

**GUILLERMO A. CU UNJIENG AND MARIANO CU UNJIENG,
PETITIONERS, VS. LEONARD S. GODDARD, ACTING AS JUDGE OF
FIRST INSTANCE OF MANILA, AND HONGKONG & SHANGHAI
BANKING CORPORATION, RE...**

G.R. No. 38284. September 27, 1933

Ponente: HULL, J.

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HULL, J.:

Original action for certiorari praying that a writ of attachment levied against the properties of the petitioners and defendants in a civil action in the Court of First Instance of Manila, brought by respondent Hongkong & Shanghai Banking Corporation, be declared null and void.

In that civil action it was alleged in substance that the defendants, the petitioners in this proceeding, entered into a fraudulent conspiracy or combination with one Fernandez, by which .the conspirators would hypothecate and pledge forged securities of various kinds with the various banking institutions and other commercial firms of the City of Manila, and pursuant to said fraudulent conspiracy, secured credit with the bank, and the plaintiff was defrauded by the defendants and Fernandez in the sum of P1,411,312.80. Simultaneously with the filing of the complaint, plaintiffs asked for a writ of attachment, which was granted.

The affidavit filed at that time reads:

"AFFIDAVIT

"B. C. M. Johnston, of legal age and resident of the City of Manila, being duly sworn, states:

"That he is the Manager of the Hongkong & Shanghai Banking Corporation, the plaintiff in the above-entitled cause, and that he knows that there exists a cause of action in favor of said plaintiff and against the defendants, as appears in the complaint on file in this case, reference to which is hereby made as an integral part of this affidavit;

"That the complaint is one for the recovery of money on a cause of action arising from a fraud; and

"That, as set out in the complaint, the defendants in said cause have been guilty of fraud in contracting the debt and in incurring the obligation upon which this action is brought.

(Sgd.) "B. C. M. JOHNSTON"

About one week thereafter, on October 20, 1931, petitioners herein filed a motion to discharge the attachment on the ground that it had been improperly and irregularly issued, which motion contains eight paragraphs.

Paragraph (4) alleges that the affidavit was defective in that it fails to state that there is no other sufficient security for the claim sought to be enforced by the action and that the amount due the plaintiff involves as much as the sum for which the order of attachment was granted, while paragraph (5) alleges that the affidavit for attachment

fails to state that the allegations contained in the unverified complaint to which it refers are true and that likewise the affidavit fails to state that affiant knows the facts.

Shortly after the hearing to discharge the attachment had begun, plaintiff asked leave to file an amended affidavit in support of its petition for a writ of attachment.

After oral and written arguments, the respondent judge on November 25, 1931, entered an order admitting the amended affidavit of attachment. The amended affidavit consists of three pages and is admitted to be in full compliance with the provisions of section 426 of the Code of Civil Procedure, which sets out what must be shown to the court before a writ of attachment shall issue.

Further proceedings were had in the trial court, and on March 4 and April 11, 1932, it entered an order refusing on the showing so far made to dissolve the attachment. On October 4, 1932, these proceedings were instituted, based on the two propositions (1) that an affidavit of attachment cannot be amended and (2) that if a cause of action arises ex delicto, it is not within the terms of our attachment statutes.

Respondents claim that petitioners had not exhausted their rights in the trial court and that if the petitioner regarded the order of April 11 as a final order, petitioners are guilty of laches by waiting until October before filing a complaint.

Without considering the minor questions raised by respondents, we believe it is for the best interests of all concerned to dispose of the case on the points raised by petitioners.

As to whether amendments should be admitted, respondents rely upon section 110 of the Code of Civil Procedure, which reads:

"Sec. 110. Amendments in General.—The court shall, in furtherance of justice, and on such terms, if any, as may be proper, allow a party to amend any pleading or proceeding and at any stage of the action, in either the Court of First Instance or the Supreme Court, by adding or striking out the name of any party, either plaintiff or defendant, or by correcting a mistake in the name of a party, or a mistaken or inadequate allegation or description in any other respect, so that the actual merits of the controversy may speedily be determined, without regard to technicalities, and in the most expeditious and inexpensive manner. The court may also, upon like terms, allow an answer or other pleading to be made after the time limited by the rules of the court for filing the same. Orders of the court upon the matters provided in this section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard." and claim it should be read in connection with section 2 of the same Code:

"Sec. 2. Construction of Code.—The provisions of this Code, and the proceedings under it, shall be liberally construed, in order to promote its object and assist the parties in obtaining speedy justice."

This court has held in the case of *Central Capiz vs. Salas* (43 Phil., 930), that section 2 applies to applications for writs, of attachment and that the affidavit may be read in connection with the complaint.

