

LUZON SURETY CO., INC., PETITIONER, VS. FIDELA MORN DE MARBELLA, HON. JOSE R. QUERUBIN AND MACARIO OFILADA, RESPONDENTS.*G.R. No. L-16088. September 30, 1960*

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

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In Civil Case No. 3186 of the Court of First Instance of Negros Occidental, Fidela Morin Vda. de MarbeUa versus Victorino Kilayko, et al., judgment was rendered finding plaintiff to be rightful heir to the properties left by the deceased Matias Morin, and ordering defendants to reconvey and deliver to her all properties belonging to the estate that they might have received, with their fruits, and in case of defendants' failure to comply, to pay plaintiff their value at the time they were disposed of. The estate of the deceased was, likewise, ordered placed under receivership.

From the above decision, defendants Kilaykos, et al., appealed to this Court (G. R. No. L-11141). During the pendency of the appeal, and upon petition of plaintiff Morin Vda. de MarbeUa, Leopoldo Anoché was, on June 6, 1956, appointed by the trial court receiver of the properties under litigation.

On July 2, 1956, receiver Anoché filed a P5,000 bond subscribed by himself as principal and the Luzon Surety Co. as surety. Whereupon, Anoché took his oath and entered into his duties as receiver.

On June 27, 1958, this Court rendered judgment in G. R. L-11141 Vda. de Marbella vs. Kilayko, et al, (104 Phil. 41; 56 Off. Gaz., 1672) affirming with some modifications the decision appealed from. This decision became final and executory on August 6, 1958, and the case was remanded to the court a quo for execution.

On March 16, 1959, receiver Anoché filed with the court below his final statement of accounts. On April 21, 1959, plaintiff Morin Vda. de Marbella filed a motion praying among other things, for the confiscation of the bond of the receiver, because the latter had admitted that part of the money and some titles turned over to him were missing or unaccounted for. On April 28, 1959, the lower court ordered the receiver to answer plaintiff's charges, and to deposit with the clerk of court all the cash in his possession. Complying with this order, the receiver filed his answer, stating among other things that he could no longer return any cash to the court because he had no more money in his possession. Whereupon, on May 20, 1959, the court issued an order endorsing the case to the provincial fiscal for investigation, with a view to the filing of a criminal complaint against the receiver for misappropriation; and on August 22, 1959, the court issued another order, stating that "the defendants are not responsible for the restitution of the amount" delivered to the receiver, "it appearing that the receiver was appointed at the instance of the plaintiff," and ordering that a writ of execution be issued "for the amount posted by the receiver". Pursuant to this order, the provincial sheriff served on September 28, 1959, upon the Luzon Surety Company, Inc., the corresponding writ of execution against the receiver's bond, and to enforce said writ, garnished the account of the surety company with the Philippine Trust Co.

Claiming that the proceedings taken against its bond, having been made without prior notice to it and in violation

of the procedure outlined in section 20, Rule 59, in conjunction with section 9, Rule 61, of the Rules of Court, are null and void, the Luzon Surety Co., Inc., filed on October 16, 1959 the present petition for certiorari with this Court. Upon petitioner's motion and the filing of a bond in the amount of P1,000, we issued a writ of preliminary injunction to enjoin the execution proceedings against it in the court below.

We find no merit in the surety's contention that the proceedings leading to the issuance of the writ of execution against the receiver's bond are null and void in so far as the same is sought to be enforced against it, because of non-compliance with the procedure laid down in section 20, Rule 59, in conjunction with section 9, Rule 61, of the Rules of Court. As correctly pointed out by respondent, this procedure is to be followed only in the execution of a bond filed by either party in the case where the receiver is appointed, but not in the execution of the receiver's bond, which is filed by the receiver himself and his surety. This is clear from the provisions of section 9, Rule 61, to wit:

"SEC. 9. Judgment to include recovery against sureties.—The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this rule, shall be claimed, ascertained, and granted under the same procedure as prescribed in section 20 of Rule 59." (*Italics supplied.*)

