

ILDEFONSO DE LA ROSA AND GO KEE, PLAINTIFFS AND APPELLEES, VS. FRANCISCO DE BORJA, DEFENDANT AND APPELLANT.

G.R. No. 28611. January 30, 1929

Ponente: OSTRAND, J.

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OSTRAND, J.:

Over ten years ago, Ildefonso de la Rosa, in his capacity as administrator of the estate of the deceased Go Lio, brought an action in the Court of First Instance of Nueva Ecija against one Enrique Go Cotay for the liquidation and partition of a partnership alleged to have been formed by Go Lio and the also deceased Go Cosing, the father of Go Cotay. After the death of the original partners, Go Cotay took possession of the property of the partnership and assumed the management of its affairs. Go Cotay denied the existence of the partnership, but upon trial the Court of First Instance, on July 20, 1918, rendered a decision declaring that the business relations between Go Lio and Go Cosing were that of a true partnership and held that the estate of Go Lio was entitled to one-half of the net assets of said partnership. The court further ordered the liquidation of the partnership for the purpose of distributing its assets.

Thereafter, the trial court, on motion of the plaintiff, appointed a receiver to take charge of the property in question, but on his own representations, Go Cotay was intrusted with the care of the property in controversy upon the filing of a bond in the sum of P10,000. Three years later, the parties to the original action presented the following stipulations in writing to the trial court:

"AGREEMENT

"Both parties through their respective counsel, submit the following agreement to the honorable court:

"That the case be forwarded to the Supreme Court upon the defendant's appeal, in its present state, suspending the liquidation proceedings ordered in the appealed judgment; defendant to remain in possession of the property in controversy upon giving a bond in favor of the plaintiff in the sum of twenty-five thousand pesos (P25,000), Philippine currency, which must be filed within a period of twenty (20) days from this date, in order to answer for the execution of the judgment to be rendered fixing the plaintiff's participation in the property in question, should the latter be affirmed by the Supreme Court, it being understood that the former bond of P10,000 is hereby cancelled.

"Both parties so submit it, and respectfully pray the honorable court to approve this agreement, issuing orders in pursuance thereof.

"Cabanatuan, Nueva Ecija, December 7, 1921."

In accordance with the terms of the stipulation, Go Cotay furnished a bond for P25,000, which reads as follows:

"PHILIPPINE ISLANDS, PROVINCE OF NUEVA ECIA, CABANATUAN

"Whereas in an action pending before the Court of First Instance of the Province of Nueva Ecija, Sixth District, Philippine Islands, wherein Ildefonso de la Rosa, administrator of the intestate estate of Go Lio, deceased, is

plaintiff, and Enrique Ortega Go Cotay defendant, the said defendant has applied to be the receiver of the property of this complaint.

"And whereas the law gives security to the plaintiff.

"Now therefore, know all men by these presents:

"That Enrique Go Cotay, of San Isidro, Nueva Ecija, as principal obligor, and Francisco de Borja, of Santa Rosa, Nueva Ecija, Santiago Lucero, of Cabanatuan, Nueva Ecija, and Antonio Vallarta, of San Isidro, Nueva Ecija, as sureties, do hereby acknowledge themselves bound jointly and severally to the said plaintiff Idefonso de la Rosa, administrator of the estate of the deceased Go Lio, in the sum of twenty-five thousand pesos (P25,000), to the faithful payment of which we, our heirs, and our legal representatives, are really and truly and jointly and severally bound.

"The conditions of this obligation are as follows:

"To answer for the payment of the damages which Enrique Go Cotay as receiver of the store for the purchase and sale of sundry mercantile goods, abandonment and any other inexcusable cause, may come to the aforesaid objects contained in the complaint, of which he is the receiver.

"In which case, this obligation shall become null and void; otherwise, it shall remain in full force and effect.

"(Sgd.) ENRIQUE GO COTAY

"Principal Obligor"

The bond was signed on January 13, 1922, by Francisco Borja, Santiago Lucero, and Antonio Vallarta as sureties.

