

HIJOS DE I. DE LA RAMA, PLAINTIFF AND APPELLEE, VS. JOSE SAJO, DEFENDANT AND APPELLANT.*G.R. No. L- 20870. February 21, 1924*

Ponente: JOHNSON, J.

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The appellant contends that the lower court committed an error in allowing the plaintiff to maintain a personal action for the recovery of a sum of money, instead of an action to foreclose a mortgage given as security for the payment of said sum. He further contends that the lower court committed an error in dismissing his cross-complaint and counterclaim. The appellant admits the execution and delivery of a certain mortgage to secure the payment of the amount which the plaintiff claims. He does not deny his liability upon said contract, but contends that the plaintiff should be adjudged to pay him certain damages resulting from the issuance of an attachment upon his property.

The record shows that on the 9th day of April, 1920, the defendant executed and delivered to the plaintiff a mortgage upon certain real and personal property mentioned in said contract, to secure the payment by the defendant to the plaintiff of the sum of P35,000. Upon the presentation of the complaint the plaintiff prayed that a writ of attachment should be issued upon certain property of the defendant upon the grounds (a) that the property secured by the mortgage was not sufficient to satisfy the debt due, and (b) that the defendant was trying to dispose of his property for the purpose of defrauding his creditor. Upon a reading of the petition, the lower court granted the attachment. Later, the defendant answered by a general and special defense, together with a counterclaim, and prayed for a judgment against the plaintiff in the sum of P63,000.

Upon the issue thus presented, the Honorable Cayo Alzona, auxiliary judge, after hearing the evidence adduced by the respective parties, reached the conclusion that a preponderance of the evidence shows that the defendant was indebted to the plaintiff under and by virtue of the terms of the contract of the 9th day of April, 1920, in the sum of P32,996.39, with interest at 12 per cent from the 4th day of August, 1921, until paid; together with the interest at 12 per cent on the sum of P35,000 from the 9th day of April, 1920, until the 4th day of August, 1921; together with the sum of P164.05 as commission due the plaintiff on the sale of 1,640 piculs of sugar; together with 15 per cent on the sum of P32,996.39, as attorney's fees, in accordance with the terms of said contract. From that judgment the defendant appealed and now asserts that the lower court committed the errors indicated above.

The appellant contends that inasmuch as he executed and delivered a mortgage to the plaintiff to secure said indebtedness, the plaintiff could not waive that security and maintain a personal action for the amount due. In the first place it may be said that the action was based upon the contract executed and delivered by the defendant to the plaintiff on the 9th day of April, 1920. But while the action was based upon said contract, it is true that the plaintiff prayed for a personal judgment only. He did not ask for a foreclosure of the mortgage. He prayed only for a personal judgment for whatever amount might be found due under and by virtue of said contract. While it is true in some jurisdictions, by virtue of statutory provisions, that when a mortgage is given to secure the payment of an indebtedness the action brought to recover a judgment for said indebtedness must be one for the foreclosure of the

mortgage, yet we are of the opinion that in the absence of statutory provisions the mortgagee may waive the right to foreclose his mortgage and maintain a personal action for the recovery of the indebtedness. There is no statutory provision in this jurisdiction prohibiting a personal action to recover a sum of money even though a mortgage has been given as security for the payment of the same.

The appellant argues, however, that if the plaintiff may waive his right under the mortgage and maintain a personal action, he is liable to be subject to two actions. That contention, in our judgment, is without merit. The appellant further argues that the purpose of the plaintiff in maintaining a personal action was to enable him to obtain a deficiency judgment, that is, a judgment for whatever sum or sums might be due after the liquidation of the property covered by the mortgage. That argument is also without merit for the reason that by virtue of section 260 of Act No. 190 the plaintiff is entitled to a deficiency judgment, whether the action is a personal one or one to foreclose the mortgage. The rule is well established that the creditor may waive whatever security he has and maintain a personal action, in the absence of statutory provisions in the contract. In this jurisdiction there are no statutes covering the question.

With reference to the contention that the lower court should not have issued the attachment, it may be said that if the facts alleged in the complaint, to the effect that the defendant was attempting to defraud his creditors, were true, then the court is within its discretion not only to authorize but to justify the issuance of the attachment, considering the form of the action instituted by the plaintiff. If the grounds upon which the attachment was issued were not true and unsupported by the facts, the defendant has his remedy by immediately presenting a motion for the dissolution of the same. That he did not do.

Considering the fact that the contract required the defendant to deliver to the plaintiff all of the sugar produced upon the real property included in the mortgage, and considering the fact that out of 1,800 and some piculs of sugar, he only delivered to the plaintiff 208 and sold the balance to other persons, thereby injuring and reducing the security held by the plaintiff, we are not inclined to hold that the attachment was illegal.

The appellant claims that he was damaged to the amount of about P60,000 resulting from the issuance of said attachment. The record shows that practically all of the property attached was claimed by third persons, and the attachment for that reason was dissolved upon said property. And, moreover, even granting that some damage resulted to the defendant by virtue of said attachment, yet the evidence presented by the defendant upon the question of damages is too speculative and remote, upon which to render a judgment.

The appellant alleges that the lower court should not have admitted Exhibit F for the reason that it had not been sufficiently identified. Exhibit F, in our judgment, was sufficiently identified to make it admissible in evidence. Its purpose was simply to show the amount of sugar which had been produced upon various haciendas with which the plaintiff had business relations; and moreover, the record contains sufficient proof, without Exhibit F, to show the amount of sugar produced by the defendant upon the real property mentioned in the contract of April 9, 1920. The facts stated in Exhibit F were, therefore, not necessary to support the conclusion of the lower court upon that question.

After a careful examination of the record in relation with the assignments of error made by the appellant, we find no reason nor justification for modifying the judgment appealed from. The same is therefore hereby affirmed, with costs. So ordered.

Araullo, C. J., Street, Malcolm, Avancena, Johns, and Romualdez, JJ., concur.

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