

**PABLO ITURRALDE, AS ADMINISTRATOR OF THE ESTATE OF
BERNABE ITURRALDE, DECEASED, PLAINTIFF AND APPELLANT, VS.
LUCIO VELAZQUEZ AND ANTONINO BABASA, AS PROVINCIAL
SHERIFF OF BATANG...**

G. R. No. 14894. October 04, 1920

Ponente: JOHNSON, J.

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JOHNSON, J.:

This is an action, commenced in the Court of First Instance of the Province of Batangas, to annul an execution sale of a certain parcel of land, particularly described in the complaint, and to recover damages.

It appears from the record in R. G. No. 8770,[1] which was an original petition for certiorari presented in this court by the spouses Mariano Valencia and Felisa Ilagan against the Honorable Mariano Cui, Judge of the Court of First Instance of Batangas, and Lucio Velazquez, one of the defendants herein, that Bernabe Iturralde (plaintiff's intestate) was one of the sureties for the said petitioners for the sum of P550, in favor of the said respondents, to secure them against damages and costs. Said petition was finally denied and the petitioners were adjudged to pay the costs, amounting to P40, to the respondent Lucio Velazquez.

On January 22, 1916, a writ of execution was issued by this court against the personal and real property of the said Mariano Valencia and Felisa Ilagan, and in case of their insolvency, against those of their sureties, Bernabe Iturralde, Juan Iturralde, and Rosa Montalvo. (Exhibit B.)

It appears from the return of the defendant sheriff (plaintiff's Exhibit B; defendant's Exhibit 1) that the said Mariano Valencia and Felisa Ilagan had no property of any kind with which to satisfy the said sum of P40; that the sheriff went to the house of the sureties Rosa Montalvo and Juan Iturralde for the purpose of levying execution upon their personal property, but he found that they had none; that thereafter he, together with Juan Iturralde and Gregorio Borbon, husband of Rosa Montalvo, went to the house of Petra Panganiban, widow of the surety Bernabe Iturralde, and she informed them that her deceased husband left no personal property subject to execution. (Petra Panganiban denies that the sheriff ever went to her house to inquire about her personal property and claims that her husband left personal property, as appears from the inventory Exhibit A, of the approximate value of P700.)

Thereafter and on February 4, 1916, according to the sheriff's return (Exhibit B, p. 76 rec.) the defendant sheriff announced that on February 25, 1916, between 9 and 11 o'clock in the morning, in his office, he would sell at public auction, to realize the sum of P40, the following described real property, to wit:

"Properties of Bernabe Iturralde.—A parcel of land situated in the barrio of Pinamucan, Batangas, 7 hectares, 82 ares, and 46 centares in area, bounded on the north by the land of Alejo Acosta, on the east by that of Josefa Iturralde, on the south by the river of the barrio and on the west by the land of Catalina Iturralde.

"Properties of Juan Iturralde.—A lot within the poblacion of Batangas, 8 ares and 79 centares in area, bounded

on the north by Calle Evangelista; on the east by the lot of P. Dandan; on the south by that of Juan Palacios; and on the west by that of Tranquilina Cacio.

"Properties of Rosa Montalvo.—A parcel of land situated in the barrio of Pinamucan, Batangas, 11 hectares, 73 ares, and 69 centares in area, bounded on the north by the land of Doroteo Acosta, on the east by that of the heirs of Eusebio Arce; on the south, by a river; and on the west by the land of Manuel Lira and Josefa Iturralde."

(Note.—The parcel of land last above described and erroneously designated by the sheriff as the property of Rosa Montalvo, is the property of Bernabe Iturralde, the subject to the present action.)

The sheriff claims that he posted that notice of sale in four public places in the municipality of Batangas; and, notwithstanding the contention of the plaintiff to the contrary, the preponderance of the evidence would tend to support the sheriff's pretension. However, the sheriff admits that he never published that notice in any newspaper.