The appeal referred to in the aforesaid stipulations was dismissed by this court on the ground that the liquidation of the affairs of the partnership was not completed.[1] Upon the return of the record to the Court of First Instance of Nueva Ecija, the proceedings in the liquidation were renewed. In the meantime Go Cotay continued as a common law receiver, and on December 13, 1924, the Court of First Instance issued an order in which it was recited that all of the property of the partnership had disappeared, due to losses sustained during the period from 1918 until 1922 and that, therefore, the plaintiff could recover nothing from the defendant. From that order both parties appealed to this court, the plaintiff appealing from the order of December 13, 1924, in which it was declared that the partnership had no assets. The defendant appealed from the decision of July 20, 1918, in which it was declared that the partnership existed and that the estate of Go Lio was entitled to one-half of the property in question. This court, in a decision dated January 15, 1926, affirmed the decision of the 20th of July, 1918, and reversed the order of December 13, 1924.[1] The court further held that while Go Cotay was a manager of the partnership prior to August 3, 1918, he must be classified as a receiver (depositario) subsequent to that date and, consequently, was responsible for the losses during that receivership, which losses amounted to the sum of P60,598.28; that the losses were due to the fact that Go Cotay continued the business of the partnership while it was in liquidation; that the continuation of the business after he had been appointed receiver was not authorized by the court and that he, therefore, was bound to indemnify the estate of Go Lio for one-half of the losses incurred during that period.

After the case was returned to the Court of First Instance, that court, upon motion of the administrator De la Rosa, appointed Go Kee, one of the sons and heirs of Go Lio, coadministrator of the estate. Thereafter, a writ of execution of the judgment of the Supreme Court was issued against Go Cotay but was returned unsatisfied by the sheriff, who was unable to find any property belonging to the partnership or to Go Cotay himself. In view of his fact, the plaintiff filed a motion praying the Court of First Instance to issue execution against the herein defendant, Francisco de Borja, as one of the joint and several sureties on the bond hereinbefore set forth, but under the date of

July 12, 1926, said court denied the motion on the ground that the sureties were liable only for the damages caused through the fault, negligence or abandonment of Go Cotay in his capacity as receiver of the partnership property and that the existence of such damages had not been shown. The plaintiff thereupon filed a petition with the Supreme Court for a writ of mandamus to compel the Judge of the Court of First Instance to issue the writ of execution prayed for, but following the decision in the case of *De la Riva vs. Molina Salvador* (32 Phil., 277), the Supreme Court denied the petition^[1] on the ground that the damages in question were not for unlawful appointment of a receiver, but for the receiver's mismanagement, and that, therefore, the liability of the sureties on the bond could only be enforced by a separate action and not by a mere motion in the receivership proceedings.

In conformity with the indications in the order quoted, the administrators of the estate of Go Lio brought the present action upon the aforesaid bond against Francisco de Borja, the sole surviving surety. The venue was laid in Manila, the coadministrator Go Kee alleging that he was a resident of that city. In their complaint the plaintiffs set forth the essential facts and prayed that the defendant be ordered to pay the full amount of the bond, P25,000. The defendant, in his answer, pleaded the general issue and set up as special defenses (1) that Go Cotay was never appointed receiver and was only left in possession of the partnership property upon the filing of the bond referred to; (2) that as surety on the bond in question, he did not undertake to respond for all the acts of Go Cotay but that his liability is limited to that set forth in the penultimate clause of the bond, viz., "to answer for the payment of the damages which Enrique Go Cotay as receiver of the store for the purchase and sale of sundry mercantile goods, abandonment and any other inexcusable cause, may come to the aforesaid objects contained in the complaint, of which he is the receiver;" (3) that the bond was not renewed after the appeal referred to in the stipulations of December 7, 1921, had been finally determined by the Supreme Court and that therefore the bond had lost its force and effect; and (4) that the decision of the Court of First Instance of Nueva Ecija dated July 12, 1926, is *res adjudicata*. The defendant also set up a counterclaim for the sum of P8,000 as damages caused by the institution of this action.

Upon trial the Court of First Instance of Manila dismissed the defendant's counterclaim and rendered judgment in favor of the plaintiffs for the sum of P25,000, with legal interest from the date of the filing of the complaint, and for the costs. From this judgment the defendant appealed.

