

## THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. VARADERO DE LA QUINTA, CELERINO B. ARELLANO AND CIRILO JOSE, DEFENDANTS AND APPELLANTS.

*G.R. No. 14370. September 01, 1919*

Ponente: MALCOLM, J.

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### MALCOLM, J.:

No better starting place for this opinion can be found than the decision of the Court of First Instance of Manila which awarded the plaintiff the sum of P13,961.76 with interest and costs. With difficulty could the fair and concise statement of the case and of the fact by the trial judge be improved upon. The decision, accordingly incorporated as an integral part of this opinion, quoted in full, reads as follows:

"This is an action to recover the sum of P13,961.76 for the non-performance of a guaranteed proposal to construct two scows for the plaintiff.

"It appears from the evidence that on February 23, 1916, the plaintiff, through the depot quartermaster of the United States Army at Manila, invited proposals for the construction of the two scows. In response to the invitation, the defendants Cho Chung Chac and Cho Chung Chee, doing business under the firm name of the Varadero de la Quinta, submitted a proposal to build the scows for the sum of \$15,850 United States currency. The proposal by its terms was effective for 60 days after the opening of the bids, and bound the bidder to complete the construction within 90 working days after formal notification of award. It also contained the following clause:

" '2. This proposal is made with a full knowledge on the part of the undersigned of the kind, quantity and quality of the supplies and services required; and should the undersigned receive written notice of the acceptance of this bid, or any part thereof, within sixty (60) days after the date of opening same, he will deliver or perform the accepted items within the time and in accordance with the terms of said proposal and acceptance or will if so required by the United States enter into contracts within ten days after such notification of acceptance in accordance with the terms of said proposal and acceptance, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract.'

"The proposal was guaranteed by the defendants Arellano and Jose in the following terms:

" 'The undersigned, Celerino B. Arellano, of Manila in the county of Manila, and state of Philippine Islands and Cirilo Jose, of Manila, in the county of Manila, and state of Philippine Islands, hereby guarantee that the foregoing proposal, if not withdrawn prior to the opening thereof shall remain open for sixty (60) days thereafter, unless accepted or rejected within that time; and if it be accepted in any or all of its terms or any part or parts thereof, within said period of sixty (60) days, the said bidder will, upon written notice of such acceptance, deliver or perform the accepted items within the time and in accordance with the terms of said proposal and acceptance, or will, if required by the United States, or its legal representative, within ten (10) days after written notification of such acceptance, enter into contract with the proper officer of the United States, for the delivery or performance of the accepted items in accordance with the terms of the said proposal and acceptance and will give bond with good and sufficient sureties, for the faithful and proper fulfillment of

such contract. And we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, to pay the United States in case the said bidder shall withdraw said proposal within said period of sixty (60) days or shall fail to furnish such articles and services in accordance with said proposal as accepted, or shall fail to enter into such contract and furnish such bond, if so required within ten days after said notice of acceptance, the difference in money between the amount of the proposal of said bidder on the articles and services so accepted and the amount for which the proper office of the United States may procure the same from other parties, if the latter amount be in excess of the former.

" 'Given under our hands and seals this 1st day of March, 1916.

" 'Witnesses:

" 'F. GARCIA as to CELERINO B. ARELLANO

" 'R. OESON, as to C. JOSE.'

"The bids were opened March 3, 1916, and 45 days thereafter the Varadero de la Quinta was formally notified that its bid was accepted. The notification reads:

" 'OFFICE OF DEPOT QUARTERMASTER

" 'MANILA, P. I.

" 'April 17, 1916.

" 'From: Depot Q. M.

" 'To: Varadero de la Quinta, 549 Echague St., Manila.

" 'Subject: Construction of two scows.

" '1. You are informed that your bid, submitted in response to circular proposal, of this office dated February 23d, 1916, for the construction of two scows, is accepted, viz: \$15,850.00, and the same to be completed in ninety (90) working days.

" '2. Work is to be begun immediately, and to be completed in time as stated above.

" '3. Formal contract covering the above work will be made in the office of the Department Quartermaster, and will be dated April 17, 1916. You are requested to advise the name and designation of the office who will sign the contract in behalf of the Corporation, and the names of the sureties who will justify in the sum of \$8,000, or corporate surety may be furnished if desired. Prompt acknowledgment of this acceptance is requested.

" 'M. GRAY ZALINSKI,

" 'Colonel, Q. M. Corps.

