

INVOLUNTARY INSOLVENCY OF U. DE POLI. FELISA ROMAN, CLAIMANT AND APPELLEE, VS, J. R. HERRIDGE, ASSIGNEE AND APPELLANT. BOWRING & CO., C. T. BOWRING & GO., LTD., ET AL., CREDITOR...

G.R. No. 22511. December 22, 1924

Ponente: STATEMENT Based on a proper proceeding on December 8, 1920, U. de Poli was declared insolvent by the Court of First Instance of Manila. January 4, 1921, the claim of Felisa Roman was presented to the assignee founded upon what is known in the record as Exhibit A, which is an agreement entered into by and between her and the insolvent on October 23, 1920. She then claimed that she had placed in De Poli's bodegas 3,031 quintals and 7 kilos of tobacco of the value of P78,815.69. That under the terms of the agreement, De Poli had paid her P15,000 in cash, and had executed four promissory notes for the balance, each for the sum of P15,953.92, and maturing in order thirty, sixty, ninety and one hundred and twenty days after their execution. She also claimed that all of the tobacco remained as her own, except that portion represented by the cash payment of P15,000. In her petition, she prayed for an order of the court that the option of De Poli to purchase the 2,201 bales and 57 bales of tobacco described in Exhibit A be cancelled, and that she be declared the sole owner thereof, unless the assignee of the insolvent secure her in the payment of the agreed purchase price. January 15, 1921, the assignee filed an answer to her petition in which he claims, among other things, that the four promissory notes were a valid claim against the insolvent estate and that the transaction was one of purchase and sale, and that delivery of the tobacco had been made and that title to it has passed to the insolvent. January 18, 1921, the lower court held in legal effect that the transaction was one of purchase and sale, and that under the provisions of article 1922 of the Civil Code, Felisa Roman had a preference right for the amount of the unpaid purchase price on the proceeds from the sale of the tobacco then in the hands of the assignee, and ordered him to pay her the unpaid purchase price derived from the proceeds of such sale. April 19, 1921, Felisa Roman filed two other motions: (a) To declare null and void the contract of pledge between De Poli and the Asia Banking Corporation for 576 bales of the tobacco in question, and (b) to order the assignee to sell the 2,777 fardos of tobacco for which the court had decided that she held a preference at the rate of P10 per quintal This gave rise to the case known as Roman vs. Asia Banking Corporation (46 Phil., 705), decided by the Supreme Court on June 26, 1922, in which it was held in legal effect that the only lien upon the tobacco which Felisa Roman had claim was a vendor's lien, and that the claim of the Asia Banking Corporation based upon quedans was superior to that of Felisa Roman. August 3, 1922, through other and different counsel Felisa Roman claimed that Exhibit A made between the parties on October 23, 1920, was a notarial agreement and, as such, was a public document, and that the claim of Felisa Roman had a preference over all other creditors which did not have such a preference. That the amount of her claim was P34,640.96, with interest at 10 per cent per annum from August 3, 1922, and that she be allowed such preference. March 8, 1924, the assignee filed written objections to the allowance of the claim as a preference, and alleged that the proceeds derived from the sale of the remainder of the tobacco had been paid over to the claimant in accordance with the order of January 18, 1921. That the question of the preference is now res judicata. That she did not have any preference and that her claim should be denied. March 18, 1924, and apparently without a hearing or the taking of any testimony, the lower court made an order that: "The balance still unpaid of the claim of Felisa Roman, viz: the sum of P55,218.52, with interest of 10 per cent from November 19, 1920, is hereby allowed by this court with the preference due to its being evidenced by a public document." From this decision the assignee and numerous creditors appeal, contending that the lower court erred in failing to sustain the plea of res judicata and in applying article 1924 of the Ciyil Code to the claim of Felisa Roman, in holding that she had a preference over other creditors of the insolvent estate, and in making its order without notice to the other creditors. JOHNS, J.

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"The balance still unpaid of the claim of Felisa Roman, viz: the sum of P55,218.52, with interest of 10 per cent from November 19, 1920, is hereby allowed by this court with the preference due to its being evidenced by a

public document."

