

**ISABELO CARPIO, PETITIONER, VS. HON. HIGINIO MACADAEG, ET AL., RESPONDENTS.***G.R. No. 17797. November 29, 1963*

Ponente: MAKALINTAL, J.

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Isabelo Carpio filed this petition for certiorari and prohibition to annul and stop implementation of respondent Judge's orders of October 24 and November 25, 1960, directing the sale of five race horses and goods previously attached upon motion of respondent Oscar Abaya. We issued a writ of preliminary injunction to restrain the sale, with instructions to respondent Sheriff of Rizal to allow the daily training of the said horses and their participation in races whenever they were included in the racing programs.

On January 17, 1960 respondent Oscar Abaya filed a complaint against petitioner for the recovery of various sums aggregating P25,000 (Civil Case No. 42450, C.F.I. Manila). Before summons was served, and upon ex parte motion of respondent Abaya (Annex B), respondent Judge issued two orders of attachment dated February 8 (Annex C-1) and February 10, 1960 (Annex C), pursuant to which the Sheriff of Manila garnished goods consisting of hardware imported by petitioner, and the Sheriff of Rizal seized petitioner's five racing horses named Mohamad, Mohamad's Pride, Magic Spell, Nashua and Sirius. On February 12, 1960 petitioner filed an urgent petition to discharge the orders of attachment (Annex 1). Acting thereon, respondent Judge, on March 11, 1960, set aside the two orders of February 8 and 10, 1960 (Annex F).

Upon two motions of respondent Abaya (Annexes H and I), respondent Judge, on March 29, 1960, set aside his order of March 11, 1960 (Annex K). Though no new petition was filed for issuance of a writ of attachment and no new order or alias writ of attachment was issued, respondent Sheriff of Manila garnished the aforementioned goods and respondent Sheriff of Rizal attached the five racing horses.

Upon petition of respondent Abaya (Annex L), respondent Judge issued an order directing the sale at public auction of the five racing horses (Annex M). However, the sale was halted by petitioner's putting up a bond of P4,000 and the horses were released to him by respondent Sheriff of Rizal.

Upon motion of respondent Abaya (Annex R), respondent Judge, on October 24, 1960, ordered the increase of the bond to P10,000, and ordered respondent Sheriff of Rizal to proceed with the sale of the horses should petitioner fail to file the additional bond of P6,000 (Annex S). Motions filed by petitioner seeking reconsideration of the said order of October 24 were denied by respondent Judge on November 25, 1960 (Annex X). So, respondent Sheriff of Rizal advertised the sale at public auction of the five racing horses. Upon motion of respondent Abaya (Annex T), and despite the opposition of petitioner (Annex U), respondent Judge, on the same day-November 25 issued an order authorizing the sale of the garnished goods (Annex Z).

Petitioner seeks annulment of the order of October 24, 1960 ordering him to file an additional bond of P6,000; the order of November 25, 1960 denying his motion for reconsideration of the order of October 24; and the order of the same date authorizing the sale of the garnished goods, on the ground that in issuing them respondent Judge

acted without jurisdiction and/or with grave abuse of discretion.

Respondent Judge should not have issued the two writs of preliminary attachment (Annexes C and C-1) on Abaya's simple allegation that the petitioner was about to dispose of his property, thereby leaving no security for the satisfaction of any judgment.[1] Mere removal or disposal of property, by itself, is not ground for issuance of preliminary attachment, notwithstanding absence of any security for the satisfaction of any judgment against the defendant. The removal or disposal, to justify preliminary attachment, must have been made with intent to defraud defendant's creditors.[2]

Respondent Judge in fact corrected himself. Acting on petitioner's motion to discharge attachment and apparently believing the correctness of the grounds alleged therein,[3] he set aside the orders of attachment (Order of March 11, 1960, Annex F).

But reversing himself again, he set aside his order of March 11, 1960 (Annex K, dated March 29, 1960.[4] This he did apparently on Abaya's contention that petitioner was about to remove or dispose of his property in order to defraud his creditors, as example of which disposals he pointed to the alleged sale of the horses and of petitioner's office furniture (Abaya's motion for reconsideration dated March 15, 1960, Annex H). These averments of fraudulent disposals were controverted by petitioner who, in his opposition to Abaya's motions for reconsideration (Annex J), reiterated the defenses against preliminary attachment which he had previously enumerated in his petition to discharge the two orders of attachment. Thus the question of fraudulent disposal was put in issue; and respondent Judge, before issuing the preliminary attachment anew, should have given the parties opportunity to prove their respective claims or, at the very least, should have provided petitioner with the chance to show that he had not been disposing of his property in fraud of creditors.[5]

But for much more than the above reason, respondent Judge should not have again ordered the issuance of the writ of preliminary attachment since Abaya never made any affidavit as required by Rules 59, Rules of court, which states that:

"Sec. 3. Order issued only when affidavit and bond filed.—An order of attachment shall be granted when it is made to appear by the affidavit of the plaintiff, or of some other person who personally knows the facts, that a sufficient cause of action exists, that the case is one of those mentioned in Section 1 hereof, that there is no other sufficient security for the claim sought to be enforced by the action, and that the amount due to the plaintiff, or the value of the property which he is entitled to recover the possession of, is as much as the sum for which the order is granted above all legal counterclaims; which affidavit, and the bond required by the next succeeding section, must be duly filed with the clerk or judge of the court before the order issues."

For purposes of issuance of preliminary attachment, the affidavit (Annex B-1) attached to Abaya's motion therefor (Annex B), as we have said, is not sufficient, and it does not appear that he ever executed another affidavit that complies with the above section. None appears attached either to his motion for reconsideration dated March 15, 1960 (Annex H) or to his motion for reconsideration dated March 16, 1960 (Annex I), upon which the order of attachment (Annex K) was based.

Having construed that the preliminary attachment should not have been ordered, we believe it no longer necessary to discuss the subsequent actuations of respondent Judge which were all based on the erroneous assumption that his order of March 29, 1960 was valid (Annex K).

Wherefore, the order of March 29, 1960 and all succeeding orders of respondent Judge with respect to said preliminary attachment, are hereby declared null and void; the attached properties are ordered released; and the preliminary injunction issued by this Court is made permanent. Costs against respondent Abaya.

Bengzon, C.J., Padilla, Bautista Angelo, Labrador, Concepcion, Barrera, Paredes, Dizon, and Regala, JJ., concur.

[1] See Abaya's motion for issuance of writ of preliminary attachment dated February 6, 1960 (Annex B) and the affidavit attached thereto (Annex B-1).

[2] Sec. 1 (e), Rule 59, Rules of Court.

[3] Petitioner claimed therein that the two orders of attachment were irregular and improper because (1) in his affidavit, Abaya failed to aver that the removal or disposal of property had been in fraud of creditors; (2) that petitioner could not have removed or disposed of his properties since they have already been all attached by Abaya in another action between them, Civil Case No. 41984, C.F.I. Manila; and (3) that Abaya had no valid cause of action against him because the promissory notes upon which he based his action had been liquidated and paid. (Petition to discharge orders of attachment and affidavit, Annexes 1 and A to petitioner's memorandum).

[4] Note, however, that while this order set aside the order of March 11, 1960 (which set aside both orders of attachments), it ordered only the provincial sheriff of Rizal "to proceed with the attachment of the horses," without directing the sheriff of Manila to garnish the goods again.

[5] National Coconut Corporation vs. Pecsons, 90 Phil., 809; Villongco vs. Panlilio, 94 Phil., 15.

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