

**MANILA SURETY & FIDELITY CO., INC., PLAINTIIF-APPELLANT,
VS. NOEMI ALMEDA, DOING BUSINESS UNDER THE NAME AND STYLE
OF ALMEDA TRADING, GENEROSO ESQUILLO AND NATIONAL
MARKETING CO...**

G.R. No. L-27249. July 31, 1970

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

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

This is an appeal from the ruling of the Court of First Instance of Manila, rendered in Civil Case No. 62518, that the insolvency of a debtor-principal does not release the surety from its ob-ligation to the creditor under the bond.

The lower court found that on 4 December 1961, Noemi Almeda, married to Generoso Esquillo, and doing business under the name and style of Almeda Trading, entered into a contract with the National Marketing Corporation (NAMARCO) for the purchase of goods on credit, payable in 30 days from the dates of deliveries thereof. As required by the NAMARCO, a bond for P5,000.00, undertaken by the Manila Surety & Fidelity Co., Inc. (Exhibit "A"), was posted by the pur-chaser to secure the latter's faithful compliance with the terms of the contract. The agreement was later supplemented on 17 October 1962 and a new bond for the same amount of P5,000.00, also under-taken by the Manila Surety & Fidelity Co., Inc. (Exhibit "C"),[1] was given in favor of the NAMARCO. The bonds uniformly contained the following provisions:

"2. Should the Principal's account on any purchase be not paid on time, then the Surety, shall, upon demand, pay said account immediately to the NAMARCO;

"3. Should the account of the Principal exceed the amount of FIVE THOUSAND (P5,000.00) PESOS, Philippine Currency, such excess up to twenty (20%) per cent of said amount shall also be deemed secured by this Bond;

"4. The Surety expressly waives its right to demand payment and notice of non-payment and agreed that the liability of the Surety shall be direct and immediate and not contingent upon the exhaustion by the NAMARCO of whatever remedies it may have against the Principal and same shall be valid and continuous until the obligation so guaranteed is paid in full; and

"5. The Surety also waives its right to be notified of any extension of the terms of payment which the NAMARCO may give to the Principal, it being understood that were extension is given to satisfy the account, that such extension shall not extinguish the guaranty unless the same is made against the express wish of the Surety."

The records show that on 8 June 1965, the marketing firm demanded from the purchaser Almeda Trading the settlement of its back accounts which, as of 15 May 1965, allegedly amounted to P16,335.09. Furnished with copy of the NAMARCO' s demand-letter, the surety com-pany thereafter also wrote to the said purchaser urging it to liquidate its unsettled accounts with the NAMARCO (Exhibit "E-1"). It appears, however, that previous to this, or on 26 March 1965, Generoso Esquillo instituted voluntary insolvency proceeding in the Court of First

Instance of Laguna (Sp. Proc. No. SP-181), and by order of said court of 6 April 1965, he was declared insolvent, with listed credits amounting to P111,873.00[2] and properties valued at P39,000.00. In the meeting of the named creditors of the insolvent, held on 14 May 1965 for the purpose of electing the assignee of his properties, the NAMARCO was represented and its contingent claim duly registered.[3]

On 10 September 1965, the Manila Surety Fidelity Co., Inc., commenced in the Court of First Instance of Manila Civil Case No. 62518 against the spouses Noemi Almeda and Generoso Esquillo, and the NAMARCO, to secure its release from liability under the bonds executed in favor of NAMARCO. The action was based on the allegation that the defendant spouses had become insolvent and that defendant NAMARCO had rescinded its agreement with them and had already demanded payment of the outstanding accounts of the couple.

Defendant NAMARCO filed its answer denying the averments of the complaint and setting up, as affirmative defenses, lack of cause of action and the court's want of Jurisdiction. On 16 December 1966, the court rendered judgment sustaining NAMARCO's contention that the insolvency of the debtor-principal did not discharge the surety's liability under the bond. Thus, the complaint was dismissed and plaintiff surety company was ordered to pay off the indebtedness of the defendant spouses to the NAMARCO to the extent of its (the Surety's) undertaking, plus attorneys' fees and costs. From this decision, plaintiff surety interposed the present appeal.