On February 25th, at the time and place mentioned in the notice, the defendant Lucio Velazquez, in whose favor the writ of execution had been issued, appeared as the only bidder and offered P60 for the three parcels of land above described, and the defendant sheriff then and there sold them to him for that amount.

For more than one year after the sale, and until shortly before the filing of the original complaint in this case, the purchaser Lucio Velazquez apparently did nothing concerning said lands; he did not attempt to take possession thereof, nor did he notify the plaintiff or his tenants that he had bought his land.

On May 22, 1917, Petra Panganiban, widow of the surety Bernabe Iturralde, commenced the present action. After a demurrer of the defendants was sustained by the lower court, the complaint was amended, making Pablo Iturralde, who had since been appointed administrator of the estate of Bernabe Iturralde, party plaintiff in lieu of the said widow. In the last amended complaint (pp. 36-39, B. of E.), the plaintiff alleged, among other things (1) that the land of Bernabe Iturralde which was sold by the sheriff contained about 23 hectares and was worth more than P5,000; (2) that the defendant sheriff, at the instigation, insinuation, and petition of his codefendant Lucio Velazquez, sold said land, together with two other parcels belonging to the other two sureties valued at more than P4,250, to the said Lucio Velazquez, for the sum of P60 only; (3) that said sale was made with malice and in bad faith; (4) that notice of said sale had not been published as required by section 454 of Act No. 190; and (5) that because of the malicious acts of the defendants the plaintiff had suffered damages to the amount of P1,200. Wherefore, plaintiff prayed that the attachment and sale of the property in question be declared null and void; that the sheriff be condemned to pay to the plaintiff the sum of P500 in accordance with section 455 of Act No. 190; and that the defendants be condemned to pay to the plaintiff the sum of P1,200 as damages.

To the said complaint the defendant interposed a general as well as a special defense. Upon the issue thus presented the Honorable Vicente Jocson, Judge, after hearing the evidence adduced during the trial of the cause, rendered a judgment declaring valid the sheriff's sale of the land in question, and absolved the defendants from all liability under the complaint. From that judgment the plaintiff appealed to this court.

That the said sale on execution, which is sought to be annulled, was made with certain irregularities appears undisputed from the record. Said irregularities are:

- (1) That the sheriff did not seize, appropriate, or take possession of, the land upon which he pretended to levy execution;
- (2) That the sheriff did not advertise the sale in any newspaper;

(3) That the sheriff sold much more property than was necessary to realize the amount to be satisfied; and

(4) That he sold said property at a grossly inadequate price.

The question is, What is the effect of each and all of said irregularities upon the validity of the sheriff's sale in question? Do they constitute a ground sufficient to declare said sale null and void, considering that the purchaser was a party to said irregularities?

We shall discuss separately the law governing each of the foregoing four points and the legal effect of said irregularities upon the said execution sale.

I.

In levying execution on the plaintiff's land the defendant sheriff did not post any notice on the premises to show that said property was attached or levied upon, nor did he ever go to the place and inform the plaintiff's tenants of the levy. Neither does it appear that the execution was ever brought to the notice of the plaintiff or his mother, the widow of the deceased Bernabe Iturralde, or that the land in question was to be sold at public auction. The statement of the trial court in its decision (p. 44, B. of E.) that the defendant sheriff posted a notice of the sale on the premises to be sold, is clearly erroneous and not borne out by the record. The sheriff himself testified that he posted four notices one at the door of the courthouse, one in the municipal building, one in the market, and one in the post-office—not on the premises to be sold.

Counsel for the appellee impliedly admit that the sheriff must take at least a constructive possession and control of the real property to be sold on execution, for they say:

"As distinguished from the attachment of personal property or property susceptible of manual delivery, the possession and control, in case of real property, are shown by filing with the register of deeds of the province where the land is situated, a copy of the order of attachment, with a description of the real property, as provided by section 429 of the Code of Civil Procedure, which treats of preliminary attachments, and which in our opinion should govern also questions of levy on execution, in the absence of some express provision on the subject." (Pages 8, 9, Appellee's Brief.)

