

TOWERS ASSURANCE CORPORATION, PETITIONER, VS. ORORAMA SUPERMART, ITS OWNER-PROPRIETOR, SEE HONG AND JUDGE BENJAMIN K. GOROSPE, PRESIDING JUDGE, COURT OF FIRST INSTANCE OF MISAMI...

G.R. No. L-45848. November 09, 1977

Ponente: AQUINO, J.

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AQUINO, J.:

This case is about the liability of a surety in a counterbond for the lifting of a writ of preliminary attachment.

On February 17, 1976 See Hong, the proprietor of Ororama Supermart in Cagayan de Oro City, sued the spouses Ernesto Ong and Conching Ong in the Court of First Instance of Misamis Oriental for the collection of the sum of P58,400 plus litigation expenses and attorney's fees (Civil Case No. 4930).

See Hong asked for a writ of preliminary attachment. On March 5, 1976, the lower court issued an order of attachment. The deputy sheriff attached the properties of the Ong spouses in Valencia, Bukidnon and in Cagayan de Oro City.

To lift the attachment, the Ong spouses filed on March 11, 1976 a counterbond in the amount of P58,400 with Towers Assurance Corporation as surety. In that undertaking, the Ong spouses and Towers Assurance Corporation bound themselves to pay solidarily to See Hong the sum of P58,400.

On March 24, 1976 the Ong spouses filed an answer with a counterclaim. For nonappearance at the pre-trial, the Ong spouses were declared in default.

On October 25, 1976, the lower court rendered a decision, ordering not only the Ong spouses but also their surety, Towers Assurance Corporation, to pay solidarily to See Hong the sum of P58,400. The court also ordered the Ong spouses to pay P10,000 as litigation expenses and attorney's fees.

Ernesto Ong manifested that he did not want to appeal. On March 8, 1977, Ororama Supermart filed a motion for execution. The lower court granted that motion. The writ of execution was issued on March 14 against the judgment debtors and their surety. On March 29, 1977, Towers Assurance Corporation filed the instant petition for certiorari where it assails the decision and writ of execution.

We hold that the lower court acted with grave abuse of discretion in issuing a writ of execution against the surety without first giving it an opportunity to be heard as required in Rule 57 of the Rules of Court which provides:

"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 counter bond 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."

Under section 17, in order that the judgment creditor might recover from the surety on the counter bond, it is necessary (1) that execution be first issued against the principal debtor and that such execution was returned unsatisfied in whole or in part; (2) that the creditor made a demand upon the surety for the satisfaction of the judgment, and (3) that the surety be given notice and a summary hearing in the same action as to his liability for the judgment under his counter bond.

The first requisite mentioned above is not applicable to this case because Towers Assurance Corporation assumed a solidary liability for the satisfaction of the judgment. A surety is not entitled to the exhaustion of the properties of the principal debtor (Art. 2959, Civil Code; Luzon Steel Corporation vs. Sia, L-26449, May 15, 1969, 28 SCRA 58, 63).

But certainly, the surety is entitled to be heard before an execution can be issued against him since he is not a party in the case involving his principal. Notice and hearing constitute the essence of procedural due process. (Martinez vs. Villacete, 116 Phil. 326; Alliance Insurance & Surety Co., Inc. vs. Hon. Piccio, 105 Phil. 1192, 1200; Luzon Surety Co., Inc. vs. Beson, L-26865-66, January 30, 1970, 31 SCRA 313).

WHEREFORE, the order and writ of execution, insofar as they concern Towers Assurance Corporation, are set aside. The lower court is directed to conduct a summary hearing on the surety's liability on its counter bond. No costs.

SO ORDERED.

Fernando, (Chairman), Barredo, Antonio, Concepcion, Jr., and Santos, JJ., concur.

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