From this decision the assignee and numerous creditors appeal, contending that the lower court erred in failing to sustain the plea of *res judicata* and in applying article 1924 of the Ciyil Code to the claim of Felisa Roman, in holding that she had a preference over other creditors of the insolvent estate, and in making its order without notice to the other creditors.

JOHNS, J.:

Numerous other questions are ably discussed in the briefs of opposing counsel, but the storm center of this case is the legal force and effect of Exhibit A. Among other things, it recites that Felisa Roman is the owner of from 2,500 to 3,000 quintals of tobacco of different classes.

"2d. That she has agreed to sell said quantity of from 2,500 to 3,000 quintals of tobacco aforementioned to the party of the second part, which purchase and sale is to be governed by the following conditions:

"(a) The party of the first part shall ship to the party of the second part, duly baled, the tobacco of which she is the owner in bales not less than 50 kilos, all the expenses to be caused by said merchandise up to the railroad station at Tutuban to be for the account of said party of the first part, in which station the party of the second part shall take charge of said merchandise and from that moment the risk thereof shall be for the account of the latter.

"(b) The price for which the party of the first part sells to the party of the second part the aforesaid tobacco is P26, Philippine currency, per quintal, payable in the manner hereinafter to be stated.

"(c) The party of the second part shall be the consignee of the tobacco in the City of Manila and shall take charge thereof upon receiving the bill of shipment and the internal revenue stamp, and shall take it to his warehouse wherein the same shall be held as a deposit until the date on which said party of the second part shall pay the price thereof, the payment of storage and insurance to be for the account of said party of the second part."

It then recites that upon the last shipment of tobacco, it should all be weighed and that when the weight is ascertained, there should be a liquidation of the price, on the account of which 15,000 should be paid and the balance should be divided into four promissory notes of equal amount, the first of which should become due thirty days from date, the second after another thirty days, etc., all of which should draw interest at the rate of ten per cent per annum. The contract then recites:

"The installments granted the purchaser for the payment of the price ate subject to the resolatory condition that, if before the maturity of each installment, the purchaser should sell a part of the tobacco in proportion to the amount of any of the remaining notes not yet due, or in case he should sell all the tobacco, the installments shall become due, for it is agreed that in this case from the moment that the party of the second part should have sold the tobacco, the deposit thereof as security for the payment of the price is cancelled and the amount of the part remaining unpaid shall simultaneously become demandable."

As we analyze it, the instrument is an executory contract upon which nothing becomes due and payable until such time as all of the tobacco is shipped, received and weighed by De Poli, when the amount would then be ascertained and determined and P15,000 of the amount paid, and the balance divided equally to Jbe evidenced by four promissory notes. The contract also expressly recites that Felisa Roman is the owner of from 2,500 to 3,000 quintals of tobacco which she agreed to sell to De Poli upon the conditions above specified. In other words, the quantity of the tobacco ranges from 2,500 to 3,000 quintals, and the amount is not to be fixed or determined until after the arrival of the last shipment, at which time it is all to be weighed. Hence, the amount which De Poli would owe Felisa Roman was not and could not be ascertained or determined until after the last shipment was made and

the tobacco was weighed.

Article 1924 of the Civil Code among other things, provides that "With respect to the other personal and real property of the debtor, the following credits shall be preferred: * * *." And subdivision 3 is as follows:

"Credits which without a special privilege are evidenced by:

"A. A public instrument; or

"B. A final judgment, should they have been the subject of litigation.

