

RAMON ABOITIZ, PLAINTIFF AND APPELLANT, VS. ARNALDO F. DE SILVA ET AL., DEFENDANTS. ARNALDO F. DE SILVA, APPELLANT.

G.R. No. L-21036. April 05, 1924

Ponente: OSTRAND, J.

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OSTRAND, J.:

This action is brought to recover the sum of P159,000, the alleged unpaid balance of the purchase price of the plaintiff's shares in the partnerships G. & R. Aboitiz and Viuda e Hijos de P. Aboitiz, sold by him to the defendants. The answer of the defendants Guillermo and Vidal Aboitiz constitutes a confession of judgment for the full amount demanded; the defendant De Silva, in his second amended answer, sets up various special defenses together with a cross-complaint and a counterclaim alleging that the accounts between the parties upon the books of Aboitiz & Co. are inaccurate and that instead of a balance being due the plaintiff there is in reality a balance in favor of the defendants in the sum of P41,186.88.

The action is based on a notarial document, Exhibit A, and two statements of account, Exhibits C and D. Exhibit A reads as follows :

"Sepan todos por la presente: Que este documento otorgado de una parte por Ram6n Aboitiz, casado con Dona Dolores S. de Aboitiz, mayor de edad y vecino del Municipio de Cebu, Provincia de Cebu, Islas Filipinas; y de otra parte los Senores Arnaldo F. de Silva, Guillermo Aboitiz, ambos casados y Vidal Aboitiz, soltero, todos mayores de edad, el primero vecino del Municipio de Cebu, Provincia de Cebu, Islas Filipinas y los dos ultimos de Ormoc, Provincia de Leyte, I. F.

"MANIFIESTA Y HACE CONSTAR:

"Primero. Que Ramon Aboitiz, por y en consideracion a la cantidad de doscientos veinticinco mil pesos, moneda filipina, pagaderos en la forma y plazos que mas abajo se mencionaran, cede, vende, y traspasa de un modo absoluto y a perpetuidad, libre de toda carga y gravamen a favor de los mencionados Arnaldo F. de Silva, Guillermo Aboitiz y Vidal Aboitiz, sus herederos y causahabientes, el negocio y participacion que dicho Ramon Aboitiz tiene en la Sociedad 'Viuda e Hijos de P. Aboitiz' y en la de 'G. & R. Aboitiz' en las proporciones siguientes:

"(a) Una novena parte de la mitad del negocio y participation en la sociedad 'Viuda e Hijos de P. Aboitiz' y la mitad del negocio y participation en la sociedad 'G. & R. Aboitiz.'

"El negocio referido consiste en los objetos, bienes y creditos que se hallan inventariados, cuyos inventarios tanto el de 'Viuda e Hijos de P. Aboitiz' como el de 'G. & R. Aboitiz' se hallan unidos a esta escritura formando parte de la misma, y cuyos inventarios se ajustan al balance correspondiente al 31 de diciembre de 1918.

"Segundo. Que la citada cantidad de doscientos veinte-cinco mil pesos (P225,000), precio de esta venta, se pagara por dichos compradores Arnaldo F. de Silva, Guillermo Aboitiz y Vidal Aboitiz en la forma y plazos siguientes a saber:

" (a) Diez mil pesos (P10,000) al contado y al firmarse la presente escritura, y los doscientos quince mil pesos (P215,000) restantes a razdn de cuatro mil pesos (P4,000) mensuales y al interes del siete por ciento (7%) anual a contar desde el primero de mayo de 1919, pagaderos men- sualmente.

"Tercero. Las utilidades que pueda recibir el vendedor Ramon Aboitiz en los negocios, en ambas sociedades, asi como la compensation que dicho Ram6n Aboitiz tenga y pueda tener como Gerente y como socio de las mencionadas sociedades, desde el primero de enero hasta la fecha en que se ha enajenado este negocio, quedaran por cuenta de los compradores, renunciando por consiguiente a ellos el ven- dedor Ramon Aboitiz.

