

**PACIFIC MERCHANDISING CORPORATION, PLAINTIFF-APPELLEE,
VS. DIESTRO LOGGING DEVELOPMENT CORPORATION, AND
CONSOLACION INSURANCE AND SURETY CO. INC., DEFENDANTS,
CONSOLACION INSURA...**

G.R. No. L-23916. August 31, 1970

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

This is an appeal taken by defendant Consolacion Insurance and Surety Co. Inc., from that portion of the decision of the Court of First Instance of Manila dated October 5, 1964, adjudging said defendant to pay attorney's fees, and from the order dated October 24, 1964, denying its motion for reconsideration.[1]

On June 21, 1963 the plaintiff filed a complaint in the Court of First Instance of Manila for the recovery of a sum of money against the defendants Diestro Logging Development Corporation and Consolacion Insurance and Surety Company, Inc. After the defendants had filed their respective answers, the case was submitted for decision on the following stipulation of facts:

1. That on or about the 23rd day of January, 1963 in the City of Manila, Philippines, the plaintiff and the defendant Diestro entered into a Sales Agreement, copy of which is attached as Annex A to complaint, wherein the former sold to the latter the motor vehicles described in said Sales Agreement (Annex A to complaint), for a total price of P32,000.00 payable within Thirty (30) days from January 23, 1963, in accordance with paragraph 1 (a) of the Sales Agreement (Annex A to complaint) but which period, by mutual consent between the parties, was extended by fifteen (15) days or a total of forty-five (45) days from January 23, 1963.
2. That to guarantee the payment of the purchase price of the said motor vehicles amounting to P32,000.00 within the stipulated period of forty-five (45) days, DIESTRO agreed to give to the plaintiff a Surety Bond, which Surety Bond was issued by CONSOLACION as per copy attached as Annex B to complaint;
3. That on January 29, 1963, simultaneous with the issuance of the Surety Bond (Annex B to complaint), and to secure cross-claimant from any loss that may attached from said bond, defendant DIESTRO EXECUTED in favor of CONSOLACION an Indemnity Agreement. A true copy of the Indemnity Agreement is attached as Annex 1 to defendant's (CONSOLACION) Answer;
4. That under the said Indemnity Agreement (Annex 1 to defendant's answer), cross-defendant DIESTRO inter alia, agreed to the following stipulations:

(a) To indemnify cross-claimant from any loss or damage that it may suffer or cause to be paid by virtue of the issuance of the Surety Bond, (Annex B to complaint), with interest thereon at the rate of One per cent (1%) per month to be liquidated monthly and to be added to the principal to earn the same rate of interest until fully paid;

(b) To pay 20% of the total amount due as and for attorney's fees;

5. That the motor vehicles itemized in the Sales Agreement (Annex A to the complaint) were received in good

condition by defendant DIESTRO as shown in the Delivery Receipt No. 8050 dated February 6, 1963;

6. That the sum of P32,000.00 representing the purchase price of the motor vehicles sold by the plaintiff to the defendant DIESTRO as stipulated in the Sales Agreement (Annex A to complaint) remains unpaid notwithstanding repeated verbal and written demands from the plaintiff;

7. That on the 14th, 27th and 31st day of May, 1963, CONSOLACION was notified by the plaintiff that DIESTRO refused and failed, to pay the said sum of P32,000.00 guaranteed by CONSOLACION Surety Bond (Annex B to complaint) and in said notification, plaintiff demanded from CONSOLACION as Surety the payment of the unpaid obligations of DIESTRO, but CONSOLACION did not pay, having been advised by DIESTRO that the trucks subject of the Sales Agreement (Annex A to complaint) were received not in good condition as stipulated;

8. That in accordance with the Surety Bond (Annex B to complaint), the liability of defendant DIESTRO and CONSOLACION to plaintiff is joint and solidary, the latter's liability however, being limited to P32,000.00, the amount of the bond;

9. That plaintiff is entitled to the payment of interest on the unpaid obligation with reasonable attorney's fees.

On October 5, 1964 the lower court rendered judgment ordering the defendants "to pay, jointly and severally, the sum of P32,000.00 to the plaintiff, with interest thereon at the legal rate from January 23, 1963 until the said amount is fully paid, plus a sum equivalent to 25% of the unpaid indebtedness as and for attorney's fees, and the costs hereof" Not satisfied with the decision, the defendant Consolacion Insurance and Surety Company, Inc. moved to reconsider, praying that the attorney's fees and interest be charged against the defendant Diestro Logging Development Corporation alone. In denying the motion, the trial court in its order of October 24, 1964 said:

"Acting upon the motion for reconsideration of the judgment rendered by this Court filed by the Consolacion Insurance and Surety Co., Inc. on the ground that under its contract with defendant Diestro Logging Development Corporation it is not liable for attorney's fees, the Court finds that the liability for attorney's fees of a surety is based not on its contract with the defendant above-mentioned, but as a consequence of its refusal to pay its obligation notwithstanding repeated demands. If the said surety company paid the obligation upon demand, there is no question that it could not have been made to pay for attorney's fees, because such is not included in its contract with the Defendant Diestro Logging Development Corporation, but after its refusal and the filing of the action as a result of the said refusal, it is but natural that it should also pay the attorney's fees, because the filing of this action is the result of its refusal to pay its obligation under the surety bond."

