

AURORA TAMBUNTING, ANTONIO TAMBUNTING, JOSE P. TAMBUNTING AND THE ACTING PROVINCIAL SHERIFF FOR THE PROVINCE OF RIZAL, PETITIONERS, VS. HON. COURT OF APPEALS, DAMASO R. CRUZ, A...

G.R. No. L-48278. November 08, 1988

Ponente: PADILLA, J.

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PADILLA, J.:

On 16 December 1959, private respondents, spouses Damaso R. Cruz and Monica Andres (hereafter, the Cruzes) obtained a loan from petitioners, spouses Antonio and Aurora Tambunting (hereafter, the Tambuntings) in the amount of P3,600.00. The Tambuntings are engaged in the lending-pawnshop business using the name and style "Agencia de Tambunting", with co-petitioner Jose P. Tambunting as Manager. The loan was evidenced by a promissory note executed by the Cruzes, payable within four (4) months from 16 December 1959, with interest at 12% per annum. As security for payment of the loan, a Deed of Real Estate Mortgage was executed by the Cruzes in favor of the Tambuntings over a parcel of land belonging to the Cruzes, covered by Transfer Certificate of Title No. 59433, Register of Deeds of Rizal.

Due to debtors' failure to pay the loan obligation at maturity, a petition for extrajudicial foreclosure of mortgage was filed by the creditors on 17 March 1967. On 4 July 1967, a notice of sheriff's sale was posted announcing an auction sale on 2 August 1967 at 10:00 o'clock in the morning. As shown by the affidavit of publication, the notice of sale was published in the Rizal Chronicle, a newspaper of general circulation in Rizal province, on 12, 19, and 26 July 1967.

On 2 August 1967, the Cruzes instituted an action against the Tambuntings for annulment of mortgage and damages with prayer for a writ of preliminary injunction before the Court of First Instance of Rizal, Branch 6-Pasig (docketed as Civil Case No. 10180). On the same day, a temporary restraining order was issued by the court enjoining herein petitioners from proceeding with the scheduled sale and to suspend the same until further orders from the court.

When the temporary restraining order was dissolved on 1 September 1967, the proposed sale was moved to 20 October 1967. Postings of sheriff's notice of sale were made on 15 September 1967 with a re-publication of said notice in the Rizal Chronicle on 27 September, 4 & 11 October 1967. However, on 19 October 1967, petitioners were again directed by the court to hold the scheduled sale in abeyance due to a motion for reconsideration filed by the Cruzes in regard to the lifting of the temporary restraining order.

Upon denial of the Cruzes' motion for reconsideration, petitioners published in the Rizal Chronicle on 20 December 1967, the sheriff's notice of scheduled sale on 26 January 1968.

On 26 January 1968, the Cruzes thru counsel wrote the Provincial Sheriff of Rizal asking that the auction sale set for that day (26 January 1968) be postponed to some other date considering that there was no compliance with the

notices required by law. On the same date, the Cruzes again thru counsel sent the sheriff a notice of lis pendens informing the latter that Civil Case No. 10180 had been filed by them for the annulment of the mortgage, upon the foreclosure of which the sale was to be conducted, and that such action affects title to the property.

The mortgaged property was nonetheless sold at public auction on 26 January 1968 to Aurora Tambunting and Antonio Tambunting for P9,400.00. Thereafter, mortgagee-vendee Antonio Tambunting sold and transferred his 1/2 share in the property to his wife Aurora Tambunting. On 31 January 1969, Aurora Tambunting executed an Affidavit of Consolidation of Title, for the issuance of a new title in her name.

On 31 January 1969, Transfer Certificate of Title No. 239717-Rizal was issued in the name of Aurora Tambunting, married to Antonio Tambunting. Aurora Tambunting then transferred the property to Tambunting Realty Corporation which obtained Transfer Certificate of Title No. 270972-Rizal in its name.

On or about 24 August 1970, the private respondents filed a supplemental complaint in Civil Case No. 10180 impleading Tambunting Realty Corporation, the Provincial Sheriff and the Register of Deeds of Rizal, the first, as the subsequent vendee of the property, the second, as the officer responsible for holding the extrajudicial foreclosure sale of 26 January 1968, and the third, for the subsequent transfers of the mortgaged property despite alleged non-compliance with the requirements of Act 3135, Sec. 3 (as amended by Act 4118) on posting and publication of the notice of foreclosure sale.