"Cuarto. Se hace constar tambien que el motor Lolita se halla avy aluado en cincuenta mil pesos (P50,000) de cuya cantidad solamente se ha pagado al vendedor la mitad, o sean veinticinco mil pesos (P25,000), teniendo por consiguiente el vendedor una participaci6n de dicho motor en la proporcion de una mitad; Entendiendose, sin embargo, Que si despues que dicho motor hayan terminado las obras que actualmente se estan realizando en el mismo, ascendiera su costo en una cantidad mayor o menor que la avaluacion actual; si el costo es mas, el vendedor Ramon Aboitiz pagara la diferencia a los compradores; pero si el costo es menos los compradores pagaran la diferencia al vendedor Ramon Aboitiz.

"Quinto. Que para garantizar el pago de la mencionada cantidad de doscientos quince mil pesos (P215,000) en los plazos arriba mencionados y sus intereses convenidos a razon del siete por ciento (7%) anual, los compradores Arnaldo F. de Silva, Guillermo Aboitiz y Vidal Aboitiz, constituyen primera hipoteca especial y voluntaria sobre los bienes znuebles inventariados y descritos en los dos inventarios que van unidos a esta escritura formando parte de la misma a favor del vendedor Sr. Ramo*n Aboitiz. "Sexto. Que en caso de venta de cualesquiera propiedades inventariadas o cualquiera parte de las mismas por los compradores Arnaldo F. de Silva, Guillermo Aboitiz y Vidal Aboitiz, estos quedan obligados a entregar el producto de dicha venta al Sr. Ramon Aboitiz hasta la cantidad de ciento veinticinco mil pesos (P125,000) y pasando de esta suma la mitad del producto de dichas ventas, cuyas cantidades se destinan o se aplican a la amortizacion de los plazos arriba mencionados.

"Septimo. Que la falta de pago de cualquiera de los plazos arriba mencionados y de todas y de cada una de las demas condiciones de este contrato dara lugar al vencimiento total de la hipoteca como si naturalmente hubiera expirado el termino de la misma, pudiendo en tal caso exigir el pago de todas las cantidades que aun adeudaren los citados compradores Arnaldo F. de Silva, Guillermo Aboitiz y Vidal Aboitiz.

"Octavo. Se hace constar que el vendedor Ramon Aboitiz, durante la vigencia de esta escritura y cinco arios despues del completo pago de las obligaciones contraidas en virtud de la presente escritura por los compradores, se abstendra de emprender o realizar cualesquiera negocios similares a los que actualmente tienen establecidos los Sres. 'Viuda e Hijos de P. Aboitiz' y 'G. & R. Aboitiz' en las provincias de Leyte, Samar, Cebli y la Isla de Camigufn y en otro donde actualmente tengan dichas sociedades negocios.

"En testimonio de todo lo cual firman las partes en Cebu, Cebu, I. F., hoy dfa 28 de abril de 1919."

(Signatures and acknowledgment.)

This document is referred to in the briefs as the "Hipoteca-Venta" and the account relating to the transaction therein set forth is designated as the "Hipoteca-Venta Account." Of the purchase price the sum of P10,000 was, as provided in the document, paid in cash and for the subsequent installments fifty-three promissory notes of P4,000 each were given, the first note to be paid on June 1, 1919, and the rest of them falling due successively on the 1st day of each of the following months. The last installment of P3,000 was not covered by any note.

Subsequently to the purchase of the interests of plaintiff in the two partnerships, the defendants also acquired the interests of the plaintiff's partners, and on March 26, 1920, the three defendants, together with Manuel Moraza

and Joaquin Irastorza, formed a corporation under the name of Aboitiz & Co., Inc., the defendants transferring to the corporation the property and good will of Viuda e Hijos de P. Aboitiz, and G. & R. Aboitiz. The defendant De Silva was the general manager of the business of the two partnerships from the time of the purchase from Ramon Aboitiz and continued as general manager after the incorporation

