

CLARA TAMBUNTING DE LEGARDA ET AL., PLAINTIFFS AND APPELLANTS, VS. VICTORIA DESBARATS MIALHE, SUBSTITUTING WILLIAM J. B. BURKE, DEFENDANT AND APPELLEE.

G. R. No. L-3435. April 28, 1951

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

This is an appeal from a judgment of the Court of First Instance of Manila rendered on August 5, 1949, dismissing the complaint and ordering plaintiff Clara Tambunting de Legarda to pay to the defendant the sum of P70,000, with interest thereon at the rate of 3 1/2 per cent per annum, from January 1, 1942, up to the date of full payment thereof, plus the sum of P2,500 as costs of suit and attorney's fees, within 120 days from the date of notice, and ordering the sale of the property mortgaged in accordance with law in the event of failure of said plaintiff to pay the amount of the judgment within the period above mentioned.

The background of this case, which originated during the Japanese occupation, is correctly stated in the judgment of the lower court, as follows:

"On June 3, 1944, plaintiffs filed a complaint against the original defendant William J. B. Burke, alleging defendant's unjustified refusal to accept payment in discharge of a mortgage indebtedness in his favor, and praying that the latter be ordered (1) to receive the sum of P75,920.83 deposited by plaintiff Clara Tambunting de Legarda, the mortgagor, on the same date with the clerk of this court in payment of the mortgage indebtedness of said plaintiff to defendant herein, (2) to execute the corresponding deed of release of mortgage, and (3) to pay damages in the sum of P1,000.

"The gist of defendant's answer dated the 19th of July, 1944, is that plaintiffs have no cause of action for the reason that at the instance of plaintiff Clara Tambunting de Legarda an agreement was had on May 26, 1944, whereunder defendant condoned the interests due and to become due on the mortgage indebtedness till the termination of the war, in consideration of the undertaking of said plaintiff (with the consent of her husband Vicente L. Legarda, the other plaintiff) to pay her obligation to defendant upon such termination of the war; and that the war then had not yet terminated.

"Upon the issues raised, after due hearing, decision was rendered by this Court through the then Judge, Honorable Jose Gutierrez David (now Appellate Court Justice), ordering defendant to accept the sum of P75,920.83 deposited by plaintiff Clara Tambunting de Legarda in the office of the clerk of court; to execute forthwith a deed of release of mortgage covering the property in question; to pay plaintiff the sum of P120.40 representing the cost of the certification of the check deposited in the court and consignment, together with the clerk's commission for the deposit of the money in court and the costs of the suit.

"Defendant, on or about January 14, 1945, presented a motion to set aside the foregoing decision and for a new trial. Before this Court could act on this motion, liberation came.

"On October 10, 1945, petition was filed on behalf of plaintiffs for the reconstitution of the record of this case.

"On October 23, 1945, defendant filed a supplemental answer alleging that the payment (by way of consignment in Japanese military notes made by plaintiff Clara Tambunting de Legarda in satisfaction of the mortgage obligation in question, which was originally contracted on the 17th of February, 1926, was null and void, and did not discharge the said obligation; and that, as plaintiffs well knew, defendant did not plead the foregoing facts in his original answer because had he done so "he and his attorneys would have been taken by the Japanese military police to Fort Santiago where they would have been tortured and most probably killed. The supplemental answer contains a counter-claim whereunder defendant sought the foreclosure of the real estate mortgage on the property in question. Basis of the counter-claim are the averments that the original mortgage executed by plaintiff Clara Tambunting de Legarda with the consent of her husband, plaintiff Vicente L. Legarda, was for the sum of P75,000," that said mortgage was renewed from time to time until on March 16, 1940, at plaintiff Clara Tambunting de Legarda's request, defendant entered into, another agreement with whereunder the latter granted said plaintiff a fourth extension of three years for the payment of the remaining balance of P70,000, and further reduced the interest rate from 9 per cent to 7 per cent per annum; that in the said agreement of March 16, 1940, defendant was granted an option to demand the payment of the principal and interests either in Philippine¹ currency or in English currency at the rate of two shillings (£.0.2/Od.) for one peso, Philippine currency; that in May, 1944, plaintiff Clara Tambunting de Legarda attempted to pay her obligation to defendant in Japanese military notes; that defendant, as plaintiffs well knew, was not disposed and did not wish to receive payment in worthless Japanese military notes; that to prevent his being reported to the Japanese military police in Fort Santiago, defendant agreed to condone the interests then due on the obligation from December 1, 1941, until the termination of the war, with the understanding that payment should not be effected until the end of the war; that plaintiff Clara Tambunting de Legarda violated her agreement with defendant, sought to force payment by depositing the amount—in Japanese military notes—in court, and thereafter filed the complaint herein; that notwithstanding demand made on October 16, 1945, plaintiff failed to pay the principal of P70,000, together with interests thereon at the rate of 7 per cent per annum which defendant claims upon the allegation that plaintiff having violated her agreement defendant was relieved from his undertaking to condone the interest.

