

VANGUARD ASSURANCE CORPORATION, PETITIONER, VS. HON. COURT OF APPEALS AND JALWINDOR MANUFACTURING, INC., RESPONDENTS.

G.R. No. L-25921. May 27, 1975

Ponente: ESGUERRA, J.

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ESGUERRA, J.:

Appeal by certiorari to review the decision of the Court of Appeals dismissing petitioner's appeal.

In the Court of First Instance of Manila plaintiff (now respondent) Jalwindor Manufacturers Inc. sued Felipe Hernandez to recover the sum of P30,000.00. In its complaint plaintiff also prayed for a writ of preliminary attachment against the property of the defendant to answer for any judgment which the former may obtain against the latter. Upon plaintiff's filing a bond in the amount of P30,000.00 the lower court issued the order of attachment against defendant Felipe Hernandez.

On May 28, 1964 Felipe Hernandez moved to dissolve or to lift the order of attachment and put up a counterbond in the amount of P30,000.00, with petitioner Vanguard Assurance Corporation acting as surety. Under the counterbond Hernandez and the Vanguard Assurance Corporation jointly and severally bound themselves "in the sum of P30,000.00, under the condition that in case the plaintiff recover judgment in the action the defendant will on demand redeliver the attached property so released to the officer of the Court to be applied to the payment of the judgment, or in default thereof that the defendant and surety will on demand pay to the plaintiff the full value of the property released." Accordingly, the lower court approved the counterbond and lifted the writ of attachment.

After the issues had been joined the parties, duly assisted by their respective counsel, entered into a compromise agreement whereby Felipe Hernandez undertook and agreed to pay the plaintiff P26,000.00 in three (3) monthly installments, the first of which would be payable on or before October 25, 1964, the second, on or before November 25, 1964 and the last, on or before December 25, 1964. It was also provided in the compromise agreement that the counterbond executed by the defendant would remain in full force and effect in favor of the plaintiff and that in case of breach by the defendant of any provision of the compromise agreement, especially that which relates to the satisfaction of the principal obligation, he would be amenable to the execution of the judgment and other relief available to the plaintiff as circumstances may warrant. The compromise agreement was submitted to the court for approval and on October 28, 1964, the court a quo approved the same and rendered judgment on the basis thereof.

On motion of the plaintiff due to defendant's failure to pay accordingly, the lower court issued a writ of execution on December 22, 1964. However, no sufficient property of the defendant was located and the writ of execution was only partially satisfied to the extent of P5,000.00. Plaintiff demanded from the Vanguard Assurance Corporation, as surety, the balance of P21,000.00 plus P652.57 representing the costs of the suit. The demand for payment having been ignored, plaintiff filed a motion with the lower court for an order to recover the unpaid

balance from the counterbond, pursuant to Sec. 17, Rule 57 of the Rules of Court. The surety, answering plaintiffs motion, interposed two special defenses, to wit: (1) that plaintiffs motion is not the proper pleading and/or remedy to make said surety liable on its counterbond, but by a supplemental complaint filed before the finality of the judgment against Hernandez; and (2) that the surety company has never become liable under its counterbond because plaintiff was never able to attach the property of the defendant. After a summary hearing, the lower court granted the motion and ordered the surety company to pay plaintiff the amount of P21,000.00.

Vanguard Assurance Corporation elevated the case to the Court of Appeals. After the perfection of the appeal and before the parties had filed their respective briefs, appellee Jalwindor Manufacturers, Inc. moved to dismiss the appeal, to which appellant surety filed an opposition claiming that the motion to dismiss could not be determined without resolving the entire case on the merits. However, the Court of Appeals sustained the motion in its decision promulgated on December 17, 1965, the dispositive part of which reads as follows:

"WHEREFORE, the appeal interposed by the Vanguard Assurance Corporation is hereby dismissed for being manifestly and palpably frivolous, and the appealed judgment is affirmed in toto, with costs against appellant surety."

Hence, the instant petition for certiorari.

The several errors assigned in petitioner's brief may be summarized into two major issues, to wit: (1) whether or not respondent's claim on the counter-bond was barred by its failure to file a supplemental pleading before finality of the judgment wherein the liability of the counter-surety may be fixed, ascertained and adjudicated; and (2) whether or not the Court of Appeals erred in dismissing the appeal before the submission of the briefs and before the parties could be heard on the merits.

Petitioner contends that a surety in a counterbond should be considered as a special intervenor in the principal case, joining issue with the principal defendant, wherein its rights and liabilities should be ascertained, fixed and adjudicated at the same time with the principal defendant before final judgment; or in a supplemental pleading for that purpose, otherwise the surety's liability under the bond would be barred.

The contention does not find support from the rules applicable to the instant case. Petitioner might have in mind Section 20 of Rule 57 which outlines the procedure to be followed in a claim for damages by the party against whom attachment was issued. This rule provides that such damages may be awarded only upon application and after proper hearing, and shall be included in the judgment; and that the application must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor of his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.

