

L. F. LANG, PLAINTIFF AND APPELLEE, VS. THE ACTING PROVINCIAL SHERIFF OF SURIGAO, DEFENDANT AND APPELLEE; PHILIPPINE TRUST COMPANY, DEFENDANT-INTERVENOR AND APPELLANT; MONTGOMER...*G.R. No. L-4083. August 31, 1953*

Ponente: LABRADOR, J.

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The most important facts involved in this case are set forth in a stipulation and in the decision of the trial court, and may be summarized as follows:

On July 21, 1948 the Bucas Grande Lumber Corporation executed a chattel mortgage for P150,000 in favor of the Philippine Trust Company over its machineries and equipments situated in Matingab, Bucas Grande Island, Surigao. The machineries and equipments are set forth in a list attached to the mortgage deed. On April 12, 1949 another deed of mortgage was executed for the same amount and over the same properties, although the arrangement or order in which the properties are listed is different. As the mortgagor failed to pay the indebtedness, the attorneys of the mortgagee sent a letter to the provincial sheriff of Surigao requesting the latter to take immediate possession of the properties mortgaged and sell them on September 30, 1949, at the office of the mortgagor at Bucas Grande. When the sheriff received this letter on September 23, 1949, he could not give sufficient notice of the sale, so he postponed the sale on October 8, 1949. At this sale, the Philippine Trust Company was the sole bidder and its bid was for P40,000. Award was made to it and a certificate of sale, dated October 15, 1949 (Exhibit 8), issued in its favor. It so happened, however, that the list of machineries attached to the certificate of sale did not include many of the items included in the deed of mortgage, so the Philippine Trust Company protested against the list of properties included in the certificate of sale (Exhibit 9). The only change that the sheriff was willing to make was the inclusion in the certificate of sale of "various equipments or spare parts scattered in the vicinity of the sawmill of the mortgagor." As this was not satisfactory, a deputy of the sheriff was sent to the premises to make a list of the properties on the island, and this list tallied with that attached to the mortgage deed of April 12, 1949. In the meantime, one Montgomery W. Rice transported four items to the town of Surigao, although one of these was taken back.

Before the representatives of the Philippine Trust Company left Surigao for Manila on November 1, 1949, they made an agreement with the sheriff that a second sale was to be conducted on November 10, 1949. The sheriff, however, did not make the sale on November 10, 1949, as agreed upon between him and the representatives of the Philippine Trust Company. He advanced the sale to November 7, 1949 and gave notice of this to the Philippine Trust Company by telegram dated November 5, 1949, which he registered with the post office only on November 6th. This telegram was received by the Philippine Trust Company only on November 7, 1949 (Exhibit 11, Philippine Trust Company), and still another (rush) on the same date (Exhibit 13, Philippine Trust Company.) The Philippine Trust Company answered these on the same date with a rush telegram, asking that the sale be postponed to November 14th (Exhibit 14, Philippine Trust Company.) This telegram of the Philippine Trust

Company was received by the sheriff at 3:38 o'clock in the afternoon of November 7, 1949. The only bidder at the sale was L. F. Lang, plaintiff and appellee herein, who placed a bid for P15,000. The bid was dated November 7, 1949, at 10 o'clock in the morning (Exhibit 15, Sheriff.) On November 7, 1949 at 10:20 in the morning, the sheriff sent a third telegram, collect, to the Philippine Trust Company, advising the latter that he received its bid late and had consummated the sale to Lang (Exhibit 17, Philippine Trust Co.) This telegram was received by the Philippine Trust Company on November 9, and, upon receiving this advice, it protested by rush telegram that the sale was illegal (Exhibit 18, Philippine Trust Company.) It also sent a letter (Exhibit 19, Philippine Trust Company), claiming that the second sale was illegal because the properties were already sold.

It will be noted that on November 7, 1949, evidently before learning that the sale had been consummated, the representative of the Philippine Trust Company wrote a letter to the sheriff offering a bid for P16,000 for all the properties in the list (Exhibit 21, Philippine Trust Company.) This letter was presented to the sheriff on November 10, 1949.

The sheriff referred the matter of the protest of the Philippine Trust Company against the second sale to the provincial fiscal for opinion, and the latter, on November 17, 1949, held that the second sale was illegal. So the sheriff refused to execute the certificate of sale in favor of L. F. Lang and, instead, advertised another sale for November 28th. At this sale, the Philippine Trust Company entered a bid for P16,000, and award to it was made, but up to the present the sheriff has not executed the corresponding certificate of sale.

The present action was instituted by L. F. Lang to compel the sheriff to execute a certificate of sale in his favor, for the award made on November 7, 1949, to deliver to him the chattels sold, and to prevent him from executing a certificate of sale in favor of the Philippine Trust Company. The Philippine Trust Company intervened in the action and filed an answer, with a counter-claim and a cross-claim, praying that the sheriff be ordered to execute a deed of sale in its favor for P16,000, this amount to be credited to its mortgage; that plaintiff's suit be dismissed; and that plaintiff be sentenced to pay P40,000 damages. In their pleadings, both Lang and the Philippine Trust Company asked for damages against each other.

