

THE IMPERIAL INSURANCE, INC., PETITIONER, VS. HON. WALFRIDO DE LOS ANGELES, JUDGE OF THE COURT OF FIRST INSTANCE OF RIZAL, QUEZON CITY BRANCH IV, ROSA V. REYES, PEDRO V. REYES A...

G.R. No. L-28030. January 18, 1982

Ponente: FERNANDEZ, J.

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FERNANDEZ, J.:

This is a petition for certiorari to review the decision of the Court of Appeals in CA-G.R. NO. 38824-R promulgated on July 19, 1967 entitled "The Imperial Insurance, Inc., petitioner versus Hon. Walfrido de los Angeles, Judge of the Court of First Instance of Rizal, Branch IV, Quezon City, et al., respondents," the dispositive part of which reads:

"WHEREFORE, the instant petition is dismissed and the writ of preliminary injunction issued by the Court on January 31, 1967, is hereby dissolved, with costs against petitioner.

"SO ORDERED." [1]

As found by the Court of Appeals, the uncontroverted facts are:

"It appears that herein private respondent Rosa V. Reyes is the plaintiff in Civil Case No. Q-8213 of the Court of First Instance of Rizal, Branch IV, Quezon City, entitled, 'Rosa V. Reyes vs. Felicisimo V. Reyes, etc.,' where she obtained a writ of preliminary attachment and, accordingly, levied upon all the properties of the defendant, Felicisimo V. Reyes, in said case. The other two herein private respondents, namely, Pedro V. Reyes and Consolacion V. Reyes, are the plaintiffs in Civil Case No. Q-5214 of the same court entitled, 'Pedro V. Reyes, etc.,' and likewise, obtained a writ of preliminary attachment and, accordingly, levied upon all the properties of the defendant, Felicisimo V. Reyes, in said case.

"For the dissolution of the attachments referred to above, the herein petitioner, The Imperial Insurance, Inc., as surety, and Felicisimo V. Reyes, as principal, posted a 'defendant's bond for dissolution of attachment' in the amount of P60,000.00 in Civil Case No. Q-5213 and another bond of the same nature in the amount of P40,000.00 in Civil Case No. Q-5214.

"Civil Cases Nos. Q-5213 and 5214 were jointly tried and the decision therein rendered was in favor of the plaintiffs. This decision was affirmed by this Court on appeal in cases CA-G.R. NOS. 33783-R and 33784-R. The decision of this Court, having become final, the records of the cases were remanded to the Court of First Instance of Rizal, Quezon City Branch, for execution of judgment.

"Accordingly, on June 24, 1966, the Court below, presided by the herein respondent Judge, Hon. Walfrido de los Angeles, issued the writs of execution of judgment in said cases. However, on August 20, 1966, the Provincial Sheriff of Bulacan returned the writs of execution 'unsatisfied in whole or in part'.

"On September 9, 1966, private respondents filed a 'motion for recovery on the surety bonds'. Thereafter, said

private respondents, thru counsel, sent a letter of demand upon petitioner asking the latter to pay them the accounts on the counter-bonds. On September 24, 1966, petitioner filed its 'opposition' to the private respondents' 'Motion for recovery on the surety bonds'. Respondent Judge, in his order, dated November 10, 1966, rendered judgment against the counter-bonds.

"On November 15, 1966, private respondents filed an 'ex parte motion for writ of execution' without serving copy thereof on petitioner.

"In the meantime, on or about November 23, 1966, petitioner filed a 'motion for reconsideration' of the order, dated November 10, 1966. This motion was, however, denied by the respondent Judge on January 9, 1967.

"On or about January 11, 1967, petitioner filed its 'notice of intention to appeal' from the final orders of the respondent Judge, dated November 10, 1966 and January 9, 1967.

"On January 19, 1967, the respondent Judge issued an order granting the issuance of the writ of execution against the bonds filed by the petitioner" (Exhibit J, petition).[2]

On January 25, 1967, the petitioner filed a petition for certiorari with prayer for preliminary injunction with the Court of Appeals to restrain the enforcement of the writ of execution.[3] The petition was given due course and on January 30, 1967 a writ of preliminary injunction was issued.[4] After the parties had submitted their respective pleadings and memoranda in lieu of oral argument, the Court of Appeals rendered the decision now under review.