In the original affidavit, affiant did not swear on information and belief but expressly swore on knowledge. It is also clear from the affidavit that the ground on which the attachment was sought to be secured, is paragraph 4 of section 412 of the Code of Civil Procedure. It is defective in (a) that there is no allegation, either in the affidavit or the complaint, that there was no other sufficient security for the claim sought to be enforced by the action and (b) that the amount due to the plaintiff above all legal set-offs or counterclaims is as much as the sum for which the order is granted. The claim of petitioners that the original affidavit is defective is virtually admitted by respondents by their having filed an amended affidavit and by their insistence upon their right to amend.

Our section 110 of the Code of Civil Procedure is based on section 473 of the California Code of Civil Procedure

and is a general statute authorizing, in the discretion of the court, any amendment, in the further interest of justice, of pleadings or procedure at any stage of the action. Proceedings in the Court of First Instance to discharge the attachment were taken under section 441 of the Code of Civil Procedure, which reads:

"Sec. 441. Discharge of Attachment on Motion.—The defendant may also at any time either before or after the release of the attached property, or before any attachment shall have been actually levied, upon reasonable notice to the plaintiff, apply to the judge or justice of the peace who granted the order of attachment, or to the judge of the court in which the action is pending, for an order to discharge the attachment on the ground that the same was improperly or irregularly issued. If the motion be made on affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was made.

"If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged."

The corresponding sections of the California Code, namely sections 556, 557, and 558, read:

"Sec. 556. When a motion to discharge attachment may be made, and upon what grounds.—The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought; or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

"Sec. 557. When motion made on affidavit, it may be opposed by affidavit.—If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

"Sec. 558. When writ must be discharged.—If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; provided that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."

In a long line of decisions from *Castle Bros., Wolf & Sons vs. Go-Juno* (7 Phil., 144), where it was said:

"Inasmuch as this section 95 is taken bodily from the California Code of Procedure, we feel justified in following the decisions of the Supreme Court of California in the interpretation of the same."

to *Pando vs. Kette and Sellner* (54 Phil., 683), where this court uses the following language:

"The provision of our Code of Civil Procedure having been adopted from section 692 of the California Code, it must be understood that our law was promulgated with the construction placed upon it by the State of California." where a provision of our Code of Civil Procedure has been adopted bodily from one of the States of the Union, we have followed the rule that it was undoubtedly the intention of the Legislature to promulgate the law with the construction that had already been placed upon it.

At the time sections 110 and 441 were adopted, the similar provisions of the California Code had already been construed by the Supreme Court of California. In *Winters vs. Pearson* (72 Cal., 553), that court used the following language:

"On a motion to discharge a writ of attachment, on the ground that it was improperly or irregularly issued, the affidavit on which the writ was issued is not amendable. This, in our opinion, is in accordance with section 558 of the Code of Civil Procedure, which provides that if on such an application, it satisfactorily appears that the writ was improperly or irregularly issued, it must be discharged.

"To allow the affidavit to be made good by amendment, and upon such action refuse to discharge the writ, would, in our judgment, violate the requirements of the section just above cited."

In *Tibbet vs. Tom Sue* (122 Cal., 206), the court followed *Winters vs. Pearson*, saying:

"Respondent asks the privilege of amending the undertaking, if it be held defective by this court. From such relief he invokes section 473 of the Code of Civil Procedure; wherein amendments are allowed to pleadings or proceedings in furtherance of justice. In speaking as to an application to discharge a writ of attachment, the Code says: 'If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.' (Code Civ. Proc., sec. 558.) This section is specific and expressly directed to the subject of attachments. It must be held to control and limit the general provisions of the aforesaid section 473. The lawmaking body has declared what shall be the action of the court under the circumstances here presented, and such action demands that the writ should be discharged. It is said in *Winters vs. Pearson* (72 Cal., 553), that the affidavit on attachment is not amendable. The undertaking upon attachment stands upon the same ground."

The fact that California in 1909 changed the law by permitting amendments of a defective affidavit for attachment under certain specified circumstances, does not affect this case, as our Legislature has allowed the law to stand unchanged.

It therefore follows that where the affidavit for attachment is fatally defective, the attachment must be held to have been improperly or irregularly issued and must be discharged, and such fatal defect cannot be cured by amendment. The writ of attachment in this case should therefore have been discharged.

In view of the above views, the second ground for the discharge of the writ of attachment presented by petitioners herein, is reserved for discussion in another case.

The writ of certiorari herein prayed for must be granted. So ordered.

Avanceña, C. J., Street, Malcolm, Villa-Real, Abad Santos, and Butte, JJ., concur.

