

DEE HAO KIM, PLAINTIFF AND APPELLEE, VS. LEON BUSIANG AND JOSE SY YOK PENG, ASSIGNEE OF THE INVOLUNTARY INSOLVENCY OF LEON BUSIANG (ALIAS SUN BIO), DEFENDANTS AND APPELLANTS.

G. R. No. 34401. September 24, 1931

Ponente: JOHNSON, J.

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JOHNSON, J.:

These two cases were tried together by agreement of the parties. In the first case Dee Hao Kim filed in the Court of First Instance of Manila an action against Leon Busiang (alias Sun Bio), and the assignee of his Involuntary Insolvency, Jose Sy Yok Peng, for the purpose of recovering from them the sum of P55,000.

The plaintiff alleged that he was the assignee of a certain chattel mortgage executed by Leon Busiang on his merchandise, goods and furniture situated in his store at Nos. 238- 240 Calle Rosario; and that said goods were disposed of, without his consent by the defendants, with the exception of a portion thereof in the hands of the sheriff of Manila, valued at P5,000. The chattel mortgage is known in the record as Exhibit A, and the deed of assignment, Exhibit B.

The defendant Jose Sy Yok Peng answered by a general denial, together with the following special defenses: That the chattel mortgage (Exhibit A) was null and void for lack of consideration, and because it was vitiated with fraud; and that the deed of assignment (Exhibit B) was also null and void on the same grounds. Leon Busiang did not answer the complaint.

At the trial the defendant Leon Busiang did not appear. The other defendant, Jose Sy Yok Peng, appeared, but presented no evidence whatsoever to substantiate his defenses.

Upon the evidence presented by the plaintiff, Anacleto Diaz, judge, rendered a judgment in favor of the plaintiff and against the defendant Jose Sy Yok Peng, as assignee of the Insolvency of Leon Busiang, for the sum of P55,649, with legal interest from August 30, 1928, and costs.

In the second case (G. R. No. 34402) Dee Hao Kim filed an action against Menzi & Co., Inc., and the sheriff of the City of Manila for the recovery of the sum of P5,000, as damages, representing the value of certain goods attached by the defendants, to which the plaintiff claimed a preferred right.

The plaintiff alleged that said goods formed part of the merchandise belonging to Leon Busiang, which was mortgaged by the latter to Co Yan Guan. He claimed said goods as assignee of the mortgagee. The chattel mortgage is known in the record as Exhibit A, and the deed of assignment as Exhibit B. (These are the same exhibits mentioned in the first case.) Both documents were recorded in the registry of property.

The defendants answered denying generally and specifically each and every allegation of the complaint. By way of special defense they alleged that documents Exhibits A and B were false, fictitious and without consideration;

and that the goods in question were in the possession of the defendant Menzi & Co., Inc., as attaching creditor in a civil action (No. 33097 of the Court of First Instance of Manila) prosecuted by Menzi & Co., Inc., against Leon Busiang for the recovery of P6,872.98, representing the price of certain goods purchased by the latter from the former.

The defendants also attacked the validity of Exhibit A, on the ground that the stipulation in paragraph 3 thereof, authorizing the mortgagor to sell the chattels and to replace them with similar goods subsequently acquired, is contrary to the provisions of section 7 of Act No. 1508. They also claimed damages in the sum of P2,000.

At the commencement of the trial, the parties entered into a stipulation of facts, the pertinent parts of which are: (1) That in civil case No. 33097 the sheriff of the City of Manila attached the merchandise in question on behalf of Menzi & Co., Inc.; (2) that later a judgment was rendered in said case in favor of Menzi & Co., Inc., and against Leon Busiang; (3) that when the judgment became final, the merchandise was sold for the sum of P4,212.24, which was turned over to Menzi & Co., Inc., to apply on the judgment.

After hearing the evidence, and taking into consideration the facts agreed upon by the parties, Anacleto Diaz, judge, reached the conclusion that the merchandise in question was not the same merchandise bought by Leon Busiang from Menzi & Co., Inc., and that said merchandise formed part of the goods covered by the mortgage Exhibit A, and consequently, the right of Menzi & Co., Inc., as judgment creditor in civil case No. 33097, did not enjoy preference over the right of the plaintiff Dee Hao Kim, whose claim was based on Exhibits A and B, which were executed long before civil case No. 33097 was commenced. The trial judge also held that said agreement in paragraph three of the mortgage, authorizing the mortgagor to sell the chattels mortgaged and to replace them with others subsequently acquired, was valid and binding, in accordance with the doctrine prevailing in various states of the Union. Accordingly, a judgment was rendered in favor of the plaintiff and against Menzi & Co., Inc., for the sum of P4,212.24, with legal interest from March 26, 1928. The sheriff of Manila was absolved from the complaint.

The dispositive part of the consolidated judgment in both cases reads as follows:

"Por tanto, el Juzgado f alia que debe condenar como por la presente condena:

" (a) A Jose Sy Yok Peng, como Sindico de la Insolvencia de Busiang L. Po Sun Bio en la causa civil No. 33366 a pagar al demandante la cantidad de P55,649, mas sus intereses legales desde la fecha de la presentation de la demanda enmendada de 30 de agosto de 1928 en la causa No. 33288, hasta su completo pago, y a pagar ademas las costas en dicha causa; y

"(b) A la demandada Menzi & Co., Inc., en la causa No. 33314 a pagar al demandante la cantidad de P4,212.24 mas sus intereses legales desde el dia 26 de marzo de 1928 hasta su completo pago; quedando absuelto de la demanda en dicha causa, el Sheriff demandado, por haber obrado estrictamente, de conformidad con sus deberes. En la causa de que se trata no se hace pronunciamiento alguno en cuanto a las costas."

From that judgment the defendants appealed, and now contend: (1) That the chattel mortgage Exhibit A is null and void because the agreement contained in paragraph 3 thereof is contrary to the provisions of section 7 of Act No. 1508; and (2) that the goods attached by the sheriff upon petition of Menzi & Co., Inc., were not included in the chattels covered by mortgage Exhibit A.

The first question raised by the appellants has very recently been decided by this court in the cases of *Torres vs. Limjap* (p. 141, ante), where it was held, on the grounds therein specified, that a stipulation in the chattel mortgage authorizing the mortgagor to sell the goods covered by the mortgage and to replace them with similar goods thereafter acquired, is valid and binding.

With reference to the second question, we agree with the lower court that the goods attached by Menzi & Co. and sold in execution by the sheriff were included among the chattels covered by the mortgage. This finding of the lower court is supported by a large preponderance of the evidence.

In harmony with all of the foregoing, we are of the opinion that the judgment rendered by the lower court in both cases is in accordance with the facts and the law, and the same should be and is hereby affirmed, with costs. So ordered.

Avanceña, C. J., Malcolm, Villamor, Romualdez, Villa- Real, and Imperial, JJ., concur.

STREET, J.:

I dissent.

OSTRAND, J.:

I reserve my vote.

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