"These credits shall have preference among themselves in the order of the priority of dates of the instruments and of the judgments respectively.'*

Exhibit A is an executory contract. Within itself no debt was created and it is not evidence of any credit. By its express terms De Poli did not owe Felisa Roman anything and was not to pay her anything until after the last shipment of the tobacco was received and then weighed. Within the meaning of the word "credit," as defined by article 1924, there was no debt or liability on the part of De Poli until after Felisa Roman complied with her part of the contract. If for any reason she had failed to deliver the tobacco, no one would contend that she would have any claim against De Poli. Her claim would be contingent upon the delivery of the tobacco. The amount of the tobacco which was to be delivered ranged from 2,500 to 3,000 quintals. Hence, the amount of the claim could not become certain or definite until the last shipment was made and the tobacco weighed. In other words, the document itself does not show upon its face that any debt is due or owing from De Poli to Felisa Roman or the amount of it. That fact should only be determined by matters outside of the document and would be contingent upon the shipment and weighing of the tobacco, and the quantity of it which would range from 2,500 to 3,000 quintals at 26 per quintal.

As this court held, after the tobacco was delivered, under the terms of the contract, Felisa Roman had a vendor's lien, but she would not have such a lien until after the delivery of the tobacco. A fortiori she would not have a preferred Hen under the provisions of article 1924 until after such delivery. Until the contract was actually consummated by both parties, either had a right to rescind. The plaintiff could refuse to make delivery, and De Poli could refuse to accept delivery of the tobacco. It was a contract to be performed in the future, contingent upon delivery and acceptance.

A preference is an exception to the general rule, and is what its name implies. By it one person is given a superior right or claim over another. For such reason the law as to preferences should be strictly construed.

The following definitions are given of the words "executory contract" in Words & Phrases, volume 3, pages 2572, 2573:

"An agreement to sell is an executory contract.

* * * * *

"An agreement to sell and convey lands, but which is not a conveyance operating as a present transfer of legal estate in seisin, is at law wholly executory, and produces no effect upon the estates and parties, and creates no lien or charge on the land itself, yet it confers an estate and right in equity.

* * * * *

" 'Executory agreement,' as used in the law of sales, means agreement for the sale of a thing where it is not specified, or the article is not manufactured, or the agreement is relative to a certain quantity of goods in general without any identification or appropriation of the same to the contract, or when something remains to be done to put the goods in a deliverable state, or to ascertain the price to be paid by the buyer.

* * * * *

"Mr. Story says that an executory contract of sale is absolutely to sell at a future time, while a conditional contract of sale is conditionally to sell. In the one case, he says, the performance of the contract is suspended and deferred to a future time; in the other the very existence and performance of the contract depends upon a contingency.

* * * * *

"The general rule for determining whether a contract of sale is executed or executory is if anything remains to be done by either party to the transaction before delivery— as, for example, to determine the price, quantity, or identity of the thing sold—the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price. (Foley vs. Felrath, 98 Ala., 176; 13 South., 485; 39 Am. St. Rep., 39.) Thus, a contract for the sale of cotton out of a certain number of bales, nothing to be taken below middlings, the number of bales not being ascertained, was executory,***."

In the instant case, the contract Exhibit A was made on October 23, 1920. Neither the original nor copies of the four promissory notes are in the record. But it is very apparent that they were executed on the 19th of November, 1920. Prior to that time there were not any credits or existing, debts between the parties within the meaning of article 1924. An examination of Exhibit A would not disclose the debt or the amount of the notes or credits or the actual amount of the tobacco to be delivered. Such fact could only be determined by the delivery of the tobacco, the weighing and acceptance of it. At the time Exhibit A was executed, there were no credits and there was not any debt. All of such matters were in Jvuiro, contingent upon the performance of the contract.

Under such a state of facts, Exhibit A was not a public document within the meaning of article 1924, and the plaintiff does not have a preferred lien for the unpaid balance of the contract.

The judgment of the lower court is reversed, and one will be entered here that the plaintiff does not have a preference, and that her existing claim can only be paid out of the general fund to be prorated in common with unsecured creditors. So ordered.

Street, Avancena, Ostrand, and Romualdez, JJ., concur.

Johnson, J., did not take part in the consideration of this case.

