

FERNANDO A. GAITE, PLAINTIFF AND APPELLEE, VS. ISABELO FONACIER, GEORGE KRAKOWER, LARAP MINES & SMELTING CO., INC., SEGUNDINA VIVAS, FRANCISCO DANTE, PACIFICO ESCANDOR AND FERNA...*G.R. No. L-11827. July 31, 1961*

Ponente: REYES, J.B.L., J.

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This appeal comes to us directly from the Court of First Instance because the claims involved aggregate more than P200,000.

Defendant-appellant Isabelo Fonacier was the owner and/or holder, either by himself or in a representative capacity, of 11 iron lode mineral claims, known as the Dawahan Group, situated in the municipality of Jose Panganiban, province of Camarines Norte.

By a "Deed of Assignment" dated September 29, 1952 (Exhibit "3"), Fonacier constituted and appointed plaintiff-appellee Fernando A. Gaité as his true and lawful attorney-in-fact to enter into a contract with any individual or juridical person for the exploration and development of the mining claims aforementioned on a royalty basis of not less than P0.50 per ton of ore that might be extracted therefrom. On March 19, 1954, Gaité in turn executed a general assignment (Record on Appeal, pp. 17-19) conveying the development and exploitation of said mining claims unto the Larap Iron Mines, a single proprietorship owned solely by and belonging to him, on the same royalty basis provided for in Exhibit "3". Thereafter Gaité embarked upon the development and exploitation of the mining claims in question, opening and paving roads within and outside their boundaries, making other improvements and installing facilities therein for use in the development of the mines, and in time extracted therefrom what he claimed and estimated to be approximately 24,000 metric tons of iron ore.

For some reason or another, Isabelo Fonacier decided to revoke the authority granted by him to Gaité to exploit and develop the mining claims in question, and Gaité assented thereto subject to certain conditions. As a result, a document entitled "Revocation of Power of Attorney and Contract" was executed on December 8, 1954 (Exhibit "A"), wherein Gaité transferred to Fonacier, for the consideration of P20,000, plus 10% of the royalties that Fonacier would receive from the mining claims, all his rights and interest on all the roads, improvements, and facilities in or outside said claims, the right to use the business name "Larap Iron Mines" and its goodwill, and all the records and documents relative to the mines. In the same document, Gaité transferred to Fonacier all his rights and interests over the "24,000 tons of iron ore, more or less" that the former had already extracted from the mineral claims, in consideration of the sum of P75,000, P10,000, of which was paid upon the signing of the agreement, and

"b. The balance of SIXTY-FIVE "THOUSAND PESOS (P65,000) will be paid from and out of the first letter of credit covering the first shipment of iron ores and or the first amount derived from the local sale of iron ore made by the Larap Mines & Smelting Co., Inc., its assigns, administrators, or successors in interests."

To secure the payment of the said balance of P65,000.00, Fonacier promised to execute in favor of Gaité a surety bond; and pursuant to the promise, Fonacier delivered to Gaité a surety bond dated December 8, 1954 with himself (Fonacier) as principal and the Larap Mines and Smelting Co., and its stockholders George Krakower, Segundina Vivas, Pacifico Escandor, Francisco Dante, and Fernando Ty as sureties (Exhibit "A-1"). Gaité testified, however, that when this bond was presented to him by Fonacier together with the "Revocation of Power of Attorney and Contract", Exhibit "A", on December 8, 1954, he refused to sign said Exhibit "A" unless another bond underwritten by a bonding company was put up by defendants to secure the payment of the P65,000 balance of the price of the iron ore in the stockpiles in the mining claims. Hence, a second bond, also dated December 8, 1954 (Exhibit "B"), was executed by the same parties to the first bond Exhibit "A-1", with the Far Eastern Surety and Insurance Co. as additional surety, but it provided that the liability of the surety company would attach only when there had been an actual sale of iron ore by the Larap Mines & Smelting Co. for an amount of not less than P65,000, and that, furthermore, the liability of said surety company would automatically expire on December 8, 1955. Both bonds were attached to the "Revocation of Power of Attorney and Contract", Exhibit "A" and made integral parts thereof.

