

IN THE MATTER OF PETITION FOR PROHIBITION OF DAMASO CAJEFE. CECILIO CAJEFE, ETC., ET AL., PETITIONERS, VS. THE HON. FIDEL FERNANDEZ, JUDGE, COURT OF FIRST INSTANCE, CATBALOGAN, ...

G.R. No. 15709. October 19, 1960

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

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

On June 10, 1957, Mariano Cojuangco filed a complaint for forcible entry against Eugenio Bardaje, Cecilio Cajefe, and Damasino Cajefe in the Justice of the Peace Court of Santa Rita, Samar, involving a parcel of land situated in that municipality. During the pendency of the case, plaintiff prayed for the issuance of a writ of preliminary injunction to be placed in the possession of the premises, and upon his filing of a bond in the amount of P600, the motion was granted. Defendants, however, filed a counterbond in the sum of P1,200, with Bernardo Orosa and Feliciano Bardaje as bondsmen. Thereupon, the writ of preliminary injunction was lifted, and defendants remained in the possession of the land in question.

On September 26, 1957, judgment was rendered by the justice of the peace court in favor of plaintiff, ordering defendants to restore to him possession of the land in dispute and to pay him P300 actual damages and P100 attorney's fees. Defendants appealed to the Court of First Instance. No motion for immediate execution of the judgment was, however, filed by plaintiff either in the inferior court or in the court of first instance, so that defendants continued to possess the land in question pending the appeal.

On February 19, 1958, the Court of First Instance of Samar rendered judgment in the case, declaring plaintiff to be the lawful possessor of the land in question, and condemning the defendants to vacate the same and pay plaintiff damages of P90 for the year 1956, P360 for the year 1957, and P90 for every quarter thereafter until delivery of the land in dispute to plaintiff is effected. Defendants received copy of the decision on February 23, 1958, and they interposed no appeal.

The judgment having become final and executory, plaintiff, on July 12, 1958, moved for the execution thereof, and an order of execution was accordingly issued. Because the provincial sheriff could not find sufficient properties of the defendants to satisfy the judgment for damages and costs, plaintiff filed a petition ex parte for an order of execution against the counterbond posted by the defendants in order to lift the writ of preliminary injunction issued in the inferior court, which petition the court granted. Notified of the order of execution against the bond, defendants moved for the reconsideration thereof on the ground that the same was null and void for having been issued without notice to them and without giving them their day in court, and that furthermore, said bond was good only for the lifting of the writ of preliminary injunction in the justice of the peace court but not for the purpose of satisfying the award of damages to plaintiff in the court of first instance. Reconsideration having been denied, defendants filed a petition for certiorari before this Court (G. R. No. L-14831), but for one reason or another, the petition was dismissed for lack of merit. In the meantime, the provincial sheriff, acting on the order of

t execution, advertised for sale at public auction on July 28, 1959 the real properties posted by defendant's bondsmen to secure the bond in question. To enjoin the sale, defendants and their bondsmen filed with this Court the present petition for prohibition. It appears, though, that four days after the petition was filed and before the submission of respondents' answer, the sale sought to be enjoined had already taken place on the date set, July 28, 1959.

We find that the writ of execution against petitioners' counterbond is null and void for having been issued without notice to defendants' sureties and after the judgment on the merits had already become final and executory.

The present case falls squarely within the doctrine laid by this Court in the case of *Alliance Insurance & Surety Co., Inc. vs. Hon. Edmundo S. Piccio, et al.*, 105 Phil., 1196. There, a writ of preliminary injunction was issued by the Court of First Instance pendente lite in a case for recovery of possession of property and damages, which writ was dissolved upon defendants' filing a counterbond. After trial the court rendered judgment ordering defendants to deliver possession of the property in question to plaintiff and to pay the latter the amount of P8,416 as damages. The Court of Appeals affirmed the judgment in toto. After the case was remanded to the court of origin, plaintiff moved for execution. The writ was, however, returned unsatisfied because defendants had no properties with which to satisfy the judgment. Whereupon, plaintiff filed a motion for the issuance of an alias writ of execution against the surety on the defendant's counterbond to lift the writ of preliminary injunction issued in the trial court, and the motion was granted. On petition for certiorari to this Court by the surety, we held, after reviewing all the cases previously decided by us on the matter, that, where plaintiff's claim for damages had already been awarded in the main decision without notice to the surety and the decision had already become final and executory, said claim can no longer be pressed against the surety, because to hold the surety liable, notice to it should be given either before the trial or, at the latest, before entry of final judgment, so that an award for damages against it may be included in said final judgment, pursuant to section 9, Rule 60, in relation to section 20, Rule 59, of the Rules of Court, to wit:

"Sec. 9. Judgment to include damages against party and sureties.— Upon the trial the amount of damages to be awarded to the plaintiff, or to the defendant, as the case may be, upon the bond of the other party, shall be claimed, ascertained, and awarded under the same procedure as prescribed in section 20 of Rule 59." (Rule 60, Injunction).

"Sec. 20. Claim for damages on plaintiff's bond on account of illegal attachment.—If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him. by filing an application there-with, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court." (Rule 59, Attachment.)