CONCURRING OPINION

MALCOLM, J.,

I concur with the prevailing opinion handed down for the court by Mr. Justice Johns. At the same time, I desire to give notice that at the first available opportunity I shall vote to set aside many of the doctrines announced in the following series of cases: Smith, Bell & Co. vs. Estate of Maronilla ([1916], 41 Phil., 557); Tec Bi & Co. vs. Chartered Bank of India, Australia & China ([1916], 41 Phil., 596, 819); Kuenzle & Streiff vs. Villanueva ([1916], 41 Phil., 611); and E. Viegelmann & Co. vs. Perez ([1918], 37 Phil., 678). On a careful reexamination of these decisions, I reach the conclusion that Mr. Justice Moreland's dissenting opinions are unanswerable. In all material respects, our Insolvency Law, Act No. 1956, is complete in itself. Chapter VI thereof relating to classification and preference of creditors, is entirely plain and conforms to good business usage if it be not confused with other laws. Any attempt to fuse by legal alchemy the elements of an Insolvency Law, inspired by modern American commercial practice, with the elements of a Civil Code, intended to harmonize with old

Spanish procedure, is, as counsel points out, humanly impossible.

DISSENTING OPINION

VILLAMOR, J.:

I do not agree with the majority opinion.

In the case of Roman vs. Asia Banking Corporation (46 Phil., 705), the court had occasion to examine the same Exhibit A here in question and had the following to say:

"Though Exhibit A in its paragraph (c) states that the tobacco should remain in the warehouse of U. de Poli as a deposit until the price was paid, it appears clearly from the language of the exhibit as a whole that it evidences a contract of sale and the recitals in an order of the Court of First Instance, dated January 18, 1921, which form part of the printed record, show that De Poli received from Felisa Roman, under this contract, 2,777 bales of tobacco of the total value of P78,815.69, of which he paid P15,000 in cash and executed four notes of P15,953.92 each for the balance. The sale having been thus consummated, the only lien upon the tobacco which Felisa Roman can claim is a vendor's lien."

The holding of this court as to the nature of the contract contained in Exhibit A is the basis of the order appealed from, authorizing the payment of the claim of Felisa Roman in the amount of P55,218.52, with interest at the rate of 10 per cent per annum from November 10, 1920.

In the decision of this case it is unimportant, in my opinion, to distinguish between an executory and an executed contract of sale, or, in the terms of the Civil Code, to note the difference between perfected and consummated contract of sale, because, since the vendee U. de Poli received the several consignments of tobacco leaf in question after the execution of the contract Exhibit A, paying therefor partly in cash and partly by promissory notes, the contract which was only in a perfected state and subject to a suspensive condition, that is, the delivery of the tobacco, became a consummated contract, as was held by this court in the case of Roman vs. Asia Banking Corporation, *supra*. All arguments, therefore, as to the lack of price and amount of the tobacco in Exhibit A are groundless.

There is no dispute as to the four promissory notes of P15,953.92 each, executed by U. de Poli after receiving from Felisa Roman the last consignment. It is admitted that he paid P15,000 at that time. Wherefore, the theory that the contract Exhibit A does not evidence any debt is simply untenable.

Since we are dealing with a sale in which the thing sold was not delivered to the vendee at the time of the sale (art. 1463, Civil Code) or, in other words, with a sale with a suspensive condition, what is important to determine is whether or not the condition was fulfilled and for this purpose it is necessary to examine Exhibit B in connection with Exhibit A, Said Exhibit B shows that the suspensive condition was complied with; that the bales received by the purchaser U. de Poli were 2,777, containing 3,031.17 quintals which, at P26 per quintal, give a total value of P78,815.69. There is no use insisting that the fulfillment of the suspensive condition makes the obligation effective and demandable.

The point decided in the case of Roman vs. Asia Banking Corporation, *supra*, is that the credit of the bank, upon a negotiable instrument, like a quedan, was superior to the credit of the vendor, as Felisa Roman's.

The point at issue in this case is that the vendor's credit contained in a public document has preference over any other not having this character (art. 1924, par. 3, Civil Code).

In virtue of the doctrine enunciated by this court in the cases of *E. Viegmann & Co. vs. Perez* (37 Phil., 678), and *Tec Bi & Co. vs. Chartered Bank of India, Australia and China* (41 Phil, 596), I am for the affirmance of the appealed order.

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