In other words, the procedure outlined in Rule 59, section 20, is required to be followed only in proceedings against the bond filed by the applicant for receivership, which answers for the damages that the adverse party may sustain by reason of the appointment of a receiver in case the applicant shall have procured the appointment without sufficient cause (sec. 3, Rule 61), or against the counter-bond posted by the party opposing the appointment of the receiver, conditioned to pay all the damages the applicant may suffer by reason of the acts, omissions, or other matters in the application for receivership (sec. 4, *supra*). Bonds filed by the parties to cases are different and should be distinguished from the bond filed by the receiver under section 5 of Rule 61, "executed to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein." Damages for improperly procuring a receivership, or on a counterbond, cannot be recovered upon any bond filed by either party unless they are claimed and ascertained in the same action, with due notice to the surety, pursuant to section 20, Rule 59 (Sec. 9, Rule 61; *Yap Unki vs. Chua Jamco*, 14 Phil., 602; *Monteverde vs. Nakata*, 30 Phil., 608; *Nava vs. Hofilena*, 53 Phil., 738; *Visayan Surety & Ins. Cor. vs. Pascual*, 85 Phil., 779; 47 Off. Gaz., 5075; *Liberty Construction Supply Co. vs. Pecson*, 89 Phil., 50). Where, however, the damages sought to be recovered arose from the misconduct or negligence of the receiver himself in relation to the discharge of his official duties, no one is responsible therefor but the receiver and his sureties (*De la Riva vs. Molina*, 32 Phil., 277, 281-282), and for these damages, the bond given by them is valid and enforceable (*De la Rosa vs. De Borja*, 53 Phil., 990). The court below having found in this case that the receiver had failed to return to the court or account for certain properties and cash in his official custody, the petitioner, as surety on the receiver's bond, is of course liable on said bond.

That petitioner is liable on its bond does not, however, mean that execution may issue against it without prior notice of the action or proceeding to hold it liable on its bond, and without giving it its day in court. The solidary nature of its liability as surety on the receiver's bond does not imply that it can be condemned to pay without a hearing. Solidarity simply dispenses with the necessity of levying first upon the property of the principal (*beneficio de excusion*). As held by this Court in the case of *Agusan vs. Velasquez*, 88 Phil., 357:

"* * * It seems elementary that before being condemned to pay, it was the elementary right of the surety to be heard and to be informed that the party seeking indemnity would hold it liable and was going to prove the grounds and extent of its liability. This case is different from those in which the surety, by law and/or by the terms of his Contract, has promised to abide by the judgment against the principal and renounced the right to be sued or cited.

That the liability of the surety and the principal under the term of the bond is joint and several has nothing to do with the case. The objection is purely procedural. The materiality of the question of joint and several obligation does not come into play until both principal and surety have legally been adjudged liable by a lawful judgment entered after due hearing." (Italics supplied.)

Besides, a solidary debtor may avail himself of all defenses which are derived from the nature of the obligation and of those which are personal to him, or pertain to his own share; and even of those personal to the other co-debtors, as regards their shares in the debt (Art. 1222, Civil Code). If a solidary debtor, such as petitioner herein under its surety bond, is considered concluded by the judgment against its co-debtor, without even notifying it of the action or proceeding against the latter, he would be deprived of the right and opportunity to set up any defenses which it may have against liability on their solidary undertaking.

Respondents argue, however, that certiorari does not lie where the petitioner did not apply for the relief sought in the court of origin to give it an opportunity to correct its supposed error, and as petitioner did not file any motion for reconsideration of the order of execution against its bond in the court below, but immediately applied for certiorari with this court, the writ should be denied. It is true that a motion for reconsideration in the court below has often been considered a condition precedent for the granting of the writ of certiorari. This rule is not without exception, however. Thus, it has been held that the rule does not apply where the order or judgment subject of review is a patent nullity (*Director of Lands vs. Santamaria*, 44 Phil., 594). We think the deprivation of petitioner's fundamental right to due process, which taints the proceedings against it in the court below not only with irregularity but with nullity, and the fact that execution had already been issued against it and its account with the Philippine Trust Co. already garnished, so that it was a matter of extreme urgency to petitioner that relief against the execution order be immediately obtained, are sufficient reasons to bring this case outside the purview of the above-mentioned rule.

Wherefore, the order of execution against petitioner is hereby set aside for being null and void, and the records are remanded to the court of origin for a hearing on the question of petitioner's liability under the receiver's bond. Costs against respondent Fidela Morin de Marbella.

Bengzon, Bautista Angelo, Labrador, Barrera, Gutierrez David, Paredes, and Dizon, JJ., concur.

Paras, C. J., concurs in the result.

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