Shortly after the sale of his business to the defendants, the plaintiff left the Philippine Islands for Spain, his brother, the defendant Guillermo Aboitiz, looking after his remaining interests here under a power of attorney and making the necessary collections and disbursements in connection with these interests, for which a separate personal account was kept on the books of G. & R. Aboitiz in addition to the "Hipoteca-Venta Account." On November 30, 1919, the two accounts were consolidated by the personal direction of De Silva, the balance of P803.53 being transferred to the "Hipoteca-Venta Account." and thereafter all entries of Ramon Aboitiz' credits and debits were made under the head of "Hipoteca-Venta" on the books of G. & R. Aboitiz and subsequently on the books of the corporation. De Silva denies that this was done in pursuance of his instructions, but the weight of the evidence is decidedly against his contention.

The business of Aboitiz & Co. did not prosper under De Silva's management and in October, 1920, Ramon Aboitiz, at the urgent request of Guillermo Aboitiz, returned to the Philippine Islands and De Silva was promptly ousted from the management of the business of the corporation. In the meantime, the defendants had, according to the books of account of Aboitiz & Co., defaulted in the payment of the installments due on the purchase price under Exhibit A, and after fruitless negotiations for a settlement between the parties, this action was finally brought. Upon the filing of the complaint and at the instance of the plaintiff, a preliminary attachment was levied on the defendant De Silva's stock in Aboitiz & Co., and the latter's cross-complaint relates to the damages alleged to have been suffered by him in consequence of this attachment.

The trial court held that as the books of account of Aboitiz & Co. were under the control of De Silva and as the entries in them were made under his direction, he was estopped from questioning the correctness of the entries there found, and judgment was rendered against the defendants for the sum of P154,298.88, the balance in favor of the plaintiff appearing upon said books, together with interest at the rate of 7 per cent per annum from December 31, 1920, with the costs. The court further found that the attachment above-mentioned was wrongful and rendered judgment against the plaintiff on the defendant De Silva's cross-complaint in the sum of P6,000. Both the plaintiff and the defendant De Silva appeal.

The defendant-appellant makes six assignments of error. The fifth assignment intimates that the primary purpose of this action is to ruin the defendant De Silva. The assignment, in common with the insinuations against the trial judge .found elsewhere in the defendant-appellant's brief, finds no support in the record and is, under the circumstances, highly improper. The plaintiff does not appear to have dealt ungenerously with the defendant; indeed, as far as the record shows, he might possibly be criticised for having placed too much confidence in the latter.

Under the fourth assignment of error the defendant-appellant maintains that the liability of the defendants under the "Hipoteca-Venta" had, with the plaintiff's implied consent, been transferred to Aboitiz & Co.; that there consequently had been a novation of the original agreement; and that the action, therefore, should have been directed against Aboitiz & Co. and not against the defendants individually. There is nothing in this contention. It is true that the three defendants transferred all the assets and liabilities of G. & R. Aboitiz to the corporation Aboitiz & Co. (Exhibit 9), and that at the time at least two of the defendants, Guillermo and Vidal Aboitiz, held a general power of attorney from the plaintiff. But, in the first place, the defendants appear to have acted for themselves only and none of them pretended to act on behalf of Ramon Aboitiz; in the second place, the defendant's liability under the "Hipoteca-Venta" was a personal and individual liability, while the transfer in

question related to the business of the partnership of G. & R. Aboitiz; and, in the third place, the defendants who held powers of attorney could not represent both themselves and their principal in a transaction involving the shifting of the liability from themselves to another party. Neither does the fact that the plaintiff subsequently accepted payments on the "Hipoteca-Venta Account" from Aboitiz & Co. work a novation. (See *Pacific Commercial Co. vs. Sotto*, 34 Phil., 237.) Novation is never presumed. Unless it is clearly shown either by express agreement of the parties or by acts of equivalent import, this defense will never be allowed. (Civil Code, art. 1205; *Zapanta vs. De Rotaeché*, 21 Phil., 154; *Martinez vs. Cavives*, 25 Phil., 581; *Vaca vs. Kosca*, 26 Phil., 388.)