On 2 September 1974, the Court of First Instance of Rizal rendered judgment, the dispositive part of which reads:

"IN VIEW OF ALL THE FOREGOING, judgement is hereby rendered:

(a)

Declaring the Real Estate Mortgage (Exhibit 'A' and '3') as well as the Promissory Note for P4,600.00 [sic] (Exhibit '1') valid until fully paid as hereunder provided;

(b)

Declaring without force and effect the Certificate dated April 25, 1963 (Exhibit 'B') insofar as it states that the capital was increased from P3,000.00 [sic] to P5,000.00;

(c)

Ordering the plaintiffs to pay the defendants Aurora Tambunting and Antonio Tambunting the sum of P3,600.00 plus 12% per annum from April 25, 1963 until the obligation shall have been duly paid; (as amended);

(d)

Ordering plaintiffs to pay defendants Aurora Tambunting and Antonio Tambunting the sum equivalent to 10% (Exhibit '1' also Exhibit '3-A') of the amount of P3,600.00 by way of mitigated liquidated damages, plus attorney's fees in the amount of P1,000.00; and finally.

(e)

Declaring as null and void the Deed of Sale (Exhibit 'L-2'), Affidavit of Consolidation (Exhibit 'L-3'), Transfer

Certificate of Title No. 239713 (Exhibit 'L-4'), Absolute Deed of Sale (Exhibit 'L-5'), Transfer Certificate of Title No. 270972 (Exhibit 'L-6'), and ordering the Register of Deeds to reinstate the Transfer Certificate of Title No. 59433 in the name of the plaintiffs giving it therefore all force and effect as though it had not been cancelled. xxx.

"SO ORDERED."[1]

The Tambuntings filed a motion for reconsideration, while the Cruzes filed an opposition and moved for partial reconsideration, insisting on automatic nullity of the Real Estate Mortgage due to alleged full payment of the obligation as of 25 April 1963 and claiming reimbursement of all proceeds by way of rentals received by the Tambuntings during the pendency of the case.

The trial court modified par. (c) of the dispositive part of its judgment and ordered the Cruzes to pay the Tambuntings P3,600.00 plus 12% interest per annum from 25 April 1963 until the obligation is fully paid. The rest of the dispositive part of the judgment remained.

Before the Court of Appeals in CA-G.R. No. 57714-R, the Tambuntings questioned the trial court's ruling voiding the foreclosure sale. Affirming the judgment of the Court of First Instance, the Court of Appeals in a decision[*] promulgated on 13 December 1977, reasoned that the petitioners deviated from the posting and publication requirements of law, which rendered the notice of sale ineffective and voided the auction sale of 26 January 1968.

On 23 January 1978, the Cruzes filed in the same CA-G.R. No. 57714-R a "petition for accounting of fruits and application of the same against amount of judgment with res-training order" to restrain the Tambuntings from continuing to collect rentals from tenants of the property in question, to render an accounting of rentals received, and to apply collected rentals to satisfy the judgment rendered against them, and to turn over to them the excess rentals. They also sought to suspend the running of interest on the P3,600.00 principal of the loan until the final accounting is submitted by the Tambuntings and necessary application (offset of accounts) has been made.[2]

Finding the Cruzes' petition meritorious, the same was granted by the Court of Appeals in a resolution[**] promulgated 2 May 1978, except for the suspension of interest on the P3,600.00 loan, which was denied.

The Tambuntings also filed a Motion for Reconsideration of the 13 December 1977 decision but it was denied for lack of merit in the same resolution of 2 May 1978.[3]

Hence, this recourse by way of review on certiorari filed by the Tambuntings.

Petitioners assign two (2) errors allegedly committed by the Court of Appeals: First, the Court of First Instance and the Court of Appeals erroneously nullified and set aside the auction sale for lack of compliance with the formalities of law, when the sale on 26 January 1968 was purely a postponement of previously scheduled sales, notices of which had been posted and published as required by law. Consequently the nullification of the various deeds of transfer and transfer certificates of title resulting from said sale is unwarranted, contend the petitioners. Second, the Court of Appeals erred in granting the Cruzes' petition for accounting of fruits, etc. after judgment had been rendered, because this was tantamount to a modification of the trial court's judgment, and an appellee, who is not an appellant, cannot seek affirmative relief from the appellate court.

We uphold the questioned decision and resolution of the Court of Appeals.

