

**AMPARO G. PEREZ, ET AL., PLAINTIFFS AND APPELLEES, VS.
PHILIPPINE NATIONAL BANK, BINALBAGAN BRANCH, ET AL.,
DEFENDANTS AND APPELLANTS.***G.R. No. L-21813. July 30, 1966*

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

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Appeal from a decision in Civil Case No. 100 of the Court of First Instance of Negros Occidental, annulling the extra judicial foreclosure sale of Lot No. 286-E of the Kabankalan Cadastre, standing in the name of Vicente Perez, in favor of the Philippine National Bank, as well as the cancellation of the mortgagor's original Certificate of Title No. 29530 and the issuance of a new Certificate T-32066 in the Bank's name; and ordering the said Bank to pay the heirs of Vicente Perez P3,000 damages and P2,000 attorneys' fees and costs.

The antecedents of the case were as follows:

On August 29, 1939, Vicente Perez mortgaged Lot No. 286-E of the Kabankalan Cadastre, with Transfer Certificate of Title No. 29530, to the appellant Philippine National Bank, Bacolod Branch, in order to secure payment of a loan of P2,500, plus interest, payable in yearly installments. On October 7, 1942, Vicente Perez, mortgagor, died intestate, survived by his widow and children (appellees herein). At that time, there was an outstanding balance of P1,917.00, and corresponding interest, on the mortgage indebtedness.

On October 18, 1946, the widow of Perez instituted Special Proceedings No. 512 of the Court of First Instance of Occidental Negros, for the settlement of the estate of Vicente Perez. The widow was appointed Administratrix, and notice to creditors was duly published. The Bank did not file a claim. The project of partition was submitted on July 18, 1956; it was approved and the properties distributed accordingly. Special Proceeding No. 512 was then closed.

It appears also that, as early as March of 1947, the widow of the late Vicente Perez inquired by letter from the Bank the status of her husband's account and she was informed that there was an outstanding balance thereon of P2,758.84 earning a daily interest of P0.4488. She was furnished a copy of the mortgage and, on April 2, 1947, a copy of the Tax Declaration (Rec. App. pp. 45-48).

On January 2, 1963, the Bank, pursuant to authority granted it in the mortgage deed, caused the mortgaged properties to be extrajudicially foreclosed. The Provincial Sheriff accordingly sold Lot No. 286-E at auction, and it was purchased by the Bank. In the ordinary course, after the lapse of the year of redemption, Certificate of Title No. T-29530 in the name of Vicente Perez was cancelled, and Certificate T-32066, dated May 11, 1962, was issued in the name of the Bank. The widow and heirs of Perez were not notified.

Three months later, on August 25, 1962, the widow and heirs of Vicente Perez instituted this case against the Bank in the court below, seeking to annul the extra-judicial foreclosure sale and the transfer of the Certificate of Title, as well as to recover damages, claiming that the Bank had acted illegally and in bad faith. The Bank

answered, denying the charges. After trial, the court a quo, on December 15, 1962, rendered judgment holding that, according to the doctrine of this Supreme Court in *Pasno vs. Ravina*, 54 Phil. 382, the Bank should have foreclosed its mortgage in court; that the power to sell contained in the deed of mortgage had terminated upon the death of the mortgagor, Vicente Perez. Wherefore, the trial court declared null and void extra-judicial foreclosure sale to the Bank, as well as the cancellation of the Certificate of Title of Vicente Perez and the issuance in its stead of a new certificate in the name s Bank; and ordered the latter to pay the plaintiffs P3,000 damages and P2,000 attorneys' fees and costs.

The Bank appealed to this Supreme Court.

The main issue in this appeal is the application of section 7, Rule 87, of the original Rules of Court adopted in 1941 (now section 7, Rule 86, of the 1964 Revised Rules), and which was, in truth, a reproduction of section 708 of the Code of Civil Procedure (Act 190). The text is as follows:

"SEC. 7. Mortgage debt due from estate—A creditor holding a claim against the deceased secured by mortgage or other collateral security, may abandon the security and prosecute his claim in the manner provided in this rule, and share in the general distribution of the assets, of the estate; or he may foreclose his mortgage or realize upon his security, by action in court, making the executor or administrator a party defendant, and if there is a judgment for a deficiency, after the sale of the mortgaged premises, or the property pledged, in the foreclosure or other proceeding to realize upon the security, he may claim his deficiency judgment in the manner provided in the preceding section; or he may rely upon his mortgage or other security alone, and foreclose the same at any time within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, and shall receive no share in the distribution of the other assets of the estate; but nothing herein contained shall prohibit the executor or administrator from redeeming the property mortgaged or pledged, by paying the debt for which it is held as security, under the direction of the court, if the court shall adjudge it to be for the interest of the estate that such redemption shall be made."