The defendant, Felicisimo V. Reyes, in the above-mentioned cases died during the pendency of the trial. He was duly substituted by his surviving spouse, Emilia T. David, an administratrix of his intestate estate.[5]

The petitioner assigns as errors allegedly committed by the Court of Appeals the following:

"I

"THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT THE RESPONDENT JUDGE COULD LEGALLY ISSUE THE WRIT OF EXECUTION AGAINST THE PETITIONER AS SURETY IN A COUNTERBOND (BOND TO DISSOLVE ATTACHMENT) ON THE BASIS OF AN EX-PARTE MOTION FOR EXECUTION WHICH WAS NEITHER SERVED UPON THE SURETY NOR SET FOR HEARING.

"II

"THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT THE PLAINTIFF WHO OBTAINED A JUDGMENT AGAINST THE DEFENDANT MAY LEGALLY CHOOSE 'TO GO DIRECTLY' AFTER THE SURETY IN A COUNTERBOND WITHOUT PRIOR EXHAUSTION OF THE DEFENDANT'S PROPERTIES.

"III

"THE COURT OF APPEALS GRAVELY ERRED IN NOT HOLDING THAT THE 'JUDGMENT' RENDERED AGAINST THE MENTIONED COUNTERBONDS IS A 'FINAL ORDER' IN THE CONTEMPLATION OF SECTION 2, RULE 41 OF THE REVISED RULES OF COURT AND, THEREFORE, APPEALABLE.

"IV

"THE COURT OF APPEALS GRAVELY ERRED IN NOT HOLDING THAT IN THE ABSENCE OF AN EXPRESS PROVISION OF THE REVISED RULES OF COURT, THE PROCEDURE FOLLOWED BY THE SHERIFF IN THE EXECUTION OF THE JUDGMENT ON THE 'SURVIVING CLAIMS', WHEN THE DEFENDANT DIED DURING THE PENDENCY OF THE TRIAL OF HIS CASE AND BEFORE

JUDGMENT WAS DULY SUBSTITUTED BY THE COURT APPOINTED ADMINISTRATRIX OF HIS ESTATE, SHOULD HAVE BEEN THE SAME AS THE PROCEDURE SET OUT IN SECTION (f), RULE 57 RESPECTING THE EXECUTION OF A WRIT OF PRELIMINARY ATTACHMENT OF PROPERTIES IN CUSTODIA LEGIS."[6]

Anent the first error, the petitioner contends that the Court of Appeals erred in holding that the respondent judge could legally issue the writ of execution against the petitioner as surety in a counterbond (bond to dissolve attachment) on the basis of an ex parte motion for execution which was allegedly never served upon the surety nor set for hearing. This contention is devoid of merit.

The counterbonds filed to lift the writs of attachment executed by the herein petitioner, The Imperial Insurance, Inc., for and in behalf of the deceased defendant Felicisimo V. Reyes in favor of the plaintiffs, private respondents herein Rosa V. Reyes and Consolacion V. Reyes in Civil Case No. Q.5214 docketed with the Court of First Instance of Rizal, Branch IV, Quezon City, are clearly the bonds contemplated under Sec. 17, Rule 57 of the Rules of Court which provides:

"Sec. 17. When execution returned unsatisfied, recovery had upon bond. - If the execution be returned unsatisfied in whole or in part, the surety or sureties on any counterbond given pursuant to the provisions of this rule to secure the payment of the judgment shall become charged on such counterbond, and bound to pay to the judgment creditor upon demand, the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

This section allows the counterbond filed to lift an attachment to be charged only after notice and summary hearing in the same action.

The records show that the notice and hearing requirement was substantially complied with in the instant case.

Prior to the filing of the ex parte motion for a writ of execution, the respondents filed a motion for recovery on the surety bonds where the petitioner was duly notified and the said motion was heard on September 24, 1966.[7] Moreover, on November 23, 1966 the petitioner filed a motion for reconsideration of the order dated November 10, 1966 rendering judgment against the petitioner on its counterbonds in the amount of P60,000.00 in Civil Case No. Q-5213 and P40,000.00 in Civil Case No. Q-5214.[8] The respondent judge set the hearing of the ex parte motion for writ of execution together with the motion for reconsideration of the order dated November 10, 1966 on December 17, 1966 at 8:30 o'clock in the morning.[9] The petitioner received the notice of the said hearing on December 9, 1966 as evidenced by Registry Return No. 40122.[10] On January 9, 1967, the respondent Judge issued an order denying the motion for reconsideration dated November 23, 1966 for lack of merit.[11] In an order dated January 19, 1967, the motion for writ of execution was granted by the respondent judge.[12]

It is thus clear from indubitable documents on record that the requirements of notice and hearing had been satisfactorily complied with by the respondents. The first error assigned is overruled.

