

VET BROS. & CO., INC., PLAINTIFF, VS. JOSE S. MOVIDO, ET AL., DEFENDANTS. JOSE S. MOVIDO, DEFENDANT AND APPELLEE, LUZON SURETY CO., INC., SURETY AND APPELLANT.

G.R. No. L-16662. January 31, 1962

Ponente: LABRADOR, J.

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LABRADOR, J.:

Appeal by the Luzon Surety Co., Inc., from an order dated August 24, 1957 of the Court of First Instance of Leyte, Hon. Lorenzo C. Garlitos, presiding, in Civil Case No. 850 of that court, entitled "Vet Bros & Co., Inc., plaintiff, versus Jose S. Movido, the Provincial Sheriff of Leyte and the Provincial Sheriff of Samar, defendants." The order issues a writ of execution against the P2,000 bond of the Luzon Surety Company in said case.

On June 13, 1951, the Vet Bros & Co., Inc. filed a complaint against Jose S. Movido, the Provincial Sheriff of Leyte and that of Samar, praying, among other things, for the issuance of a writ of preliminary injunction to enjoin said defendants from proceeding with the sale of plaintiff's properties. The properties of the plaintiff were caused to be sold to satisfy the judgment of the lower court in Civil Case No. 441, entitled "Jose S. Movido, plaintiff, vs. Vet Bros. & Co., Inc., defendant."

It is alleged in the complaint that the Provincial Sheriff of Samar, proceeded on May 14, 1951, with the attachment of certain properties of the plaintiff, giving notice thereof to him, notwithstanding the fact that Civil Case No. 441 was already terminated and closed, and the claim of defendant Movido had already been satisfied by the plaintiff.

Upon the filing of the complaint in said Civil Case No. 850, the writ of preliminary injunction was issued upon its presentation of a P2,000 bond of the Luzon Surety Co., Inc., wherein the surety company undertook to pay the defendants "all such damages as such party may sustain by reason of the Writ of Preliminary Injunction, if the Court finally decides that the Plaintiff is not entitled thereto." (p. 16, R. O. A.).

In his answer to the complaint, defendant Movido denies payment to him by the plaintiff of the unpaid balance of P6,000, plus interest, as per judgment of the court in said Civil Case No. 441.

The case having been set for hearing on April 22, 1952, the plaintiff failed to appear, so the court dismissed the case. The order of dismissal reads as follows:

"Por incomparecencia de la demandante, no obstante estar debidamente notificada de la vista de este asunto para este dia, y no estando de acuerdo con la ley ni con los Reglamentos, la peticion de posposicion por telegrama del abogado de la demandante, se deniega la posposicion y se sobresee la demanda, con las costas a cargo de la demandante. Se deja sin efecto el interdicto prohibitorio preliminar dictado en este asunto contra los demandados." (p. 24, R. O. A.)

Two motions for reconsideration filed by the plaintiff having been denied, the afore-quoted order of dismissal became final and executory. Consequently, on May 4, 1957, Movido filed a motion for the issuance of a writ of

execution against the bond of the surety company. The lower court, after considering said motion and the opposition thereto filed by the surety company, issued the order appealed from, relying solely on our decision in the case of *Bautista vs. Joaquin*, 46 Phil., 885. A motion for reconsideration of the order granting the writ of execution was denied, so the surety company has prosecuted this appeal before this Court.

Pending appeal, the lower court ordered the substitution of appellee Movido, who had died, by his wife and children.

The appellees did not file a brief, and this Court ordered the appeal in this case to take its course without said brief.

The liability of the appellant upon its bond is governed by the provisions of Section 9, Rule 61 and Section 20, Rule 59, both of the Rules of Court, which read as follows:

"Sec. 9. Judgment to include damages against party and sureties.— Upon the trial the amount of damages to be awarded to the plaintiff or to the defendant, as the case may be, upon the bond of the other " party, shall be claimed, ascertained, and awarded under the same procedure as prescribed in section 20 of Rule 59." (Rule 61)

"Sec. 20. * * *. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application, must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. * * *." (Rule 59)

In its bond, the appellant undertook to pay the defendants only such damages that they may sustain by reason of the issuance of the writ of preliminary injunction. And such bond cannot be extended beyond the bound of its contents.

