

LUZON STEEL CORPORATION, REPRESENTED BY TOMAS AQUINO CU, PLAINTIFF-APPELLANT, VS. JOSE O. SIA, DEFENDANT, TIMES SURETY & INSURANCE CO., INC., SURETY-APPELLEE.

G.R. No. L-26449. May 15, 1969

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

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REYES, J.B.L., Acting C.J.:

Direct appeal from two orders, dated 19 May and 5 June 1965, issued by the Court of First Instance of Manila (Judge Francisco Arca presiding), in its Civil Case No. 54913, entitled Luzon Steel Corporation, plaintiff, vs. Metal Manufacturing of the Philippines, Inc., and Jose O. Sia, defendants, whereby the court aforesaid quashed a writ of execution issued against the Times Surety & Insurance Co., Inc., and cancelled the undertaking of said surety company.

The essential and uncontroverted facts of the case may be summarized as follows:

Luzon Steel Corporation has sued Metal Manufacturing of the Philippines and Jose O. Sia, the former's manager, for breach of contract and damages. It obtained a writ of preliminary attachment of the properties of the defendants, but the attachment was lifted upon a P25,000.00 counter-bond executed by the defendant Sia, as principal, and the Times Surety & Insurance Co., Inc. (hereinafter designated as the surety), as solidary guarantor, in the following terms:

"WHEREFORE, we JOSE O. SIA, as principal, and the TIMES SURETY & INSURANCE CO., INC., as Surety, in consideration of the dissolution of attachment, hereby jointly and severally bind ourselves in the sum of Twenty Five Thousand Pesos (P25,000.00), Philippine Currency, to answer for the payment to the plaintiff of any judgment it may recover in the action in accordance with Section 12, Rule 59, of the Rules of Court.' (pp. 32, 45, Rec. on Appeal.)"

Issues having been joined, plaintiff and defendant (without intervention of the surety) entered into a compromise whereby defendant Sia agreed to settle the plaintiff's claim in the following manner:

"1. That the Defendant shall settle with the Plaintiff the amount of TWENTY FIVE THOUSAND (P25,000.00) PESOS, in the following manner: FIVE HUNDRED (P500.00) PESOS, monthly for the first six (6) months to be paid at the end of every month and to commence in January, 1965, and within one month after paying the last installment of P500.00, the balance of P22,000.00 shall be paid in lump sum, without interest. It is understood that failure of the Defendant to pay one or any installment will make the whole obligation immediately due and demandable and that a writ of execution will be issued immediately against Defendants bond."

The compromise was submitted to the court and the latter approved it, rendered judgment in conformity therewith, and directed the parties to comply with the same (Record on Appeal, page 22).

Defendant having failed to comply, plaintiff moved for and obtained a writ of execution against defendant and the joint and several counterbond. The surety, however, moved to quash the writ of execution against it, averring that

it was not a party to the compromise, and that the writ was issued without giving the surety notice and hearing. The court, overruling the plaintiff's opposition, set aside the writ of execution, and later cancelled the counter-bond, and denied the motion for reconsideration. Hence this appeal.

Main issues posed are (1) whether the judgment upon the compromise discharged the surety from its obligation under its attachment counterbond and (2) whether the writ of execution could be issued against the surety without previous exhaustion of the debtor's properties.

Both questions can be solved by bearing in mind that we are dealing with a counterbond filed to discharge a levy on attachment. Rule 57, section 12, specifies that an attachment may be discharged upon the making of a cash deposit or filing a counterbond "in an amount equal to the value of the property attached as determined by the judge"; that upon the filing of the counterbond "the property attached ----- shall be delivered to the party making the deposit or giving the counter-bond, or the person appearing on his behalf, the deposit or counterbond aforesaid standing in place of the property so released".

The underlined expressions constitute the key to the entire problem. Whether the judgment be rendered after trial on the merits or upon compromise, such judgment undoubtedly may be made effective upon the property released; and since the counterbond merely stands in the place of such property, there is no reason why the judgment should not be made effective against the counterbond regardless of the manner how the judgment was obtained.

Squarely on the point, and rebutting the appellee's apprehension that the compromise could be the result of a collusion between the parties to injure the surety, is our decision in *Anzures vs. Alto Surety & Insurance Co., Inc.*, et al., 92 Phil. 742, where this Court, through former Chief Justice Pares, ruled as follows:

"Under section 12, Rule 59, of the Rules of Court, the bond filed, as in this case, for the discharge of an attachment is 'to secure the payment to the plaintiff of any judgment he may recover in the action,' and stands 'in place of the property so released'. It follows that the order of cancellation issued by the respondent judge is erroneous. Indeed, judgment had already been rendered by the Court of First Instance of Manila in civil case No. 11748, sentencing Ben-jamin Aguilar to pay the sum of P3,500.00 to the petitioner; and it is not pretended that said judgment is a nullity. There is no point in the contention of the respondent Surety Company that the compromise was entered into without its knowledge and consent, thus becoming as to it essentially fraudulent. The Surety is not a party to civil case No. 11748 and, therefore, need not be served with notice of the petition for judgment. As against the conjecture of said respondent that the parties may easily connive by means of a compromise to prejudice it, there is also the likelihood that the same end may be attained by parties acting in bad faith through a simulated trial. At any rate, it is within the power of the Surety Company to protect itself against a risk of the kind.