The petitioner asserts that the Court of Appeals gravely erred in holding that the plaintiff who obtained judgment against the defendant may legally choose "to go directly" after the surety in a counterbond without prior exhaustion of the defendant's properties. This contention is likewise not meritorious.

Although the counterbond contemplated in the aforequoted Sec. 17, Rule 57, of the Rules of Court is an ordinary guaranty where the sureties assume a subsidiary liability, the rule cannot apply to a counterbond where the surety bound itself "jointly and severally" (in solidum) with the defendant as in the present case. The counterbond executed by the deceased defendant Felicisimo V. Reyes, as principal, and the petitioner, The Imperial Insurance, Inc., as solidary guarantor to lift the attachment in Civil Case No. Q-5213 is in the following terms:

"WHEREFORE, We, FELICISIMO V. REYES, of legal age, Filipino, and with postal address at San Jose, San Miguel, Bulacan and/or 1480 Batangas Street, Sta. Cruz, Manila, as PRINCIPAL and THE IMPERIAL INSURANCE, INC., a corporation duly organized and existing under the laws of the Philippines, as SURETY, in consideration of the dissolution of said attachment, hereby JOINTLY AND SEVERALLY, bind ourselves in the sum of SIXTY THOUSAND PESOS ONLY (P60,000.00), Philippine Currency, under the condition that in case the plaintiff recovers judgment in the action, the defendant shall pay the sum of SIXTY THOUSAND PESOS (P60,000.00), Philippine Currency, being the amount released for attachment, to be applied to the payment of the judgment, or in default thereof, the Surety will, on demand, pay to the plaintiff said amount of SIXTY THOUSAND PESOS ONLY (P60,000.00), Philippine Currency. (Italics supplied).

"Manila, Philippines, June 30, 1960."[13]

The counterbond executed by the same parties in Civil Case No. Q-5214, likewise states:

"WHEREFORE, We, FELICISIMO V. REYES, of legal age, Filipino, and with postal address at San Jose, San Miguel, Bulacan, and/or 1480 Batangas Street, Sta. Cruz, Manila, as PRINCIPAL and THE IMPERIAL INSURANCE, INC., a corporation duly organized and existing under the laws of the Philippines, as SURETY, in consideration of the dissolution of said attachment, hereby JOINTLY and SEVERALLY, bind ourselves in the action the defendant shall pay the sum of FORTY THOUSAND PESOS ONLY (P40,000.00), Philippine Currency, being the amount released for attachment, to be applied to the payment of the judgment, or in default thereof, the Surety will, on demand, pay to the plaintiffs said amount of FORTY THOUSAND PESOS ONLY (P40,000.00), Philippine Currency. (Capitalizations supplied).

"Manila, Philippines, June 30th, 1960."[14]

Clearly, the petitioner, the Imperial Insurance, Inc., had bound itself solidarily with the principal, the deceased defendant Felicisimo V. Reyes. In accordance with Article 2059, par. 2 of the Civil Code of the Philippines,[15] excussion (previous exhaustion of the property of the debtor) shall not take place "if he (the guarantor) has bound himself solidarily with the debtor." Section 17, Rule 57 of the Rules of Court cannot be construed that an "execution against the debtor be first returned unsatisfied even if the bond were a solidary one, for a procedural rule may not amend the substantive law expressed in the Civil Code, and further would nullify the express stipulation of the parties that the surety's obligation should be solidary with that of the defendant."[16]

Hence the petitioner cannot escape liability on its counterbonds based on the second error assigned.

As regards the third error, the petitioner submits that the Court of Appeals erred in not holding that the order dated November 10, 1966 rendering judgment against the counterbonds, as well as the order dated January 9, 1967, denying the motion for reconsideration thereof, and the order of the writ of execution dated January 19, 1967 are final and appealable in accordance with Sec. 2, Rule 41 of the Revised Rules of Court. This submission is also without merit.

