

**ABOITIZ & COMPANY, INC., HONORABLE VICENTE N. CUSI, JR.,
JUDGE OF THE COURT OF FIRST INSTANCE OF DAVAO, AND THE
PROVINCIAL SHERIFF OF DAVAO DEL SUR, PETITIONERS, VS.
COTABATO BU...**

G.R. No. L-35990. June 17, 1981

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

The instant petition stemmed from Civil Case No. 7329 of the Court of First Instance of Davao (Branch I) in which a writ of preliminary attachment was issued ex-parte by the Court on the strength of an affidavit of merit attached to the verified complaint filed by petitioner herein, Aboitiz & Co., Inc., on November 2, 1971, as plaintiff in said case, for the collection of money in the sum of P155,739.41, which defendant therein, the respondent in the instant case, Cotabato Bus Co., owed the said petitioner.

By virtue of the writ of preliminary attachment, the provincial sheriff attached personal properties of the defendant bus company consisting of some buses, machinery and equipment. The ground for the issuance of the writ is, as alleged in the complaint and the affidavit of merit executed by the Assistant Manager of petitioner, that the defendant "has removed or disposed of its properties or assets, or is about to do so, with intent to defraud its creditors."

Respondent company filed in the lower court an "Urgent Motion to Dissolve or Quash Writ of Attachment" to which was attached an affidavit executed by its Assistant Manager, Baldovino Lagbao, alleging among other things that "the Cotabato Bus Company has not been selling or disposing of its properties, neither does it intend to do so, much less to defraud its creditors; that also the Cotabato Bus Company, Inc. has been acquiring and buying more assets". An opposition and a supplemental opposition were filed to the urgent motion. The lower court denied the motion stating in its Order that "the testimony of Baldovino Lagbao, witness for the defendant, corroborates the facts in the plaintiff's affidavit instead of disproving or showing them to be untrue."

A motion for reconsideration was filed by the defendant bus company but the lower court denied it. Hence, the defendant went to the Court of Appeals on a petition for certiorari alleging grave abuse of discretion on the part of herein respondent Judge, Hon. Vicente R. Cusi, Jr. On giving due course to the petition, the Court of Appeals issued a restraining order restraining the trial court from enforcing further the writ of attachment and from proceeding with the hearing of Civil Case No. 7329. In its decision promulgated on October 3, 1971, the Court of Appeals declared "null and void the order/writ of attachment dated November 3, 1971 and the orders of December 2, 1971, as well as that of December 11, 1971, ordered the release of the attached properties, and made the restraining order originally issued permanent.

The present recourse is an appeal by certiorari from the decision of the Court of Appeals reversing the assailed orders of the Court of First Instance of Davao, (Branch I), petitioner assigning against the lower court the following errors:

"ERROR I

"THE COURT OF APPEALS ERRED IN HASTILY AND PERFUNCTORILY RENDERING, ON OCTOBER 3, 1971, A DECISION WITHOUT CONSIDERING MOST OF THE EVIDENCE SUCH THAT -

"1) EVEN AN IMPORTANT FACT, ESTABLISHED BY DOCUMENTARY EVIDENCE AND NOT DENIED BY RESPONDENT, IS MENTIONED ONLY AS A "CLAIM" OF PETITIONER COMPANY;

"2) THE DECISION CONTAINS NO DISCUSSION AND APPRECIATION OF THE FACTS AS PROVED, ASSEMBLED AND PRESENTED BY PETITIONER COMPANY SHOWING - IN THEIR TOTALITY - THAT RESPONDENT HAS REMOVED, DIVERTED OR DISPOSED OF ITS BANK DEPOSITS, INCOME AND OTHER LIQUID ASSETS WITH INTENT TO DEFRAUD ITS CREDITORS, ESPECIALLY ITS UNSECURED SUPPLIERS;

"3) THE DECISION IGNORES THE SIGNIFICANCE OF THE REFUSAL OF RESPONDENT TO PERMIT, UNDER REP. ACT NO. 1405, THE METROPOLITAN BANK & TRUST CO. TO BRING, IN COMPLIANCE WITH A SUBPOENA DUCES TECUM, TO THE TRIAL COURT ALL THE RECORDS OF RESPONDENT'S DEPOSITS AND WITHDRAWALS UNDER ITS CURRENT AND SAVINGS ACCOUNTS (NOW NIL) FOR EXAMINATION BY PETITIONER COMPANY FOR THE PURPOSE OF SHOWING DIRECTLY THE REMOVAL, DIVERSION OR DISPOSAL OF RESPONDENT'S DEPOSITS AND INCOME WITH INTENT TO DEFRAUD ITS CREDITORS.

"ERROR II

"THE COURT OF APPEALS ERRED IN NOT APPRECIATING THE FACTS THAT RESPONDENT'S BANK DEPOSITS ARE NIL AS PROOF WHICH - TOGETHER WITH RESPONDENT'S ADMISSION OF AN INCOME OF FROM P10,000.00 TO P14,000.00 A DAY AND THE EVIDENCE THAT IT CANNOT PRODUCE P634.00 WITHOUT USING A PERSONAL CHECK OF ITS PRESIDENT AND MAJORITY STOCKHOLDER, AND OTHER EVIDENCE - SHOWS THE REMOVAL OR CHANNELING OF ITS INCOME TO THE LATTER.