There is neither claim nor evidence of damages sustained by Movido as a result of the issuance of the injunction. And this was the reason also why the lower court did not award damages to the defendants in its order of dismissal of April 22, 1952. Consequently, there can be no execution against the bonds; as there is nothing in the judgment of dismissal sentencing the plaintiff or its surety to pay damages.

"As the judgment is against the defendant personally not against the surety on his counter-bond, the execution to be issued must be against the property of the defendant only and it cannot issue against petitioner thereon. As a matter of fact, the order complained of was issued to secure a judgment against the surety on the counterbond of defendant, which shows the absence of a judgment against the surety to be executed. A judgment against a defendant cannot per se be enforced by execution against the surety on his counterbond; a judgment against the surety MUST be secured before his counterclaim may be proceeded against." (*Visayan Surety & Insurance Co. vs. Aquino, et al.*, 96 Phil., 900; see also *Port Motors, Inc. vs. Baposas, et al.*, 100 Phil., 732; 53 Off. Gaz., 2450; *Visayan Surety vs. Pascual*, 85 Phil., 7179; 47 Off. Gaz., 5075; *Facundo vs. Tan*, 77 Phil., 740; *Liberty Construction vs. Pecson*, 89 Phil., 50; *Cruz vs. Manila Surety*, 92 Phil., 699; 49 Off. Gaz., 964).

It is intimated in the pleadings in the court below that the amount of damages for which the surety should be liable upon its bond is the amount of the judgment sought to be enforced in Civil Case No. 441, which amount was not collected by appellee Movido by reason of the issuance of the writ of preliminary injunction in the case at bar.

The surety bond executed by the appellant does not refer to any judgment, or to the judgment being executed in Civil Case No. 441. The bond only responds for "all such damages as such party (defendant Movido) may sustain by reason of the Writ of Preliminary Injunction, if the Court finally decides that the Plaintiff is not entitled thereto." There is no final judgment in the case at bar, in which the court made a finding that the plaintiff is not entitled to the writ of preliminary injunction. The judgment was an order of dismissal for failure of the plaintiff to

appear; it did not declare that the plaintiff was not entitled to the writ of preliminary injunction. Consequently, there is no legal basis for making the surety liable upon its bond.

It is to be noted that the injunction was issued in another case, Civil Case No. 850, and not in the old case, Civil Case No. 441, where judgment for Movido was issued and execution issued. The plaintiff herein could have presented, instead of filing this independent action, an ordinary motion Case No. 441 to suspend the enforcement of the writ of execution and the proceedings therein, upon the filing of a bond. Even if such motion would have been presented, the bond would still not be liable, for there is no proof that damages were caused to the Movido by the issuance of the injunction and there is no judgment to that effect. In such a situation, once the injunction was dissolved, the plaintiff would still be entitled to continue to enforce the writ of execution and proceed with the sale of the properties attached by the sheriff in the old case No. 441.

Our decision in the case of Bautista vs. Joaquin, *supra*, cited by the court *a quo* in its order, is not applicable to the case at bar. In that case, we held that the bond filed for the dissolution of a writ of attachment answers for the amount of the judgment. In accordance with Section 12 of Rule 59 of the Rules of Court, the bond thus given by the defendant to release the property attached stands in the place of the property released. Consequently, the surety directly answers for whatever judgment the plaintiff may recover in the action. The case of Bautista vs. Joaquin is, therefore, entirely different from the case before this Court.

In view of the foregoing considerations, the order appealed from is set aside. With costs against the heirs of appellee Jose S. Movido.

Padilla, Bautista Angelo, Concepcion, Reyes, J. B. L., Barrera, Paredes, Dizon, and De Leon, JJ., concur.

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