" 'HAT/T

" 'L/A 72416029'

"Under date of April 27, 1916, the Varadero de la Quinta addressed to the Department Quartermaster a request for a six months extension of time commencing the work, on the ground that there was not a sufficient supply of suitable lumber in the local market. This request was under date of April 29 denied by the Department Quartermaster, who called attention to the fact that his office was informed that the firm of Norton & Harrison had on hand a large stock of suitable lumber which they still were willing to sell at the price quoted the Varadero de la Quinta at the time its bid was submitted. After some further correspondence, and several ineffective efforts to furnish a bond satisfactory to the Quartermaster Department, the Varadero de la Quinta was on May 17, 1916, notified that unless the work was undertaken immediately and satisfactory bond given by one o'clock in the afternoon of May 20, 1916, steps would be taken 'to guard the interests of the government by either awarding the contract to the next lowest bidder, doing the work by purchase of material and hiring of labor, or such other manner as is deemed necessary.'

"The scows were finally constructed by the Insular Collector of Customs at a total cost to the United States

Government of \$22,830.88, United States currency, or an excess of \$6,980.88, United States currency, over the defendants' bid, for the recovery of which excess this action is brought.

"Upon the facts stated, the defendants are clearly liable for the difference between the amount of their bid and the actual cost to the plaintiff of the construction of the scows. The defendants' contention that the plaintiff's failure to take immediate advantage of the provision in the proposal binding the bidder to enter into contract and furnish bond within ten days constituted a waiver, merits no serious consideration. Neither is there any force in the argument that the plaintiff should have waited until the termination of the 90 days period before taking the contract out of the hands of the defendants. As far as the record shows the defendants, after their bid was accepted, never offered to complete the construction of the scows within the period specified in their proposal; in fact, the burden of their contention is that they were unable to obtain the necessary materials and hence required an extension of the time. But be this as it may, their proposal bound them to enter into a formal contract and give a satisfactory bond within ten days from the acceptance of the bid, or in default thereof to pay the difference in money between the amount of their proposal and the actual cost. There is no basis for equitable relief from this agreement; time must be regarded as of the essence in a contract for military supplies.

"Wherefore, it is hereby ordered and adjudged that the plaintiff have and recover judgment against the defendants Cho Chung Chac and Cho Chung Chee, jointly and severally as principals, and against the defendants Celerino B. Arellano and Cirilo Jose, jointly and severally, as sureties, for the sum of P13,961.76, with interest at the rate of 6 per cent per annum from the 7th day of August, 1917, and with the costs. Execution will not issue against the sureties until a writ of execution against the principals has been returned unsatisfied in whole or in part."

Appellants' first assignment of error goes to the overruling of their demurrer by the trial court, and is to the effect that there is a misjoinder of parties defendant in that the contract of the defendants Celerino B. Arellano and Cirilo Jose being one of guaranty, the liability of the principal debtor and the guarantors cannot properly be decided in one and the same action. Appellants may be technically correct in their demonstration of the proposition that Arellano and Jose were not sureties, as stated by the trial court, but were, in fact, guarantors of the contract. The distinction made between the contract of guaranty and the contract of suretyship under the American law is, however, more shadowy than substantial and is not emphasized at all under the English law. The vital difference between the contract of a surety and that of a guarantor is sometimes said to be, that a surety is charged as an original promisor while the engagement of the guarantor is a collateral undertaking. The obligation of the surety is primary; the obligation of the guarantor is secondary. (12 R. C. L., 1057; Homewood People's Bank vs. Hastings [1919], 106 Atl., 308 and note in 89 Central Law Journal, July 4, 1919, p. 15.) It would then follow that a guarantor not being a joint contractor with his principal, cannot, as a general rule, be sued with his principal. Admitting, although not necessarily conceding, that this is the correct rule of pleading, yet adherence to the same at this stage of the proceedings and under the situation in which we find the case, would serve merely to delay the ultimate accounting of the guarantors. Be it remembered that the concluding sentence of the judgment reads: "Execution will not issue against the sureties (guarantors) until a writ of execution against the principals has been returned unsatisfied in whole or in part." In other words, it having been proved that the principal is not able to perform a contract which he has made and for which in a cumulative, collateral agreement, the guarantors become liable, the latter must respond for the damages if the same be not satisfied by their principal. No different result would be attained if plaintiff were forced to institute separate actions against the principal and the guarantors. (See *Haldane vs. United States* [1895], 69 Fed., 819.)

