

INVOLUNTARY INSOLVENCY OF MARIANO VELASCO & CO., ET AL. S. W. O’BRIEN, CLAIMANT AND APPELLEE, VS. CHINA BANKING CORPORATION, OPPOSITOR AND APPELLANT. VICENTE NEPOMUCENO, ASSIGNE...

G.R. No. 32704. November 29, 1930

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

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The undisputed facts of the case are set forth in the findings of the trial court as follows:

"That on and prior to the 1st of July, 1918, the late C. W. O'Brien, the father of the said minors, William Keister O'Brien, Frank Harmon O'Brien, Mary Virginia O'Brien and James Byron O'Brien, and of the deceased Charles Emmett O'Brien, delivered to the insolvent, Mariano Velasco & Company, in the character of deposit, the sum of P101,041, with the understanding that the said deposit would be returned to him upon thirty days' demand, with interest at the rate of 8 per cent per annum from the date thereof; that the said C. W. O'Brien died in the United States on July 10, 1918, and his estate was administered in the Court of First Instance of Manila, as shown by the record of case No. 16272, of that court; that on June 1, 1920, the said S. W. O'Brien, as the administrator of the estate of the said C. W. O'Brien, made a further deposit of P7,500 with the said Mariano Velasco & Company, with the understanding that it would draw interest at the rate of 9 per cent per annum and that it would be returned to him upon demand; that on May 19, 1923, the estate of the said C. W. O'Brien was partitioned by the court, and one-third of the said deposit of P101,041, in the sum of P36,180.33, was transferred and delivered to his wife, Oretha K. O'Brien and the other two-thirds thereof, in the sum of P64,860.67, was transferred and delivered to the said S. W. O'Brien, as the guardian of said minors, and the administrator of the estate of Charles Emmett O'Brien, deceased, and the said deposit of P7,500 was transferred to the said S. W. O'Brien as the trustee of the said minor children; that on or about December 11, 1923, the said Mariano Velasco & Company returned to the said S. W. O'Brien the sum of P1,500 on account of the said deposit of P64,860.67, leaving a balance due thereon of P63,360.67; that on December 11 and 15, 1923, the said Mariano Velasco & Company executed and delivered to the said S. W. O'Brien in the capacities stated, the two promissory notes set out on page 2 of Exhibit C, for the amounts of said deposit above-mentioned, and pursuant to the agreement at the time the notes were executed, on January 16, 1924, the contract of pledge or mortgage, Exhibit C, was executed by the parties for the purpose of securing the payment of the said promissory notes; that on April 20, 1924, the said Mariano Velasco & Company paid on account of the said promissory note for P7,500 the sum of P4,771.97, and on August 4, 1924, the sum of P1,000 was paid on account of the promissory note for P63,360.67; that the total amount due on said promissory notes, including the interest to April 5, 1927, and the attorney's fees stipulated therein after deducting the above payments, is the sum of P79,507.40, from which must be deducted the amount of P7,500 the sum for which the

mortgaged property was sold, which leaves a balance now due of P72,007.40, to which the claimant is entitled. He is also entitled to interest on the principal sums of P2,728.13 and P62,360.67 at the rate of 9 per cent per annum from April 5, 1927." (Pages 12, 13, and 14, Bill of Exceptions.)

And the dispositive part of the judgment orders that:

"Therefore, the claim of the said S. W. O'Brien, as Guardian and Trustee of the minors, William Keister O'Brien, Frank Harmon O'Brien, Mary Virginia O'Brien, and James Byron O'Brien, and as the administrator of the estate of Charles Emmett O'Brien, deceased, in the sum of P72,007.40, with interest on the sum of P65,088.80 thereof at 9 per cent per annum from April 5, 1927, should be and it is hereby allowed against all the insolvent debtors and their insolvent estate as a preferred claim under and in accordance with the provision of subdivision A, paragraph 3, of article 1924 of the Civil Code, and the assignee is ordered to pay the same accordingly out of the funds of the insolvent estate.

"It is so ordered."

The China Banking Corporation, one of the claimants against the bankrupt firm, and Vicente Nepomuceno as assignee thereof, have appealed from that judgment and make the following assignments of error:

"1. The trial court erred in holding that the present claim is a preferred one under and in accordance with the provisions of subdivision A, of paragraph 3, of article 1924, of the Civil Code.

