

SOUTHERN MOTORS, INC., PLAINTIFF AND APPELLEE, VS. ELISEO BARBOSA, DEFENDANT AND APPELLANT.

G.R. No. L-9306. May 25, 1956

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This is an appeal from a decision of the Court of First Instance of Iloilo:

"(a) Ordering the defendant Eliseo Barbosa to pay to the Court, for the benefit of the plaintiff within a period of ninety (90) days from receipt by the defendant hereof, the sum of P2,889.53, with interest at the rate of 12% per annum computed on the basis of the amounts of the instalments mentioned in the mortgage and of the dates they respectively fell due, until fully paid; the sum of P200 by way of attorney's fees, plus costs; and (b) Upon failure of the defendant to pay as aforesaid, ordering the land described in the complaint and subject of the mortgage to be sold at public auction in accordance with law in order to realize the amount of the judgment debt and costs"

Although originally forwarded to the Court of Appeals, the same has certified the record to this Court in view of the fact that the issues raised in the appeal involve merely questions of law.

Plaintiff, Southern Motors, Inc., brought this action against Eliseo Barbosa, to foreclose a real estate mortgage, constituted by the latter in favor of the former, as security for the payment of the sum of P2,889.53 due to said plaintiff from one Alfredo Brillantes, who had failed to settle his obligation in accordance with the terms and conditions of the corresponding deed of mortgage. Defendant Eliseo Barbosa filed an answer admitting the allegations of the complaint and alleging, by way of "special and affirmative" defense:

"That the defendant herein has executed the deed of mortgage Annex A for the only purpose of guaranteeing—as surety and/or guarantor—the payment of the above mentioned debt of Mr. Alfredo Brillante& in favor of the plaintiff.

"That the plaintiff until now has no right action against the herein defendant on the ground that said plaintiff, without motive whatsoever, did not intent or intends to exhaust all recourses to collect from the true debtor Mr. Alfredo Brillantes the debt contracted by the latter in favor of said plaintiff, and did not resort nor intends to resort all the legal remedies against the true debtor Mr. Alfredo Brillantes, notwithstanding the fact that said Mr. Alfredo Brillantes is solvent and has many properties within the Province of Iloilo."

Thereupon, plaintiff moved for summary judgment which a branch of the Court of First Instance of Iloilo, presided over by Hon. Roman Ibanez, Judge, denied upon the ground that it "is premature" Plaintiff moved for a reconsideration of the order to this effect. Soon later, he filed, also, another motion praying that the case be transferred to another branch of said court, because that of Judge Ibanez would be busy trying cadastral cases, and had adopted the "policy of refraining from entertaining any other civil cases and all incidents related thereto, until after said cadastral cases shall have been finally disposed of." With the express authority of Judge Ibanez, the case was referred to the branch of said court, presided over by Hon. Querube C. Makalintal, Judge, for action, upon

said motion for reconsideration. Thereafter, Judge Makalintal rendered the aforementioned decision, from which the defendant has appealed. He maintains, in his brief, that:

"The trial court erred in hearing plaintiff-appellee's 'motion for reconsideration' dated June 9, 1951, notwithstanding the fact that defendant-appellant was not served with a copy thereof nor served with notice of the hearing thereof.

2. "The trial court erred in rendering a judgment on the pleadings' in appellee's favor when no issue was at all submitted to it for resolution, to the prejudice of the substantial rights of appellant.

3. "The court a quo erred in depriving defendant-appellant of his property rights without due process of law."

The first assignment of error is based upon an erroneous predicate, for, contrary to defendant's assertion, his counsel in the lower court, Atty. Manuel F. Zamora through an employee of his office, by the name of Agripino Aguilar, was actually served on June 9, 1951, with copy of plaintiff's motion for reconsideration, with notice to the effect that said motion would be submitted for the consideration and approval of the lower court, on Saturday, June 16, 1951, at 8:00 a.m., or soon thereafter as counsel may be heard.

The second assignment of error is, likewise, untenable. It is not true that there was no issue submitted for determination by the lower court when it rendered the decision appealed from.

