

BENITO DE LOS REYES ET AL., PETITIONERS, VS. COURT OF FIRST INSTANCE OF BATANGAS AND CHUA PUA HERMANOS, RESPONDENTS.

G.R. No. 34450, December 13, 1930

Ponente: STREET, J.

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STREET, J.:

This is an original petition for the writ of certiorari filed in this court by Benito de los Reyes and wife, for the purpose of quashing an order of the Court of First Instance of Batangas granting an attachment of property belonging to the plaintiffs, in an action instituted in the Court of First Instance of the Province of Batangas, wherein the respondents Chua Pua Hermanos are plaintiffs and the petitioners defendants. The cause has been here submitted upon the answer of the defendants.

The question presented in this case is whether in a proceeding to foreclose a mortgage upon land, the court entertaining such proceeding can issue an attachment against other property of the defendants than such as is included in the mortgage, upon a showing, by affidavit, that the mortgaged property is insufficient to pay the mortgage debt and that the defendants are attempting to alienate their unmortgaged property to other persons with intent to defraud the plaintiff.

We are of the opinion that the court has such authority. The affidavit accompanying the application for attachment shows, in conformity with the requirement of section 426 of the Code of Civil Procedure, that the value of the mortgaged property is not sufficient to satisfy the debt. In addition to this it is alleged in the affidavit that the defendants are attempting to dispose of their other property, meaning property not mortgaged to the plaintiff, with intent to defraud the plaintiff. This is in conformity with the requirement of subsection 5 of section 412 of the Code of Civil Procedure.

Under section 424 of the Code of Civil Procedure, an attachment may be obtained at or after the commencement of the plaintiff's "action." The word "action," as used in this provision, includes in our opinion a proceeding for the foreclosure of a mortgage. This is of course directed primarily to the property covered by the mortgage, but under section 260 of the Code of Civil Procedure, the mortgage creditor is entitled to judgment for any excess remaining due upon the mortgage debt after the mortgaged property shall have been sold; and this judgment for the balance due is entered upon motion in the foreclosure proceeding itself. This fact, taken in connection with the statement of the affidavit to the effect that the mortgaged property was insufficient in value to cover the indebtedness due to the plaintiff, made a case where it was proper to grant an attachment upon the facts stated.

It results that the trial court did not act irregularly in excess of its jurisdiction, in granting the attachment which is the subject of this petition.

The petition will therefore be dismissed, and it is so ordered, with costs against the petitioners.

Avanceña, C. J., Johnson, Malcolm, Villamor, Ostrand, Johns and VillarReal, JJ., concur.

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