Granting that section 429 of Act No. 190 is applicable, as contended by counsel, yet their contention would not avail them, for it does not appear that the sheriff complied with its provisions by delivering to the register of deeds a copy of the notice of execution.

The law provides a method of enforcing a writ of execution. Section 453 of Act No. 190 provides in part as follows:

"SEC. 453. Seizure of property on execution.—The officer must enforce the execution against the property of the judgment debtor, by levying on a sufficient amount of the property, if there be sufficient, and selling the same, and paying to the plaintiff, or his lawyer, so much of the proceeds as will satisfy the judgment."

The word "levy," in relation with writs of execution, has been judicially defined as follows:

"The legal definition of the word 'levy' is to have the property within the power and control of the officer. (Ca-rey vs. German American Ins. Co., 84 Wis., 80, 20 L. R. A., 267.)

"Levy of execution 'is an appropriation by the sheriff of the land designed to be levied on, indicated by some act, such as advertisement or handbills.' (Evans vs. Wilder, 7 Mo., 359, 364.)

"To levy means to do the acts by which an officer sets apart and appropriates for the purpose of satisfying the command of a writ of execution a part or the whole of a defendant's property. (Burkett vs. Clark, 64 N. W.,

1113-1115; 46 Neb., 466.)

"The term 'levy' is as appropriately used in speaking of an attachment as of an execution. A levy is defined by Bouvier to be a seizure, and it is no less a seizure when made under an attachment than when made under an execution. (Union Nat. Bank vs. Byram, 131 111., 92.)

"The idea of the term 'levy' includes a constructive as well as an actual taking into possession of property under execution process. (Dover Glassworks Co. vs. American Fire Ins. Co. [Del.], 65 Am. St. Rep., 264.)

"The term 'levy,' in legal parlance, signifies taking pos-session. (Burchell vs. Green, 27 N. Y. Supp., 82, 83).

"The word 'levy' itself implies seizure in the ordinary way by entry. (Textor vs. Shipley, 86 Md., 424.)" 5 Words & Phrases, pp. 4103, 4104, and 4105.)

It is clear, then, that the law requires that the sheriff appropriate or take at least a constructive possession of the real property to be sold—a thing which he did not do in the present case. (Walker and Rohde vs. McMicking, 14 Phil., 668.)

II.

Paragraph 3, section 454, of Act No. 190, provides in part as follows:

"SEC. 454. Advertisement of property to be sold on exe-cution.—Before the sale of property on execution, notice thereof must be given, as follows:

* * * * *

"3. In cases of real property, by posting a similar notice (written notice of the time and place of the sale) partic-ularly describing the property, for twenty days in three public places of the municipality or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in some newspaper published or having general circulation in the province, if there be one."

The Spanish translation of the foregoing, as quoted by the trial court in its decision (pp. 52-53, B. of E.), is as, follows:

"Si se tratare de bienes inmuebles, se fijara durante veinte dias un anuncio, con la descripcion de los mismos en tres sitios publicos del municipio o de la ciudad en donde estan situados los bienes, y tambien en el lugar donde se haya de verificar la venta y se publicara durante el mismo espacio de tiempo, una vez a la semana, copia de dicho anuncio en un periodico de la provincia, si lo hubiere."

This translation is very inaccurate and misleading. The phrase "en un periodico de la provincia, si lo hubiere," clearly does not convey the same idea as the English original:

"in some newspaper published or having general circulation in the province, if there be one." This mistranslation ac-counts for the erroneous holding of the trial court (p. 53, B. of E.) that the defendant sheriff, in failing to publish the notice in some newspaper, did not violate any legal provision because it was a matter of judicial knowledge that there was no newspaper published in the Province of Batangas. But, as counsel for the appellant asserts, it was also a matter of judicial knowledge that there were several news-papers published or edited in Manila and having general circulation in the Province of Batangas; and, under the provisions of said paragraph 3, section 454, Act No. 190, above quoted, the sheriff was in duty bound to publish the notice of the sale in one of said newspapers.