The first assignment of error relates to the conclusion of the trial court that in view of the fact that the account books of G. & R. Aboitiz and Aboitiz & Co. have been kept under the defendant De Silva's direction and control, he is now estopped from questioning the correctness of the entries therein. In so holding, the court was clearly in error. It is true that a party will not be heard to object to the form of his own account books or the manner in which they are kept, but the entries therein can only be regarded as admissions against interest which may be overcome by other competent evidence, unless the adverse party has been misled to his prejudice by such entries or admissions. (See 22 C. J., 889-892.) It does not appear that the plaintiff has been so misled in the present case.

Under the remaining assignments of error, the defendant-appellant impugns the correctness of the balance in favor of the plaintiff as shown by Exhibits C and D, which are copies of the "Hipoteca-Venta Account" in the books of G. & R. Aboitiz and Aboitiz & Co., and in connection therewith he strenuously objects to the mingling of the plaintiff's personal current account with the "Hipoteca- Venta Account," but as that was done not only with the full knowledge of the defendant-appellant, but also, according to the weight of the evidence, by his express instructions, he cannot now be heard to complain.

As we have already stated, the entries appearing in Exhibits C and D having been copied from books kept under the defendant-appellant's direction, must be regarded as admissions against interest which, unless overcome by the weight of other evidence, are conclusive. To rebut these admissions we have only the defendant-appellant's testimony and that of the witness Cabellon. Cabellon testified as an expert accountant who "audited" the portions of the books in question relating to the account of the plaintiff. His figures seem to be correct as far as the mathematical operations are concerned, and, in that respect, do not necessarily conflict with the plaintiff's figures, but it appears that he has obtained his data as to the origin of the entries from the defendant-appellant himself, so that in the last analysis his testimony is that of the defendant-appellant and stands and falls with that of the latter. The testimony of the defendant De Silva covers one hundred seventy pages of the transcript and a careful reading thereof does not inspire us with confidence in his good faith. Even if it were uncontradicted by other testimony, we should hardly regard it as sufficient to overcome the implied admissions contained in the accounts in question. To indicate the general character of his attacks upon the accounts in question, we shall briefly discuss the most plausible of his contentions, namely, that relating to the motor boat Lolita.

Exhibit A, the "Hipoteca-Venta," was drafted by Mr. De Silva. Reading the document, it will be observed that its paragraph 4 is somewhat ambiguous and in apparent conflict with paragraphs 1 and 2 of the same document. According to paragraphs 1 and 2, all of the plaintiff's participation in *Viuda e Hijos de P. Aboitiz* and *G. & R. Aboitiz* is sold to the defendants for the sum of P225,000; in paragraph 4 the *Lolita* is valued at P50,000, of which the vendor (the plaintiff) has received only one-half and therefore remains the owner of a one-half interest in the boat, with the understanding that if certain work which is being done on the boat brings its cost above the sum of P50,000, the vendor will pay the difference to the vendees (the defendants), but that if the cost of the boat proves to be less than P50,000, the vendees will pay the difference to the vendor.

In view of the ambiguity of the language of paragraph 4, in connection with paragraphs 1 and 2, parol evidence

was properly admitted by the trial court to explain the circumstances of the transactions there referred to. (Sec. 289, Code of Civil Procedure.) It appears from the oral evidence that at the time the transaction took place the Lolita was under construction and that when her construction and equipment was completed the total cost was found to be P95,378.23 instead of P50,000. A fair construction of paragraph 4 would be to charge the plaintiff with one-half of the cost and the defendants with the other half, but De Silva, in the so-called "Corrected Account" (defendant's Exhibit 13) which has been prepared by himself and Cabellon and upon which his counterclaim for a balance of P43,097.56 in his favor is based, debits the plaintiff and credits the defendant with P25,000 for the plaintiff's half interest in the Lolita plus P45,578.24, the entire difference between P50,000 and the actual cost of the construction, plus the sum of P19,452.68 for construction and equipment, making a total sum of P90,029.92 charged to the plaintiff. In other words, the plaintiff's half of the Lolita cost him P90,029.92, while the defendants obtained their half for only P5,348.31. This is, of course, absurd on its face. But assuming, for the sake of argument, that it is true that the intention of the parties was that the estimated cost of the plaintiff's one-half interest in the Lolita, P25,000, was to be deducted from the P225,000, the purchase price stated in Exhibit A, why then were fifty-three notes for P4,000 each issued instead of only forty-seven? The defendant is apparently a very intelligent man, the transaction was of great importance to him and had been discussed for some time. In these circumstances it is inconceivable that he would have signed notes for a total amount of P24,000 for a debt he and the other two defendants did not owe. The conclusion is irresistible that his explanation is not given in good faith, that he did not tell the truth upon the witness stand, and what is still worse, that he knew he did not tell the truth.

