

**THE BANK OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE,
VS. B. A. GREEN ET AL., DEFENDANTS. ORETHA K. O'BRIEN
AND S. W. O'BRIEN, THE LATTER AS GUARDIAN OF THE
MINORS WILLIAM...**

G.R. No. L-41632. July 31, 1935

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is an appeal taken by the defendants Oretha K. O'Brien and S. W. O'Brien, the latter as guardian of the minors William Keister O'Brien, Frank Harmon O'Brien, Mary O'Brien, and James Byron O'Brien, from a judgment of the Court of First Instance of Manila the dispositive part of which reads:

"Let judgment be entered, ordering the defendant B. A. Green to deposit in the clerk's office of this court within ninety days from the date this decision becomes final, or to pay to the plaintiff bank, the sum of eighty-eight thousand two hundred twenty-four pesos and forty-six centavos (P88,224.46), with interest at 9 per cent per annum from January 1, 1933, and the costs, with warning that upon failure to do so, the parcels of land situated in the municipality of Pasay, Rizal, will be sold at public auction and the proceeds thereof applied to the payment of this judgment. In the event the defendants O'Briens fail to exercise their right of redemption, their right as second mortgagees of the said parcels of land situated in the municipality of Pasay, Province of Rizal, will be declared extinguished. So ordered."

In support of their appeal, the appellants assign the following errors alleged to have been committed by the trial court in its decision, to wit:

"1. The trial court erred in overruling the demurrer to the complaint.

"2. The trial court erred in rendering a judgment for the foreclosure of the properties of the defendant Green situated in the Province of Rizal, and in declaring that the mortgage lien of the defendants, O'Briens, on said properties will be declared extinguished and foreclosed unless they redeem said properties, and in not dismissing the complaint, with costs against the plaintiff.

"3. The trial court erred in not holding that the unpaid balance of the judgment against Green sought to be revived is a personal money judgment and not secured by the properties situated in Rizal Province."

The necessary and pertinent facts in the resolution of the questions raised in the appeal are the following:

On June 14, 1924, the Bank of the Philippine Islands filed a complaint against B. A. Green in the Court of First Instance of Manila docketed as civil case No. 24594, to recover a mortgage credit and to foreclose the properties mortgaged as a security for its payment.

After proper proceedings, judgment was entered as follows :

"Benjamin A. Green is ordered to pay the plaintiff the sum of fifty-seven thousand nine hundred pesos (P57,900), minus P62.24, with stipulated interest at 12 per cent per annum from August 9, 1921, plus 10 per

cent on the principal as attorney's fees and costs."

The said decision not being in accordance with the prayer of the complaint in said case, the plaintiff Bank of the Philippine Islands on December 15, 1925, filed a motion to amend, which was granted by the court in the following amended judgment:

"Benjamin A. Green is ordered to pay the plaintiff the sum of fifty-seven thousand nine hundred pesos (P57,900), minus sixty-two pesos and twenty-four centavos (₱N32.24), with stipulated interest of twelve (12%) per cent per annum from August 9, 1921, on the principal, plus 10 per cent on the principal as attorney's fees and costs, with notice to said defendant that the said amount which he is ordered to pay should be deposited with the court within ninety (90) days from the date of this amended judgment, and upon failure to do so, the mortgaged properties will be ordered sold at public auction, and the proceeds thereof applied to the payment of the indebtedness of the defendant to the plaintiff, with costs." (Exhibit A.)

The defendant B. A. Green in said case appealed from said amended judgment, and this court affirmed the same stating:[1]

"Confining our decision strictly to the situation before us and to the apparent effort of the trial judge to have the judgment conform to the findings and to cure the omission inadvertently made, but without intending to lay down a general legal rule for other cases, a majority of the court are of the opinion that no reversible error was committed. Accordingly the order appealed from will be affirmed without special finding as to costs." (Exhibit A-1.)

The defendant B. A. Green having failed to make the deposit required of him in the said amended judgment, and the same having become final, the mortgaged properties were ordered sold at public auction on October 9, 1927, and the proceeds thereof applied to the payment of defendant's indebtedness to the plaintiff, as this was in fact done by selling the land situated on Azcarraga Street. The mortgagee was the highest bidder, and the property was adjudicated to it for the sum of P25,000, which adjudication was later approved by the court.

