

**MACONDRAY & CO., INC., PLAINTIFF-APPELLANT, VS.
BERNARDO S. DUNGAO AND RIZAL SURETY & INSURANCE CO.,
INC., DEFENDANTS and APPELLANTS.**

G.R. No. 18079, May 26, 1964

Ponente: PADILLA, J.

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PADILLA, J.:

These are appeals by the plaintiff corporation, the administratrix of the estate of the late Bernardo S. Dungao and the Rizal Surety & Insurance Co., Inc., from a judgment and supplementary judgment rendered by the Court of First Instance of Manila, the dispositive parts of which read, as follows:

IN VIEW OF THE FOREGOING CONSIDERATIONS, judgment is hereby rendered in favor of the plaintiff ordering the defendant to pay to said plaintiff the sum of P5,138.02, plus 12% interest thereon from June 15, 1949, until fully paid, together with 20% thereof or P1,027.60 as attorney's fees. Defendant's counter claim is hereby ordered dismissed.

With costs against the defendant.

* * *

WHEREFORE, judgment is likewise rendered in favor of plaintiff ordering the respondent Rizal Surety & Insurance Co., Inc., to pay jointly and severally, with the defendant to said plaintiff the sum of P5,138.02, plus 12% interest thereon from April 2, 1958, until fully paid, together with 20% thereof or P1,027.60 as attorney's fees, (Civil Case No.8535)

certified by the Court of Appeals to this Court, for the reason that "the question of jurisdiction raised by the parties is of such a substantial character that it necessarily removes this case (appeals) from the appellate competence of this Court."

It appears that on 18, 21 and 29 September 1948, Bernardo S. Dungao executed in favor of Macondray & Co., Inc., three promissory notes for the total sum of P6,100, and on 17 December 1948, to replace the three promissory notes, he executed in favor of the same party, a promissory note for the sum of P6,100 payable by installments, with interest at the rate of 12% per annum from the date of execution of the note and with the stipulation that in default of payment of the principal and interest, when due and payable, the total balance and interest would become due and payable, and that an additional sum equivalent to 20% of the total balance and Interest would be paid to the holder by way of attorney's fees and cost of collection.

Bernardo S. Dungao paid the amount of P961.98 on the principal and interest up to 15 June 1949 but defaulted in subsequent payments to Macondray & Co., Inc., and despite several demands on him, he failed and refused to pay. So, on 1 July 1949 Macondray & Co., Inc. brought an action in the Court of First Instance of Manila against him for the collection of the balance of the principal amounting to P5,138.02, the stipulated interest thereon and attorney's fees. Upon motion of the plaintiff, Macondray & Co., Inc., a writ of attachment was issued on 16

August 1949, but this was later on dissolved on 21 September 1949, when the defendant put up a surety bond subscribed by the defendant, as principal, and the Rizal Surety & Insurance Co., Inc., as surety. The extent of the obligation under the bond appears, as follows:

WHEREFORE, we, Bernardo S. Dungao, as principal, and the Rizal Surety & Insurance Company, as surety, in consideration of the dissolution of said order of attachment, hereby jointly and severally bind ourselves in the sum of Six Thousand One Hundred Sixty-five Pesos & 62/100 (P6,165.62), Philippine currency, under the condition that in case the plaintiff recover judgment in the action, the defendant will, on demand, pay to the plaintiff the full value of the property so released, or pay to the plaintiff any judgment the latter may recover in the action, upon the plaintiff's compliance with the provisions of the Rules of Court.