On the same day that Fonacier revoked the power of attorney he gave to Gaité and the two executed and signed the "Revocation of Power of Attorney and Contract", Exhibit "A", Fonacier entered into a "Contract of Mining Operation", ceding, transferring, and conveying unto the Larap Mines and Smelting Co., Inc. the right to develop, exploit, and explore the mining claims in question, together with the improvements therein and the use of the name "Larap Iron Mines" and its goodwill, in consideration of certain royalties. Fonacier likewise transferred, in the same document, the complete title to the approximately 24,000 tons of iron ore which he acquired from Gaité, to the Larap Mines & Smelting Co., in consideration for the signing by the company and its stockholders of the surety bonds delivered by Fonacier to Gaité (Record on Appeal, pp. 82-94).

Up to December 8, 1955, when the bond Exhibit "B" expired with respect to the Far Eastern Surety and Insurance Company, no sale of the approximately 24,000 tons of iron ore had been made by the Larap Mines & Smelting Co., Inc., nor had the P65,000 balance of the price of said ore been paid to Gaité by Fonacier and his sureties. Whereupon, Gaité demanded from Fonacier and his sureties payment of said amount, on the theory that they had lost every right to make use of the period given them when their bond, Exhibit "B", automatically expired (Exhibits "C" to "C-24"). And when Fonacier and his sureties failed to pay as demanded by Gaité, the latter filed the present complaint against them in the Court of First Instance of Manila (Civil Case No. 29310) for the payment of the P65,000 balance of the price of the ore, consequential damages, and attorney's fees.

All the defendants except Francisco Dante set up the uniform defense that the obligation sued upon by Gaité was subject to a condition that the amount of P65,000 would be payable out of the first letter of credit covering the first shipment of iron ore and/or the first amount derived from the local sale of the iron ore by the Larap Mines & Smelting Co., Inc.; that up to the time of the filing of the complaint, no sale of the iron ore had been made, hence the condition had not yet been fulfilled; and that consequently, the obligation was not yet due and demandable. Defendant Fonacier also contended that only 7,573 tons of the estimated 24,000 tons of iron ore sold to him by Gaité was actually delivered and counterclaimed for more than P200,000 damages.

At the trial of the case, the parties agreed to limit the presentation of evidence to two issues:

- (1) Whether or not the obligation of Fonacier and his sureties to pay Gaité P65,000 became due and demandable when the defendants failed to renew the surety bond underwritten by the Far Eastern Surety and Insurance Co., Inc. (Exhibit "B") which expired on December 8, 1955, and
- (2) Whether the estimated 24,000 tons of iron ore sold by plaintiff Gaité to defendant Fonacier were actually in

existence in the mining claims when these parties executed the "Revocation of Power of Attorney and Contract", Exhibit "A".

On the first question, the lower court held that the obligation of defendants to pay plaintiff the P65,000 balance of the price of the approximately 24,000 tons of iron ore was one with a term: i.e., that it would be paid upon the sale of sufficient iron ore by defendants, such sale to be effected within one year or before December 8, 1955; that the giving of security was a condition precedent to Gaite's giving credit to defendants; and that as the latter failed to put up a good and sufficient security in lieu of the Far Eastern Surety bond (Exhibit "B") which expired on December 8, 1955, the obligation became due and demandable under Article 1198 of the New Civil Code.

As to the second question, the lower court found that plaintiff Gaite did have approximately 24,000 tons of the iron ore at the mining claims in question at the time of the execution of the contract Exhibit "A".

Judgment was, accordingly, rendered in favor of plaintiff Gaite ordering defendants to pay him, jointly and severally, P65,000 with interest at 6% per annum from December 9, 1955 until full payment, plus costs. From this judgment, defendants jointly appealed to this Court.

