

**LIBERTY INSURANCE CORPORATION, PETITIONER, VS. THE
HONORABLE COURT OF APPEALS, HON. NAPOLEON K. FLOJO,
PRESIDING JUDGE OF BRANCH II, RTC MANILA; ATILLA ARKIN, THE
CITY SHERIFF O...**

G.R. No. 104405. May 13, 1993

Ponente: BIDIN, J.

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BIDIN, J.:

This is a petition for review on certiorari seeking to set aside and to declare null and void the decision dated September 17, 1991 of the respondent Court of Appeals dismissing petitioner's petition for review and its resolution dated February 7, 1992 denying petitioner's Motion for Reconsideration.

On May 4, 1988 Jose H. Imperial Organizations, Pty., thru Atty. Jose H. Imperial entered into an agreement with Coca - Cola Bottlers Philippines to promote two concerts featuring a group known as "Earth, Wind and Fire" on June 12 and 13, 1988 with Coca-Cola sponsoring the concerts and the former promoting the same.

To ensure compliance with the terms of the agreement, Coca-Cola required Imperial Organizations to put up a performance bond. Petitioner Liberty Insurance, upon application of Imperial Organization put up the performance bond in the amount of Three Million Pesos (P 3,000,000.00), the principal condition of which was to "fully and faithfully guarantee the terms and conditions" of the agreement dated May 24, 1988 entered into between Coca-Cola and Imperial Organizations. More particularly, the bond was to guarantee the return to Coca-Cola of "whatever portion of the cash sponsorship and cash advances to be made by Coca-Cola to finance the holding of the concerts on the dates aforesaid x x x." (Rollo, pp.37)

In turn, and as a condition for the issuance of said performance bond, petitioner required Imperial Organizations, Jose H. Imperial, Atilla Arkin, and Carmen Madlangbayan to execute an indemnity agreement in its favor to indemnify it for any and all damages including attorney's fees which the petitioner may incur by reason of the issuance of the bond.

It appears that while the concerts took place, Imperial Organizations and private respondents failed to comply with their obligations to Coca Cola as a result of which petitioner became liable upon its performance bond paying Coca-Cola Three Million Pesos. Petitioner, demanded reimbursement from Imperial, Arkin and Madlangbayan based on their indemnity bond but to no avail.

On August 7, 1988 petitioner filed with the Regional Trial Court, National Capital Region, Branch 2, Manila a complaint for damages with application for the issuance of a writ of preliminary attachment against private respondents.

On September 20, 1988, the Trial Court thru the Hon. Rosalio A. de Leon, issued an order allowing the issuance of the writ, stating that:

"x x x There could have been fraud committed by the defendants Arkin and Madlangbayan in promising to give as security or collateral to their Indemnity Agreement, which caused the plaintiff to release the security bond, when as it turned out, the Transfer Certificate of Title of a parcel of land supposedly issued by the Register of Deeds of Rizal turned out to be fake, as the true land title number was issued over a different parcel of land issued in the name of a person other than defendant Madlangbayan, while defendant Atila Arkin delivered an official receipt in the name of a third party but which vehicle was allegedly sold to him free from lien and encumbrance, when it turned out that the car was heavily mortgaged to a third party x x x.

"The conclusion of fraud is inevitable in view of the above circumstances, for any (sic) rate fraud is a state of mind that may be inferred from the circumstances extant in the case (Republic vs. Gonzales, 13 SCRA 633).

"In addition to the fact that these representations/promises of Arkin and Madlangbayan were made prior to the release of the bond (the bond by then had already been executed), it can still be said that this fraud existed when the obligation was contracted in line with Sec. 1, par (d), Rule 57, which reads: An attachment may issue in an action against a party who has been guilty of fraud in contracting or incurring the obligation upon which the action is brought.

"A debt is fraudulently contracted if at the time of contracting it, the debtor entertained an intention not to pay, or an intention not to keep a collateral agreement regarding the disposition of a property purchased on credit. (Francisco, Rules of Court, Second [1985] Edition, p. 21) x x x" (Rollo, pp. 38 - 39)

On May 10, 1989 respondent Arkin filed a Motion to Quash/ Recall Writ of Attachment. On October 19, 1989, the trial court, this time presided by respondent judge Napoleon K. Flojo, denied the motion, reasoning out as follows:

"Defendant Atila Arkin posits that no ground existed for the issuance of the preliminary attachment because he was not guilty of fraud in incurring the obligation under the indemnity agreement.