Before the trial of the case, Bernardo S. Dungao died on 30 July 1952. On 6 August 1952 counsel for the deceased Bernardo S. Dungao moved for the dismissal of the case on the ground that this action being for recovery of money did not survive the defendant who had died. Meanwhile, in the Court of First Instance of Rizal, administration proceedings for the settlement of the estate of the late Bernardo S. Dungao was commenced and Maria Gervacio Bias Vda. de Dungao, the widow of the late Bernardo S. Dungao, was appointed administratrix of the estate. On 14 July 1954, the Court of First Instance of Manila ordered the substitution of the defendant Bernardo S. Dungao, deceased, by Maria Gervacio Bias Vda. de Dungao, as party defendant in the case. On 31 July, administratrix Maria Gervacio Bias Vda. de Dungao moved for the dismissal of the case on the same ground as that set forth in the motion of 6 August 1952. On 15 November, the motion to dismiss was denied. On 15 September 1955, the administratrix renewed her motion for the dismissal of the case, on the ground that on 23 November 1953 the plaintiff had filed in the intestate proceedings of the late Bernardo S. Dungao pending in the Court of First Instance of Rizal (case No. 1714) a "Manifestation of Creditor" claiming "the amount of P5,128.02 plus twelve per cent (12%) interest thereon from June 15, 1949, P1,027.60 for attorney's fees and costs," and praying that in the distribution of the estate of the deceased the claim of Macondray & Co., Inc. be taken into account. On 26 September 1955, the third motion to dismiss was denied.

On 13 February 1956 the parties submitted a stipulation of facts dated 6 February 1956 which reads, as follows:

Now come the parties with their respective undersigned attorneys and to this Honorable Court respectfully submit the following agreed stipulation of facts without prejudice to presenting such further evidence as they may deem convenient and necessary:

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Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the Philippines with principal office in the City of Manila;

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Defendant Bernardo S. Dungao died on July 30, 1952, and by virtue of an order of this Honorable Court dated July 14, 1954, his widow Maria Gervacio Bias Vda. de Dungao, appointed administratrix of his estate in Civil Case No. 1714 of the Court of First Instance of Rizal, entitled "Intestado del Finado Bernardo S. Dungao" was ordered substituted as defendant in this case;

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On December 17, 1948, Bernardo S. Dungao executed and delivered to the plaintiff his promissory note in words and figures, as follows:

P6,100.00

MACONDRAY & COMPANY, INC.

Manila, P.I., December 17, 1948

For value received, I/we, jointly and severally, promise to pay to the order of Macondray & Co., Inc., at its office in the City of Manila, the principal sum of Six Thousand One Hundred Pesos (P6,100.00), Philippine currency, with interest thereon at the rate of Twelve per centum (12%) per annum from the date of the execution of this note until paid, the said principal sum to be payable In (by) Installments of the amounts following and at the dates hereinafter set forth, to wit:

P763.00

on Jan. 2, 1949;

762.00

on Feb. 2, 1949;

763.00

on March 2, 1949;

763.00

on April 2, 1949;

762.00

on May 2, 1949;

762.00

on June 2, 1949;

762.00

on July 2, 1949;

762.00

on Aug. 2, 1949.

Interest on the whole unpaid balance of the principal of this promissory note shall be payable on each date upon which an installment of principal becomes due.

It is hereby agreed that if default be made in the payment of any one of the said installments, or the interest in full, as and when the same becomes due and payable, the total principal sum then remaining unpaid, with accrued interest thereon, shall at once become due and payable.

It is further agreed that if default be made in the payment of the principal or interest of this note in full, as and when the same becomes due and payable as aforesaid, an additional sum equal to twenty per cent (20%) of the total amount then due hereof, shall be paid to holder or holders hereof for attorney's fees and costs of collection, in addition to the legal costs established by the Courts.

The payment of this note is secured by a mortgage on personal property.

s/ Bernardo S. Dungao

t/ BERNARDO S. DUNGAO

125 Real St., Baclaran

Parañaque, Rizal

Witness:

s/ L. Fernandez

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4. In the month of September, 1948, three (3) promissory notes were executed by the said deceased Bernardo S. Dungao in favor of the plaintiff, as follows:

Date of Promissory Note

Principal

September 18, 1948

P3,000.00

September 21, 1948

1,600.00

September 29, 1948

1,500.00

- The promissory note for P3,000.00 covered the purchase price of two (2) used Ford Trucks, Motors Nos. 71GY-30381, 71GY-3841; the promissory note for P1,600.00 covered the purchase price of one (1) used Dodge Baby Bus, Motor No. T112-167125, Serial No. 81883247; and the promissory note for P1,500.00 covered the purchase price of one (1) used Dodge Baby Bus, Motor No. T112-180261, Serial No. 81192880;

- On the said three promissory notes of September 1949, nothing was paid on the principal but only the interest up to December 17, 1948, leaving a balance of six thousand one hundred pesos (76,100.00) as of said date;

- The promissory note of December 17, 1948, copied in paragraph 3 hereof was executed to replace the three previous promissory notes of September 1948, which were accordingly cancelled;

- On February 12, 1949, plaintiff's attorney wrote a letter as follows:

February 12, 1949

Mr. Bernardo S. Dungao

125 Real St., Baclaran

Parañaque, Rizal

Dear Sir:

Macondray & Co., Inc. has requested me to take your car and truck in view of your failure to pay the overdue installments on the promissory notes which you signed to cover the purchase prices thereof. In the hope that you will avoid all the troubles incident to judicial proceedings, I expect that you will pay your overdue accounts within five days from the date of this letter.

Very truly yours,
s/ JOSE AGBULOS
Attorney for Macondray & Co., Inc.

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On March 16, 1949, the said deceased replied as follows:

125 Real Street
Baclaran, Parañaque
Rizal
March 16, 1949

Atty. Jose Agbulos
3rd Floor, China Bank Bldg.
Manila

Sir:

With reference to your letter to me dated February 12, 1949, which I received on February 26, 1949, in which you stated that the Macondray & Company advised you to take back the four trucks I bought from them. In this connection, I wish to tell you that those trucks are at your disposal. Of course, when I bought these trucks I had an agreement with Mr. Lackwood that in case I find these small trucks to be unfit to my line or the running of which will be losing, I am given the privilege to return them to the Company and change them with new ones. Such being the case, I am turning them back to your Company for I have been losing so much for I had them repaired and repainted. However, if the two Ford trucks can be separated from the four trucks Join-Obligation, I will be willing to retain them provided that I will be required only to pay Two Hundred Pesos(P200.00) monthly for the two trucks simply because the business now is very slow as everybody finds it. I wish to inform you further that ever since I received your letter I stopped using them. In brief, you have the full disposition and discretion in this matter without resorting to court litigation.

Before closing I wish to reiterate in my request that if the accounts of the two Ford trucks can be separated from the Join-Promissory Note that I signed and I will be allowed to pay Two Hundred Pesos (P200.00) monthly for these two trucks then I am willing to retain them and if not acceptable to your Company, then the trucks will be sent to your shop or you can get them from my garage.

Very respectfully,
s/ BERNARDO S. DUNGAO

Manila, February 6, 1965.
(Sgd.) MARIA GERVACIO BLAS DUNGAO
MARIA GERVACIO BLAS VDA. DE DUNGAO
As administratrix of the Estate of
Bernardo S. Dungao
Defendant
125 Real St., Baclaran, Rizal

MACONDRAY & CO., INC.
Plaintiff
(Sgd.) NEWLAND BALDWIN
NEWLAND BALDWIN

Assistant General Manager
3rd Floor China Bank Bldg.
Manila

MARCELINO LONTOK and
MARCELINO LONTOK, JR.
By:

(Sgd.) MARCELINO LONTOK
MARCELINO LONTOK
Attorney for the Defendant
313 Villonco Building
Manila

(Sgd.) JOSE AGBULOS
JOSE AGBULOS
Attorney for the Plaintiff
3rd Floor, China Bank Bldg.
Manila

After hearing, on 5 March, 2 August, and 23 September, 1958, judgment, supplementary judgment and order, respectively, were rendered by the Court of First Instance of Manila, as stated at the beginning of this opinion.