The lower court held that the Rule inhibits any extra-judicial foreclosure of the mortgage constituted by a deceased debtor-mortgagor, following the majority opinion of five justices in *Pasno vs. Ravina*, 54 Phil. 378. Said the Court in that case (382) :

"The power of sale given in a mortgage is a power coupled with an interest which survives the death of the grantor. One case, that of *Carter vs. Slocomb* ([1898], 122 N. C, 475), has gone so far as to hold that a sale after the death of the mortgagor is valid without notice to the heirs of the mortgagor. However that may be, conceding that the power of sale is not revoked by the death of g mortgagor, nevertheless in view of the silence of Act No. 3135 an in view of what is found in section 708 of the Code of Civil Procedure it would be preferable to reach the conclusion that the mortgage with a power of sale should be made to foreclose the mortgage in conformity with the procedure pointed out in section 708 of the code of Civil Procedure. That would safeguard the interests of the estate by putting the estate on notice while it would not jeopardize any rights, of the mortgagee. The only result is to suspend temporarily the power to sell so as not to interfere with the orderly administration of the estate of a decedent. A contrary holding would be inconsistent with the portion of our law governing the settlement of estates of deceased persons."

A vigorous and able dissenting opinion, subscribed by Justices Street, Villamor and Ostrand, held that an extra judicial foreclosure was authorized (cas. cit. pp. 383-385). The dissent argues:

"The opinion of the court refers to section 708 of the Code of Civil Procedure as determining the proposition that, after the death of the mortgagor, foreclosure can be effected only by an ordinary action in court but if this section be attentively examined, it will be seen that the bringing of an action to foreclose is necessary only when the mortgagee wishes to obtain a judgment over for the deficiency remaining unpaid after foreclosure is effected. In fact this section gives to the mortgagee three distinct alternatives, which are, first, to waive his

security and prove his credit as an ordinary debt against the estate of the deceased; secondly, to foreclose the mortgage by ordinary action in court and recover any deficiency against the estate in administration and, thirdly, to foreclose without action at any time within the period allowed by the statute of limitations.

The third mode of procedure is indicated in that part of section 708 which is expressed in these words:

'Or he may rely upon his mortgage or other security alone, and foreclose the same at any time, within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, shall receive no share in the distribution of the other assets of the estate.'

The alternative here contemplated is, evidently, a foreclosure under power of sale contained in the mortgage. It must be so, since there are no other modes of foreclosure known to the law than by ordinary action and foreclosure under power, and the procedure by action is covered in that part of section 708 which immediately precedes the words which we have quoted above. It will be noted that the result of adopting the last mode of foreclosure is that the creditor waives his right to recover any deficiency from the estate.

In addition to what is said above, we submit that the policy of the court in requiring foreclosure by action in case of the death of a mortgagor, where a power of sale is inserted in the mortgage, will prove highly prejudicial to the estates of deceased mortgagors. Nowadays nearly every mortgage executed in this country contains a stipulation for the payment of attorney's fees and expenses of foreclosure, usually in an amount not less than 20 or 25 per cent of the mortgage debt. This means, in practical effect, that the creditor can recover, for attorney's fees and expenses, whatever the court will allow as reasonable, within the stipulated limit. On the other hand, if an extrajudicial foreclosure is effected under the power of sale, the expenses of foreclosure are limited to the cost of advertising and other actual expenses of the sale, not including the attorney's fee.

Again, if foreclosure is effected extra judicially, under the power, in conformity with the provisions of Act No. 3135, the mortgagor or his representative has a full year, from the date of the sale, within which to redeem the property, this being the same period of time that is allowed to judgment debtors for redeeming after sale under execution. On the other hand, the provisions of the Code of Civil Procedure relative to the foreclosure of mortgages by action allows no fixed period for redemption after sale; and although, in the closing words of section 708 of the Code of Civil Procedure the court is authorized to permit the administrator to redeem mortgaged property, this evidently refers to redemption to be effected before the foreclosure becomes final.