During the pendency of this appeal, several incidental motions were presented for resolution: a motion to declare the appellants Larap Mines & Smelting Co., Inc. and George Krakower in contempt, filed by appellant Fonacier, and two motions to dismiss the appeal as having become academic and a motion for new trial and/or to take judicial notice of certain documents, filed by appellee Gaite. the motion for contempt is unmeritorious because the main allegation therein that the appellants Larap Mines & Smelting Co., Inc. and Krakower had sold the iron ore here in question, which allegedly is "property in litigation", has not been substantiated; and, even if true, does not make these appellants guilty of contempt, because what is under litigation in this appeal is appellee Gaite's right to the payment of the balance of the price of the ore, and not the iron ore itself. As for the several motions presented by appellee Gaite, it is unnecessary to resolve these motions in view of the result that we have reached in the case, which we shall hereafter discuss.

The main issues presented by appellants in this appeal are:

- (1) that the lower court erred in holding that the obligation of appellant Fonacier to pay appellee Gaite the P65,000 (balance of the price of the iron ore in question) is one with a period or term and not one with a suspensive condition, and that the term expired on December 8, 1955; and
- (2) that the lower court erred in not holding that there were only 10,954.5 tons in the stockpiles of iron ore sold by appellee Gaite to appellant Fonacier.

The first issue involves an interpretation of the following provision in the contract Exhibit "A":

"7. That Fernando Gaite or Larap Iron Mines hereby transfers to Isabelo F. Fonacier all his rights and interest over the 24,000 tons of iron ore, more or less, above-referred to together with all his rights and interests to operate the mine in consideration of the sum of seventy-five thousand pesos (P75,000) which the latter binds to pay as follows:

- a. TEN THOUSAND PESOS (P10,000) will be paid upon the signing of this agreement.
- b. The balance of SIXTY-FIVE THOUSAND PESOS (P65,000) will be paid from and out of the first letter of credit covering the first shipment of iron ores and/or the first amount derived from the local sale of iron ore made by the Larap Mines & Smelting Co., Inc., its assigns, administrators, or successors in interest.

We find the court below to be legally correct in holding that the shipment or local sale of the iron ore is not a condition precedent (or suspensive) to the payment of the balance of P65,000, but was only a suspensive period or

term. What characterizes a conditional obligation is the fact that its efficacy or obligatory force (as distinguished from its demandability) is subordinated to the happening of a future and uncertain event; so that if the suspensive condition does not take place, the parties would stand as if the conditional obligation had never existed. That the parties to the contract Exhibit "A" did not intend any such state of things to prevail is supported by several circumstances:

1) The words of the contract express no contingency in the buyer's obligation to pay: "The balance of Sixty-Five Thousand Pesos (P65,000) will be paid out of the first letter of credit covering the first shipment of iron ore . . ." etc. There is no uncertainty that the payment will have to be made sooner or later; what is undetermined is merely the exact date at which it will be made. By the very terms of the contract, therefore, the existence of the obligation to pay is recognized; only its maturity or demandability is deferred.

2) A contract of sale is normally commutative and onerous: not only does each one of the parties assume a correlative obligation (the seller to deliver and transfer ownership of the thing sold and the buyer to pay the price), but each party anticipates performance by the other from the very start. While in a sale the obligation of one party can be lawfully subordinated to an uncertain event, so that the other understands that he assumes the risk of receiving nothing for what he gives (as in the case of a sale of hopes or expectations, *emptio spei*), it is not in the usual course of business to do so; hence, the contingent character of the obligation must clearly appear. Nothing is found in the record to evidence that Gaité desired or assumed to run the risk of losing his rights over the ore without getting paid for it, or that Fonacier understood that Gaité assumed any such risk. This is proved by the fact that Gaité insisted on a bond to guarantee payment of the P65,000, and not only upon a bond by Fonacier, the Larap Mines & Smelting Co., and the company's stockholders, but also on one by a surety company; and the fact that appellants did put up such bonds indicates that they admitted the definite existence of their obligation to pay the balance of P65,000.

3) To subordinate the obligation to pay the remaining P65,000 to the sale or shipment of the ore as a condition precedent, would be tantamount to leaving the payment at the discretion of the debtor, for the sale or shipment could not be made unless the appellants took steps to sell the ore. Appellants would thus be able to postpone payment indefinitely. The desirability of avoiding such a construction of the contract Exhibit "A" needs no stressing.

