 6, L.R.C. Record No. 338 of the Court of First Instance of Capiz, to consolidate ownership over the lot; that the defendant opposed the petition, alleging among other things that the said deed of sale with pacto de retro did not express the true intention of the parties, which was merely to constitute a mortgage on the property as security for a loan; that after hearing the case on the merits the trial court, in its order dated March 8, 1960, denied the petition, holding in effect that the contract was an equitable mortgage; that Jose A. Arches appealed to the Court of Appeals, which on December 29, 1964 rendered judgment affirming the order of the trial court; that Jose A. Arches filed in this Court a petition for certiorari to review the decision of the appellate court, but in a resolution dated March 29, 1965, which became final and executory on May 29, 1965, this Court dismissed the petition on fee ground that the issues involved were factual; that in addition/to the sum of P123500.00, the consideration mentioned in the deed of sale a retro, Jose A. Arches spent PL543.70 in connection with the reconstitution of the title to Lot No. 2706 in the name of the vendor and in paying the real estate taxes on said lot for the years 1951 to 1960; that Jose A. Arches died on August 18, 1965, before he could fsle an action in court for the collection of the aforesaid sums from the defendant; that on May 31, 1966, the petitioners, as forced heirs of the deceased Jose A. Arches, demanded by registered letter from the defendant the payment of the sum of P12,500.00, the consideration mentioned in the sale a retro, aid the reimbursement of the sum of PL543.70; and that the defendant failed and refused to pay. They, therefore, prayed among other things that the defendant be ordered to pay them the aforementioned sums, plus damages.

Instead of answering the complaint the defendant moved to dismiss it on the ground that the first cause of action for the recovery of the sum of P12,5Q0.00 was barred by the statute of limitations and that the second cause of action for the reimbursement of the sum of PI,543.70, standing alone, was not within the jurisdiction of the trial court. The plaintiffs filed their opposition. The court overruled the plea of prescription, stating that the ten-year prescriptive period commenced on August 29, 1965, when the resolution of this Court dismissing the petition for certiorari filed by the late Jose A. Arches became final and executory, and not from January 21, 1955, the date the one-year period of repurchase expired, as claimed by the defendant. The defendant moved to reconsider, alleging

res judicata and multiplicity of suits as additional grounds for dismissal. In an order dated September 8, 1966, the trial court set aside its previous order and dismissed the complaint. Said the court:

"When an action is barred by a prior judgment, by res judicata and estoppel, such action in effect is devoid of cause. Failure to specifically invoke it in the motion to dismiss does not operate as waiver or abandonment thereof. This should be more so, inasmuch as the facts are apparent from the complaint itself.

"For it appears that when the late Jose A. Arches, father and predecessor in interest of plaintiffs herein, petitioned this Court on November 20, 1958, to consolidate in his name ownership and title over Lot 2706, Capiz Cadastre, by virtue of the alleged sale a retro executed by defendant herein in his favor on January 21, 1954, with reservation of vendor's right to repurchase in one year, said Jose A. Arches, clearly had two remedies, inconsistent though they certainly were - (a) to consolidate title and ownership and (b) to foreclose in the event the deed of sale a retro be declared one of equitable mortgage.

"Said Jose A. Arches elected to consolidate without alternatively opting to foreclose. When he opted to consolidate and prosecuted his option to a final determination he was thereby barred from pursuing the other alternative and inconsistent remedy of foreclosure of mortgage or collection of debt."

Having failed to obtain a reconsideration of the order of dismissal, the plaintiffs instituted the instant appeal.

We find the appeal well taken. In the first place, resjudicata as a ground to dismiss was waived by the appellee when she failed to include it in her motion for that purpose. Rule 15, Section 8, of the Rules of Court provides that "(A) motion attacking a pleading or proceeding shall include all objections then available, and all objections not so included shall be deemed waived." Secondly, the decision of the cadastral court, holding in effect that the sale with pacto de retro was an equitable mortgage and consequently dismissing the petition to consolidate ownership, did not constitute an adjudication of the right to foreclose the mortgage or to collect the indebtedness. In the case of *Correa vs. Mateo and Icasiano*,^[1] wherein an unrecorded pacto de retro sale was construed as an equitable mortgage, it was ruled that the plaintiff had the right "within sixty days after final judgment, for a failure to pay the amount due and owing him, to foreclose his mortgage in a proper proceeding and sell all or any part of the ten parcels of land to satisfy his debt." In effect this Court recognized the right of the plaintiff to enforce his lien in a separate proceeding notwithstanding the fact that he had failed to obtain judgment declaring him the sole and absolute owner of the parcels of land in question.

The law abhors injustice. It would be unjust in this case to allow the defendant to escape payment of her debt and, worse still, to rationalize such a result by her very claim that she is a debtor and not, as the plaintiff says, a vendor of property in favor of the latter. Strictly speaking, where the petition of the vendee in a pacto de retro sale is for a judicial order pursuant to Article 1607 of the Civil Code, so that consolidation of ownership by virtue of the failure of the vendor to redeem may be recorded in the Registry of Property, the right of action to foreclose the mortgage or to collect the indebtedness arises from the judgment of the court declaring the contract as an equitable mortgage. Although an alternative prayer to that effect may be made in the petition, the same cannot but be conditional, that is, only in the event such a declaration is made, contrary to the plaintiffs claim and the principal relief he seeks. His failure to make that alternative prayer, and the failure of the court to grant it in the judgment petition, should not be considered as a bar to collecting the indebtedness in a proper action for that purpose.

Wherefore, the orders appealed from are hereby reversed and the case remanded to the trial court for further proceedings. Costs against defendant-appellee.

Zaldivar, Fernando, Teehankee, Makasiar, Antonio, and Esguerra, JJ., concur,

Barredo, J, I concur in the result because of the first ground stated in the main opinion. I reserve my view as to the

second ground, since a pacto de retro is usually resorted to intentionally as a form of security, hence the creditor should be considered as knowing, ab initio that the transaction is a mortgage.

Ruiz Castro, J., took no part.

[*] As stipulated in the deed (Annex "A " of the complaint) the vendor reserved the right to repurchase the property within a period of one (1) y ear from the date of its execution.

[1] 55 Phil. 79.

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