Act No. 3135 (governing extra judicial foreclosure of real estate mortgage), as amended by Act No. 4118, reads:

"SEC. 3. - Notice shall be given by posting notices of the sale for not less than twenty (20) days in at least three public places of the municipality or city where the property is situated, and if such property is worth more than four hundred pesos, such notice shall also be published once a week for at least three consecutive weeks

in a newspaper of general circulation in the municipality or city."

The rule is that statutory provisions governing publication of notice of mortgage foreclosure sales must be strictly complied with, and that even slight deviations therefrom will invalidate the notice and render the sale at least voidable.[4] Interpreting sec. 457 of the Code of Civil Procedure (reproduced in sec. 18 (c) of Rule 39, Rules of Court and in sec. 3 of Act No. 3135) in *Campomanes v. Bartolome and German & Co.*, [5] this Court held that if a sheriff sells without the notice prescribed by the Code of Civil Procedure induced thereto by the judgment creditor, and the purchaser at the sale is the judgment creditor, the sale is absolutely void and no title passes. This is regarded as the settled doctrine in this jurisdiction whatever the rule maybe elsewhere.[6]

"Where required by the statute or by the terms of the foreclosure decree, public notice of the place and time of the mortgage foreclosure sale must be given, a statute requiring it being held applicable to subsequent sales as well as to the first advertised sale of the property. It has been held that failure to advertise a mortgage foreclosure sale in compliance with statutory requirements constitutes a jurisdictional defect invalidating the sale and that a substantial error or omission in a notice of sale will render the notice insufficient and vitiate the sale." [7]

One issue of a newspaper of general circulation is not substantial compliance with the required publication of once (1) a week for at least three (3) consecutive weeks.[8] Petitioners claim the publisher's affidavit of publication is merely a customary proof, hence, it should not be considered as the sole evidence of publication. This may be so in the presence of equally convincing evidence. In the case at bar, however, there is no such other proof of publication. To show compliance, the published notices and certificate of posting by the sheriff of the notice of sale of 26 January 1968 should have been presented. They do not appear in the record. Neither can the sale be considered as an adjournment of an earlier sale under Sec. 24 of Rule 39 of the Rules of Court.[9] As correctly posed by the Court of Appeals, why was there one (1) publication of the notice of sale scheduled on 26 January 1968?[10] The presumption of compliance with official duty[11] has been rebutted by the failure to present proof of posting and publication of the notice of sale of 26 January 1968.

There being no reversible error in the Court of Appeals ruling on this issue, we have no choice but to affirm the declared nullity of the mortgage foreclosure sale in question, for lack of compliance with the mandatory requirements of law in the matter of posting and publication of notice of sale.

At this juncture, it should be carefully stressed that, while the foreclosure or auction sale of 26 January 1968 is null and void, the real estate mortgage as well as the Cruzes' loan obligation to the Tambuntings remain valid and effective as ruled in the decisions of the trial court and the Court of Appeals.

As to the second issue, the Court notes that private respondents, the Cruzes, have repeatedly sought the refund and reimbursement of money collected and received as rentals by the Tambuntings from the property in question, from January 1969 until its actual return to them (private respondents).[12] Was the appellate court, however, the proper forum for respondent's aforesaid petition for accounting of fruits, etc.?

We hold that it was and the Court of Appeals resolution of 2 May 1978 is in accordance with law.

Private respondents' petition for accounting, etc.[13] did not really seek a modification of the judgments of the trial court and the Court of Appeals. The remedy sought (accounting and offsetting of accounts) was a direct clear-cut consequence of an equally clear-cut decision which, in effect, held that the Cruzes were never divested of their ownership over the property in question. In other words, the accounting sought and granted is merely an incident of the declared respondents' right of ownership under the Civil Code.[14]

As to petitioners' claim that it was erroneous for the appellate court to grant said petition for accounting, etc.

because an appellee (like the private respondents) who is not at the same time an appellant cannot seek a modification of the trial court's judgment,[15] the rule indeed is found in Section 7, Rule 51 of the Rules of Court stating that –

"SEC. 7. Questions that may be decided. - No error which does not affect the jurisdiction over the subject matter will be considered unless stated in the assignment of errors and properly argued in the brief, save as the court, at its option, may notice plain errors not specified, and also clerical errors." [16]

But, as already stated, the private respondents' petition for accounting, etc. was merely a direct consequence of the Court of Appeals decision which affirmed the trial court's judgment declaring them as not having lost their ownership over the disputed property. If the respondents had been precluded from filing said petition for accounting, etc. in the Court of Appeals, they would have had to file a separate action which could only result in a multiplicity of suits.