4) Assuming that there could be doubt whether by the wording of the contract the parties intended a suspensive condition or a suspensive period (*dies ad quem*) for the payment of the P65,000, the rules of interpretation would incline the scales in favor of "the greatest reciprocity of interests", since sale is essentially onerous. The Civil Code of the Philippines, Article 1378, paragraph 1, in fine, provides:

"if the contract is onerous, the doubt shall be settled in favor of the greatest reciprocity of interests.";

and there can be no question that greater reciprocity obtains if the buyer's obligation is deemed to be actually existing, with only its maturity (due date) postponed or deferred, than if such obligation were viewed as non-existent or not binding until the ore was sold.

The only rational view that can be taken is that the sale of the ore to Fonacier was a sale on credit, and not an aleatory contract where the transferor, Gaité, would assume the risk of not being paid at all; and that the previous sale or shipment of the ore was not a suspensive condition for the payment of the balance of the agreed price, but was intended merely to fix the future date of the payment.

This issue settled, the next point of inquiry is whether appellants, Fonacier and his sureties, still have the right to insist that Gaité should wait for the sale or shipment of the ore before receiving payment; or, in other words,

whether or not they are entitled to take full advantage of the period granted them for making the payment.

We agree with the court below that the appellants have forfeited the right to compel Gaite to wait for the sale of the ore before receiving payment of the balance of P65,000, because of their failure to renew the bond of the Far Eastern Surety Company or else replace it with an equivalent guarantee. The expiration of the bonding company's undertaking on December 8, 1955 substantially reduced the security of the vendor's rights as creditor for the unpaid P65,000, a security that Gaite considered essential and upon which he had insisted when he executed the deed of sale of the ore to Fonacier (Exhibit "A"). The case squarely comes under paragraphs 2 and 3 of Article 1198 of the Civil Code of the Philippines:

"ART. 1198. The debtor shall lose every right to make use of the period:

(1) * * * * *

(2) When he does not furnish to the creditor the guaranties or securities which he has promised.

(3) When by his own acts he has impaired said guaranties or securities after their establishment, and when through fortuitous event they disappear, unless he immediately gives new ones equally satisfactory."

Appellants' failure to renew or extend the surety company's bond upon its expiration plainly impaired the securities given to the creditor (appellee Gaite), unless immediately renewed or replaced.

There is no merit in appellants' argument that Gaite's acceptance of the surety company's bond with full knowledge that on its face it would automatically expire within one year was a waiver of its renewal after the expiration date. No such waiver could have been intended, for Gaite stood to lose and had nothing to gain thereby; and if there was any, it could be rationally explained only if the appellants had agreed to sell the ore and pay Gaite before the surety company's bond expired on December 8, 1955. But in the latter case the defendants-appellants' obligation to pay became absolute after one year from the transfer of the ore to Fonacier by virtue of the deed Exhibit "A".

All the alternatives, therefore, lead to the same result: that Gaite acted within his rights in demanding payment and instituting this action one year from and after the contract (Exhibit "A") was executed, either because the appellant debtors had impaired the securities originally given and thereby forfeited any further time within which to pay; or because the term of payment was originally of no more than one year, and the balance of P65,000 became due and payable thereafter.

Coming now to the second issue in this appeal, which is whether there were really 24,000 tons of iron ore in the stockpiles sold by appellee Gaite to appellant Fonacier, and whether, if there had been a short-delivery as claimed by appellants, they are entitled to the payment of damages, we must, at the outset, stress two things: first, that this is a case of a sale of a specific mass of fungible goods for a single price or a lump sum, the quantity of "24,000 tons of iron ore, more or less", stated in the contract Exhibit "A", being a mere estimate by the parties of the total tonnage weight of the mass; and second, that the evidence shows that neither of the parties had actually measured or weighed the mass, so that they both tried to arrive at the total quantity by making an estimate of the volume thereof in cubic meters and then multiplying it by the estimated weight per ton of each cubic meter.

