

**VISAYAN SURETY & INSURANCE CORPORATION, PETITIONER,
VS. HON. BERNABE DE AQUINO, JUDGE OF THE COURT OF FIRST
INSTANCE OF TARLAC, ET AL., RESPONDENTS.**

G.R. No. L-8107. April 29, 1955

Ponente: LABRADOR, J.

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LABRADOR, J.:

This is a proceeding by way of certiorari against an order of the Court of First Instance of Tarlac, Honorable Bernabe de Aquino presiding. In civil case No. 397 of said court, entitled Ysidra Cojuanco, et al. vs. Manuel Ernesto Gonzales, filed in said court in May, 1949, judgment was rendered ordering defendant to pay plaintiffs P6,000 a year from March 1, 1941 as rentals of a parcel of land leased by plaintiffs to the defendant. This judgment was affirmed by us on September 15, 1953. On September 12, 1949, while the case was pending trial, plaintiffs prayed for the appointment of a receiver for the property leased, filing a bend therefor. But as the defendant filed a counterbond, defendant was allowed to retain the land leased. The terms of the bond by the defendant are as follows:

"Now Therefore, we Manuel Ernesto Gonzales as Principal and the Visayan Surety & Insurance Corporation as Surety, hereby bind ourselves jointly and severally to the plaintiffs, their heirs, executors, administrators and assigns in an amount not exceeding thirty six thousand (P36,000.00) pesos, Philippine currency, conditioned that the defendant will pay all damages which the said plaintiffs may suffer by reason of the non-appointment or the discharge of the receiver in the above-entitled case."

As stated above, by reason of the above counterbond filed by him, defendant continued in possession of the property. The case was appealed to the Supreme Court, where the judgment of the Court of First Instance already referred to was affirmed. Upon the return of the records of the case to the Court of First Instance, plaintiffs filed a motion dated December 23, 1953, alleging that by reason of the filing of the counterbond by the Visayan Surety & Insurance Corporation, the plaintiffs were deprived of the harvest of the land leased, and praying that execution issue against the said Visayan Surety & Insurance Corporation for the amount of its bond. The motion was amended on February 15, 1954 so as to pray for opportunity to prove the damages that had been caused plaintiffs by the nonappointment of the receiver. The Visayan Surety and Insurance Corporation filed an opposition to the amended motion, but this was overruled and the motion granted in an order dated August 4, 1954, which reads as follows:

"Acting on the amended motion dated February 16, 1954, filed by the representation of plaintiffs in Civil Case No. 397, the Court finds said amended motion well taken.

"In View Whereof, let this amended motion be set for August 16, 1954 at 8:30 o'clock in the morning, for the reception of evidence on damages suffered by plaintiffs by reason of non-appointment of receiver in Civil Case No. 397. Upon the reception of the evidence the Court will determine the damages suffered, for the payment of which execution will issue against the Visayan Surety & Insurance Corporation of Manila.

"So ordered."

It is against the above order of the Court of First Instance that the petition for certiorari has been filed, petitioner alleging that the damages sought to be claimed are not included in the judgment, which had become final and that the order is in excess of the court's jurisdiction, as it amounts to an order for the reopening of the case for the purpose of amending the decision which has already become final and executory, and adding thereto a liability of the petitioner which was not adjudged in the original decision. The principal defenses interposed by the respondents are that the petitioner herein had notice that respondents are claiming damages for the retention of the leased premises by the defendant Manuel Ernesto Gonzales; that the proceeding adopted by the Judge in its order is a summary hearing authorized by the provisions of Section 17 of Rule 59 to enforce the liability on the counterbond; that the notice to the surety and proof of damages required in Section 20 of Rule 59 was complied with at the trial of the case because counsel for petitioner herein was counsel for the defendant in the case; and that the proceeding complained of was within the power of the court as it was merely executing its judgment, the said order being merely to carry out the execution of the judgment, which execution falls within his authority from the time the judgment becomes final until the expiration of five years from the entry of judgment.

The rule applicable to the case at bar is Section 9, Rule 61, which provides:

"Sec. 9. Judgment to include recovery against sureties.—The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this rule, shall be claimed, ascertained, and granted under the same procedure as prescribed in section 20 of Rule 59."

In accordance therewith, and following the procedure outlined in Section 20 of Rule 59, respondents in this case should have filed a claim in a supplemental complaint in the court of first instance for the rentals of the land due up to the time of the judgment up to November 4, 1950) in said court, and an application in this Court for the rentals due from the date of the judgment appealed from (November 4, 1950) to the date of our judgment (September 15, 1953) for the rentals up to the latter date. The supplemental complaint in the court of first instance and the application in this Court should have been made before the judgment in either court was rendered or had become final, so that the damages awarded could have been included therein. The philosophy of this requirement has been carefully pointed out in the case of *Santos vs. Moir*, 36 Phil., 350, thus:

"The purpose of these provision is not difficult to ascertain. It does away with the necessity of calling the same witnesses in a second action to give the same testimony they have in the first; the presentation of the same evidence a second time; and the litigation of the same questions which had been litigated before. It is clear that when the cause is finally adjudicated and the injunction continued or dissolved the right to the injunction is definitely and finally determined; and with it the right to damages. The liability of the sureties is also determined in large part by such adjudication. Thereafter, the evidence as to their liability, if any, is largely formal. This being so, why not settle the whole matter at the time the cause is decided on the merits?

"It not only saves an extra action in the trial court but it avoids an extra appeal. If there are two separate actions there may be two appeals; one from the judgment on the merits, the other from the judgment for damages for wrongful issuance of the injunction. Why have two appeals when there need be one only?"

The provision has been consistently followed in a long line of decisions (*Monteverde vs. Nakata*, 30 Phil., 608; *Yap Unki vs. Chua Jamco*, 14 Phil, 602; *Nava vs. Hofilena*, 63 Phil., 738, etc.), and there is no reason for deviating from the express language of the provision and the consistent rulings of the Court.

But it is contended by respondents that the order is in consonance with Section 17 of Rule 59 of the Rules of Court. This section is applicable to attachment bonds only and has not been made applicable in cases of receivership.

It is also contended that the order complained of has been issued under the authority of the court to execute its judgments. As the judgment is against the defendant personally, not against the surety on his counterbond, the execution to be issued must be against the property of the defendant only (Sec. 8, Rule 39, Rules of Court), and it can not issue against the counterbond because there is no judgment against the petitioner thereon. As a matter of fact, the order complained of was issued to secure a judgment against the surety on the counterbond of defendant, which shows the absence of a judgment against the surety to be executed. A judgment against a defendant can not per se be enforced by execution against the surety on his counterbond; a judgment against the surety must first be secured, before his counterbond may be proceeded against.

Wherefore, the petition is hereby granted, the order complaint of is revoked and the preliminary injunction we have granted made absolute. With costs against respondents.

Pablo, Acting C.J., Bengzon, Padilla, Montemayor, Reyes, A., Bautista Angelo, Concepcion and Reyes, J. B. L., JJ., concur.

Writ granted.

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