"In the order of December 24, 1945, declaring that the record of this case was reconstituted for all legal purposes, the then Judge presiding this court, Honorable Jose Gutierrez David, denied the admission of the foregoing supplemental answer.

"Appeal was taken by defendant from the above order of the 24th of December 1945.

"The Honorable Supreme Court in its decision oh appeal (Clara Tambunting de Legarda and Vicente L. Legarda, plaintiffs-apellees vs. Antonio Carrascoso, Jr., substituting William J. B. Burke, defendant-appellant, GRL-831) declared that the supplemental answer heretofore adverted to should have been allowed and consequently directed that a new trial be had * * *.

"The record was returned to this court.

On March 31, 1949, a motion consisting of two parts was filed on behalf of defendant. The first prayed for the substitution of Victoria Desbarats Mialhe as party defendant for the reason that William J. B. Burke died in the City of Manila on July 23, 1946, and his claim against plaintiffs was adjudicated to the said Victoria Desbarats Mialhe as heir of the said William J. B. Burke. The second sought the admission of an amended supplemental answer. In the main the amended supplemental answer is a reproduction of the original supplemental answer filed on October 23, 1945, with the significant change that instead of demanding payment from plaintiffs in Philippine pesos for the discharge of the obligation of plaintiff Clara Tambunting de Legarda, defendant now seeks payment in pounds sterling, English currency. By order of this court of April 2, 1949, the petition for substitution was granted and the amended supplemental answer was admitted into the record of this case.

"The issues raised in the counterclaim in the amended supplemental answer were met in the plaintiffs' reply

dated April 4, 1949, which substantially denies the allegation that Burke was not disposed and did not wish to receive payment in Japanese military notes and refused payment to avoid being sported to the Japanese military police. The reply alleges that the demand made by the new defendant Victoria Desbarats Mialhe is unavailing because it was presented too late, that is, after the present case had long been sub judice and the obligation to be collected was already extinguished."

On August 5, 1949, the Court, presided over by Judge Conrado Sanchez, rendered judgment for the defendant as stated in the early part of this decision. From this judgment, plaintiffs appealed.

The principal question of fact which is presented for our determination in this appeal is whether the agreement had by the plaintiffs and William J. B. Burke during the Japanese occupation was that the rate of the annual interest of the indebtedness was merely reduced to 3 1/2 per cent, as claimed by plaintiffs, or whether said agreement was in the sense that the defendant condoned the interests then due and which might hereafter become due on said obligation with the understanding that plaintiff Clara Tambunting de Legarda would pay her obligation upon the termination of the war.

On this point, Judge Jose Gutierrez David, who originally decided this case, gave weight and credence to the evidence presented in behalf of the plaintiffs, disregarding entirely the evidence submitted in behalf of the defendant, and concluded that the alleged agreement was never entered into, as evidenced by the letters plaintiff Clara Tambunting de Legarda sent to defendant William J. B. Burke, not only tendering the payment of her obligation, but also giving notice that she will deposit same in court as required by law to protect her interests. The court also gave credence to the claim of the plaintiffs that defendant Burke agreed to reduce the rate of interest from 7 per cent to 3 1/2 per cent per annum from January 1, 1942, in the conference they had sometime in February or March, 1942. Judge Conrado Sanchez, who took over the court after the case was returned following the revocation by this court of the order denying the supplemental answer of the defendant, adopted in full said findings of fact of Judge Gutierrez David.

We have carefully examined the evidence, testimonial as well as documentary, submitted by both parties in this case with a view to an enlightened determination of this important question of fact which may be considered as the crux of this case, and we have not been able to see eye to eye on this matter with the two Judges who decided this case in the lower court. As a rule, the determination of a question of fact depends largely on the credibility of witnesses unless some documentary evidence is available, which clearly substantiates the issue and whose genuineness and probative value is not disputed. In this case, most of the evidence presented is testimonial, with only some corroborating letters, and on the basis of this evidence the preponderance in our opinion militates in favor of the defendant. And we say so because, on one hand, only Vicente Legarda testified for the plaintiffs, whereas Antonio Carrascoso and William J. B. Burke testified for the defendant. True, their testimony' is contradictory, but in our opinion the testimony of witnesses Carrascoso and Burke deserve more weight and credence. Of course these three witnesses are well known in our community and their character for probity has never been assailed, but we are more inclined to accept the view of Carrascoso and Burke because it is more consonant with fairness and the history of the transaction. It appears that the indebtedness in question was granted to Clara Tambunting de Legarda as far back as February 1926, with the obligation to pay it within five (5) years but which period has been extended from time to time with the gradual reduction of the rate of interest up to January 1942, when, as intimated by the plaintiff, a further reduction of the interest to 3 1/2 per cent per annum was granted by the defendant. During this long period of time the plaintiffs enjoyed the use of the money, with a continued reduction of the rate of interest, and defendant had la visited upon her his unusual liberality when he extended to her his help and relief whenever she so requested as the exigencies of her financial situation warranted. The life of this indebtedness would not have been so prolonged as to be overtaken by war were it not for the desire of the defendant to help the mortgagor in her hour of need, yet Vicente Legarda went out of his way