"2. The trial court erred in not holding that even assuming for the sake of argument that the present claim was a preferred one, claimant-appellee had waived his preference."

The principal question raised in this appeal is whether or not the appellee's claim is a preferred credit.

That claim consists of the balance of the mortgage credit evidenced by the notarial deed, Exhibit C, recorded in the proper registry of deeds, remaining after the sale of the mortgaged property.

Article 1924 of the Civil Code, in enumerating the ordinary preferred credits, among other things, provides the following:

"ART. 1924. With respect to the other personal and real property of the debtor, the following credits shall be preferred :

* * * * *

"3. Credits which without a special privilege are evidenced by:

"A. A public instrument, * * *."

If the credit here in question, instead of being secured by a mortgage, were an ordinary credit evidenced by a public instrument, there would be no doubt that, under this provision of law, above quoted, it would be an ordinary preferred credit. Now then, does the fact that the credit in question was secured by a mortgage, which, after being foreclosed, leaves a portion of the credit unpaid, strip such a balance of the character of a claim evidenced by a public instrument? We hold that it does not.

In commenting on article 1924 of the Civil Code, the illustrious commentator, Manresa, says the following:

"Furthermore, the Supreme Court has itself also recognized by its decision rendered on July 11, 1898, that mortgagees have the same preference with respect to property not encumbered by the mortgage, as subsection A of this article gives to creditors whose credit is evidenced by a public instrument,' which is nothing more than a just and logical consequence of the principle recognized and sanctioned by number 1 of article 1280, whereby, in order to be enforceable against third persons, a mortgage must be evidenced by a public instrument,

because this obligation secured by the mortgage, being recognized in that instrument, the person in whose favor it was executed cannot but be considered as a creditor whose credit is evidenced by a public instrument, to the extent of the amount not covered by the special mortgage." (Commentaries on the Spanish Civil Code, vol. XII, 3d. edition, page 745.) (Italics ours.)

As to the appellee's recommendation to the court that the assignee be appointed, it cannot be considered a waiver of the said appellee's preferred credit. Such a recommendation is not equivalent to the vote forbidden by section 29 of the Insolvency Law. A waiver, so called in North American law, and hereby invoked against the appellee by the appellant, is the intentional relinquishment of a known right (27 B. C. L., .904), and said recommendation does not amount to an intentional relinquishment of the appellee's preferred credit.

Finding no merit in the assignments of error, but rather that the judgment appealed from is in accordance with the law and the evidence, the same is hereby affirmed in its entirety, with costs against the appellants. So ordered.

Avanceña, C. J., Street, Villamor and Villa-Real, JJ., concur.

Johnson, J., dissents.

DISSENTING

Malcolm, J.:

I entertain the opinion that the trial court erred in holding that the present claim is a preferred one under the provisions of article 1924 of the Civil Code. This article was swept away as a result of the enactment of the Insolvency Law. As in the case of all other statutes, where a provision in an Insolvency Law cannot stand and be enforced with provisions on the same subject in a later law, the former is repealed by implication and without any express repealing clause. As the Insolvency Law specifies and defines what claims are to be preferred, it follows that any claim which is not in the nature of or kindred to those specified is not a preferred claim. In corroboration of these statements, there should be taken into account section 50 of the Insolvency Law, which, after listing the preferred claims, concludes: "All other creditors shall be paid pro rata" Since the facts disclose that the instant claim is not one of those specifically classified as preferred under the Insolvency Law, it gains no special right of priority under that law, which is exclusively controlling (See concurring and dissenting opinion in Kuenzle & Streiff vs. Villanueva [1916], 41 Phil., 611; concurring opinion in Roman vs. Herridge [1924], 47 Phil., 98; dissenting opinion in the Voluntary Insolvency of Central Capiz [1927], 50 Phil., 160; the majority opinion in Ingersoll vs. National Bank [1922], 4S Phil., 308; and the opinion in the Voluntary Insolvency of Rafael Rebullida [1927], No. 27706) .[1]

For the foregoing reasons, the judgment appealed from should be reversed.

Ostrand and Johns, JJ., concur in this dissent.

[1] Promulgated December 12, 1927, not reported.

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