The plaintiff explains that at the beginning of the negotiations for the sale of the business to the defendants, he demanded a minimum price of P250,000. Later on he decided to retain a one-half interest in the Lolita and made the corresponding reduction of P25,000 in the purchase price; that the provisions in paragraph 4 that in the event the cost of the boat proved more than the estimated cost of P50,000 he would pay the difference was, at the time of the execution of the document, understood by all parties to mean that he would reimburse the defendants for the extra cost of his half of the boat, and that he therefore owed them only one-half of P45,578.24, *i.e.*, the sum of P22,789.12. The boat being treated as an asset to the extent of P50,000 at the time of the sale and therefore assuming, as we must, in the absence of evidence to the contrary, that at that time he had already paid P50,000, on account of its construction, and the extra cost was subsequently paid to the builders and outfitters by the defendant, the plaintiff's explanation seems reasonable and is in reality not in conflict with Exhibit A.

Considerable space and energy have been devoted by counsel to pointing out that in the document Exhibit C, the plaintiff is credited with the sum of P250,000 instead of P225,000 as the purchase price of the business sold by him to the defendants. But in the same account the plaintiff is debited with P25,000 for his retained one-half of the Lolita which bears out plaintiff's statement that the purchase price was reduced from P250,000 to P225,000 in consideration of his retaining a one-half interest in the boat. The result is, of course, the same whether the account states a purchase price of P225,000 without a debit, or whether it states a purchase price of P250,000 with a debit of P25,000.

We have not lost sight of the fact that one may infer from Exhibit C that the P25,000 in excess of the P225,000 was paid by the defendants for the plaintiff's share of the business of Viuda e Hijos de P. Aboitiz; but that may be due to a misunderstanding by the person making the entry in question and is not binding upon the plaintiff.

The defendant-appellant has been no more successful in his attacks upon the other items of the accounts in question. The additional alleged debits with which he seeks to charge the plaintiff have been fully explained by the latter and are, in our opinion, unfounded. It can serve no useful purpose to devote time and space to their discussion in detail.

The plaintiff, as appellant, makes only one assignment of error, namely, that "The court erred in awarding damages to the defendant Arnaldo F. de Silva upon his counterclaim for illegal attachment."

The assignment is well taken. The defendant De Silva has proved no specific damages. His testimony that the levy of the attachment and his consequent loss of reputation prevented the consummation of a, to him, very advantageous business arrangement with Gabino Veloso, is contradicted by Veloso himself. Neither is there any evidence before us from which malice on the part of the plaintiff or loss of credit to the defendant may be inferred or presumed. It is admitted by Mr. De Silva that he contemplated going abroad at the time the action was brought and the order of attachment levied. As far as the record shows, his only assets consisted in his interest in Aboitiz & Co., but this interest might have been disposed of through the sale of the shares. The attachment was unobtrusively levied and was accomplished by simply giving a written notice to the bank in which the defendant had mortgaged his shares for P25,000. In these circumstances, the defendant-appellant is clearly not entitled to damages.

The judgment against the defendants for the sum of P154,298.05 is therefore affirmed and that against the plaintiff for P6,000 is reversed. The appellant De Silva will pay the costs. So ordered.

Johnson, Street, Avancena, Johns, and Romualdez, JJ., concur.

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