The plaintiff and mortgagee, Bank of the Philippine Islands, not having included as defendants the herein defendants-appellants, surnamed O'Brien, who held a second mortgage on the mortgaged property, when the transfer certificate of title of said land was made in favor of the Bank of the Philippine Islands, the second mortgage abovementioned in favor of the O'Briens was noted on the back of the transfer certificate of title as an encumbrance. To free the property from the said second mortgage, the Bank of the Philippine Islands found it necessary to begin an independent action in the Court of First Instance of Manila, docketed as civil case No. 35023, to compel the O'Briens ' to redeem the property, praying that upon their failure to do so said mortgage be declared extinguished in accordance with the doctrine laid down in the case of Sun Life Assurance Co. of Canada vs. Gonzalez Diez (52 Phil., 271). After proper proceedings in this latter case, the judge of the Court of First Instance of Manila rendered judgment ordering the defendants O'Briens to redeem the second mortgage on the property sold at public auction, and for failure to do so, ordered the cancellation of the notation of the said second mortgage on the back of transfer certificate of title No. 32380.

On February 13, 1929, that is, one year and two months after the approval of the sale on December 16, 1927, the mortgagee, Bank of the Philippine Islands, filed a complaint in the Court of First Instance of Rizal, docketed as civil case No. 4099, against B. A. Green, Oretta K. O'Brien and S. W. O'Brien, the latter as guardian of the minor children of the deceased C. W. O'Brien, to recover from said defendant B. A. Green the sum of P68,618.46, with interest at 9 per cent per annum and attorney's fees, and to foreclose the mortgage as to the lands with their improvements situated in the Province of Rizal which were not included when the property situated on Azcarraga Street, City of Manila, was foreclosed.

On October 28, 1930, a decision was rendered in said civil case No. 4099 of the Court of First Instance of Rizal, ordering the foreclosure of the properties situated in said province to satisfy the unpaid balance of the amount of the judgment entered in civil case No. 24594 of the Court of First Instance of Manila.

On appeal in said civil case No. 4099 of the Court of First Instance of Rizal, this court on December 12, 1932, rendered judgment the dispositive part of which reads:

"We think it to the interest of all parties and conducive to orderly procedure to enter a clear-cut reversal of the judgment appealed from, with directions to dismiss the petition at the costs in both instances of the appellee, but without prejudice in any proceedings that may be legally instituted in the proper tribunal for the final adjudication of the respective claims of the parties." (57 Phil., 712.)[1]

Six years from December 17, 1926, when the decision of the Court of First Instance of Manila in civil case No. 24594, as amended by an order of December 23, 1925, was affirmed by this court, the herein plaintiff-appellee, Bank of the Philippine Island's, filed the complaint which is now before us, based on the said judgment entered in civil case No. 24594, for the purpose of executing the balance of the judgment on the mortgaged properties situated in the Province of Rizal, on which the defendants-appellants hold a second mortgage, and as a result a judgment was rendered the dispositive part of which is quoted at the beginning of this decision.

The first question to be decided in this appeal, which is raised in the first assigned error, is whether or not the trial court erred in overruling the demurrer interposed by the defendants on the grounds that the complaint is vague, ambiguous, and unintelligible; that there is a misjoinder of defendants; that the complaint does not state facts constituting a cause of action against the defendants surnamed O'Brien, and that the court has no jurisdiction over the subject matter of the suit.

In support of the first assigned error, the defendants-appellants contend that the complaint alleges two distinct and separate causes of action against different defendants because the complaint seeks to revive a judgment and to foreclose a mortgage on properties situated in the Province of Rizal, the first cause of action being against the defendant B. A. Green only, to revive a judgment entered in civil case No. 24594, wherein the defendants-appellants O'Briens were not parties; and the second cause of action being against all the defendants to foreclose a mortgage on the properties of the defendant B. A. Green situated in the Province of Rizal only.

Section 447 of the Code of Civil Procedure provides as follows:

"Sec. 447. Enforcement of judgment after lapse of five years.—In all cases, a judgment may be enforced after the lapse of five years from the date of its entry, and before the same shall have been barred by any statute of limitation, by an action instituted in regular form, by complaint, as other actions are instituted."

According to the legal provision above-quoted, a judgment may be revived after the lapse of five years from the date of its entry and before it has prescribed, by filing an ordinary action. To comply with said legal provision, it is necessary that there be a judgment, that the said judgment has not been executed; that five years have elapsed from the date of its entry in the register book; that an ordinary action has been commenced based thereon, and that the said action has not prescribed.