On 27 March 1958, in the said Court of First Instance of Manila, the plaintiff Macondray & Co., Inc., filed a motion alleging that the estate of the deceased Bernardo S. Dungao was insolvent and therefore praying that the Rizal Surety & Insurance Co., Inc., be made to pay the amount of the judgment. The surety company objected to the motion on the ground that the judgment was not yet final. On 19 April 1958, the court directed the surety company to file a responsive pleading to the plaintiff's motion for the purpose of joining the issues. On 29 May 1958 the surety company filed the responsive pleading entitled "Amended Answer," setting up the defense (1) that the court had no jurisdiction to take cognizance of the plaintiff's claim against it (the surety company) and the deceased defendant; (2) that as the surety company was not served with notice of the Judgment rendered on 5 March 1958 the same could not be enforced against it; (3) that the step taken by the plaintiff to make it liable on its bond is premature and too late in so far as it sought to establish its (surety's) liability; and (4) that the plaintiff is guilty of laches in prosecuting its claim against it.

The plaintiff presented evidence in support of its motion against the surety company on the date set for hearing, but the surety company waived presentation of evidence in its behalf.

On 2 August, and 23 September, 1958, the court rendered a supplementary judgment and entered an order referred to herein before.

On 30 September 1958, the plaintiff Macondray & Co., Inc., moved for a reconsideration of the order entered on 23 September 1958 in so far as it awards interest on the plaintiff's claim from 2 April 1958 only and not from 15 June 1949. On 13 October 1958, the surety company objected to the motion for reconsideration filed by the plaintiff. On 20 October, the court denied the motion for reconsideration filed by the plaintiff and, at the same time, granted the surety company an opportunity to file its own motion for reconsideration. On 24 October, the Rizal Surety & Insurance Co., Inc., filed a motion for reconsideration of the order entered on 23 September 1958 modifying the supplementary judgment rendered on 2 August 1958, on the ground that the said order had no basis in law and that it contravened the provisions of the indemnity bond executed by the defendant to dissolve the

attachment issued in case No. 8535 of the Court of First Instance of Manila. On 25 November 1958 the plaintiff Macondray & Co., Inc., objected to the motion for reconsideration filed by the Rizal Surety & Insurance Co., Inc. On 2 December 1958, the motion for reconsideration was denied.

The plaintiff assigns an error claimed to have been committed by the trial court, to wit:

The lower court erred in ordering the Rizal Surety & Insurance Co., inc., to pay interest only from April 2, 1958 instead of from June 15, 1949.

The defendant Bernardo S. Dungao (deceased), represented by administratrix Maria Gervacio Bias vda. de Dungao, assigns five errors allegedly committed by the trial court, to wit:

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When the lower court assumed jurisdiction and decided the case at bar.

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In not declaring that the order of attachment and the counter bond filed by defendant Bernardo S. Dungao have no legal effect after the death of the said Bernardo S. Dungao and in not including the bondsman as party in this case. ;

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In admitting documents marked as Exhibits G, G-1, G-2, H, I and J as evidence in this case when they are incompetent.

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In not declaring that the purchase contracts marked as Exhibits B, C and D and the consolidating promissory note marked as Exhibit A has (have) been novated in view of the letter of Bernardo S. Dungao of March 16, 1949 accepted by the plaintiff-Appellee and the payment made by said Bernardo S. Dungao marked as Exhibits E and F for the plaintiff-appellee and 10 and 11 for the administratrix-appellant.

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In ordering the defendant-appellant to pay the sum of P5,138.02, plus 12% interest thereon from June 15, 1949 until fully paid without considering the payment made on account by the deceased Bernardo S. Dungao.

And the surety company assigns four errors claimed to have been committed by the trial court, to wit:

- The lower court erred in taking cognizance of the case involving as it does a simple claim for money against the deceased Bernardo S. Dungao, principal of the bond.

- The lower court erred in holding appellant-surety's bond liable for the claim of plaintiff in the amount of P5,138.02.

- The lower court erred in charging interest on appellant-surety's bond at the rate of 12% per annum from April 2, 1958.