"The Court granted the prayer for a writ of preliminary attachment after a finding of fraud from the evidence adduced by the parties. This conclusion was supported by substantial evidence. There is no cogent reason from the arguments posed by the movant to warrant and/or recall of the writ.

"Furthermore, the complaint invokes another ground for the grant of the writ and that is, 'in an action against a party who has removed be (sic) disposed of his property, or is about to do so, with the intent to defraud his creditors,' x x x, evidenced by three conveyances or disposals of properties by defendant Atila Arkin, though made before the institution of the action, is a circumstance tending to show fraudulent conveyance with intent to defraud his creditors. Especially so, when the payment of herein claim upon which the action is brought is not secured by any mortgage or pledge of real (sic) personal property and plaintiff had no other sufficient security for the enforcement of the claim." (Rollo, p. 58; under-scoring supplied).

After more than a year, or on December 14, 1990, Arkin filed a Motion for Reconsideration of the aforementioned order of denial.

On March 6, 1991, respondent judge reversed his earlier ruling and instead issued two orders, (1) granting Arkin's Motion for Reconsideration and directing the lifting of the writ of preliminary attachment earlier issued, and (2) ordering the deputy sheriff assigned to said court to immediately discharge or lift said writ. The first order, among other things, states:

x x x x x x x x

"The Court, presided at the time by Judge Rosalio De Leon, found that the defendant has been guilty of fraud in inveigling the plaintiff to issue the surety bond by offering false collaterals. The ground relied upon by the Court to issue the attachment was based on Section 1 (d) of Rule 57 of the Rules of Court, which states:

'Section 1. Grounds upon which attachment may issue. - A plaintiff or any party may, at the commencement of the action or at anytime thereafter, have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered in the following cases:

x x x x x

'(d) In action (sic) against a party who has been guilty of fraud in contracting the obligation upon which the action is brought, x x x.'

"To constitute a ground for attachment, fraud should be committed prior to or simultaneous with the birth of the obligation sued upon, which in this case is the May 30, 1988 surety bond.

x x x x x x x x

"A close examination of the evidence, on record shows that the delivery of the fake collaterals were made to Eduardo Cunanan on June 1, 1988, or two (2) days after the issuance by the plaintiff of the surety bond. Thus, the offering of the fake Transfer Certificate of Title and encumbered Mercedes Benz car was not prior to or simultaneous with the execution of the Surety Bond. Such being the case, the offer of the collaterals were not the cause which induced the plaintiff to issue the surety bond. It is there-fore clear that the issuance of the surety bond on May 30, 1988 was not based on the alleged fraud of the defendant Arkin offering the fake collaterals.

x x x x x x x x

"With regards (sic) to the allegations that the defendant Arkin has removed or disposed of his property, with intent to defraud his creditors, suffice it to say that (when) the law authorizes the issuance of a writ of preliminary attachment (it) should be construed in favor of the defendant and before issuing an Order to that effect, the judge should require that all the requisites prescribed by law be complied (with), without which a judge acquires no jurisdiction to issue the writ.

x x x x x x x x

"Furthermore, allegations that debtors were removing or disposing some of the properties with intent to defraud creditors must be specific.

x x x x x x x x

"In the present case the plaintiff did not prove the intent of defendant Arkin to defraud creditors. Aside from the fact that the alleged dispositions were made long prior to the filing of the case, the alleged dispositions were made of conjugal partnership property which were then the subjects of partition between Arkin and his estranged wife. x x x" (Rollo, pp. 42-43).

Aggrieved, petitioner filed a special civil action for certiorari with respondent Court of Appeals to set aside the above orders of respondent judge.