The trial court found that the second sale was agreed upon between the Philippine Trust Company and the sheriff because of the misunderstanding as to the properties covered by the deed of mortgage and those actually sold in the foreclosure sale; that as a third party was involved in the second sale, even if the sheriff and the Philippine Trust Company had agreed that it be a formality, this agreement could not be effective as against said third person; that granting that the Philippine Trust Company had the right to be given opportunity to offer its bid and was not given that opportunity because the sale was waived by it (1) because when it received notice of the sale, it only limited itself to asking for its postponement, and only protested its illegality after it had been advised that it was already consummated, and (2) because its representative filed its bid on November 10, 1949. It, therefore, held that the second sale was valid and that the first and third sales were illegal, and it ordered the sheriff to execute the certificate of sale in favor of the plaintiff, dismissing the cross-claim of the Philippine Trust Company. It also found that none of the parties had proved or is entitled to damages, and dismissed all claims therefor.

The Philippine Trust Company has appealed against the above judgment, claiming (1) that the first sale was a valid one; (2) that the second sale was null and void because no notice thereof was given as provided for by law; and (3) that with respect to the second sale, it did not waive the requirements of the law as to notice, and is not estopped to raise this objection.

The most important error assigned against the judgment of the trial court, refers to the validity of the second sale effected on November 7, 1949. In support of the alleged invalidity of this sale, it is claimed that the properties had

already been previously sold to defendant-intervenor-appellant, Philippine Trust Company, in the first sale made on October 8, 1949. The argument is based on a wrong premise, i.e., that the first sale conducted on October 8, 1949 was a valid one. Assuming, as defendant and appellant Philippine Trust Company contends, that the properties sold on that first foreclosure sale were believed by it to be all the properties covered by the mortgage, the sheriff who conducted the sale believed otherwise, claiming that only those listed in the certificate of sale (Exhibit 8) were sold by him. The existence of a mistake on the part of the sheriff was recognized by the representatives of the Philippine Trust Company, who upon refusal of the sheriff to include in his certificate all the items covered by the mortgage, agreed that another sale be conducted. In a foreclosure sale, just as in any ordinary contract of sale, there must be a specific subject. There must be a "meeting of the minds" with respect to the subject of the contract, i.e., that what the vendor is selling is exactly the same as what the vendee is purchasing. In the absence of such an understanding, no sale may be considered perfected. We, therefore, hold that the first foreclosure sale of October 8, 1949 was not a valid one, for the reason that there was a misunderstanding at the sale between the sheriff and the appellant, Philippine Trust Company, as to the identity of the properties being sold.

As to the second sale, it should be noted that it was advertised on November 1, 1949 and actually took place on November 7, 1949. Therefore, the 10-day period of notice required by the law (section 14, Act No. 1508) was not complied with. However, the trial court held that, notwithstanding this irregularity, the same can not be annulled because the deed of mortgage contains an express waiver on the part of the mortgagor of the ten days notice required by law. It is true that, insofar as the mortgagor is concerned, the express waiver of the notice contained in the deed of mortgage saves the sale from his objection. But not the mortgagee. It did not receive notice of the sale within ten days thereof because, in spite of the agreement between the representatives of the mortgagee and the sheriff that the sale shall be made on November 10, 1949, the latter, for reasons which the record does not show or explain, advanced the sale and set it for November 7, 1949, without previous notice, and without opportunity for it to bid. The sheriff dated his telegram November 5, 1949, but he actually filed it and was received in the office of the postmaster only at 11:10 o'clock in the morning of November 6, 1949 (Exhibit 11, Philippine Trust Company). This telegram was received by the Philippine Trust Company on November 7, 1949. The Philippine Trust Company, in utter good faith, answered this first telegram by a rush telegram registered at the post office at 10:31 o'clock in the morning of November 7th, and this telegram was received at the post office of Surigao at 12:16 in the afternoon of the same day. But the sale had been advertised for 10:00 o'clock in the morning, and the sheriff ignored the telegram, making the award in favor of the bidder, L.F. Lang.

It is clear and evident, as the trial court found, that there was no sufficient opportunity for the mortgagee to take part in the sale and offer its bid thereat. However, it held that it waived its objection (to the failure of the sheriff to give it sufficient notice in advance and opportunity to bid) because the objection against the illegality was made only after learning that its request for postponement was not granted, and because it made a bid on November 10, 1949. In arriving at this conclusion the court reasoned, with plaintiff and appellee, that the appellant may not at the same time be allowed to attack the sale if its bid is rejected, and approve of it if said bid is accepted. The fallacy of the reasoning of the court in both arguments is evident. As to the first, the mortgagee did not expect, as he had no right to assume, that its request for postponement was to be denied, because it had not been given sufficient opportunity to bid, and in all fairness the sale should have been postponed. Of course, its attack against the validity of the sale could come only after it was advised of the denial of its request for postponement; it could not have done otherwise. It could not put the cart before the mule. To ask for the postponement of a sale is not to agree thereto on the date it actually took place, which was objectionable. If it may be considered a waiver of the objection at all, it is so only conditionally, i.e., that the proceedings already had been allowed to stand, but that the mortgagee will not be denied the right to bid and will still be granted its opportunity to do so.