- The lower court erred in awarding attorney's fees equivalent to 20% of the claim of plaintiff, or P1,027.60.

The first point or question to determine in these appeals is whether the Court of First Instance of Manila had jurisdiction to take cognizance and decide the case, in spite of the fact that before the trial thereof the court was apprised of the demise of the defendant on 30 July 1952. The action brought against him being for recovery of money, the same should have been dismissed to be prosecuted in the manner especially provided in the Rules of

Court.

Section 21 of Rule 3, Rules of Court, provides:

When the action is for recovery of money, debt or interest thereon, and the defendant dies before final judgment in the Court of First Instance, it shall be dismissed to be prosecuted in the manner especially provided in these rules.

Section 7 of Rule 86, Rules of Court, provides:

A creditor holding a claim against the deceased secured by mortgage or other collateral security, may abandon the security and prosecute his claim in the manner provided in this rule, and share in the general distribution of the assets of the estate; or he may foreclose his mortgage or realize upon his security, by action in court, making the executor or administrator a party defendant, and if there is a judgment for a deficiency, after the sale of the mortgaged premises, or the property pledged, in the foreclosure or other proceeding to realize upon the security, he may claim his deficiency judgment in the manner provided in the preceding section; or he may rely upon his mortgage or other security alone, and foreclose the same at any time within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, and shall receive no share in the distribution of the other assets of the estate; but nothing herein contained shall prohibit the executor or administrator from redeeming the property mortgaged or pledged, by paying the debt for which it is held as security, under the direction of the court, if the court shall adjudge it to be for the best interest of the estate that such redemption shall be made.

There seems to be no doubt that the action brought by the plaintiff corporation is for collection or recovery of money. The prayer of the complaint unmistakably appears to or collection be for recovery of a sum of money. And although at the bottom of the promissory note sued upon and before the signature of the obligor there appears the following: "The payment of this note is secured by mortgage on personal property," yet it does not appear that the plaintiff sought to foreclose it, as the personal property mortgaged to secure the payment of the promissory note is not described in the complaint. The attachment levied on some properties of the defendant, on the plaintiff's motion, to secure payment of its money claim, might constitute an exception to the general rule on claims that do not survive, as provided for in section 21 of Rule 3, Rules of Court. But after the discharge of the attachment upon the filing of a bond by the surety company, the property attached became free from any specific lien and reverted to its previous condition.

The reason behind the rule of non-survival of money claims is to grant all creditors a proportionate share in the estate of the deceased debtor should the same be insufficient to pay fully the debts that the deceased had contracted in his lifetime and owed his creditors.

The action brought by the plaintiff being one for recovery of money, debt or interest thereon did not survive after the death of the defendant debtor. As already stated, the case should have been dismissed to be prosecuted in the manner especially provided in the Rules of Court.

Having arrived at this conclusion, the other points raised by the parties need not be passed upon.

As to the bond filed by the surety company, the same having been filed to secure the discharge of the writ of attachment validly issued by the Court of First Instance of Manila on the properties of the defendant before his death to answer for any money judgment that may be rendered against him, It must be deemed to subsist or continue to answer for any money claim of the plaintiff corporation that may be allowed by the probate court-- the Court of First Instance of Rizal—in the probate proceedings instituted for the administration and settlement of the estate of the late Bernardo S. Dungao, because the dismissal of the action after the death of the defendant is directed by the Rules of Court and the filing of the money claim in the probate proceedings is just a continuation

of the action brought by the plaintiff corporation to collect the sum of money owed to it by the defendant, subject, of course, to such defense or defenses that may be set up by the surety company to be determined by the probate court. As a matter of fact, the plaintiff corporation already has filed in the probate court its money claim for its allowance.

The judgments and order appealed from are set aside, without prejudice to the filing of the money claim by the plaintiff corporation with the probate court of the province of Rizal and without special pronouncement as to costs.

Bengzon, C.J., Bautista Angelo, Concepcion, Reyes, J.B.L., Barrera, Paredes, Dizon and Makalintal, JJ., concur.

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