Wherefore, the order of the respondent Judge cancelling the bond in question is set aside. So ordered with costs against the respondent Alto Surety & Insurance Co., Inc."

The lower court and the appellee herein appear to have relied on doctrines of this Court concerning the liability of sureties in bonds filed by a plaintiff for the issuance of writs of attachment, without discriminating between such bonds and those filed by a defendant for the lifting of writs of attachment already issued and levied. This confusion is hardly excusable considering that this Court has already called attention to the difference between these kinds of bonds. Thus, in *Cajefe vs. Judge Fernandez, et al.*, L-15709, 19 October 1960, this Court pointed out that -

"The diverse rule in section 17 of Rule 59 for counterbonds posted to obtain the lifting of a writ of attachment is due to these bonds being security for the payment of any judgment that the attaching party may obtain; they are thus mere replacements of the property formerly attached, and just as the latter may be levied upon after

final judgment in the case in order to realize the amount adjudged, so is the liability of the countersureties ascertainable after the judgment has become final. This situation does not obtain in the case of injunction counterbonds, since the sureties in the latter case merely undertake to pay all damages that the plaintiff may suffer by reason of the continuance ----- of the acts complained of ' (Rule 60, section 6) and not to secure payment of the judgment recovered.[1]

It was, therefore, error on the part of the court below to have ordered the surety bond cancelled, on the theory that the parties' compromise discharged the obligation of the surety.

As declared by us in *Mercado vs. Macapayag*, 69 Phil. 403, 405-406, in passing upon the liability of counter sureties in replevin who bound them-selves to answer solidarily for the obligations of the defendants to the plaintiffs in a fixed amount of P912.04, to secure payment of the amount that said plaintiff be adjudged to recover from the defendants.[2]

"the liability of the sureties was fixed and conditioned on the finality of the judgment rendered regardless of whether the decision was based on the consent of the parties or on the merits. A judgment entered on a stipulation is nonetheless a judgment of the court because consented to by the parties."

But the surety in the present case insists (and the court below so ruled) that the execution issued against it was invalid because the writ issued against its principal, Jose O. Sia, et al., defendants below, had not been returned unsatisfied; and the surety invoked in its favor Section 17 of Rule 57 of the Revised Rules of Court (old Rule 59), couched in the following terms:

"SEC. 17. When execution returned unsatisfied, recovery had upon bond. - If the execution be returned unsatisfied in whole or in part, the surety or sureties on any counterbond given pursuant to the provisions of this rule to secure the payment of the judgment shall become charged on such counter-bond, and bound to pay to the judgment creditor upon demand, the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

The surety's contention is untenable. The counterbond contemplated in the rule is evidently an ordinary guaranty where the sureties assume a subsidiary liability. This is not the case here, because the surety in the present case bound itself "jointly and severally" (in solidum) with the defendant; and it is prescribed in Article 2059, paragraph 2, of the Civil Code of the Philippines that excusion (previous exhaustion of the property of the debtor) shall not take place "if he (the guarantor) has bound himself solidarily with the debtor". The rule heretofore quoted can not be construed as requiring that an execution against the debtor be first returned unsatisfied even if the bond were a solidary one; for a procedural rule may not amend the substantive law expressed in the Civil Code, and further would nullify the express stipulation of the parties that the surety's obligation should be solidary with that of the defendant.

A second reason against the stand of the surety and of the court below is that even if the surety's undertaking were not solidary with that of the principal debtor, still he may not demand exhaustion of the property of the latter, unless he can point out sufficient leviable property of the debtor within Philippine territory. There is no record that the appellee surety has done so. Says Article 2060 of the Civil Code of the Philippines:

"ART. 2060. In order that the guarantor may make use of the benefit of excusion, he must set it up against the creditor upon the latter's demand for payment from him, and point out to the creditor available property of the debtor within Philippine territory, sufficient to cover the amount of the debt."

A third reason against the thesis of appellee is that, under the rule and its own terms, the counter-bond is only conditioned upon the rendition of the judgment. Payment under the bond is not made to depend upon the re-delivery or availability of the property previously attached, as it was under Section 440 of the old Code of

Civil Procedure. Where under the rule and the bond the undertaking is to pay the judgment, the liability of the surety or sureties attaches upon the rendition of the judgment, and the issue of an execution and its return nulla bona is not, and should not be, a condition to the right to resort to the bond.[3]

It is true that under Section 17 recovery from the surety or sureties should be "after notice and summary hearing in the same action". But this requirement has been substantially complied with from the time the surety was allowed to move for the quashal of the writ of execution and for the cancellation of their obligation.

WHEREFORE, the orders appealed from are reversed, and the court of origin is ordered to proceed with the execution against the surety appellee, Times Surety & Insurance Co., Inc. Costs against said appellee.

Dizon, Makalintal, Zaldivar, Sanchez, Fernando, Capistrano, and Barredo, JJ., concur.

Teehankee, J., did not take part.

Concepcion, C.J., and Ruiz Castro, J., on official leave, did not take part.

[1] See concurring opinion, *Alliance Insurance & Surety Co. vs. Piccio*, ante.).

[2] Note the similarity in conditions of this replevin bond with that of appellee surety in the case at bar (v. ante, page 2).

[3] See *Anzures vs. Alto Surety* and *Mercado vs. Macapayag*, ante; 7 C. J. S., page 510; 6 Am. Jur. 2d, page 938, section 530.

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