The appellants are correct in contending that an error was committed by the lower court in finding the defendant Cho Chung Chee liable as a principal in this action. The record discloses what is styled a stipulation, by which it is admitted by the defendants that Cho Chung Chac is the sole owner of the business establishment known as the Varadero de la Quinta, and this is corroborated defendants' exhibits which speak of the "Varadero de la Quinta,

Cho Chung Chac, sole proprietor, by Cho Chung Chee, attorney-in-fact."

With the modification just indicated, all the other contentious issues appear to be covered fully in the decision of the trial court. In one way or another they relate to the contract between the United States and the Varadero de la Quinta. Examining the facts as one may, the terms of this agreement are plain and definite. Skeletonized they are—The bid of the Varadero de la Quinta accepted—bid guaranteed by Arellano and Jose—pleas for extension of time—no modification consented to—Varadero de la Quinta fails to carry out agreement—principal liable for excess cost—guarantors notified of default although not necessary—guarantors likewise liable.

With these facts, one of two hypotheses can be reasonably assumed. The first assumption is that there was an absolute impossibility of performance of the contract because of inability to secure lumber "of the kind, quantity and quality specially called for by the specifications" in the Manila market, and the second that the contractor could have secured the lumber but at such a figure as would not have permitted of a profit. On the supposition that no such lumber as was needed to construct the scows could be found in the city of Manila and that the authorities of the United States Army would not agree to an extension of time, nevertheless, the principal and the guarantors cannot escape from their agreement.

This is not a case of an impossibility existing at the time of the contract and known to both parties. It is rather a case of where two parties enter into a contract and the performance becomes impossible subsequent thereto. In such instances, the courts invariably refer to the old and leading case of *Paradine vs. Jane* ([1647], *Aleyn*, 26; 82 Eng. L. & Eq. Rep., 897). Here, the original rule of English law, with the reasons therefor, and the exceptions thereto, is made clear in its insistence that when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The reason for the rule is obvious, for if one of two innocent persons must sustain a loss, the law should leave it where the agreement of the parties has put it. Although in the course of time, the rigor of this ancient doctrine has been modified, it still remains as a cornerstone in the law of contracts. Thus, the United States Supreme Court in the case of *Day vs. United States* ([1917], 245 U. S., 159) said;

"One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. (*The Kronprinzessin Cecilie*, 244 U. S., 12, 22). But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent'

Again, if, as argued by counsel, the war be deemed to have affected the instant contract the effect would be as summarized in a statement of the law adopted in the report of the Pre-War Contract Committee of Great Britain, dated January 12, 1918, wherein it is said:

"Prima facie if a man binds himself by contract unconditionally to do that which turns out to be impossible, he will be held to his bargain and have to pay damages for his failure to perform. If, however, the impossibility arises from a cause that neither party can reasonably have contemplated when the contract was made, and as to which the terms of the contract make no provision, a man will not be so bound; the matter being unforeseen, he is not taken to have promised unconditionally nor, for the same reason, has he stipulated for any condition of excuse." (Report of the Pre-War Contract Committee dated January 12, 1918, Cd. 8975 of 1918; *The Law Quarterly Review*, January, 1919, p. 95.)

From these authorities and facts, we can reach no other conclusion than that since impossibility of performance was not known to both parties at the time of making the contract, since performance has not been prevented by the acts of the United States, since the contract related to nothing which was unlawful, and since the modificatory

rules growing out of war conditions do not affect the same, the contractor and his guarantors are not excused from the consequences of non-performance.

The second assumption we have mentioned is, after all, the more tenable. We think it fairly shown from the evidence that one of the large dealers in the city of Manila had on hand a sufficient supply of Oregon pine such as was needed to construct the scows. This being so, the contractor could make propositions without number to the plaintiff, but if they were not accepted by the plaintiff, the contractor would still be held to his agreement. The excuses offered for failure to carry out the agreement while they might arouse sympathy would certainly not furnish a legal defense. Mere increase of the cost of performance or unexpectedly burdensome and oppressive war conditions are insufficient pleas. (See *Blackburn, Robbin Co., Ltd., vs. Allen & Sons* [1918], 2 K. B., 267.) Contracts with the Government, like other contracts, must be performed according to their tenor.

Judgment is modified so that so much as adjudges Cho Chung Chee liable as principal is eliminated, and, as thus modified, judgment is affirmed with interest, and with the costs of this instance against the appellants. So ordered.

Torres, Johnson, Araullo, Avanceña, and Moir, JJ., concur.

Judgment modified.

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