Respondent court dismissed the petition on the ground that the filing of the said petition was premature considering that there was yet a remedy available in the ordinary course of law, i.e., filing a motion for reconsideration of the challenged orders. Hence, this petition with the following assignment of errors:

"I. A MOTION FOR RECONSIDERATION IS NOT ALWAYS A CONDITION PRECEDENT TO THE FILING OF A SPECIAL CIVIL ACTION FOR CERTIORARI, AS THERE IS NO APPEAL OR ANY PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW AVAILABLE TO HEREIN PETITIONER;

"II. RESPONDENT HONORABLE COURT OF APPEALS ERRED IN UPHOLDING THE DISSOLUTION

OF THE WRIT OF PRELIMINARY ATTACHMENT ON THE BASIS OF SECTION 13, RULE 57, OF THE RULES OF COURT SUPPORTED (SIC) BY ANY EVIDENCE;

“III. RESPONDENT COURT OF APPEALS COMMITTED GRAVE ERROR OF LAW IN CONCLUDING THAT HEREIN PETITIONER FAILED TO RAISE AS AN ISSUE THE DELAYED FILING OF PRIVATE RESPONDENT’S MOTION FOR RECONSIDERATION DATED DECEMBER 14, 1990, IN PETITIONER’S OPPOSITION THERETO.

“IV. THE APPREHENSION OF THE HEREIN PETITIONER REGARDING THE PROPENSITY OF PRIVATE RESPONDENT TO DISPOSE OF HIS PROPERTIES IN FRAUD OF HIS CREDITORS TURNED OUT TO BE TRUE AND CORRECT. (Rollo, pp. 24-26, 30).

In brief, the questions posited by the instant petition may be consolidated into two issues, namely:

1) Whether or not the writ of preliminary attachment in question was properly or regularly issued and 2) Whether or not petitioner's failure to file a motion for reconsideration of the questioned orders of the court a quo bars the filing of a special civil action for certiorari before the respondent court.

In an action against a party who has been guilty of fraud in contracting the debt or incurring the obligation upon which the action is brought, Section 1 (d) of Rule 57 authorizes the plaintiff or any proper party to have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered therein. Thus:

"Rule 57, Sec. 1. Grounds upon which attachment may issue. -

"(d): "In an action against a party who has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought;"

To sustain an attachment on this ground, it must be shown that the debtor in contracting the debt or incurring the obligation intended to defraud the creditor. The fraud must relate to the execution of the agreement and must have been the reason which induced the other party into giving consent which he would not have otherwise given. To constitute a ground for attachment in Section 1 (d), Rule 57 of the Rules of Court, fraud should be committed upon contracting the obligation sued upon. A debt is fraudulently contracted if at the time of contracting it the debtor has a preconceived plan or intention not to pay, as it is in this case. Fraud is a state of mind and need not be proved by direct evidence but may be inferred from the circumstances attendant in each case (*Republic v. Gonzales*, 13 SCRA 633 [1965]).

Here, it has been established that all the collaterals given by the respondent Arkin as security for the bond were either fraudulent or heavily encumbered. Records show that Transfer Certificate of Title No. 300011 supposedly issued by the Register of Deeds of Rizal covering a parcel of land with an area of 25,750 square meters located at Muntinlupa, Las Piñas, M.M. and registered in the name of Carmen Madlangbayan, used as one of the collaterals, turned out to be fake and spurious as the genuine TCT No. 300011 of the Office of the Register of Deeds of Rizal covers a parcel of land located in Angono, Rizal with an area of 514 square meters registered in the name of persons other than respondents Imperial, Arkin, and Madlangbayan. Likewise, the supposed lien-free motor vehicle offered as collateral turned out to be heavily mortgaged and was even disposed of without informing petitioner. Furthermore, it has also been proven that subsequent to the issuance of the May 30, 1988 surety bond, respondent Arkin started disposing of his other properties. Prior to the filing of the complaint, respondent not only had sold the motor vehicle given as collateral but that his two other condominium units were also alienated in favor of a company of which respondent Arkin is the president. All these circumstances unerringly point to the devious scheme of respondent Arkin to defraud petitioner.

It is therefore clear that fraud was present when private respondent, among others, entered into an indemnity agreement with petitioner. The actuations of respondent Arkin indubitably lead to the conclusion that he never entertained the idea of fulfilling his obligations under the agreement and was bent on defrauding petitioner from the very beginning.

Under the circumstances, we perceive no impropriety or irregularity in the issuance of the writ of attachment especially so where petitioner has fully complied with the requirements for the issuance thereof.