Plaintiff-appellant's action to secure its discharge from the surety ship was based on Article 2071 of the Civil Code,[4] which provides the surety with certain protective remedies that may be resorted to before he has paid, but after he has become liable to do so.[5]

Upon the other hand, the lower court's ruling, now on appeal, is anchored on an equally explicit provision of the Insolvency law (Act 1956, as amended), to wit:

"SEC. 8. xxxxx xxxxx xxxxx

No discharge (of the insolvent from his obligations) shall release, discharge or affect any person liable for the same debt, for or with the debtor, either as partner, joint contractor, endorser, surety, or otherwise."

The issue posed by this appeal, therefore, is whether a surety can avail itself of the relief specifically afforded in Article 2071 of the Civil Code and be released from its liability under the bonds, notwithstanding a prior declaration of the insolvency of the debtor-principal in an insolvency proceeding.

We see no reversible error in the decision appealed.

There is no question that under the bonds posted in favor of the NAMARCO in this case, the surety company assumed to make immediate payment to said firm of any due and unsettled accounts of the debtor-principal, even without demand and notice of said debtor's non-payment, the surety, in fact, agreeing that its liability to the creditor shall be direct, without benefit of exhaustion of the debtor's properties, and to remain valid and continuous until the guaranteed obligation is fully satisfied. In short, appellant secured to the creditor not just the payment by the debtor-principal of his accounts, but the payment itself of such accounts. Clearly, a contract of surety ship was thus created, the appellant becoming the insurer, not merely of the debtor's solvency or ability to pay, but of the debt itself.[6] Under the Civil Code, with the debtor's insolvency having been judicially recognized, herein appellant's resort to the courts to be released from the undertaking thus assumed would have been appropriate.[7] Nevertheless, the guarantor's action for release can only be exercised against the principal debtor and not against the creditor, as is apparent from the precise terms of the legal provision. "The guarantor" (says Article 2071 of the Civil Code of the Philippines) "even before having paid, may proceed against the principal debtor to obtain a release from the guaranty....." The juridical rule grants no cause of action against the creditor for a release of the guaranty, before payment of the credit, for a plain reason: the

creditor is not compellable to release the guaranty (which is a property right) against his will. For, the release of the guarantor imports an extinction of his obligation to the creditor; it connotes, therefore, either a remission or a novation by subrogation, and either operation requires the creditor's assent for its validity (See Article 1270 and Article 1301). Especially should this be the case where the principal debtor has become insolvent, for the purpose of a guaranty is exactly to protect the creditor against such a contingency.

In what manner, then, can the article, operate? Where the debtor can not make full payment, the release of the guarantor can only be obtained with the assent of the creditor, by persuading the latter to accept an equally safe security, either another suitable guaranty or else a pledge or mortgage. Absent the creditor's consent, the principal debtor may only proceed to protect the demanding guarantor by a counter bond or counter guaranty, as is authorized by the codal precept (Article 2071 in fine). To this effect is the opinion of the Spanish commentator, Scaevola, in his explanations to Article 1843 of the Spanish Civil Code (from which Article 2071 of our Code is derived). Says Scaevola:

"Como se prestaran tales garantias al fiador? Lo contesta el aludido parrafo final del Articulo 1843. Se hara por uno de estos dos modos: ora consiguiendo el deudor que el acreedor abandone libremente aquella fianza, lo cual ocurrira dandole el deudor otra garantia analoga, ya por razon de la persona fiadora, ya ofreciendole una garantia real, v. gr. prenda o hipoteca; ora ofreciendole el deudor al mismo fiador, pero continuando este como tal, una garantia que lo ponga a cubierto de los pro-cedimientos del acreedor y del peligro de insolven-cia del deudor." (Scaevola,Codigo Civil, 2d Ed., Vol. 28, pp. 651-652)

