

**BERNARDO S. DUÑGAO AND MARIA GERVACIO BLAS, PETITIONER,
VS. ANGEL ROQUE, ALFONSO ROQUE AND JUSTINA ROQUE,
RESPONDENTS.***G.R. Nos. L-4140-41. December 29, 1951*

Ponente: TUASON, J.

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This is an appeal by certiorari from the Court of Appeals, which affirmed the decision of the Court of First Instance of Pampanga in a case involving the validity of a consignment and a case to foreclose a mortgage. By stipulation the two cases were consolidated for trial and decision.

The facts as found by the Appellate Court and the issues submitted before it are set forth in the following paragraphs:

"On September 23, 1941 Maria Gervacio Bias, of Malabon, Rizal, borrowed from Alfonso Roque the sum of P3,000 and from the latter's sister Justina Roque, the sum of P2,000 payable within 5 years from said date with an annual interest of 10 percent, payable yearly at the creditors' residence. Justina and Alfonso are children of Angel Roque. As security for said loan Maria Gervacio Bias mortgaged in favor of the creditors a certain parcel of land in Lubao, Pampanga, covered by Transfer Certificate of Title No. 13297 of the Registry of Pampanga, the contract of mortgage (Exhibit 2) having been duly recorded in the Office of the Register of Deeds on September 26, 1941. On December 21, 1943 Bernardo Dungao, husband of plaintiff Maria Gervacio Bias, paid the interests then due on the loan in question and payable from October 23, 1941 until December 21, 1943 at the reduced rate of 6 percent to herein defendant Angel Roque, the aforesaid father of the creditors (Exhibits A and A-1).

"In or about July 1944, Atty. Conrado S. Carlos acting for the spouses Maria Gervasio Bias and Bernardo Dungao, went to Macabebe, Pampanga, where defendant Angel Roque evacuated at the time and was there temporarily residing. In behalf of his clients, Atty Carlos offered to pay to Angel Roque the whole indebtedness in question in the sum of P5,000 plus the interests then due. Angel Roque refused to accept the payment on the ground that he was not the mortgagee but his children, Alfonso and Justina who were then in San Jacinto, Pangasinan. Inasmuch as Atty. Carlos could not tender the payment personally to the mortgagees he went to the office of the Clerk of Court of San Fernando, Pampanga, and there deposited the amount of P5,183.28 representing the capital of the loan in question plus the interests due thereon from December 22, 1943 until July 31, 9 1944. And on July 26, 1944 the spouses, through Atty. Carlos, commenced against Alfonso Roque, Justina Roque and Angel Roque the case which was docketed as Civil Case No. 105 of the Court of First Instance of Pampanga (CA-G. R. No. 4264-R). In their complaint therein they alleged that in July 1944 they offered to pay the whole indebtedness plus interests to mortgagees' father, Angel Roque, but the latter refused to accept payment alleging that his children were then in Isabela and that their exact residence could not be ascertained and that they consigned the sum of P5,183.28 with the Clerk of Court for the payment of the amount indebted together with the interests due thereon. They prayed that defendants Alfonso Roque and Justina Roque be ordered to execute the corresponding release of the mortgage, to accept the payment of said mortgage from the Clerk of Court and that defendant Angel Roque be ordered to surrender the owner's

duplicate of T-13297 covering the mortgaged land, allegedly in his possession.

"On March 24, 1947, Alfonso Roque and Justina Roque, in turn, filed the complaint for foreclosure of the mortgage in question against the spouses Maria Gervacio Bias and Bernardo Duñgao which was docketed as Civil Case No. 77 of the Court of First Instance of Pampanga (CA-G. R. No. 4263-R). On the ground that another action was pending between the same parties and for the same cause—which is Civil Case No. 105—Maria Gervacio Bias and her husband filed a motion to dismiss the latter case, No. 77. The motion was denied and they filed their answer alleging that the amount of the loan under consideration was not obtained from Alfonso Roque and Justina Roque but from their father, Angel Roque, who requested that the mortgage contract be executed in the names of, and in favor of his aforesaid children, in order to avoid the payment of the inheritance taxes in the event of his death; that on December 21, 1943 the stipulated interest of 10 percent per annum on the said mortgage was reduced to 6 percent per annum, by agreement between the mortgagors and the mortgagees and that having tendered payment to Angel Roque on July 2, 1944 which the latter-refused they consigned in court the amount of P5,1832 as full payment of their standing obligation; and that they had filed in court the above mentioned Civil Case No. 105.