Moreover, said petition for accounting, etc. is based on the rationale underlying a related rule in the Rules of Court, Sec. 34, Rule 39 of the Rules of Court provides:

"SEC. 34. Rents and profits pending redemption. Statement thereof and credit therefor on redemption. - The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive the rents of the property sold or the value of the use and occupation thereof when such property is in the possession of a tenant. But when any such rents and profits have been received by the judgment creditor or purchaser, or by a redemptioner, or by the assignee of either of them, from property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and, if a later redemptioner or the judgment debtor, before the expiration of the time allowed for such redemption demands in writing of such creditor, purchaser, or prior redemptioner, or his assigns, a written and verified statement of the amounts of the rents and profits thus received, the period of redemption is extended five (5) days after such demand is complied with and such sworn statement given to such later redemptioner or debtor. If such statement is not so given within one (1) month from and after such demand, such redemptioner or debtor may bring an action to compel an accounting and disclosure of such rents and profits, and until fifteen (15) days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor."

What clearly appears from this provision is the right of the debtor to demand for an accounting of the rents and profits received by a creditor during the period of redemption. Thus, while the Rules of Court allow the purchaser in an execution sale to receive the rentals if the purchased property is occupied by tenants, he is, however, accountable to the judgment debtor or mortgagor, as the case may be, for the amounts so received and the same will be duly credited against the redemption price when said debtor or mortgagor effects the redemption.[17]

Consequently, the principle applies in the instant case that issues though not specifically raised in the pleadings in the appellate court, may, in the interest of justice, be properly considered by said court in deciding a case, if they are questions raised in the trial court and are matters of record having some bearing on the issue submitted which the parties failed to raise or the lower court ignored.[18]

WHEREFORE, the petition is DENIED. The decision and resolution of the Court of Appeals dated 13 December 1977 and 2 May 1978 in CA-G.R. No. 57714-R are hereby AFFIRMED. With costs against petitioners.

SO ORDERED.

Melencio-Herrera, (Chairman), Paras, Sarmiento, and Regalado, JJ., concur.

[1] Narration of facts culled from pp. 39 to 54 of Rollo

[*] Ponente: Justice Luis B. Reyes; concurring: Justices Mariano V. Agcaoili and Hugo E. Gutierrez, Jr.

[2] Id. at 71

[**] Ponente: Justice Luis B. Reyes; concurring: Justices Samuel F. Reyes and Hugo E. Rodriguez, Jr.

[3] Id. at 63

[4] Jalandoni v. Ledesma, 64 Phil. 1058, G.R. No. 42589, August 31, 1937 and October 29, 1937

[5] 38 Phil. 808, G.R. No. 13809, October 18, 1918

[6] Borja v. Addison, 44 Phil. 895, G.R. No. 18010, June 21, 1922

[7] 59 C.J.S. 1314

[8] Rollo at 21

[9] Rule 39, Sec. 24. Adjournment of sale. - By written consent of debtor and creditor, the officer may adjourn any sale upon execution to any date agreed upon in writing by the parties. Without such agreement he may adjourn the sale from day to day, if it becomes necessary to do so for lack of time to complete the sale on the fixed day in the notice.

[10] Rollo at 19

[11] Rule 131, Sec. 5(m), Rules of Court

[12] Rollo at 37, ROA, p. 48, 84, 102; 26 Appellees Brief, CA, Rollo at 37

[13] Rollo at 71

[14] Art. 441 and 442 of the Civil Code

[15] Citing Saenz v. Mitchell, 60 Phil. 69; Pineda & Ampil Manufacturing Co. v. Bartolome, et al. 95 Phil. 930; David v. de la Cruz and Calauig, 103 Phil. 380; Dy v. Kuizon, G.R. No. L-16654, November 30, 1961, 3 SCRA 617

[16] La Mallorca vs. CA, G.R. No. L-20761, 27 July 1968, 17 SCRA 739

[17] Reyes v. Hamada, et al., G.R. No. L-19967, May 31, 1965, 14 SCRA 215

[18] Relativo vs. Castro, 76 Phil. 563; Dilag vs. Heirs of Resurreccion, 76 Phil. 650; Hernandez vs. Andal, 78 Phil. 196 cited in Baquiran v. CA, L-14551, July 31, 1961, 2 SCRA 873.

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