In the present case the purpose of the complaint is to revive the amended judgment ordering the foreclosure of a mortgage dated December 23, 1925, entered in civil case No. 24594, affirmed by this court on December 17, 1926, the dispositive part of which is as follows:

"B. A. Green is ordered to pay the plaintiff the sum of fifty-seven thousand nine hundred pesos (P57,900), minus sixty-two pesos and twenty-four centavos (P62.24), with stipulated interest at 9 per cent per annum from December 31, 1922, on the principal, plus the sum of two thousand five hundred pesos (P2,500) as attorney's

fees and costs, with notice to said defendant that the said amount which he is ordered to pay should be deposited in this court within ninety (90) days from the date of this amended judgment, and upon failure to do so, the mortgaged properties will be ordered sold at public auction in order that the proceeds thereof may be applied to the payment of defendant's indebtedness to the plaintiff, with the costs."

The foregoing is the judgment which the present action seeks to revive. Said judgment ordered the defendant B. A» Green to pay a mortgage indebtedness, and upon failure to do so within a specified time, directed that the mortgaged properties consisting, according to the mortgage deed accompanying the complaint, of a property in the City of Manila and several properties in the Province of Rizal, be sold at public auction. There exist, therefore, no two distinct and separate causes of action, because what the complaint seeks to revive is the same judgment foreclosing a mortgage of properties situated in the City of Manila and in the Province of Rizal.

The second question for resolution is whether or not there is a misjoinder of defendants.

The O'Briens were not parties either in the original complaint or in the judgment sought to be revived. Inasmuch as the purpose of the present complaint is to revive the judgment entered in civil case No. 24594 (G. R. No. 22716)[1] this complaint can not include other parties, either as plaintiffs or defendants, than those named in the original case, or their successors in interest.

As to defendants-appellants' contention that the trial court lacks jurisdiction over the subject matter in litigation, the purpose of the action being only to revive a judgment ordering the foreclosure of properties situated in the City of Manila and in the Province of Rizal, and the said judgment having been entered by the Court of First Instance of Manila, the same court has jurisdiction to revive its own judgment.

There is, however, one question which has not been raised by the defendants-appellants, and this refers to the amount to which the plaintiff-appellee is still entitled to collect by foreclosing the mortgaged properties situated in the Province of Rizal.

The judgment entered in the said civil case No. 24594 ordered the defendant B. A. Green to pay the sum of P57,900, minus P62.24, with stipulated interest at 12 per cent per annum from December 31, 1932, on the principal, plus 10 per cent on the principal as attorney's fees and costs.. The proceeds realized from the sale of the property situated in the City of Manila, one of the mortgaged properties ordered foreclosed, being only P25,000, there is left a balance of 5=57,681.04. This balance, plus the amount of the land taxes, interest, and attorney's fees, constitute the total sum which the plaintiff-appellee is entitled to receive from the proceeds of the sale of the mortgaged properties situated in the Province of Rizal. It is not fair that, through its attorneys' error and delay in exercising its rights, the defendant B. A. Green, and consequently the herein defendants-appellants, as holders of the second mortgage, should be made to pay the interest, attorney's fees, and costs, accumulated and incurred from the confirmation of the sale of the mortgaged property situated in Manila on December 16, 1927, up to the filing of the complaint in the present case on March 10, 1933, due to plaintiff-appellee's delay in enforcing its rights by virtue of the amended judgment entered in, civil case No. 24594 of the Court of First Instance of Manila.

In view of the foregoing considerations, we are of the opinion, and so hold: (1) That a judgment foreclosing a mortgage which has lost executory force by the lapse of five years, may be revived by filing a complaint based thereon; (2) that a second mortgagee who was not a party either in the original complaint or in the judgment entered by virtue thereof, may not be included as party defendant in an action commenced by a complaint for the purpose of reviving the said judgment which has already lapsed; (3) that the mortgagee who forecloses a part of the mortgaged properties only and does not foreclose the remainder until after the expiration of five years to recover the balance of the mortgage indebtedness, is not entitled to charge interest on said balance for the period of the delay.

Wherefore, the judgment foreclosing the mortgage entered in civil case No. 24594 of the Court of First Instance of Manila, and affirmed by this court (G. R. No. 22716), is revived, and the public sale of the mortgaged properties situated in the municipality of Pasay, Province of RizaU is ordered, the proceeds thereof to be applied to the payment of the unpaid balance of the judgment revived, plus the amount of land taxes and interest thereon, and attorney's fees, and the complaint is dismissed as to the second mortgagees, without special pronouncement as to the costs. So ordered.

Malcolm, Imperial, Butte, and Goddard, JJ., concur.

Judgment modified.

[1] G. R. No. 26155. Bank of the Philippine Islands vs. Green, promulgated December 17, 1926, not reported.

[1] Bank of the Philippine Islands vs. Green.

[1] Resolution of the Supreme Court of September 2, 1924.

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