The defendant surety interposed this appeal, assigning as sole error the lower court's finding that it was liable for the payment of attorney's fees in favor of the plaintiff.

The appellant contends that although the appellee's right to the payment of reasonable attorney's fees was stipulated, the liability therefor pertained only to the principal, the Diestro Logging Development Corporation. Two grounds are relied upon by the appellant, namely: (1) the payment of attorney's fees by the appellant would be in excess of its liability under the surety bond; and (2) it was not at fault in not paying the appellee upon the latter's extra-judicial demands.

In support of the first ground, the appellant cites the terms of the surety bond as well as paragraph 8 of the stipulation of facts, which states:

"8. That in accordance with the Surety Bond (Annex "B" to complaint), the liability of defendant DIESTRO and CONSOLACION to plaintiff is joint and solidary, the latter's liability, however, being limited to P32,000.00, the amount of the bond;"

Explaining the second ground, the appellant avers that its refusal to pay the sum of P32,000.00 upon demand was based upon the fact, admitted in paragraph 7 of the stipulation, that it had been advised by its principal "That the trucks subject of the Sales Agreement (Annex "A" to complaint) were received not in good condition..." The appellant points out that under the circumstances it would have been imprudent to comply with the extrajudicial demands, since if it paid the appellee and the information should turn out to be true, its principal could validly refuse reimbursement of the amount thus paid.

On the other hand, the appellee disputes the appellant's stand and insists that under the stipulation of facts the appellant is liable for attorney's fees, citing paragraph 9 which reads:

"9. That plaintiff is entitled to the payment of interest on the unpaid obligation with reasonable attorney's fees."

The appellee maintains that the stipulation in paragraph (9) supersedes the one in paragraph 8, and that the latter would govern only if the appellant had paid the obligation upon extra-judicial demand, but not when the appellee was constrained to bring an action in court to enforce its rights under the surety bond.

The appellant should be sustained. The stipulation of facts should be so construed as to give effect to all its provisions if the same can fairly and reasonably be done. Conformably thereto, paragraphs 8 and 9 must be reconciled rather than construed in such a way that one would nullify the other. Thus, while paragraph 9 recognizes the appellee's right to reasonable attorney's fees, such right may be enforced only against the Diestro Logging Development Corporation, thereby giving effect at the same time to paragraph 8, which limits the appellant's liability to the amount of the bond. This is the more reasonable interpretation, considering that the appellant was not at fault when it refused to pay the appellee upon demand because of the advice given by its principal that the trucks were not received in good condition.

With regard to paragraphs 5 and 7, the appellee's claim that the latter nullified the former is unjustified, because there is no conflict between them. The said stipulations simply mean that the Diestro Logging Development Corporation did receive the trucks in good condition, but nevertheless advised the appellant to the contrary. This is all the more reason to hold that if the appellee was constrained to go to court to enforce its rights, the principal debtor was alone to blame, and therefore should be the one to pay the attorney's fees awarded on that ground.

The trial court declared that the appellant's liability for attorney's fees is not based on contract, but on its refusal to pay its obligation notwithstanding repeated demands. Disregarding - for purposes of testing the correctness of the judgment upon the basis thus stated - the stipulation limiting the appellant's liability to the amount of P32,000.00 fixed in the surety bond, we now consider Article 2208 of the Civil Code, which enumerates the instances where attorney's fees may be recovered in the absence of agreement. There are eleven (11) such instances, of which only the fifth and the last could have any relevancy here, namely: "(5) where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;" and "(11) in any other case where the court deems it just and equitable that attorney's fees...should be recovered." Number 5 is at once ruled out in the case of the appellant, for there is neither allegation nor proof that it refused, in gross and evident bad faith, to comply with the appellee's extra-judicial demands for payment. What does appear, and in fact is stipulated, is that the appellant "did not pay, having been advised by DIESTRO that the trucks subject of the sales agreement were received not in good condition." It must be remembered that the appellant was merely a surety, had no knowledge of the condition in which those trucks were delivered to its principal, and therefore could only rely upon the information the latter supplied, which information, if true, would have been a partial defense in the action, at least to reduce the liability of both defendants. The fact that the information turned out to be untrue is of no consequence insofar as the appellant's position is concerned. That development came out only in the stipulation of facts, whereupon, the action for collection having already been filed, the parties, submitted the case for

decision. Under the circumstances, the judgment for attorney's fees against the appellant is not even justified under paragraph (11) of Article 2208 of the Civil Code. It would in effect be imposing a penalty on the right to litigate. (See *Koster Inc. vs. Zulueta*, G. R. No. L-9305, 99 Phil. 945, 951.)

Wherefore, the decision is modified by eliminating the award of attorney's fees against the defendant-appellant.

Concepcion, C.J., Reyes, J.B.L., Dizon, Zaldivar, Castro, Fernando, Teehankee, Villamor, and Makasiar, JJ., concur.

Barredo, J., took no part.

[1] Civil Case No. 54306.

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