

AQUILINO F. PANDO, ADMINISTRATOR OF THE ESTATE OF A. F. PANDO, DECEASED, PLAINTIFF AND APPELLEE, VS. CARMEN KETTE, REPRESENTED BY HER ATTORNEY IN FACT A. A. ADDISON, AND GEORGE ...

G.R. No. 29184. October 03, 1928

Ponente: VILLA-REAL J.

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VILLA-REAL J.:

This is an appeal taken by Carmen Kette from the judgment of the Court of First Instance of Rizal, the dispositive part of which is as follows:

"For the foregoing, it is ordered that judgment be rendered sentencing Carmen Kette to pay the plaintiff the sum of twenty thousand pesos (P20,000), the amount of the mortgage credit; to pay the stipulated interest at the rate of P200 a month from the month of August, 1926, inclusive, until full payment of said credit; to pay 10 per cent on the sum of P20,000, the amount of the loan, and on the sum of P200, which is the interest for the month of August, 1926, as expressly agreed by the parties in the mortgage instrument, and also to pay the costs of this action. Should ninety (90) days elapse after the defendant has been notified of this judgment, without her making payment of such amounts as she is obliged to pay, the provincial sheriff shall, after the legal notices, proceed to the sale of the mortgage property at public auction, applying the proceeds thereof to the payment of the judgment, costs and expenses incurred, and the remainder, if any, is to be delivered to the defendant, submitting the sale and the instrument of transfer made to the court for approval. But if after the sale has been made of the property given as mortgage security the amounts claimed shall not have been in full. the defendant George C. Sellner is sentenced to pay the sums lacking for the full payment of the mortgage credit, as well as the 10 per cent additional payment as penalty and costs. So ordered."

In support of her appeal, the appellant assigns the following alleged errors as committed by the trial court in its judgment, to wit:

"1. The trial court committed an error in not dismissing the complaint as premature, since the mortgage deed Exhibit A which is the basis of said complaint, provides that the mortgage shall last for one year, and shall be extendible for another year if suitable to the creditor, and because there was *lis pendens*.

"2. The lower court committed an error in not holding the mortgage void, the interest being usurious, and therefore immoral and against public order.

"3. The trial court committed an error in not finding that the sum really loaned by the deceased Adolfo F. Pando during his lifetime to Carmen Kette was only P19,000 and not P20,000 as appearing in the mortgage deed.

"4. The trial court committed an error in holding that the defendant defaulted in the payment of the interest due for the month of August 1926.

"5. And lastly the trial court committed an error in sentencing the defendant instead of absolving her, with costs against the plaintiff."

There is no question that the defendant-appellant Carmen Kette, through her attorney in fact A. A. Addison, in consideration of the sum of P20,000, which she had received from Adolfo F. Pando by her aforesaid attorney, executed a first mortgage on a lot of her property, described in the deed executed to that effect, in favor of the said Adolfo F. Pando, among others under the following conditions:

"The conditions of this mortgage are such that if I, Carmen Kette, within the period of one year,—extendible for another year from the date of the execution of the present instrument, if suitable to the creditor,—should pay Adolfo F. Pando the sum of twenty thousand pesos (P20,000) Philippine currency, and during said period of one year extendible to another, should have paid in advance every month within the first ten (10) days of each month the interest on the said sum of the P20,000 at the rate of 12 per cent per annum, as well as the taxes on the land, and the improvements thereon, and each of the other conditions hereinafter enumerated, this mortgage shall be deemed cancelled and without further effect; otherwise, it shall remain in full force and effect.