It has been argued that the reference to section 20 of Rule 59 does not apply to counterbonds posted to lift preliminary injunctions already issued, for the reason that the sureties in such counterbonds are aware from the very first of the existence of a claim for damages, and that the rule applicable to such counterbonds is not section 20 but section 17 of Rule 59. We do not believe such a distinction is warranted in the case of injunctions, since the express terms of section 9 of Rule 60, already quoted, "the amount of damages to be awarded to the plaintiff or to the defendant . . . upon the bond of the other party," are broad enough to cover both kinds of bonds, whether posted to obtain the issuance of a preliminary writ of injunction or filed to secure its dissolution; and Rule 59 makes section 20 thereof applicable to either. To apply the terms of section 20, Rule 59 only to bonds posted to

obtain writs of injunction would leave vague and uncertain the procedure for assessing damages against the sureties in counterbonds for the dissolution of such writ. This Court has already settled the procedure to be followed in proceeding against bonds in *Del Rosario vs. Nava*, 95 Phil., 637; 50 Off. Gaz. (9) 4189.

The fact that the surety in an injunction counterbond is aware that damages are being claimed against his principal, while sureties in a bond to obtain a writ of injunction do not know whether the enjoined party will or will not claim damages subsequently, is not substantial enough to warrant a distinction in treatment, since mere allegation of damages is not proof thereof. Even if the counterbondsmen know that the party who originally obtained the dissolved injunction is claiming damages, the truth and extent of such damages remain dependent upon subsequent proof, and the counterbondsmen are certainly entitled to be notified and heard on the question before final judgment against them is rendered; nor do we see any justification why the uncertainty of a counterbondsmen's liability should be prolonged beyond the entry of the judgment that finally settles the responsibility of his principal.

The diverse rule in section 17 of Rule 59 for counterbonds posted to obtain the lifting of a writ of attachment is due to these bonds being security for the payment of any judgment that the attaching party may obtain; they are thus mere replacements of the property formerly attached, and just as the latter may be levied upon after final judgment in the case in order to realize the amount adjudged, so is the liability of the countersureties ascertainable after the judgment has become final. This situation does not obtain in the case of injunction counterbonds, since the sureties in the latter case merely undertake "to pay all damages that the plaintiff may suffer by reason of the continuance ... of the acts complained of" (Rule 60, section 6) and not to secure payment of the judgment recovered.[1] We, therefore, hold that the court below acted without jurisdiction in issuing a writ of execution against the sureties of defendants in this case on their counterbond to lift the writ of preliminary injunction in the justice of the peace court, for lack of notice to and hearing of said sureties, and after the judgment in the case had long become final and executory. And as the writ of execution against the bond is null and void, the execution sale conducted by the provincial sheriff pursuant thereto is also completely null and void and should be set aside.

Respondents claim, however, that prohibition is not the proper remedy in this case, the public auction sale sought to be enjoined having been already accomplished, prohibition being available only to prevent, not to correct, an act or proceeding. Although prohibition is, indeed, a preventive and not a corrective remedy, it does not mean, however, that no affirmative relief may be given petitioners in this case. For it is not the title or caption of a pleading, but the substance and averments thereof, that is controlling, and this Court has held time and again that in the interest of justice, although a petition is styled certiorari, it may be considered a petition for mandamus if the facts alleged make out a case for the issuance of the latter writ,[2] or, conversely, a petition for mandamus may be considered one for certiorari[3]. Similarly, the present petition, which makes out a petition for certiorari to annul the writ of execution in question and the public auction sale conducted pursuant thereto, may be considered as such to justify the issuance of the writ of certiorari for the nullification and setting aside of said writ of execution and sale.

As for respondent's claim that the present petition is fatally defective because it is not properly verified, that is, counsel who verified the petition did not swear that the contents thereof are true of his own knowledge but only "to the best of his knowledge and belief"; the claim is untenable because it is only when the person verifying is other than the attorney who signs the pleading that the affiant must state that the allegations thereof are true of his knowledge, but when the complaint is signed by the attorney, the latter's oath couched in the usual form "Subscribed and sworn to before me, etc." is substantial compliance with the rules.[4] Besides, it has been held that where the affiant swears that the contents of the complaint "are true to the best of his knowledge, information and belief"[5] or "to the best of his knowledge and belief,"[6] verification is sufficient.

Wherefore, the writ of execution and public auction sale complained of in this petition are declared null and void and hereby set aside, with costs against respondent Mariano Cojuangco.

Bengzon, Padilla, Bautista Angelo, Concepcion, Barrera, Gutierrez David, and Paredes, JJ., concur.

[1] See concurring opinion, *Alliance Insurance Co. vs. Piccio*, ante.

[2] *Concepcion vs. Vera*, et al., 67 Phil., 122; *San Agustin vs. Barrios*, et al., 66 Phil., 173; *Quizon vs. Arellano*, G.R. No. L-1461, Dec. 28, 1951; *Makabenta vs. Bocar*, 95 Phil., 634; 50 Off. Gaz., 3549.

[3] *Tambunting de Tengco vs. San Jose*, et al., 97 Phil., 491.

[4] *Arambulo*, et al. vs. *Perez*, 78 Phil., 387.

[5] *Madrigal vs. Rodas*, 80 Phil., 252.

[6] *Lim Bonfing y Ramos, Inc. vs. Rodriguez*, 72 Phil., 586, 587-588.

DISSENTING OPINION

PARAS, C. J.:

I dissent for the same reason stated in my dissenting opinion in the case of *Alliance Ins. & Surety Co. vs. Piccio*, et al., cited in the opinion of the majority.

LABRADOR, J.:

I dissent for the reasons stated in my dissent in case of *Alliance Ins. & Surety Co. vs. Piccio* cited in the decision.

Writ set aside.

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