

THE BACHRACH MOTOR CO., INC., PLAINTIFF AND APPELLEE, VS. FAUSTINO ESPIRITU, DEFENDANT AND APPELLANT.

G.R. No. 28497. November 06, 1928

Ponente: AVANCEÑA, C.J.

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AVANCEÑA, C.J.:

These two cases, Nos. 28497 and 28498, were tried together.

It appears, in connection with case 28497; that on July 28, 1925 the defendant Faustino Espiritu purchased of the plaintiff corporation a two-ton White truck for P11,988.50, paying P1,000 down to apply on account of this price, and obligating himself to pay the remaining P10,983.50 within the periods agreed upon. To secure the payment of this sum, the defendant mortgaged the said truck purchased and, besides, three others, two of which are numbered 77197 and 92744 respectively, and all of the White make (Exhibit A). These two trucks had been purchased from the same plaintiff and were fully paid for by the defendant and his brother Rosario Espiritu. The defendant failed to pay P10,477.82 of the price secured by this mortgage.

In connection with case 28498, it appears that on February 18, 1925 the defendant bought a one-ton White truck of the plaintiff corporation for the sum of P7,136.50, and after having deducted the P500 cash payment and the 12 per cent annual interest on the unpaid principal, obligated himself to make payment of this sum within the periods agreed upon. To secure this payment the defendant mortgaged to the plaintiff corporation the said truck purchased and two others, numbered 77197 and 92744, respectively, the same that were mortgaged in the purchase of the other truck referred to in the other case. The defendant failed to pay P4,208.28 of this sum.

In both sales it was agreed that 12 per cent interest would be paid upon the unpaid portion of the price at the execution of the contracts, and in case of non-payment of the total debt upon its maturity, 25 per cent thereon, as penalty.

In addition to the mortgage deeds referred to, which the defendant executed in favor of the plaintiff, the defendant at the same time also signed a promissory note solidarity with his brother Rosario Espiritu for the several sums secured by the two mortgages (Exhibits B and D).

Rosario Espiritu appeared in these two cases as intervenor, alleging to be the exclusive owner of the two White trucks Nos. 77197 and 92744, which appear to have been mortgaged by the defendant to the plaintiff.

While these two cases were pending in the lower court the mortgaged trucks were sold by virtue of the mortgage, all of them together bringing in, after deducting the sheriff's fees and transportation charges to Manila, the net sum of P3,269.58.

The judgment appealed from ordered the defendant and the intervenor to pay plaintiff in case 28497 the sum of P7,732.09 with interest at the rate of 12 per cent per annum from May 1, 1926 until fully paid, and 25 per cent thereof in addition as penalty. In case 28498, the trial court ordered the defendant and the intervenor to pay plaintiff the sum of P4,208.28 with interest at 12 per cent per annum from December 1, 1925 until fully paid, and

25 per cent thereon as penalty.

The appellants contend that trucks 77197 and 92744 were not mortgaged, because, when the defendant signed the mortgage deeds these trucks were not included in those documents, and were only put in later, without defendant's knowledge. But there is positive proof that they were included at the time the defendant signed these documents. Besides, there were presented two of defendant's letters to Hidalgo, an employee of the plaintiff's, written a few days before the transaction, acquiescing in the inclusion of all his White trucks already paid for, in the mortgage (Exhibit H-I).

Appellants also allege that on February 4, 1925, the defendant sold his rights in said trucks Nos. 77197 and 92744 to the intervenor, and that as the latter did not sign the mortgage deeds, such trucks cannot be considered as mortgaged. But the evidence shows that while the intervenor Rosario Espiritu did not sign the two mortgage deeds (Exhibits A and C), yet together with the defendant Faustino Espiritu, he signed the two promissory notes (Exhibits B and D) secured by these two mortgages. All these instruments were executed at the same time, and when the trucks 77197 and 92744 were included in the mortgages, the intervenor Rosario Espiritu was aware of it and consented to such inclusion. These facts are supported by the testimony of Bachrach, manager of the plaintiff corporation, of Agustin Ramirez, who witnessed the execution of all these documents, and of Angel Hidalgo, who witnessed the execution of Exhibits B and D.

We do not find the statement of the intervenor Rosario Espiritu that he did not sign promissory notes Exhibits B and C to be sufficient to overthrow this evidence. A comparison of his genuine signature on Exhibit AA with those appearing on promissory notes B and C, convinces us that the latter are his signatures. And such is our conclusion, notwithstanding the evidence presented to establish that on the date when Exhibit B appears to have been signed, that is, July 25, 1925, the intervenor was in Batac, Ilocos Norte, many miles away from Manila. And the fact that on the 24th of said month of July, the plaintiff sent some truck accessory parts by rail to Ilocos for the intervenor does not necessarily prove that the latter could not have been in Manila on the 25th of that month.

In view of this conclusion that the intervenor signed the promissory notes secured by trucks 77197 and 92744 and consented to the mortgage of the same, it is immaterial whether he was or was not the exclusive owner thereof.

It is finally contended that the 25 per cent penalty upon the debt, in addition to the interest of 12 per cent per annum makes the contract usurious. Such a contention is not well founded. Article 1152 of the Civil Code permits the agreement upon a penalty apart from the interest. Should there be such an agreement, the penalty, as was held in the case of *Lopez vs. Hernaez* (32 Phil., 631), does not include the interest, and as such the two are different and distinct things which may be demanded separately. According to this, the penalty is not to be added to the interest for the determination of whether the interest exceeds the rate fixed by the law, since said rate was fixed only for the interest. But considering that the obligation was partly performed, and making use of the power given to the court by article 1154 of the Civil Code, this penalty is reduced to 10 per cent of the unpaid debt.

With the sole modification that instead of 25 per cent upon the sum owed, the defendants need pay only 10 per cent thereon as penalty, the judgment appealed from is affirmed in all other respects without special pronouncement as to costs. So ordered.

Malcolm, Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.

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