The appellant's troubles are compounded by the fact that when the complaint for release from suretyship was filed in the Manila court on 10 September 1965, the insolvency case in the Laguna court was already pending and the debtor-principal Generoso Esquillo had been judicially declared an insolvent. By the time the appellant sued, therefore, the insolvency court had already acquired jurisdiction over all the debtor's properties and of all claims by and against him, to the exclusion of any other court.[8] In the circumstances, the lawful recourse of the guarantor of an obligation of the insolvent would be to file a contingent claim in the insolvency proceeding, if his rights as such guarantor or surety are not to be barred by the subsequent discharge of the insolvent debtor from all his liabilities.[9]

In the case at bar, it is true that the guaranteed claim of NAMARCO was registered or filed in the insolvency proceeding. But appellant can not utilize this fact in support of its petition for release from the assumed undertaking. For one thing, it is almost a certainty that creditor NAMARCO can not secure full satisfaction of its credit out of the debtor's properties brought into the insolvency proceeding. Considering that under the contract of suretyship, which remains valid and subsisting, the entire obligation may even be demanded directly against the surety itself, the creditor's act in resorting first to the properties of the insolvent debtor is to the surety's advantage. At least, the latter would be answerable only for whatever amount may remain not covered or unsatisfied by the disposition of the insolvent's properties,[10] with the right to go against debtor-principal after it has made the necessary payment to the creditor. For another, the fact that the debtor-principal may be discharged from all his outstanding obligations in the insolvency case would not benefit the surety, as to relieve it of its liability under the surety agreement. That is so provided in Section 68 of the Insolvency Act, which shall be controlling in the case.

Finally, even supposing that the present action is not blocked by the insolvency proceedings because it does not aim at reducing the insolvent's assets, but only at having the suretyship substituted by other equivalent security, still it is difficult to see how the principal debtor, with his business, property and assets impounded by the in-solvency court, can obtain other securities with which to replace the guaranty given by the plaintiff-appellant. The action at bar would seem, under the circumstances, destined to end in futility.

WHEREFORE, with the modification that appellant's liability shall be limited to the payment of whatever amount

may remain due to the appellee NAMARCO and is unsatisfied in the insolvency proceeding, but not to exceed the amount of the surety's undertaking under the bonds, the decision appealed from is affirmed in all other respects. Costs against appellant surety company.

Concepcion, C.J., Dizon, Makalintal, Zaldivar, Castro, Fernando, Teehankee, Barredo, and Villamor, JJ., concur.

[1] This bond was signed by Generoso Esquillo, as attorney-in-fact of the Almeda Trading.

[2] Included in the list of petitioner's liabilities was the unpaid account with the NAMARCO, in the sum of P25,000.00 (Exhibits "F", F-1").

[3] Page 8, Exhibit "F-4".

[4] "ART. 2071. The guarantor, even before having paid, may proceed against the principal debtor:

(1) When he is sued for the payment;

(2) In case of insolvency of the principal debtor;

(3) When the debtor has bound himself to relieve him from the guaranty within a specified period, and this period has expired;

(4) When the debt has become demandable, by reason of the expiration of the period for payment;

(5) After the lapse of ten years, when the principal obligation has no fixed period for its maturity, unless it be of such nature that it cannot be extinguished except within a period longer than ten years;

(6) If there are reasonable grounds to fear that the principal debtor intends to abscond;

(7) If the principal debtor is in imminent danger of becoming insolvent.

"In all these cases, the action of the guarantor is to obtain release from the guaranty, or to demand a security that shall protect him from any proceedings by the creditor and from the danger of insolvency of the debtor."

[5] Kuenzle & Streiff vs. Tan Sunco, 16 Phil. 670.

[6] Machetti vs. Hospicio de San Jose, 43 Phil. 297, 300.

[7] Manila Surety & Fidelity Co., Inc. vs. Batu Construction and Co., 101 Phil. 494.

[8] Cu Unjieng e Hijos vs. Mitchell, 58 Phil. 476.

[9] Castro Vda. de Azaola vs. O'Farrell, 68 Phil. 74.

[10] See Vol. 6, Reyes and Puno, Outline of Philippine Civil Law, Part II, page 86, citing Castan.

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