The general rule regarding the effect of lack of notice of execution sales is stated in Ruling Case Law as follows:

"As a general rule the title acquired at the sale is not affected by the want of notice, except where a contrary rule is established by statute, at least if the purchaser has bought innocently, and no collusion appears. And it is not incumbent on the purchaser to see that the sheriff has properly advertised the sale. Any person injured by the officer's neglect of duty may hold him to such damages as have accrued therefrom. As between him and the execution defendant he may be regarded as a trespasser ab initio. In some instances a failure to give notice may be ground for setting aside the sale in a direct proceeding between the parties, particularly under other circumstances of hardship or irregularity." (10 R. C. L., 1294.)

III and IV.

To realize the sum of P40 the defendant sheriff sold en masse, for P60, three distinct parcels of land: One parcel, situated in the barrio of Pinamucan, Batangas, containing 7 hectares, 82 ares, and 46 centares; another parcel, situated in the poblacion of Batangas, containing 8 ares and 79 centares; and another parcel, belonging to the plaintiff, situated also in the barrio of Pinamucan, Batangas, containing, according to the sheriff's return, 11 hectares, 73 ares, and 69 centares, and according to the plaintiff, about 23 hectares. The assessed values of these three parcels of land, according to the bond Exhibit C, are, respectively, P200, P360, and P590, or a total of P1,150. The appellant claims that they had an actual aggregate value of P9,250. While this is probably exaggerated, it is but fair to presume that their market value is higher than their assessed value.

Section 453 of Act No. 190 provides that: "When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs, within the view of the officer, he must levy only on such part of the property as may be amply sufficient to satisfy the judgment and costs." And section 457 of the same Act provides that "when the sale is of real property, consisting of several known lots or parcels, they must be sold separately."

With regard to the effect of these irregularities (sale of several parcels en masse and gross inadequacy of price) upon the execution sale, the following authorities, in our opinion, furnish a working guide toward a fair and just solution of the question:

"Execution sale en masse, when the property sold is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular, and the sale will be set aside in equity.

"While gross inadequacy of price alone is not sufficient to avoid a sale under judicial process, it will, when conjoined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition." (Smith vs. Huntoon, 134' 111., 24; 23 Am. St. Rep., 646.)

"Though mere inadequacy of price will not ordinarily be deemed sufficient of itself to set aside an execution sale, yet it may be considered in connection with other irregularities in the proceedings, and when the inadequacy is great the sale may be set aside upon slight additional circumstances.

"When property susceptible of division is sold under execution en masse for an inadequate price without first being offered in separate parcels, the sale will be set aside, if application is made within a reasonable time." (Lurton vs. Rodgers, 139 111., 554; 32 Am. St. Rep., 214.)

"Execution sale will be inferred to be fraudulent from slight additional circumstances, when the disproportion between the price and the value of the property is enormous; and it is not necessary, to authorize the interposition of the court, that these circumstances lead to the conclusion of actual fraud on the part of the purchaser." (Chamblee vs. Tarbox, 27 Tex., 139; 84 Am. Dec, 614, 615.)

"Failure to set up advertisements of a sheriff's sale in the town where the land lies or its vicinity, though notices are posted in other parts of the county, is a circumstance of weight in favor of setting the sale aside, where the property is sold much below its value.

"Execution sale of realty for one fifth of its value furnishes intrinsic evidence of irregularity and unfairness,

upon which, when connected with other irregularities, the sale may be vacated." (Nesbitt vs. Dallam, 7 Gill and Johnson [Md.], 494; 28 Am. Dec, 236, 237.)

"While inadequacy of price alone does not justify the setting aside of a judicial sale, yet when such inadequacy is very great, slight circumstances tending to show that interested parties were misled, or by accident or mistake prevented from attending the sale, or preventing it, it may be set aside." (Rogers etc. H. W. Co. vs. Cleveland B. Co., 132 Mo., 442; 53 Am. St. Rep., 494.)