To recover on against the petitioner surety on its counterbonds it is not necessary to file a separate action. Recovery and execution may be had in the same Civil Cases Nos. Q-5213 and Q-5214, as sanctioned by Sec. 17, Rule 57, of the Revised Rules of Court.

The decision in Civil Cases Nos. Q-5213 and Q-5214, having become final, the respondent judge issued the writs of execution in said cases. On August 20, 1966, the Provincial Sheriff of Bulacan returned the writs of execution "unsatisfied in whole or in part."[17]

Sec. 12, Rule 57 of the Revised Rules of Court[18] specifies that an attachment may be discharged upon the making of a cash deposit or filing a counterbond "in an amount equal to the value of the property attached as determined by the judge"; and that upon filing the counterbond "the property attached shall be delivered to the

party making the deposit or giving the counterbond or the person appearing in his behalf, the deposit or counterbond standing in place of the property so released."

The counterbonds merely stand in place of the properties so released. They are mere replacements of the properties formerly attached, and just as the latter may be levied upon after final judgment in the case in order to realize the amount adjudged so is the liability of the counter sureties ascertainable after the judgment has become final.[19]

The judgment having been rendered against the defendant, Felicisimo V. Reyes, the counterbonds given by him and the surety, The Imperial Insurance, Inc., under Sec. 12, Rule 57 are made liable after execution was returned unsatisfied. Under the said rule, a demand shall be made upon the surety to pay the plaintiff the amount due on the judgment, and if no payment is so made, the amount may be recovered from such surety after notice and hearing in the same action. A separate action against the sureties is not necessary.[20]

In the present case, the demand upon the petitioner surety was made with due notice and hearing thereon when the private respondents filed the motion for recovery on the surety bonds dated September 9, 1966 and to which the petitioner filed their opposition dated September 24, 1966.[21]

Therefore, all the requisites under Sec. 17, Rule 57, being present, namely: (1) the writ of execution must be returned unsatisfied, in whole or in part; (2) the plaintiff must demand the amount due under the judgment from the surety or sureties, and (3) notice and hearing of such demand although in a summary manner, complied with, the liability of the petitioner automatically attaches.

In effect, the order dated November 10, 1966 rendering judgment against the counterbonds was a superfluity. The respondent judge could have issued immediately a writ of execution against the petitioner surety upon demand.

As correctly held by the Court of Appeals:

"In fact, respondent Judge could have even issued a writ of execution against petitioner on its bond immediately after its failure to satisfy the judgment against the defendant upon demand, since liability on the bond automatically attaches after the writ of execution against the defendant was returned unsatisfied as held in the case of *Tijan vs. Sibonghanoy*, CA-G.R. No. 23669-R, December 11, 1927." [22]

Moreover, the finality and non-appealability of the order dated November 10, 1966 is made certain and absolute with the issuance of the order of execution dated January 19, 1967 [23] upon the filing of the ex parte motion for writ of execution [24] of which the petitioner was duly notified by the respondent Judge and which was duly heard. [25] The general rule is that an order of execution is not appealable, otherwise a case would never end. The two exceptions [26] to this rule are: (1) where the order of execution varies the tenor of the judgment; and (2) when the terms of the judgment are not very clear, and there is room for interpretation. The case at bar does not fall under either exception. There is no showing that the order of execution varies the tenor of the judgment in Civil Cases Nos. Q-5213 and Q-5214, nor of the order dated November 10, 1966, but is in fact, in consonance therewith and the terms of the judgment are clear and definite, therefore, the general rule of non-appealability applies.

It is no longer necessary to discuss the fourth error assigned because of this Court's finding that the liability expressly assumed by the petitioner on the counterbonds is solidary with the principal debtor, the deceased defendant, Felicisimo V. Reyes. As a solidary guarantor, the petitioner, the Imperial Insurance, Inc., is liable to pay the amount due on such counterbonds should the creditors, private respondents herein, choose to go directly after it. [27]

Under the law and under their own terms, the counterbonds are only conditioned upon the rendition of the

judgment. As held by this Court in the aforecited case of Luzon Steel Corporation vs. Sia[28] ;" where under the rule and the bond the undertaking is to pay the judgment, the liability of the surety or sureties attaches upon the rendition of the judgment, and the issue of an execution and its return nulla bona is not, and should not be a condition to the right to resort to the bond." Thus, it matters not whether the Provincial Sheriff of Bulacan, in making the return of the writ of execution served or did not serve a copy thereof with notice of attachment on the administratrix of the intestate estate of Felicisimo V. Reyes and filed a copy of said writ with the office of the clerk of court with notice in accordance with Sec. 7 (f), Rule 57 of the Revised Rules of Court. The petitioner surety as solidary obligor is liable just the same.