"4. I, Carmen Kette, through my attorney in fact and legal representative, A. A. Addison, do hereby agree that if at any time during the subsistence of this mortgage should fail to comply with any of the conditions stipulated herein, or should not perform any of the acts which I hereby bind myself to perform, or let a month elapse without paying the corresponding interest, Adolfo F. Pando, his heirs and assigns may declare the present mortgage violated and due, or may proceed to its foreclosure as provided for by law, or take any other action they may deem proper and convenient for the recovery of the sum owed; should any action be taken for the foreclosure of the mortgage or any other nature, I, Carmen Kette, shall be bound to reimburse the mortgagee Adolfo F. Pando, for the expenses he may have incurred as attorney's fees and a per centum of the collection, which expenses are hereby fixed at a sum equal to ten per cent of the amount still owing at that time, apart from all the costs and rights established by the Code of Civil Procedure, which sum is also hereby secured by the present mortgage;"

Neither is there any question that when the mortgage in question was executed, A. A. Addison issued 11 checks in favor of the creditor, Adolfo F. Pando, for the sum of P200 each, and deposited them with attorney Antonio Opisso, who was to deliver monthly in advance to said creditor Adolfo F. Pando, one check in payment of the interest corresponding to that month, such checks not becoming effective save upon the creditor's receiving them. When August, 1926, came around, the last month of the contract, the plaintiff failed to pay the interest corresponding thereto, notwithstanding the demand made to that effect.

With regard to the first assignment of error, while it is true that the mortgage stipulates that the one year during which the mortgage was to be in force was extendable for another year, such an extension could only take place if the creditor agreed thereto.

One of the conditions of the mortgage is that if the mortgagor allowed a month to elapse without paying the interest corresponding thereto, the creditor could declare the mortgage due and matured, and could proceed as provided for by law.

It is logical that the extension of one year, could take place only when the debtor had fulfilled all the conditions stipulated in the contract within the year during which the same was in force, and should not have caused it to become forcibly matured and due by reason of the breach of any condition of the contract. The mortgagor failed to comply with one of the conditions of the contract referring to the payment of the interest for the month of August, 1926, and the creditor declared the obligation due and matured. Carmen Kette, therefore, has lost her right to the extension. Moreover, the consent of the creditor to the extension was necessary. As the latter notified the debtor through her attorney in fact that he was not agreeable to the extension, such extension could not take place.

With respect to the fact that there was an action pending between the same parties at the filing of the complaint in

the present case, it is no bar to the continuation of the present case inasmuch as the first case dealt with the annulment of the mortgage while the instant case is for the foreclosure thereof, and the cause of action is different. (Hongkong & Shanghai Banking Corporation vs. Aldecoa & Co., 30 Phil., 255.)

As to the second assignment of error, the fact that it has been stipulated that the interest of 12 per cent per annum was to be paid monthly in advance within the first ten days of each month, does not make the contract usurious when, as in the instant case, the advancement of the interest is only made monthly, as in banking transactions.

Upon this particular point, American jurisprudence has laid down the following rule:

"Interest taken in advance.—Taking the highest rate of interest in advance, so that the borrower receives less than the principal sum he contracts to repay, is unquestionably usurious on principle, and seems at first to have been so considered in all cases. But an early concession was made to the usage among banks and other persons dealing in commercial paper whose customary short term loans made the violation of the law involved insignificant. The usage has widened, however, as is the custom of the law merchant, until at the present time it is the settled rule that upon any short term loan interest may be reserved in advance at the highest legal rate without rendering the loan usurious. But some American courts still insist that the right to take such advance interest is strictly confined to commercial transactions. It is manifest that the rule permitting interest in advance must be limited to short term loans, since otherwise the borrower might incur an obligation to repay a large sum in consideration of the present receipt of an insignificant amount. But no limit has been fixed by the cases by which to determine the maximum period that will be permitted. The taking of interest in advance on loans for one yea? has been held to be legal; but with a single exception there seems to be no case in which a loan stipulating for full legal interest in advance for a longer period has been held enforceable in the absence of special statutory provision." (39 CYC., 948-951.)

Touching the third assignment of error, the preponderance of the evidence shows that the amount really delivered to Adolfo F. Pando as loaned to Carmen Kette, was P20,000, P19,000 of which was paid by check and P1,000 in cash.

For the foregoing, we are of the opinion and so hold, that the trial court did not commit any of the errors assigned to it in its judgment.

In virtue whereof, and not finding any error in the judgment appealed from, the same is affirmed in all respects, with costs against the appellant. So ordered.

Avanceña, C. J., Johnson, Street, Malcolm, Villamor, Ostrand, and Romualdez, JJ., concur.

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