ERROR III

"THE COURT OF APPEALS ERRED IN NOT APPRECIATING THE RESCUE AND REMOVAL BY RESPONDENT OF FIVE ATTACHED BUSES, DURING THE PENDENCY OF ITS MOTION TO DISSOLVE THE ATTACHMENT IN THE TRIAL COURT, AS A FURTHER ACT OF REMOVAL OF PROPERTIES BY RESPONDENT WITH INTENT TO DEFRAUD PETITIONER COMPANY, FOR WHOSE BENEFIT SAID BUSES HAD BEEN ATTACHED."

The questions raised are mainly, if not solely, factual, revolving on whether respondent bus company has in fact removed its properties, or is about to do so, in fraud of its creditors. This being so, the findings of the Court of Appeals on said issues of facts are generally considered conclusive and final, and should no longer be disturbed. However, We gave due course to the petition because it raises also a legal question of whether the writ of attachment was properly issued upon a showing that defendant is on the verge of insolvency and may no longer satisfy its just debts without issuing the writ. This may be inferred from the emphasis laid by petitioner on the fact that even for the measly amount of P634.00 payment thereof was made with a personal check of the respondent company's president and majority stockholder, and its debts to several creditors, including secured ones like the DBP, have remained unpaid, despite its supposed daily income of an average of P12,000.00, as declared by its assistant manager, Baldovino Lagbao.[1]

Going forthwith to this question of whether insolvency, which petitioners in effect claims to have been proven by the evidence, particularly by company's bank account which has been reduced to nil, may be a ground for the

issuance of a writ of attachment, the respondent Court of Appeals correctly took its position in the negative on the strength of the explicit ruling of this Court in *Max Chamorro & Co. vs. Philippine Ready Mix Concrete Company, Inc. and Hon. Manuel P. Barcelona*.^[2]

Petitioner, however, disclaims any intention of advancing the theory that insolvency is a ground for the issuance of a writ of attachment,^[3] and insists that its evidence is intended to prove his assertion that respondent company has disposed, or is about to dispose, of its properties, in fraud of its creditors. Aside from the reference petitioner had made to respondent company's "nil" bank account, as if to show removal of company's funds, petitioner also cited the alleged non-payment of its other creditors, including secured creditors like the DBP to which all its buses have been mortgaged, despite its daily income averaging P12,000.00, and the rescue and removal of five attached buses.

It is an undisputed fact that, as averred by petitioner itself, the several buses attached are nearly junks. However, upon permission by the sheriff, five of them were repaired, but they were substituted with five buses which were also in the same condition as the five repaired ones before the repair. This cannot be the removal intended as ground for the issuance of a writ of attachment under Section 1(e), Rule 57, of the Rules of Court. The repair of the five buses was evidently motivated by a desire to serve the interest of the riding public, clearly not to defraud its creditors, as there is no showing that they were not put on the run after their repairs, as was the obvious purpose of their substitution to be placed in running condition.

Moreover, as the buses were mortgaged to the DBP, their removal or disposal as alleged by petitioner to provide the basis for its prayer for the issuance of a writ of attachment should be very remote, if not nil. If removal of the buses had in fact been committed, which seems to exist only in petitioner's apprehensive imagination, the DBP should not have failed to take proper court action, both civil and criminal, which apparently has not been done.

The dwindling of respondent's bank account despite its daily income of from P10,000.00 to P14,000.00 is easily explained by its having to meet heavy operating expenses, which include salaries and wages of employees and workers. If, indeed the income of the company were sufficiently profitable, it should not allow its buses to fall into disuse by lack of repairs. It should also maintain a good credit standing with its suppliers of equipment and other needs of the company to keep its business a going concern. Petitioner is only one of the suppliers.

It is, indeed, extremely hard to remove the buses, machinery and other equipments which respondent company have to own and keep to be able to engage and continue in the operation of its transportation business. The sale or other form of disposition of any of this kind of property is not difficult of detection or discovery, and strangely, petitioner has adduced no proof of any sale or transfer of any of them, which should have been easily obtainable.

In the main, therefore, We find that the respondent Court of Appeals has not committed any reversible error, much less grave abuse of discretion, except that the restraining order issued by it should not have included restraining the trial court from hearing the case, altogether. Accordingly, the instant petition is hereby denied, but the trial court is hereby ordered to immediately proceed with the hearing of Civil Case No. 7329 and decide it in accordance with the law and the evidence. No special pronouncement as to costs.

SO ORDERED.

Barredo, (Chairman), and Abad Santos, JJ., concur.

Guerrero, J., designated in place of J. Concepcion.

Aquino, J., in the result.

Concepcion, J., took no part.

[1] p. 24, Appellant's Brief.

[2] 94 Phil. 1005.

[3] pages 8-9, Appellant's Reply Brief.

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