WHEREFORE, the decision of the Court of Appeals promulgated on July 19, 1967 in CA-G.R. No. 38824-R is affirmed and the order of the respondent judge dated January 19, 1967 and all writs or orders issued in consequence or in pursuance thereof are also affirmed. The court of origin is hereby ordered to proceed with the execution against the petitioner surety, the Imperial Insurance, Inc., with costs against said petitioner.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Guerrero, Melencio-Herrera, and Plana, JJ., concur.

[1] CA decision was penned by Justice Ramon O. Nolasco and concurred in by Justice Julio Villamor and Justice Jesus Perez, Rollo, pp. 21-28.

[2] Annex "A", Petition (CA Decision), pp. 1-4; Rollo, pp. 21-24.

[3] CA Rollo, pp. 1-9.

[4] Ibid, p. 44.

[5] Annex "A", Petition, pp. 5 6, Rollo, pp. 24-25.

[6] Brief for the Petitioner, pp. a-c, Rollo, p. 59.

[7] Annex "E", Answer, CA Rollo, p. 70.

[8] Exhibit "F", Petition, CA Rollo, pp. 27-29.

[9] Annex "A-1", Answer, CA Rollo, p. 64.

[10] Annex "A-2", Answer, CA Rollo, p. 65.

[11] Exhibit "H", Petition, CA Rollo, p. 38.

[12] Exhibit "J", Petition, CA Rollo, pp. 40-41.

[13] Exhibit "A", Petition, CA Rollo, p. 10.

[14] Exhibit "B", Petition, CA Rollo, p. 12.

[15] Art. 2059, par. 2. - This excussion shall not take place:

(1) x x x

(2) If he has bound himself solidarily with the debtor;

(3) x x x

[16] Luzon Steel Corp. vs. Sia, 28 SCRA 58, 63.

[17] Annex "B" to Exhibit "D", Petition, CA Rollo, p. 19.

[18] "Sec. 12, Rule 57; Discharge of attachment upon giving counterbond. - At any time after an order of attachment has been granted, the party whose property has been attached, or the person appearing on his behalf, may, upon reasonable notice to the applicant, apply to the judge who granted the order, or to the judge of the court in which the action is pending, for an order discharging the attachment wholly or in part on the security given. The judge shall, after hearing, order the discharge of the attachment if a cash deposit is made, or a counter-bond executed to the attaching creditor is filed, on behalf of the adverse party, with the clerk or judge of the court where the application is made, in an amount equal to the value of the property attached as determined by the judge, to secure the payment of any judgment that the attaching creditor may recover in action. Upon the filing of such counterbond, copy thereof shall forthwith be served on the attaching creditor or his lawyer. Upon the discharge of an attachment in accordance with the provisions of this section the property attached, or the proceeds of any sale thereof, shall be delivered to the party making the deposit or giving the counter-bond, or the person appearing in his behalf, the deposit or counterbond aforesaid standing in place of the property so released. Should such counterbond for any reason be found to be, or become, insufficient, and the party furnishing the same fail to file an additional counterbond, the attaching creditor may apply for a new order of attachment."

[19] Cajefe vs. Judge Fernandez, 109 Phils. 743, 749.

[20] Moran, Comments on the Rules of Court, Vol. 3, 1980 Edition, pp. 50-51.

[21] Annex "A", Petition, p. 3, Rollo, p. 23; Annex "D", Answer, CA Rollo, p. 70.

[22] Ibid, p. 27.

[23] Exhibit "J", Petition, CA Rollo, p. 40.

[24] Exhibit "K", Petition, CA Rollo, pp. 42-43.

[25] Annex "A-1", Answer, CA Rollo, p. 64.

[26] Corpus vs. Alikpala, 22 SCRA 104, 109.

[27] Article 1216, New Civil Code.

[28] 28 SCRA 58, 64.

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