

ROCHA & CO., SOCIEDAD EN COMANDITA, PLAINTIFF, M A. S. CROSSFIELD, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND FRANCISCO T. FIGUERAS, DEFENDANTS.

G.R. No. 3430. August 07, 1906

Ponente: WILLARD, J.

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WILLARD, J.:

On the 25th of January, 1906, Francisco T. Figueras, one of the defendants, commenced in the Court of First Instance of Manila an action against Rocha & Co. in which he alleged, among other things, that in 1898 a limited partnership had been formed under the name of "Carman & Co.;" that he and two others were the general partners and that there were various special partners; that in accordance with the terms of the articles of partnership any one of the partners had the right to withdraw from the partnership upon six months' notice; that upon giving the said notice his participation in the profits of the partnership should cease but that his capital should draw interest at the market rate until it was returned, and that it should be returned in four installments, one part upon giving notice, the second part six months after the notice, the third part twelve months after the notice, and the fourth part eighteen months after the notice. He further alleged that on the 31st day of January, 1904, he gave notice of his desire to withdraw from the partnership and waived his right to receive at that time the fourth part of his capital and consented that the fourth part should be paid at the end of six months. It was further alleged that on the 15th day of February, 1904, the partnership of Carman & Co. was reorganized under the name of Rocha & Co., which latter company assumed all the debts and liabilities of Carman & Co. and took possession of all its assets.

The complaint alleged that the plaintiff's participation in the business consisted (1) of the capital which he had paid in, P12,000, (2) his proportionate part of a reserve fund, and (3) his proportionate part of a sinking fund, and that he was entitled to receive from the partnership the sum of P51,484.17; that the partnership alleged that his interest did not exceed P34,218.22, and on the 2d day of August, 1904, the partnership paid, and the plaintiff received, one-fourth of the amount which the partnership admitted that the plaintiff was entitled to.

The prayer of the complaint is as follows:

"Therefore the plaintiff prays that judgment be granted in his favor in the amount of P43,574.95, with interest at 6 per cent per annum from August 2, 1904, and costs of this action."

There was no allegation in the complaint that the partnership of Carman & Co. was dissolved by the withdrawal of Figueras, nor was there any allegation that after that withdrawal he was the owner of an undivided or of any interest in the physical property which belonged to the partnership and which consisted of lorchas, launches, and cascos, nor was there any allegation that he had any lien upon any of this property.

It is apparent that the real controversy between the parties is Over the right of Figueras to receive his proportionate part of the reserve fund and of the sinking fund.

Notwithstanding the want of these allegations, Figueras, after the presentation of the complaint and after the

defendants had demurred thereto, made an application to the court below for the appointment of a receiver of the property of Rocha & Co. A receiver was appointed who afterwards took possession of the entire property of Rocha & Co., and thereupon Rocha & Co. commenced this original action of certiorari in this court, asking that the proceedings in reference to the appointment of a receiver be certified to this court and that after such certification they be examined and that the order appointing the receiver be declared void because the court making it had no jurisdiction to appoint such receiver. A preliminary injunction was granted by one of the justices of this court restraining the receiver and the defendants in this action from taking further proceedings in the matter during the pendency thereof.

The defendants, having been cited, appeared and answered the complaint, admitting practically all of the facts alleged therein, a hearing was had upon said complaint and answer, and an order was made by this court requiring the court below to send to it all of the proceedings in the case relating to the appointment of the receiver, Those proceedings have been remitted, a hearing has been had thereon, and the case is now before us for final disposition.

Section 174 of the Code of Civil Procedure is as follows:

"SEC. 174. When a receiver may be appointed.—A receiver may be appointed in the following cases:

"(1) When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

"(2) Where it is made to appear by the complaint or answer, and by such other proof as the judge may require, that the party making the application for the appointment of receiver has an interest in the property or fund which is the subject of the action and it is shown that the property or fund is in danger of being lost, removed, or materially injured unless a receiver shall be appointed to guard and preserve it.

"(3) In an action by the mortgagee for the foreclosure of a mortgage where it appears that the property is in danger of being wasted or materially injured and that its value is probably insufficient to discharge the mortgage debt.

"(4) Whenever in other cases it shall be made to appear to the court that the appointment of a receiver is the most convenient and feasible means of preserving and administering the property which is the subject of litigation during the pendency of the action."

The case at bar does not fall within any of the provisions of this section. There is no allegation in the complaint, as has been before stated, that the plaintiff is the owner of any of the property of Rocha & Co., nor is there any allegation that he has any lien thereon, nor are there any facts alleged in the complaint from which it could be inferred that he was the owner of such property or had any lien thereon. On the contrary, from the facts that are alleged in the complaint it would seem that his separation from the partnership of Carman & Co. left that partnership as a going concern and did not dissolve it. The effect of the provisions of the articles of partnership which are referred to in the complaint is that after the withdrawal of any partner the remaining partners became the owners of all the assets of the partnership and he became a general creditor of the partnership.

After this action had been commenced in this court, and after a preliminary injunction had been issued as aforesaid, Figueras applied to the court below for leave to amend his complaint in the action therein pending and such leave was granted. This amendment, having been made after the action was commenced in this court and after a receiver was appointed, can not be considered.

In one of the orders made by the court below relating to the receiver, its authority for making it was based on paragraphs 2 and 4 of section 174 of the Code of Civil Procedure above quoted. In a subsequent order this ground

was abandoned and the appointment was based on paragraph 1 of said section, the court holding that a special partnership was a corporation within the meaning of said section 174. This claim can not be sustained and, in fact, it was not urged in the argument of this case in this court.

The case not being one in which a receiver could be appointed, the order making such appointment was void and was beyond the jurisdiction of the court, although that that court had jurisdiction of the main action has been settled adversely to the defendants in this suit by the case of Bonaplata vs. Ambler (2 Phil. Rep., 392). (See also Encarnacion vs. Ambler,[1] 2 Off. Gaz., 490; Findlay & Co. vs. Ambler,[2] 2 Off. Gaz., 491).

That certiorari is the proper remedy in such a case was decided in the case of Blanco vs. Ambler[3] (2 Off. Gaz., 281, 492).

In the argument in this court it was claimed that this extraordinary remedy would not lie because the plaintiff, Rocha & Go., had a right to appeal from the order appointing a receiver, although that appeal could not be taken until a final judgment had been entered in the case. That argument is answered by what is said in the case of Yangco vs. Rohde (1 Phil. Rep., 404).

The order of the court below appointing a receiver in this case was illegal and void, and it and all proceedings taken therein are hereby annulled. Let judgment be entered to that effect in favor of the plaintiff in this action and against the defendants, and with costs against the defendant, Figueras. At the expiration of ten days let judgment be entered in accordance herewith. So ordered.

Arellano, C. J., Torres, Mapa, Carson, and Tracey, JJ., concur.

[1] 3 Phil. Rep., 623.

[2] 3 Phil. Rep., 690.

[3] 3 Phil. Rep., 358, 735.

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