The sale between the parties is a sale of a specific mass of iron ore because no provision was made in their contract for the measuring or weighing of the ore sold in order to complete or perfect the sale, nor was the price of P75,000 agreed upon by the parties based upon any such measurement (see Art. 1480, second par., New Civil Code). The subject-matter of the sale is, therefore, a determinate object, the mass, and not the actual number of units or tons contained therein, so that all that was required of the seller Gaite was to deliver in good faith to his buyer all of the ore found in the mass, notwithstanding that the quantity delivered is less than the amount

estimated by them (Mobile Machinery & Supply Co., Inc. vs. York Oilfield Salvage Co., Inc. 171 So. 872, applying art. 2459 of the Louisiana Civil Code). There is no charge in this case that Gaité did not deliver to appellants all the ore found in the stockpiles in the mining claims in question; Gaité had, therefore, complied with his promise to deliver, and appellants in turn are bound to pay the lump price.

But assuming the plaintiff Gaité undertook to sell and appellants undertook to buy, not a definite mass, but approximately 24,000 tons of ore, so that any substantial difference in this quantity promised and the quantity delivered would entitle the buyers to recover damages for the short-delivery, was there really a short-delivery in this case?

We think not. As already stated, neither of the parties had actually measured or weighed the whole mass of ore cubic meter by cubic meter, or ton by ton. Both parties predicate their respective claims only upon an estimated number of cubic meters of ore multiplied by the average tonnage factor per cubic meter.

Now, appellee Gaité asserts that there was a total of 7,375 cubic meters in the stockpiles of ore that he sold to Fonacier, while appellants contend that by actual measurement, their witness Cipriano Manlañgit found the total volume of ore in the stockpiles to be only 6,609 cubic meters. As to the average weight in tons per cubic meter, the parties are again in disagreement, with appellants claiming the correct tonnage factor to be 2.18 tons to a cubic meter, while appellee Gaité claims that the correct tonnage factor is about 3.7.

In the face of the conflict of evidence, we take as the most reliable estimate of the tonnage factor of iron ore in this case to be that made by Leopoldo F. Abad, chief of the Mines and Metallurgical Division of the Bureau of Mines, a government pensionado to the States and a mining engineering graduate of the Universities of Nevada and California, with almost 22 years of experience in the Bureau of Mines. This witness placed the tonnage factor of every cubic meter of iron ore at between 3 metric tons as minimum to 5 metric tons as maximum. This estimate, in turn, closely corresponds to the average tonnage factor of 3.3 adopted in his corrected report (Exhibits "FF" and "FF-1") by engineer Nemesio Gamatero, who was sent by the Bureau of Mines to the mining claims involved at the request of appellant Krakower, precisely to make an official estimate of the amount of iron ore in Gaité's stockpiles after the dispute arose.

Even granting, then, that the estimate of 6,609 cubic meters of ore in the stockpiles made by appellants' witness Cipriano Manlañgit is correct, if we multiply it by the average tonnage factor of 3.3 tons to a cubic meter, the product is 21,809.7 tons, which is not very far from the estimate of 24,000 tons made by appellee Gaité, considering that actual weighing of each unit of the mass was practically impossible, so that a reasonable percentage of error should be allowed anyone making an estimate of the exact quantity in tons found in the mass. It must not be forgotten that the contract Exhibit "A" expressly stated the amount to be 24,000 tons, more or less. (cf. *Pine River Logging & Improvement Co. vs. U. S.*, 186 U.S. 279, 46, L. Ed. 1164)

There was, consequently, no short-delivery in this case as would entitle appellants to the payment of damages, nor could Gaité have been guilty of any fraud in making any misrepresentation to appellants as to the total quantity of ore in the stockpiles of the mining claims in question, as charged by appellants since Gaité's estimate appears to be substantially correct.

Wherefore, finding no error in the decision appealed from, we hereby affirm the same, with costs against appellants.

Bengzon, C. J., Padilla, Labrador, Concepcion, Barrera, Paredes, Dizon, De Leon, and Natividad, JJ., concur.

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