Aside from the irregularities already noted above, the preponderance of the evidence also tends to show that the plaintiff and his mother, the widow of Bernabe Iturralde, had been kept, by the defendants, in ignorance of the sale of their land under execution, thus depriving them of the opportunity to redeem it within the time fixed by the law. The widow, Petra Panganiban, testified:

"Q. Have you at any time been advised by the provincial sheriff that the land in Pinamucan, left by your husband, has been attached or was about to be attached?—A. No, sir.

"Q. Have you been advised that the land left by your husband which is in Pinamucan was to be sold at public auction?—A. No, sir." (P. 26, sten. notes.)

The plaintiff, Pablo Iturralde, eldest son of the deceased Bernabe Iturralde, and administrator of his estate, testified:

"Q. State when you learned that the land in Pinamucan has been attached.—A. Last May only.

"Q. And what did you do when the land was attached?—A. I went to the house of Lucio Velazquez and I asked if it was in reality attached and he told me it was and that he bought from the sheriff. I asked him for how much the land was attached and he said it was attached for forty pesos. I asked him if I could redeem the land for forty pesos and he said I could not. He told me that he would give me one thousand pesos and that I should not claim the land back; I answered that as we had no other land upon the products of which we could rely, we could not give it to him; and he told me that we could not claim back the land and that he would just give me one thousand pesos as indemnification." (P. 21, sten. notes.)

The foregoing statements of the plaintiff stand uncontradicted by the defendant Lucio Velazquez.

The vague and indecisive declaration of the witness for the defendants relating to the notice to the plaintiff is, in our opinion, not sufficient to overcome the clear and positive statements of the plaintiff and his mother, above quoted, especially when we take into consideration the fact that the said witness, Juan Iturralde, together with Gregorio Borbon, husband of the other surety, had made an amicable private arrangement with the defendant Lucio Velazquez whereby the latter was to return to the former their respective lands in consideration of P100, each paying P50. (Exhibit E.) It is but natural, then, that Juan Iturralde should testify in favor of Lucio Velazquez in consideration of the return of his land to him. by the latter. Exhibit E, the private agreement between the purchaser Lucio Velazquez on the one hand and the two sureties Juan Iturralde and Gregorio Borbon on the other, is also a suspicious circumstance tending to reveal an unfair design on the part of the purchaser Lucio Velazquez against the plaintiff and his mother, to the end that the latter's land might be forfeited to him; and in such design he' was aided by the other two sureties, Juan Iturralde and Gregorio Borbon, in consideration of their getting their lands back. The purchaser's preference for the plaintiff's land is undoubtedly due to the fact that it was the most extensive and most valuable of the three parcels which he had bought for the meager sum of P60.

The fact that the purchaser, Lucio Velazquez, did not attempt to take possession of the land which he had bought until after the lapse of the statutory period of redemption, is also another suspicious circumstance tending to show that he had purposely and fraudulently kept the plaintiff in ignorance of the matter so as not to give him an opportunity to redeem his land.

Our conclusion from all of the foregoing is, that while each one of the irregularities above enumerated, alone, may not be a sufficient ground to annul the execution sale of the plaintiff's land, yet when we consider them all together, in relation with all the other circumstances of the case, we are persuaded that justice requires that the said sale should be vacated.

Considering the difference between the Spanish and the English in the original translation of paragraph 3 of section 454 of Act No. 190, relating to the publication of notice of sale in a newspaper, we are not inclined at this time to impose the penalty provided for by section 455 upon the sheriff for his failure to make the publication of the notice of sale in accordance with the law.

Therefore, the judgment of the lower court is hereby re-voked, and the sale made by the sheriff of the appellant's land to the appellee Lucio Velazquez is hereby declared null and void; and, without any finding as to costs, it is so ordered.

Mapa, C. J., Araullo, Malcolm, Avanceña, and Villamor, JJ., concur.

[1] Not reported.

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