

BENIGNO MALINAO, PETITIONER, VS. LUZON SURETY CO. INC., RESPONDENT.

G.R. No. L-16082. February 29, 1964

Ponente: REGALA, J.

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REGALA, J.:

On May 11, 1948, Escudero and Co., Inc. sued Benigno Malinao and the Luzon Surety Co., Inc. in the Court of First Instance of Manila for the recovery of P23,748.28, representing the value of automobile and truck spare parts and other goods which it had allegedly sold on credit to Malinao. The surety was included as defendant on account of the bond given by it to guarantee Malinao's faithful compliance with the terms of the sale.

On May 28, 1948, both defendants filed their answer and thereafter the court heard the case.

On May 7, 1953, Malinao asked the court to allow him to file a cross-claim against the surety. There is considerable dispute as to whether or not the court granted Malinao's request. At any rate, Malinao filed a cross-claim against the surety, alleging that, on June 2, 1948, the surety took possession of his hardware store, the Pioneer Auto Supply, together with its accounts receivables all worth P60,576, on the understanding that the surety would apply the proceeds of the merchandise to the payment of Malinao's obligation and that after thus applying the proceeds, "there is an outstanding balance in the sum of P58,776.00 payable by the Luzon Surety Company, Inc. in favor of co-defendant Benigno Malinao, which amount has never been turned over to the defendant Benigno Malinao, despite demands made by the latter."

For failure to answer the cross-claim, the surety was declared in default. It filed a motion to set aside the order of default but the court denied the same. It filed a motion for reconsideration. This time, the court set aside the default order and ordered the cross-claim stricken off the record on the ground that the cross-claim was filed without permission. (Order dated June 20, 1957), On August 15, 1957, Malinao again asked the court for leave to file a cross-claim against the surety. The court denied the motion on the ground that it did not state sufficient reasons to justify the filing of a cross-claim. (Order dated September 12, 1957).

On August 9, 1958, however, Malinao asked for a reconsideration and the court, acting on this motion, reconsidered its order of September 12, 1957 and allowed the filing of a cross-claim. (Order dated August 26, 1958). The lower court justified its order of reconsideration thus -

"* * * the Court concludes that the authority (to file a cross-claim) must have been made verbally in open court and in the presence of the parties in this case, otherwise, the attorney for the Luzon Surety Company, Inc. would not have filed a motion ex parte praying that they be allowed an extension of time to file their responsive pleading to the cross-claim. The verbal order of this Court must not have been transcribed by the stenographer so as to make it appear in the records of this case."

The court therefore ordered:

"However, to avoid any doubt as to the granting of authority to Benigno Malinao, this Court hereby grants the said authority on Benigno Malinao to file the said cross-claim retroactive to the date when said prayer for leave

to file cross-claim was filed on May 6, 1953. The Luzon Surety Company, Inc., in view of the authority granted by this Court on Benigno Malinao to file the cross-claim, is hereby granted ten (10) days within which to file his responsive pleading to the said cross-claim."

The surety moved for a reconsideration of this order,, but its motion was denied. And so the surety brought the matter on certiorari to the Court of Appeals."

The Court of Appeals held the respondent judge guilty of grave abuse of discretion in allowing the cross-claim. According to the appellate court, the cross-claim was improper because its subject matter did not arise out of the transaction that is the subject matter of Escudero and Co.'s complaint. For this reason, it set aside the order of the trial court, allowing the cross-claim.

It is the decision of the Court of Appeals, in setting aside the order of the lower court allowing Malinao to file his cross-claim, which is the subject of this appeal before Us.

Malinao contends that the issue in the Court of Appeals was not whether under the Rules of Court his claim was proper for a cross-claim. According to him, the issue rather was whether the trial court was guilty of grave abuse of discretion in allowing his claim on the basis of the surety's allegation that the orders of June 20, 1957 and September 12, 1957, which denied Malinao's request for leave to file a cross-claim, had long ago become final. Accordingly, it is contended that, in thus, discussing the propriety of the cross-claim in the determination of whether the trial court acted with grave abuse of discretion in admitting the cross-claim, the Court of Appeals erred.

In support of this contention, it is asserted that the propriety or impropriety of the cross-claim was never passed upon by the lower court and therefore the allowance of the cross-claim could not have been an abuse of discretion on the part of the trial court.