When account is further taken of the fact that a creditor who elects to foreclose by extrajudicial sale waives all right to recover against the estate of the deceased debtor, for any deficiency remaining unpaid after the sale, it will be readily seen that the decision in this case will impose a burden upon the estates of deceased persons who have mortgaged real property for the security of debts, without any compensatory advantage."

The ruling in *Pasno vs. Ravina* not having been reiterated in any other case, we have carefully reexamined the same, and after mature deliberation have reached the conclusion that the dissenting opinion is more in conformity with reason and law. Of the three alternative courses that section 7, Rule 87 (now Rule 86), offers the mortgage creditor, to wit, (1) to waive the mortgage and claim the entire debt from the estate of the mortgagor as an ordinary claim; (2) foreclose the mortgage judicially and prove any deficiency as an ordinary claim; and (3) to rely on the mortgage exclusively, foreclosing the same at any time before it is barred by prescription, without right to file a claim for any deficiency, the majority opinion in *Pasno vs. Ravina*, in requiring a judicial foreclosure, virtually wipes out the third alternative conceded by the Rules to the mortgage creditor, and which would precisely include extra-judicial foreclosures by contrast with the second alternative. This result we do not consider warranted by the text of the Rules; and, in addition, the recognition of the creditor's right to foreclose extra-judicially presents undoubted advantages for the estate of the mortgagor, as pointed out by the dissenting opinion in *Pasno vs. Ravina*, *supra*. In the light of these considerations, we have decided to overrule the majority decision, in said case, and uphold the right of the mortgage creditor to foreclose extra-judicially in accordance

with section 7, Rule 86, of the Revised Rules (old Rule 87).

The argument that foreclosure by the Bank under its power of sale is barred upon death of the debtor, because agency is extinguished by the death of the principal, under Article 1732 of the Civil Code of 1889 and Article 1919 of the Civil Code of the Philippines, neglects to take into account that the power to foreclosure is not an ordinary agency that contemplates exclusively the representation of the principal by the agent, but is primarily an authority conferred upon the mortgagee for the latter's own protection. It is, in fact, an ancillary stipulation supported by the same causa or consideration for the mortgage and forms an essential and inseparable part of that bilateral agreement. As can be seen in the preceding quotations from *Pasno vs. Ravina*, Phil. 382, both the majority and the dissenting opinions conceded that the power to foreclose extrajudicially survived the death of the mortgagor, even under the law prior to the Civil Code of the Philippines now in force.

Nevertheless, while upholding the validity of the appellant Bank's foreclosure, we can not close our eyes to the fact that the Bank was apprised since 1947 of the death of its debtor, Vicente Perez, yet it failed and neglected to give notice of the foreclosure to the latter's widow and heirs, as expressly found by the court a quo. Such failure, in effect, prevented them from blocking the foreclosure through seasonable payment, as well as impeded their effectuating a seasonable redemption. In view of these circumstances, it is our view that both justice and equity would be served by permitting herein appellees to redeem the foreclosed property within a reasonable time, by paying the capital and interest of the indebtedness up to the time of redemption, plus foreclosure and useful expenses, less any rents and profits obtained by the Bank from and after the same entered into its possession.

Wherefore, the judgment appealed from is hereby modified, as follows:

- (1) Declaring valid and effective the extra judicial foreclosure of the mortgage over Lot 286-E of the Kabankalan Cadastre;
- (2) Upholding and confirming the cancellation of Transfer Certificate of Title No. 29350 of the Registry of Deeds of Occidental Negros in the name of the late Vicente Perez, as well as its replacement by Certificate of Title T-32066 of the same Registry in the name of appellant Philippine National Bank;
- (3) Declaring the appellees herein, widow and other heirs of Vicente Perez entitled to redeem the property in question by paying or tendering to the Bank the capital of the debt of Vicente Perez, with the stipulated interest to the date of foreclosure, plus interest thereafter at 12% per annum and reimbursing the Bank the value of any useful expenditures on the said property but deducting from the amounts thus payable the value of any rents and profits derived by the appellant National Bank from the property in question Such payment to be made within sixty (60) days after the balance is determined by the court of origin.

Neither party to recover damages or costs.

Let the records be returned to the court of origin for further proceedings in conformity with this decision. So ordered.

Concepción, C. J., Barrera, Dizon, Regala, Makalintal, Bengzon, J. P., Zaldivar, Sanchez and Ruiz Castro JJ., concur.

Judgment modified, records remanded to court of origin for further proceedings.

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