It will be recalled that each one of the allegations made in plaintiff's complaint were expressly admitted in defendant's answer, in which he merely alleged, as "special and affirmative" defense,, that plaintiff is not entitled to foreclose the mortgage constituted in its favor by the defendant, because the property of Alfredo Brillantes, the principal debtors, had not been exhausted as yet, and were not sought to be exhausted, for the satisfaction of plaintiff's credit. Thus, there was an question of fact left for determination. The only issue set up by the pleadings was the sufficiency of said affirmative defense. And such was the only point discussed by the defendant in his opposition to plaintiff's motion for a summary judgment, referring, evidently, to a judgment on the pleadings.

Plaintiff's motion for reconsideration of the order of Judge Roman Ibanez refusing to render said judgment, upon the ground that it was premature, revived said issue of sufficiency of the aforementioned affirmative defense, apart from calling for a reexamination of the question posed by said order of Judge Ibañez, namely, whether it was proper, under the circumstances, to render a judgment on the pleadings. In other words, said motion for reconsideration had the effect of placing before then Judge Makalintal, for resolution, the following issues, to wit: (1) whether a summary judgment or a judgment on the pleadings was in order, considering, the allegations of plaintiff's complaint and those of defendant's answer; and (2) whether the mortgage in question could be foreclosed although plaintiff had not exhausted, and did not intend to exhaust, the properties of his principal debtor, Alfredo Brillantes.

The third assignment of error is predicated upon the alleged lack of notice of the hearing of plaintiff's motion for reconsideration. As stated in our discussion of the first assignment of error, this, pretense is refuted by the record. Moreover, it is obvious that defendant's affirmative defense is devoid of merit for:

1. The deed of mortgage executed by him specifically provides:

"That if said Mr. Alfredo Brillantes or herein mortgagor, his heirs, executors, administrators and assigns shall well and trolly perform the full obligations above-stated according to the terms thereof, then this mortgage shall be null and void, otherwise it shall remain in full force and effect, in which event herein mortgagor authorizes and empowers herein mortgagee-company to tab any of the following actions to enforce said payment; "

"(a) Foreclose, judicially or extrajudicially, the chattel mortgage above referred to and/or also this mortgage,

applying the proceeds of the purchase price at public sale of the real property herein mortgaged to any deficiency or difference between the purchase price of said chattel at public auction and the amount of P2,889.53, together with its interest hereby secured; or

"(b) Simply foreclose this mortgage judicially in accordance with the provisions of section 2, Rule 70, Rules of Court, or extra-judicially under the provisions of Act No. 3135 and Act No. 4118, to satisfy the full amount of P2,889.53, together with its interest of 12 per cent per annum."

2. The right of guarantors, under Article 2058 of the Civil Code of the Philippines, to demand exhaustion of the property of the principal debtor, exists only when a pledge or a mortgage has not been given as special security for the payment of the principal obligation. Guarantees, without any such pledge or mortgage, are governed by Title XV of said Code, whereas pledges and mortgages fall under Title XVI of the same Code, in which the following provisions, among others, are found:

Art. 2087. "It is also of the essence of these contracts that when the principal obligation becomes due, the things in which the pledge or mortgage consists may be alienated for the payment to the creditor."

Art. 2126. "The mortgage directly and immediately subjects the property upon which it is imposed, whoever the possessor may be, to the fulfillment of the obligation for whose security it was constituted."

3. It has been held already (*Saavedra vs. Price*, 68 Phil., 688), that a mortgagor is not entitled to the exhaustion of the property of the principal debtor.

4. Although an ordinary personal guarantor—not a mortgagor or pledgor—may demand the aforementioned exhaustion, the creditor may, prior thereto, secure a judgment against said guarantor, who shall be entitled, however, to a deferment of the execution of said judgment against him until after the properties of the principal debtor shall have been exhausted to satisfy the obligation involved in the case.

Wherefore, the decision appealed from is hereby affirmed, with costs against the defendant-appellant. It is so ordered.

Paras, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Jugo, Bautista Angelo, Labrador, Reyes, J. B. L., and Endencia, JJ., concur.

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