Under his first assignment of error, the appellant argues in substance that the bond in question purports to be the bond of a receiver; that the principal Go Cotay never was appointed receiver for the property and affairs of the partnership; that there therefore was no valid principal obligation; and that consequently under the provisions of article 1824 of the Civil Code, there could be no valid bond. This argument seems far-fetched and may be answered in very few words. It is true that the principal Go Cotay was not formally appointed receiver in equity, but he virtually assumed the obligation of a common law receiver and as such was bound to account for the assets of the partnership placed under his care. That obligation was perfectly valid and it was no error to require a bond for its fulfillment. It is true that the court has no power to compel the execution of the bond, but it had the power to appoint a receiver in equity, and if Go Cotay chose to give the bond rather than to submit to such a receivership, he is bound by such bond and, together with his sureties, must take the consequences. As stated in the standard work of *High on Receivers*, 4th ed., par. 124:

"Where, upon a bill in equity to enforce an interest in a trust fund and for a receiver *pendente lite*, the court refuses to appoint a receiver, upon condition of defendant executing a bond to account as receiver for all goods and money which have come into his possession, and to pay them over pursuant to the decree of the court, such a bond will be deemed good as a common-law obligation. And the obligor, although not considered as a receiver or officer of the court, stands in the light of one who, for a personal accommodation, has assumed a legal responsibility, and after receiving the benefits of the obligation he is estopped from denying its legality."

Appellant's second, third and fourth assignments of error deal with the nature and extent of the liability of the defendant as surety on the bond. It is argued that under the terms of the bond, the defendant can only be held responsible for negligence and abandonment on the part of the principal; that no such negligence or abandonment has been shown; and that there is no proof of losses subsequently to the execution of the bond.

At first blush, this argument may seem rather plausible, but upon further consideration, this impression vanishes. While the principal Go Cotay was not formally named receiver, it is evident from the bond itself, as well as from the previous stipulations, that he assumed a receiver's responsibility for the care and conservation of the property left in his possession and that responsibility was not confined to acts of negligence or abandonment on his part; "any other inexcusable cause" would render him liable, and no excuse has been offered for his failure to account for the property and assets in his possession and under his control. The losses may have been due to unfortunate business ventures, but acting in the place of a receiver, Go Cotay had no authority or right to use the assets of the partnership for that purpose, and misfortunes of that character can, therefore, not serve as excuses.

As to the amount of the plaintiff's recovery, it is to be observed that shortly before the execution of the bond and after Go Cotay had entered upon his common law receivership, the plaintiffs' share of the net assets of the partnership were valued, at over P30,000, and the presumption is that this condition continued until the contrary was shown (*Torres vs. Genato*, 7 Phil., 204). The fact that a bond of as much as ₱25,000 was given, strengthens this presumption and indicates that the disappearance of the property must have occurred after the bond was executed.

The fifth assignment of error relates to the effect of the order of July 12, 1926, in which the Court of First Instance refused to issue a writ of execution against the herein appellant, who now contends that the conclusions contained in that order are *res adjudicata*. We do not think that such is the case; in the *mandamus* case, this court held that in order to enforce the herein appellant's liability on the bond, a separate action was necessary. The pronouncements of the Nueva Ecija Court can, therefore, only be regarded as *obiter dicta* expressed outside of the jurisdiction of the court and therefore lacking the force of an adjudication.

The sixth assignment of error has reference to the fact that the plaintiff Go Kee, as a foreign subject, was not a resident of the City of Manila, and that, therefore, the present action was brought in a jurisdiction where neither the plaintiffs nor the defendant were residing. There is nothing in this contention. The residence referred to in section 377 of the Code of Civil Procedure need not necessarily be permanent and the record shows that Go Kee had his actual residence in Manila at the time the action was brought. But be this as it may, the fact remains that the defendant submitted to the jurisdiction of the Manila Court and did not properly raise the point in question until after the judgment in the case had been rendered. Section 377 of the Code of Civil Procedure provides, among other things, that "the failure of a defendant to object to the venue of the action at the time of entering his appearance in the action shall be deemed a waiver on his part of all objection to the place or tribunal in which the action is brought, except in the actions referred to in the first sixteen lines of this section relating to real estate, and actions against executors, administrators, and guardians, and for the distribution of estates and payment of legacies." As will be seen, the defendant's objection came altogether too late.

The defendant's remaining assignments of error are consequences of the foregoing assignments and need not be discussed.

The appealed judgment is, in our opinion, in accordance with the law and the facts and is affirmed with the costs against the appellant. So ordered.

Johnson, Street, Malcolm, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

[1] G.R. No. 18919, De la Rosa vs. Go-Cotay, promulgated October 6, 1922, not reported.

[1] De la Rosa vs. Ortega Go. Cotay, 48 Phil., 605.

[1] G.R. No. 26273, De la Rosa vs. Gutierrez David and De Borja, decided by resolution of July 30, 1926.

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