to propose that his wife Clara Tambunting be exempted from paying all the interests due from January 1, 1942, up to the termination of the war, which caused the defendant to utter some unkind words and to be resentful. Nevertheless, through the mediation of Attorney Carrascoso, plaintiffs at last became reasonable and agreed not to pay the obligation, until the termination of the war provided that all the interests due and which might become due be condoned. It is not strange nor unnatural that that should happen, considering the background of the loan. And there is nothing incredible in it considering the letter written by Burke to Clara Tambunting wherein the same understanding was reiterated (Exhibit "B"). Doctor Burke would not have stated in his letter that there was such an understanding if it was not true, considering the fact that he was so sick then and had practically one leg in the grave. We find no reason to discredit this statement of Burke which finds full corroboration in the testimony of Attorney Carrascoso.

Granting, however, for the sake of argument that such an agreement is not true and was set up by the defendant as a mere defense to justify his refusal to accept payment of the mortgage indebtedness in Japanese military notes, the next question to be determined is whether or not the consignment made by the plaintiffs during the Japanese time had the effect of relieving Clara Tambunting de Legarda from the payment of her mortgage obligation in contemplation of law.

There is no dispute that on June 3, 1944, Clara Tambunting de Legarda deposited in court the sum of P75,920.83 for the purpose of satisfying the full amount then due on her obligation. But it is likewise true that the money deposited was in certified check, representing Japanese Military notes, which notes defendant Burke refused to receive as payment a few days before the consignment.

The offer of payment or consignment to be effective must comply with some legal requirements. On this point our Civil Code contains the following provisions:

"A debt shall not be deemed paid unless there has been a complete delivery of the thing or a performance of the undertaking which constitute the subject-matter of the obligation. (Art. 1157, Civil Code.)

"The debtor of one thing cannot oblige his creditor to receive another, even though it should be of equal or greater value than that due.

"In obligations to do, one undertaking cannot be substituted by another against the will of the creditor. (Art. 1166, Civil Code.)

"Payment of debts of money shall be made in the specie stipulated and, should it not be possible to deliver such specie, in silver or gold coin legally current in the Philippines. (Art. 1170, Civil Code.)"

As formerly stated, in the mortgage renewal executed by plaintiffs and defendant on March 16, 1940, defendant was given the option to demand payment of the obligation either in Philippine currency, or in English currency. And this option has to be exercised "al tiempo del vencimiento de esta obligación," (Exhibit "5"), or on February 17, 1943.

But defendant claims that on that date he could not very well refuse to accept the worthless Japanese Military notes tendered to him, nor insist on the payment of English currency, for he then entertained the fear that, had he done so, he would have been reported to the Japanese authorities, taken to Fort Santiago, and killed. But could the defendant then insist on the payment of English currency even if he could do so without exposing himself to bodily peril under the stipulation just mentioned?

Our answer is in the negative. As we have stated before, the option to demand payment of the indebtedness has to be exercised upon maturity of the obligation, which is February 17, 1943. On this date, the only currency available is the Philippine currency, or the Japanese Military notes, because all other currencies, including the

English, were outlawed by a proclamation issued by the Japanese Imperial Commander on January 3, 1942. This means that the right of election ceased to exist on that date because it had become legally impossible. And this is so because in alternative obligations there is no right to choose undertakings that are impossible or illegal (Civil Code, art. 1132, par. 2). In other words, the obligation on the part of the debtor to pay the mortgage indebtedness has since then ceased to be alternative. (Articles 1134 & 1136(1) of the Civil Code.)