"As regards Civil Case No. 105 it is revealed by the records that Justina Roque and Angel Roque were served with summons on July 11, 1947 only while the other defendant Alfonso Roque who was then residing in San Jacinto, Pangasinan, has not been served with summons until the date of the hearing in the lower court. However, on July 24, 1947, the three defendants, Alfonso, Justina and Angel, through counsel, filed their answer to the complaint. They alleged therein that Angel Roque had nothing to do with the mortgage contract in question; that the mortgagees Justina Roque and Alfonso Roque were not duly notified of the alleged consignment in court, and consequently, the same has no effect? and that the money deposited was in Japanese military notes which were already worthless.

The trial court found for the Roques and rendered decision with the following dispositive part

'WHEREFORE, the complaint in Civil Case No. 105 is hereby dismissed and the defendant-mortgagor, Maria Gervacio Bias in Civil Case No. 77 is hereby ordered to pay into Court or to the mortgagees, Alfonso and Justina Roque the sums of P3,000 and P2,000 respectively, plus interests thereon at the rate of 10 percent per annum from September 23, 1941 up to date on which the principal is paid, and the amount of P500 as attorney's fees and costs within ninety (90) days from the date of the service of this order, and in default of such payment the property mortgaged be sold to realize the mortgage debts and costs.'

"The judgment appealed from is assailed on the ground that the trial court erred (1) in denying the motion to dismiss Civil Case No. 77 predicated on the pendency of Civil Case No. 105 between the same parties; (2) in not holding that the real mortgagee in the mortgage in question is Angel Roque and not his children Alfonso Roque and Justina Roque; (3) in not finding that the tender of payment made by Atty. Carlos of the sum of P5,183.28 to Angel Roque in the early part of July 1944, and the subsequent deposit of the same amount with the Clerk of Court on July 26, 1944, were sufficient redemption and payment of the aforesaid mortgage; (4) in dismissing Civil Case No. 105 and ordering the appellants to pay to Alfonso Roque and Justina Roque the amount of the mortgage with yearly interests of 10 percent thereon from September 23, 1941 until full payment, plus P500 as attorney's fees and costs; and (5) in denying appellants' motion for new trial."

The appellants, in this instance, make five assignments of error, the last two of which are a general repetition of the first three, and will be omitted. It is alleged—

"The lower court erred in denying appellants' motion to dismiss dated April 10, 1947 in Civil Case No. 77 of the said court;

"The lower court likewise erred in denying not having declared that the real mortgages in the real estate mortgage, a copy of which is attached to the complaints in Civil Cases Nos. 165 and 77, is Angel Roque, the

father, and not his children, Alfonso Roque and Justina Roque, the appellees in both cases;

"The court a quo also erred in not declaring that the tender of payment made by Atty. Conrado S. Carlos, former counsel of the herein appellants, of the sum of P5,183.28 to Angel Roque in the early part of July, 1944 and the subsequent deposit of the same amount with the Clerk of Court on July 26, 1944, was in full and sufficient redemption and payment of the said real estate mortgage."

The second assignment of error, extensively discussed in appellants' briefs, already has been decided by the Court of Appeals, which found that Alfonso Roque and Justina Roque owned the money loaned to the mortgagors. This finding is not open to review and will not be touched except *Cor* reference.

The heart of the case is the third assignment of error and the applicable law is Articles 1162, 1176 and 1177 of the Civil Code of Spain, which was the Code in force when these cases were instituted and tried. These articles provide:

"ART. 1162. Payment must be made to the persons in whose favor the obligation has been constituted or to another authorized to receive . it in his name.

"ART. 1176. If the creditor to whom a tender of payment is made refuses to accept it without reason, the debtor shall be released from liability by the consignation of the thing due.

"Consignation by itself alone shall produce the same effect when made during the absence of the creditor, or v/hen he is incapacitated to receive the payment at the time it is due. and when several persons claim to have a right to collect it, or when the title to the obligation has been lost.

"ART. 1177. In order that the consignation of the thing due may release the obligor, notice thereof must be previously made to the persons interested in the fulfillment of the obligation.

"Consignation shall be inefficacious if not made strictly in accordance with the provisions governing payment."

No tender of payment having been made to the persons found by the Court of Appeals to be the creditors, the consignation under consideration does not come within the provision of the first paragraph of Article 1176; it is governed by Article 1177 in relation to the second paragraph of Article 1176. And as already seen, by Article 1177 previous notice of the consignation to the person interested in the fulfillment of the obligation is strictly prescribed.

It is a fact admitted by the appellant that no such notice was sent to Alfonso Roque and Justina Roque. These, however, were not at their former residence in Guagua, Pampanga, where the mortgage document had been executed, nor in Macabebe whither they and their father are said to have evacuated after the outbreak of war? and the question arises whether by reason of that absence they lost their right to be informed of the consignation.

