

IN RE: PETITION FOR CONSOLIDATION OF OWNERSHIP IN PACTO DE RETRO SALE OF A HOUSE. JUAN TACDORO, PETITIONER AND APPELLEE VS. JESUS ARCENAS, OPPOSITOR AND APPELLANT.

G.R. No. L-15312. November 29, 1960

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

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

On December 22, 1958, petitioner-appellee Juan Tacdoro filed in the Court of First Instance of Davao a petition (docketed as Misc. Case No. 374) alleging, among other things, that appellant Jesus Arcenas had sold to the petitioner, *con pacto de retro*, a residential house situated at Bolton Street, Davao City, and covered under Taxation No. R-1452; that February 16, 1957 was the original expiry date fixed by the parties for the repurchase, but upon subsequent agreement, the period was extended for another year counted from the aforesaid date; and that the term for the repurchase had expired without the right of repurchase having been exercised by the vendor. Accordingly, petitioner prayed that the court order a judicial consolidation of ownership over the property sold pursuant to the provisions of Article 1607 of the Civil Code.

The petition was heard on December 24, 1958, the date set by the petitioner. Appellant was served a copy of the Baid petition two days previously, or on December 22, 1958; but no summons was served by the court.

On January 6, 1959, the court *a quo* entered an order consolidating ownership of the property in question in favor of the petitioner. On January 10, 1959, appellant filed a motion for reconsideration, contending that the lower court had no jurisdiction to consider the petition of the appellee for lack of summons, and that the denominated *pacto de retro* sale was in fact an equitable mortgage. This motion was denied by the court in its order of January 21, 1959.

From the two orders aforesaid, Jesus Arcenas appealed to us on points of law.

The appeal is well taken. Article 1607 of the Civil Code states:

"In case of real property, the consolidation of ownership in the vendee by virtue of the failure of the vendor to comply with the provisions of article 1616 shall not be recorded in the Registry of Property without a judicial order, after the vendor has been *tidy* heard" (Italics supplied)

The code did not provide for any specific procedure to be observed in securing the judicial order above-mentioned. Accordingly, we should fall back on the ordinary rules of procedure applicable. As correctly pointed out by the appellant, the petition to consolidate ownership under the article aforequoted does not partake of the nature of a motion,[1] it not being merely an incident to an action or a special proceeding (see Sec. 1, Rule 26, Rules of Court; 60 C.J.S. 7), but is an ordinary civil action cognizable by the Court of First Instance. As such ordinary action, it should be governed by the rules established for summons found in Rule 7 of the Rules of Court, stating, among other things, that upon the "filing of the complaint, the clerk of court shall forthwith issue the corresponding summons to the defendant" (Sec. 1). The defendant would then be entitled to a period of fifteen

(15) days from service, of such summons within which to file either a motion to dismiss the petition (Sec. 1, Rule 8) or an answer (Sec. 1, Rule 9). The failure of the court to properly observe these rules is sufficient cause for validly attacking its consequent judgments and or orders even on jurisdictional grounds (See *Salmon & Pacific Commercial Co. vs. Tan Cuelco, et al.*, 36 Phil., 556).

That the vendor a retro should be made a party-defendant to the proceedings and, therefore, be entitled to notice of the same, is clearly inferable from the codal provision, that the judicial order consolidating ownership in the vendee a retro shall not issue unless "after the vendor has been duly heard" (Art. 1607, Civil Code, *supra*) ; which statement would also imply that the proceedings therein to be taken are in no way to be construed as merely summary in nature. This conclusion is further fortified by other Provisions of the new Civil Code such as articles 1602, 1603, 1604, 1605 and 1606, which are all indicative of the legislative intent to accord the vendor a retro the maximum safeguards for the protection of his legal rights under the true agreement of the parties. Experience has demonstrated that many sales with right of repurchase have been devised only to circumvent or ignore our usury laws and for this reason, the law looks upon them with disfavor (Report of the Code Commission, pp. 63-64). When, therefore, Article 1607 speaks of a judicial order after the vendor shall have been duly heard, it contemplates none other than a regular court proceeding under the governing Rules of Court, wherein the parties are given full opportunity to lay bare before the court their real covenant. Furthermore, the obvious intent of our Civil Code, in requiring a judicial confirmation of the consolidation in the vendee a retro of the ownership over the property sold, is not only to have all doubts over the true nature of the transaction speedily ascertained and decided, but also to prevent the interposition of buyers in good faith while such determination is being made. Under the former method of consolidation by a mere extra-judicial affidavit of the buyer a retro, the latter could easily cut off any claims of the seller by disposing of the property, after such consolidation, to strangers in good faith and without notice. The chances of the seller a retro to recover his property would thus be nullified, even if the transaction were really proved to be a mortgage and not a sale.

The Court below, therefore, erred in considering that judicial consolidation of ownership under Article 1607 of the new Civil Code can be had by a mere motion with three days' notice, instead of requiring an independent proceeding, for which docket fees are chargeable. As aforesaid, a motion could only exist as an incident to a principal suit or proceeding.

It is still premature to decide here and now whether the agreement in question is a true pacto de retro sale or in reality a mere equitable mortgage. Upon the other hand, the arguments advanced by the appellant convince us that his exceptions to the orders appealed from were not taken merely for frivolous reasons.

Wherefore, the orders appealed from are set aside; and appellant Jesus Arcenas is hereby given a period of 15 days from the finality of this judgment within which to file in the court below his answer to the petition. The case is ordered remanded to the lower court for further proceedings in accordance with this opinion. Costs in this instance against petitioner-appellee Juan Tacdoro.

Paras, C.J., Bengzon, Bautista, Angelo, Labrador, Concepcion, Barrera, Gutierrez David, Paredes and Dizon, JJ., concur.

Orders set aside, case remanded to lower court for further proceedings.

[1] As the lower court has apparently construed the instant petition to be.

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