The same may be said of the submission of mortgagee's bid on November 10, 1949. As it was agreed upon between it and sheriff that the sale was to be made on November 10, 1953, it wanted the sheriff to be bound by said agreement and still allow its bid to be considered, even if the sale had actually been made. If there was a waiver also, it was likewise a conditional one, i.e., that the sale continue but that its bid be considered submitted on time. But the plaintiff and appellee and the trial court would consider the mortgagee as having waived its objection to the invalidity of the sale only, without considering its subsequent bid as presented on time; plaintiff, in effect, would want to accept the waiver only, and reject the condition imposed in said waiver; he would want to eat his cake and still have it too. The claim of plaintiff and appellee is clearly unfair and unjust and can not be justifiable in law or equity.

A waiver must be express. If it is to be implied from conduct merely, said conduct must be clearly indicative thereof (of the waiver), indicative of a clear intent (67 C. J. 306). Especially where, as in the case at bar, the mortgagee loses a very valuable right, such as the right to participate in a bid, in order to recover the loan that it has granted on the security of the mortgage, or as much thereof as is possible under the circumstances, nothing less than a clear, positive waiver, made with a full knowledge of the circumstances, must be required. In the case at bar, the conduct from which the alleged waiver is implied was neither express, nor clear or positive, but implied from the request for the postponement of the bid and the presentation of such bid three days later. These two acts clearly imply an assertion that the right to bid still existed, not a waiver thereof. They may not be interpreted as a waiver of the objection to the illegality of the sale, but a re-assertion of the right to an opportunity to bid. And as the trial court clearly committed error in holding that mortgagee had waived its objection, the sale, which was held without the ten days prior notice to the mortgagee, must be declared, as we hereby declare it to be, null and void.

As the sales of October 8 and November 7, 1949 are both null and void, it follows that the third one, concluded on November 28, 1949, which was in all respects regular, and against which no objection had been raised except the alleged validity of the second sale, must be upheld. At this sale the Philippine Trust Company was the successful bidder and it bid P16,000. The execution of the corresponding certificate of sale has been asked for and this remedy can no longer be denied.

For the foregoing considerations, the judgment appealed from is hereby reversed, and the Provincial Sheriff of Surigao is hereby ordered to execute and deliver a certificate of sale of the properties sold thereat at the price of P16,000, which price should be credited in favor of the purchaser as mortgage creditor in the sale on foreclosure. Costs shall be taxed against the plaintiff and appellee. So ordered.

Paras, C.J., Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, Jugo and Bautista Angelo, JJ., concur.

SUPPLEMENTAL DECISION

Sept. 29, 1953

LABRADOR, J.:

In view of the fact that favorable judgment has been rendered in its favor, the Philippine Trust Company has now filed a motion asking that the judgment be completed by an award of damages. There is no evidence to support a finding that the sheriff had wanted to deprive the Philippine Trust Company of its opportunities to make a bid at the sale, notwithstanding the fact that the date thereof was advanced. If the Philippine Trust Company was actually deprived thereof, it was perhaps more due to delay in the transmission and delivery of the telegrams that the sheriff had sent. Furthermore, the supposed damage was too speculative and grossly out of proportion to the

appraisal of the properties that the Philippine Trust Company itself made, as evidenced by the amount of its bid, for the claim for damages to merit the serious consideration of the court. Neither is there any ground for it to recover in its counterclaim, as there is absolutely no evidence to show that plaintiff-appellee was in any way responsible for the advancing of the sale. The counterclaim and the cross-claim presented by the Philippine Trust Company are therefore dismissed.

Paras, C.J., Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, Jugo and Bautista Angelo, JJ., concur.

RESOLUTION

September 29, 1953

LABRADOR, J.:

Plaintiff-appellee has moved the court to reconsider the decision, contending that the law on extra-judicial foreclosure contains no provision that notice of the sale be given the executing mortgage creditor. The absence of a provision is explained by the fact that it is the creditor who causes the mortgaged property to be sold, and the date of sale is fixed upon his instruction because it is he who causes the sale and controls its details. That the creditor should fix the date of the sale is clearly to be inferred from the provision that it is he (the creditor) who is required by the law to give notice of the sale and its date to the mortgagor. When, as in the case at bar, the sheriff sets a day for the sale different from that fixed for it by the creditor, Neither the pleadings nor the evidence entitle him to such relief. Motion denied.

Paras, C.J., Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, Jugo and Bautista Angelo, JJ., concur.

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