As stated earlier, Malinao's second motion for leave to file a cross-claim was denied on the ground that it did not state sufficient reasons to justify the filing of a cross-claim. (Order dated September 12, 1957). That was as clear a statement as could be made that the cross-claim was not proper because it did not comply with the requirements of the Rules of Court. Of course the order granting leave to file a cross-claim was based on the inference that probably Malinao had been given authority to file a cross-claim by the court, which, through inadvertence, the stenographer failed to transcribe. But since the order which the court reconsidered was premised on the failure of the movant to justify the filing of a cross-claim, We take it that the trial court also reconsidered its previous stand on the propriety of the cross-claim.

It is to be noted that Section 2 of Rule 10 defines a cross-claim as "any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein." The cross-claim filed by Malinao contained no allegation that the subject matter thereof arose out of the transaction between Malinao and Escudero and Co. All that it stated was that the surety had taken possession of Malinao's store and its accounts receivable, the agreement being that the surety would apply the proceeds thereof to the payment of Malinao's obligation but that, in violation of that agreement, the surety refused to return to him what remained after paying off his obligation. On the other hand, the complaint in the original action alleges that Escudero and Co. sold goods on credit to Malinao for the collection of prices of which the action was brought. The mere fact that part of the goods in Malinao's store were the same ones which Escudero and Co. had sold to Malinao does not justify the filing of a cross-claim against the surety. The transaction between the surety and Malinao must be shown to have arisen out of the transaction between Escudero and Co. on the one hand and Malinao on the other, in order to justify the allowance of a cross-claim.

Malinao complains that had the Court of Appeals ordered the records of this case to be elevated to it, it would

have found that his claim arose out of his previous transaction with Escudero and Co. But even in this Court, Malinao has not shown how the transaction between him and the surety arose out of his previous transaction with Escudero and Co. What is more, Section 8 of Rule 67 does not make the elevation of the records mandatory.

Neither is there merit in the contention that the propriety or impropriety of the cross-claim could only be raised on appeal. While appeal was available to the surety, the same, was not a speedy and adequate remedy that could bring about immediate relief from the effects of the order complained of as the surety would have to wait until judgment was rendered not only in the action brought by Escudero and Co. but also in the very cross-claim filed by Malinao. Under the circumstances, certiorari was the only adequate remedy open to the surety. As this Court held in *Silvestre vs. Torres and Oben*, 57 Phil. 885:

" * * * the availability of the ordinary recourse of appeal does not constitute sufficient ground to prevent a party from making use of the extraordinary remedy of certiorari; but it is necessary besides, that the ordinary appeal be an adequate remedy, that is a remedy which is equally beneficial, speedy and sufficient, not merely 'a remedy which at some time in the future will bring; about a revival of the judgment of the lower court complained of in the certiorari proceeding, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal.'"

Even if We consider the surety's reason for alleging grave abuse of discretion on the part of the trial court, still we think that the Court of Appeals correctly decided this case. As stated earlier, in an order dated June 20, 1957, the trial court, acting on the surety's motion for reconsideration, disallowed Malinao's cross-claim on the ground that the same was filed without its permission. Instead of contesting that order, Malinao allowed it to become final. What he did was to file on August 15, 1957 another motion for leave to file a cross-claim allegedly "to avoid multiplicity of suits, save the precious time of the court and afford defendant Benigno Malinao opportunity to have his rights against co-defendant Luzon Surety Co., Inc. (be) adjudged once and for all." Again, the trial court, in an order dated September 12, 1957, denied Malinao's motion on the ground that there was no sufficient reason to justify the filing of a cross-claim.

It was only on August 9, 1958 that Malinao moved for a reconsideration of this order. The trial court, in disregard of the fact that its orders of June 20, 1957 and September 12, 1957 had become final for failure of Malinao to appeal, completely reversed itself and granted Malinao's motion to file a cross-claim. Now, the orders of June 20, 1957 and September 12, 1957 are not merely interlocutory but final orders, inasmuch as they dispose of Malinao's motions and leave nothing else to be done. As such, what Malinao should have done was either to appeal from the orders or to file a motion to set them aside in accordance with Rule 38 of the Rules of Court. In not doing any of these, Malinao allowed the orders to become final so that, in disregarding them, the trial court acted with grave abuse of discretion.

Finally, it is argued that a separate action against the surety, as suggested by the Court of Appeals, would no longer lie because of prescription. But if prescription has set in, Malinao has no one to blame but himself.

WHEREFORE, the decision appealed from is hereby affirmed, without pronouncement as to costs.

Bengzon, C. J., Padilla, Labrador, Reyes, J. B. L., Paredes, and Makalintal, JJ., concur.

Bautista Angelo, J., concurs in the result.

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