It appears, therefore, that the tender of payment made by the plaintiff in Japanese Military notes was a valid tender because it was the only currency permissible at the time, and the same was made in accordance with the agreement because payment in Japanese Military notes during the occupation is tantamount to payment in Philippine currency. (*Haw Pia vs. China Banking Corporation*, 45 Off. Gaz., Supp. [9] 229; *Phil. Trust vs. Araneta*, 46 Off. Gaz., 4254; *Allison D. Gibbs vs. Eulogio Rodriguez*, 47 Off. Gaz., 186.) But the consignment of the sum of P75,920.83 in Japanese currency made by the plaintiffs with the clerk of court does not have any legal effect because it was made in certified check, and a check "does not meet the requirements of a legal tender."

"In her sole assigned error the plaintiff contends that the Court erred in holding that the consignment of the check with the clerk of court was invalid and that it did not have the effect of paying her obligation. The court correctly held that the consignment was unavailing and that it did not produce any legal effect because the defendant did not accept it and it was not in the form of money or legal tender. Article 1170 of the Civil Code provides that payment of debts of money shall be made in the specie stipulated and, should it not be possible to deliver such specie, in silver or gold coin legally current; and provides further, that the delivery of promissory notes payable to order, or drafts or other commercial paper, shall produce the effects of payment only when realized or when, by the fault of the creditor, the privileges inherent in their negotiable character have been lost. Under this legal provision the defendant was not under a duty to accept the check because it is known that it does not constitute legal tender, and the consignment having been refused, it did not produce any legal effect and could not be considered as payment made by the plaintiff of the repurchase price. In *Belisario vs. Natividad* (1934, 60 Phil., 156) it was held that a creditor is not bound to accept a check in satisfaction of his demand because a check even if good when offered, does not meet the requirements of a legal tender" (*Villanueva vs. Santos*, 39 Off. Gaz., 681-682). (Italics supplied.)

"It is not necessary, in our opinion, to examine all the questions raised by appellant in his brief, in view of our conclusion on the question of the validity of the consignment made in court.

"Under article 1127 of the Civil Code, 'Consignment should not be efficacious unless made strictly in accordance with the provision governing payment.' And Article 1170 provides that, 'payment of debts of money shall be made in the specie stipulated and, should it not be possible to deliver such specie, in silver or gold coin which is legal-tender in the Philippines.' Under this provision, a consignment by check is not binding upon the creditor (*Meliciano vs. Natividad*, 60 Phil., 156), unless accepted by him (*Gutierrez vs. Carpio*, 53 Phil., 334, 336), and in the instant case, there has been no such acceptance. In one case it was held by this court that where a person entitled to make a repurchase of some property, deposits with the court, by way of consignment, a check for the re-purchase price, the vendee is not under a duty to accept the check and may refuse the consignment which cannot produce the effect of payment." (*Villanueva vs. Santos*, 39 Off. Gaz., March 8, 1941, p. 681).

"True that the consignment in the instant case was made by means of a manager's check. But a manager's check is, like an ordinary check, not legal-tender in the Philippines. Even treasury certificates are not legal-tender except for the payment of taxes and public debts, under sec. 1626 of Act No. 2711 as amended by Act No. 3058. In the United States, 'the general rule is that an offer of a bank check for the amount due is not a good tender and this is true even though the check is certified' (62 C. J., p. 668), except 'where no objection is made on the ground' (62 O. J., p. 668). Again it is said that, 'on the same principle a check is not good legal-tender as against an objection duly made, whether the check is certified or not' * * *" 40 Am. Jur., p. 764; *Quayson vs. Rius*, (47 Off. Gaz., 6125).

To recapitulate, we may state that, even if the claim of the plaintiff that Clara Tambunting de Legarda did not enter into any agreement with the defendant William J. B. Burke regarding payment of her obligation, subject to condonation of interests, after the termination of the war, is correct, and even if the tender of payment by Clara Tambunting of her obligation was made in Philippine currency in pursuance of the mortgage contract, yet the consignation made in Court can not have any legal effect for the simple reason that it was made by means of a certified check, which is not a legal tender within the meaning of the law. It is obvious, therefore, that such consignation did not have the effect of relieving her from her obligation to the defendant.

As regards the other issues, we find correct the findings and conclusions reached by the lower court on the matter.

Wherefore, the decision appealed from is hereby affirmed in toto, with costs against the appellants.

Paras, C. J., Pablo, Bengzon, Tucson, Montemayor and Jugo, JJ., concur.

Padilla, J., concurs in the result.

CONCURRING AND DISSENTING

FERIA, J.,

I concur in the result on the first ground; but I dissent from the decision as based on the second ground that "the consignation of the sum of P75,920.83, in Japanese currency made by the plaintiffs with the Clerk of Court does not have legal effect, because it was made in certified check, and a check does not meet the requirement of a legal tender," because I am of the opinion that consignation is different from tender, and the consignation of said certified check is sufficient compliance with the law. I reserved my right to write a dissenting opinion on the matter.

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