On the contrary, what we see as having been attended by irregularity is the assailed order of respondent judge lifting the writ of attachment based on grounds which are contradicted by the evidence on record. It is a fact that respondent Arkin gave fake land titles as collaterals and even disposed of real properties in his obvious attempt to defraud petitioner. And yet, respondent judge concluded that petitioner's allegation that respondent Arkin's fraudulent alienation of his properties has no foundation in fact. This is plain absurdity. As respondent judge himself noted in his earlier order denying respondent Arkin's motion to quash writ of attachment, the latter's three (3) conveyances, "though made before the institution of the action, is a circumstance tending to show fraudulent conveyance with intent to defraud his creditors. Especially so, when the payment of herein claim upon which the action is brought is not secured by any mortgage or pledge of real (or) personal property and plaintiff had no other sufficient security for the enforcement of the claim" (Rollo, p. 58). Such being the case, respondent Arkin's claim that the writ of attachment has been irregularly issued should not have merited serious consideration by respondent judge.

Be that as it may, the instant case being "an action against a party who has been guilty of fraud in contracting the obligation upon which the action is brought", respondent Arkin is not allowed to file a motion to dissolve the attachment on the ground that the writ has been improperly or irregularly issued. As we held in *Mindanao Savings and Loan Assoc. vs. Court of Appeals* (172 SCRA 480 [1989]):

"x x x, when the preliminary attachment is issued upon a ground which is at the same time the applicant's cause of action: e.g., x x x an action against a party who has been guilty of fraud in contracting the debt or incurring the obligation upon which the action is brought, the defendant is not allowed to file a motion to dissolve the attachment under Section 13 of Rule 57 by offering to show the falsity of the factual averments in the plaintiff's application and affidavits on which the writ was based and consequently that the writ based therein had been improperly or irregularly issued - the reason being that the hearing on such motion for dissolution of the writ would be tantamount to a trial on the merits. In other words, the merits of the action would be ventilated at a mere hearing of a motion, instead of the regular trial. Therefore, when the writ of attachment is of this nature, the only way it can be dissolved is by a counterbond."

Petitioner next contends that a motion for reconsideration need not at all times be resorted to before a special civil action for certiorari may be instituted before respondent court.

Ordinarily, certiorari will not lie unless an inferior court, through a motion for reconsideration, had been given an opportunity to correct the imputed errors. However, this rule admits of exceptions such as 1) when the issue raised is one purely of law; 2) where public interest is involved; 3) in cases of urgency (*Quirino vs. Grospe*, 169 SCRA 702 [1989]); or 4) where special circumstances warrant immediate or more direct action (*People vs. Dacudao*, 170 SCRA 489 [1989]).

In the case at bar, petitioner's failure to file a motion for reconsideration in the trial court before commencing certiorari proceedings in the Court of Appeals is not fatal considering the existence of special circumstances that warrant immediate and more direct action (*Saldana vs. CA*, 190 SCRA 396 [1990]).

The indecent haste with which respondent Arkin had been disposing of his properties demonstrates the imperative

need for a more adequate relief requiring an immediate and more direct action. There was an urgency which caused the present case to fall under one of the exceptions thereby allowing petitioner to file a petition for certiorari without the need of first filing a motion for reconsideration.

Filing a motion for reconsideration would have served no useful purpose nor can it be considered a plain, speedy and adequate remedy since the order directing the sheriff to discharge or lift the writ of attachment was issued on the same day the order granting the quashal was made. It would not have automatically forestalled Arkin from further disposing of his properties. It is rather disturbing how respondent judge, after ruling in his order of October 19, 1989, denying respondent's motion to quash, that the trial court's finding of fraud in incurring the obligation under the indemnity agreement was supported by substantial evidence, would, in his order of March 6, 1991 granting the motion for reconsideration, based on the same substantial evidence supporting a finding of fraud, later reverse himself and declare that "the plaintiff (petitioner herein) did not prove the intent of defendant Arkin to defraud creditors."

Through the order for the "immediate" lifting of the writ, respondent Judge, in one swift stroke, completely subverted the valid order of attachment issued after a finding of fraud, which finding he himself has declared as supported by substantial evidence. We hold that respondent judge in issuing the contested orders has acted capriciously, whimsically and arbitrarily and with grave abuse of discretion amounting to lack or in excess of jurisdiction correctible by the special writ of certiorari.

WHEREFORE, the petition is GRANTED. The assailed order of respondent judge dated March 6, 1991 is SET ASIDE and the order dated October 19, 1989 is hereby REINSTATED. Costs against private respondent.

SO ORDERED.

Feliciano, (Chairman), Davide, Jr., Romero, and Melo, JJ., concur.

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