By its very terms, Section 20 of Rule 57 obviously refers to the recovery of damages by a party against whom attachment was issued. This remedy is available only to the defendant not the plaintiff (*Dizon vs. Valdez*, G.R. No. L-23920, April 25, 1968). Rule 57 of the Rules of Court, particularly Sections 12 and 17 thereof, is the rule applicable to the case at bar. Section 12 provides that a counter-bond in an attachment is executed "to secure the payment of any judgment that the attaching creditor may recover in the action". This legal precept should be read together with Section 17 of the same Rule, which we quote:

"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 counterbond, 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 above-quoted provision of the pertinent Rule contemplates of proceedings on execution after judgment when

liability upon the surety's bond may be determined. The key term in Section 17 is the phrase "if the execution be returned unsatisfied in whole or in part." (Dizon vs. Valdez, supra). Hence, after the judgment for the plaintiff has become executory and the execution is returned unsatisfied, as in the instant case, the liability of the bond automatically attaches and, in case of failure of the surety to satisfy the judgment against the defendant despite demand therefor, writ of execution may issue against the surety to enforce the obligation of the bond (Tijam, et al. vs. Manila Surety and Fidelity Co., Inc. G.R. No. L-21450, April 15, 1968).

It is also contended that where the case is tried and disposed of either on the basis of a compromise entered into by the plaintiff and the defendant, or the evidence duly presented by the parties, where the surety has never consented to the compromise nor notified of the trial, the judgment rendered against the principal based thereon cannot bind the surety unless he is given an opportunity to ascertain the correctness of said judgment before it becomes final, otherwise any subsequent claim against the surety on the counterbond should be barred. It is claimed that unless this is the rule the plaintiff and the defendant can easily connive by means of a compromise to prejudice the surety.

The contentions are not new. In *Anzures vs. Alto Surety & Insurance Co., Inc., et al.*, 49 O.G. 946, this Court, thru Mr. Chief Justice Ricardo Paras, brushed aside a similar contention in this wise:

"There is no point in the contention that the compromise was entered into without the surety's knowledge and consent, thus becoming as to it essentially fraudulent. The surety is not a party to Civil Case No. 117848 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."

Petitioner likewise claims that the Court of Appeals erred in not considering its defense showing full payment by defendant of the obligation sought to be enforced against the counterbond.

On the issue of full payment by defendant of the obligation, the trial court made the following findings:

"As it appears that defendant has not yet paid to plaintiff the amount of P21,000.00, being the balance of the judgment which the latter secured against the former by virtue of their Compromise Agreement approved by this Court on October 28, 1964, it follows that the said counterbond is still liable for the said unpaid balance.

"The said liability may only be avoided if there is collusion between plaintiff and defendant in securing the said judgment to the prejudice of the surety on the counter-bond, or if the said judgment has already been paid by defendant. There is no showing whatsoever of such collusion, nor was defendant presented as a witness that he has fully paid said judgment." (Record on Appeal pp. 78-79)

It must be noted that the decision of the trial court was affirmed in toto by the Court of Appeals. In other words, the above findings of the trial court that there was really no full payment of the judgment debt was also found correct by the Court of Appeals when it fully affirmed the decision appealed from. Besides, the petitioner's evidence to that effect partook of the nature of hearsay evidence, considering that the defendant was never presented to testify thereon.

As regards the last issue, we are not prepared to say that the Court of Appeals erred in dismissing the appeal of the petitioner on the ground that the same was manifestly frivolous and instituted merely for delay. On the face of the record before Us We could not see any prospect of the decision appealed from being reversed or modified, in view of the clear and unequivocal provisions of Sections 12 and 17 of Rule 57 of the Rules of Court regarding the liability of a surety on a counter-bond in attachment proceedings. To entertain the instant appeal by remanding the case to the Court of Appeals for further proceedings would entail too much time and effort which would impair

the speedy administration of justice. The instant appeal is manifestly frivolous and completely devoid of merit. Thus:

" . . . Although as a general rule, an appeal should not be dismissed on a ground which goes to the merits of the case or to the right of plaintiff or defendant to recover, yet, in exceptional instance, an appellate court may order the dismissal when the appeal appears to be manifestly and palpably frivolous. And where, as in the instant case, the dismissal has been ordered by the trial court, it will not be disturbed in the appellate court if the latter finds the appeal to have been interposed ostensibly for delay. It has been held that a frivolous appeal is one presenting no justiciable question, or one so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect that it can ever succeed. The instant case is one such instance in which the appeal is evidently without merit, taken manifestly for delay." (De la Cruz, et al. vs. Blanco, et al., 73 Phil. 956, cited in Keater Huang, et al. vs. Associated Realty Development Co., Inc., G.R. No. L-26421, October 29, 1966).

WHEREFORE, the decision appealed from is affirmed, with costs against petitioner.

SO ORDERED.

Castro, (Chairman), Teehankee, Makasiar, Muñoz Palma and Martin, JJ., concur.

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