The law and available commentaries are vague as to v/hat action the obligor is to take in a situation such as here presented. Common sense would tell us that the person obligated to receive the money or thing consigned could not demand that he be notified of the consignation if he purposely kept away to elude notice or where his location was unknown and could not be ascertained with the exercise of reasonable diligence. On the other hand, it must also be true that mere absence of the creditor or bona fide removal to another place known to or easily ascertainable by the debtor, will not furnish a valid excuse for dispensing with a legal requirement so vital to the right and interest of the obligee.

The Court of Appeals did not make an express finding that the debtors knew the creditors were staying in San Jacinto, Pangasinan; but it is fairly safe to assume that they did. It was natural that they should ask Angel Roque

where his children were, when the father refused to accept the payment, or that Angel should volunteer the information without being asked. It is significant that the debtors do not now assert that they were ignorant of Alfonso's and Justina's whereabouts.

Knowing, then, as they did, or ought to have known, where their creditors resided, it was a simple matter for the debtors to communicate with the Roque brother and sister. At the very least, they could have made a try at reaching the latter by mail or messenger; the mail was in operation and Pangasinan was easily accessible by ordinary means of transportation. But the debtors did or attempted to do nothing of the kind, keeping the parties to whom the payment was due or for whom the deposit was intended in complete ignorance of it.

This omission rendered the consignment inefficacious. If the debtors were to be discharged from their obligation by the deposit, it was their elementary duty to put the creditors in a position to withdraw the money, if they chose, or shoulder the loss if they failed to claim it. The notice of the consignment was especially necessary in this case, for then the money to be deposited was fast depreciating in value and soon was to be absolutely worthless.

Significant of the importance of the notice of consignment to the creditors is the fact that not only before but also after the consignment was effected, such notice is required. "Article 1178 provides among other things that "After consignment has been made, notice thereof must be given to the interested parties." Subsequent notice is imperative for the reason that, notwithstanding the previous notice it is possible for the debtor, and it is his privilege, to desist from his announced intention. In the light of the last-quoted provision and the possibility it envisages, the creditor may rightly assume that the debtor changed his mind if he did not follow up the previous announcement with the definite information that his intention had been carried out.

How the second notice is to be effected is not specified. The usual method is, when the consignment is followed by the filing of a suit, through service to the defendant of the summons accompanied by a copy of the complaint. (*Limkako vs. Teodoro*, Off. Gaz., No. 9 p. 980; 74 Phil., 313.)

The appellants did not in any shape or form acquaint the appellees with the fact that the amount owed them had been placed in the custody of the court. The action to compel the mortgagees to accept the consignment having been commenced on July 26, 1944, Justina Roque was served with summons only on July 11, 1947, when the Japanese war notes had ceased to be legal currency; and Alfonso Roque was never served with summons at all, although he filed his answer on July 2h through counsel. The appellants' failure to send the appellees a second notice in time to enable them to withdraw, if they desired, the consignment, when the money deposited could still be of some use to them, was also fatal to the validity and efficacy of the consignment.

The facts relative to the first assignment of error are set out in the Appellate Court's findings hereinbefore transcribed. The Court of Appeals dismissed the objection raised in this assignment of error, saying—

"* * *. The two cases having been tried and decided jointly upon agreement of both parties, the question as to whether the first action should have abated the second has become moot. However, the rule is that identity between the two actions must be such that any judgment rendered on the one will, regardless of which party is successful, amount to an adjudication . on the other. Such situation is not obtaining in the cases under consideration for if the judgment in Civil Case No, 105 were that the consignment therein relied upon was not valid and operative, it would not at the same time dispose of the foreclosure of mortgage sought for in Civil Case No. 77."

It may be added that the objection was deemed waived when the parties agreed to have the two cases tried and decided jointly* At the very most, the error, if any, was not prejudicial or reversible. As it turned out, the action of the court refusing to dismiss the case for foreclosure of the mortgage has saved the parties time and unnecessary trouble and expense.

The appealed decision is affirmed with costs against the appellants.

Pablo, Bengzon, Montemayor, Reyes, Jugo and Bautista Angelo, JJ. concur.

CONCURRING

PADILLA, J.,

I concur in the result only, because of the implication that if the consignation had been valid, the obligation would have been discharged. My view on this point is stated in my opinion in the case of *La Orden de los Padres Benedictinos vs. Philippine Trust Company*, 47 O.G. 2894, 2897; 85 Phil., 217.

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