DISSENTING

IMPERIAL J.:

Petitioners brought this certiorari proceeding to annul the writ of attachment issued by the Court of First Instance of Manila on October 14, 1931, as well as the orders of November 25, 1931, March 4 and April 11, 1932, granting the admission of an amended affidavit and denying the motion to dissolve the attachment, respectively.

It is the purpose of this opinion to show: (a) That the averments of the complaint, which were made integral part of the affidavit supporting the petition for the issuance of the writ of attachment, meet substantially the requirements of the statute on attachment; (b) that the affidavit on which the petition for attachment was based is sufficient and has substantially complied with the grounds required by section 426 of the Code of Civil Procedure, and (c) that the respondent judge did not act in excess of his jurisdiction when issued the writ of attachment and denied the motion for dissolution.

The complaint filed in the civil action in which the writ of attachment was issued contains, among others, the following allegations:

"III

"That during the years 1930 and 1931, the said defendants entered into a fraudulent conspiracy or combination with one Rafael Fernandez, who has been adjudicated an involuntary insolvent by the Court of First Instance of Manila, and for that reason is not made a defendant in this action, pursuant to which fraudulent conspiracy and combination, it was agreed that the said Fernandez, or the said Fernandez, or the said defendant Guillermo A. Cu Unjieng, or the said Mariano Cu Unjieng should hypothecate and pledge forged share certificates, forged warehouse receipts, and forged securities of other kinds, in large amounts, with various banking institutions and other commercial firms of the City of Manila, with a view to a division of the proceeds among the said fraudulent conspirators.

"IV

"That pursuant to said fraudulent combination and conspiracy the said Guillermo A. Cu Unjieng employed a forger to forge the signatures of the proper officers on a large number of warehouse receipts and share certificates of the Pampanga Sugar Development Company, Inc., a corporation organized under the laws of the Philippine Islands, and operating a large sugar central in the Province of Pampanga, Philippine Islands, after the said Rafael Fernandez, pursuant to said fraudulent combination and conspiracy, had caused a large number of said share certificates and warehouse receipts to be printed in blank, for the purpose of having them so forged.

"V

"That pursuant to said fraudulent combination and conspiracy, the said defendants, Guillermo and Mariano Cu Unjieng and the said Rafael Fernandez pledged and hypothecated said forged share certificates and said forged warehouse receipts in large amounts with various banking institutions and commercial firms of the City of Manila, using the proceeds in some cases for the purpose of taking up the forged certificates and warehouse receipts so pledged and hypothecated in other cases, so as to continue the scheme for the longest possible time, and in other cases, dividing among themselves the proceeds of the loans obtained on the security of said forged share certificates and forged warehouse receipts so fraudulently pledged and hypothecated.

"VI

"That pursuant to said fraudulent conspiracy and combination, the said Rafael Fernandez, at various dates, on and after June 16th, 1931, pledged and hypothecated various forged warehouse receipts and promissory notes to the plaintiff herein, as security for loans in account current granted said Fernandez by the plaintiff in reliance therein, on which there was a total debit balance due of P1,411,312.80, on the date of the adjudication of Fernandez as an insolvent, that is, on the 1st day of August, 1931, together with interest at 9 per cent per annum on P1,010,886.96 thereof from the 1st day of July, 1931, and interest on the balance at the rate of 9 per cent per annum from July 8, 1931.

"VII

"That of the amounts so obtained by the said Fernandez from this plaintiff by the fraudulent pledging and hypothecation of said forged warehouse receipts and promissory notes, pursuant to said fraudulent combination and conspiracy, as hereinbefore alleged, said Fernandez, pursuant to said combination and conspiracy, paid directly to the defendant herein, Guillermo A. Cu Unjieng, sums aggregating P325,000; to the defendant herein, Mariano Cu Unjieng, the sum of P10,000; caused other large amounts to be paid said defendants indirectly through other banking institutions in the City of Manila; and utilized the balance in covering overdrafts and loans obtained in his name with other banking institutions in the City of Manila, on the security of forged share certificates, warehouse receipts and other forged securities the proceeds of which were divided between him and the defendants herein pursuant to said fraudulent combination and conspiracy.

"VIII

"That as a result of said fraudulent conspiracy and combination, between the defendants herein and the said

insolvent, Rafael Fernandez, and the pledging and hypothecation by said Fernandez of said forged warehouse receipts and promissory notes with the plaintiff herein, the said plaintiff has been defrauded by the defendants herein and by the said Fernandez in the sum of P1,411,312.80, with interest on P1,010,886.96 thereof at the rate of 9 per cent per annum from July 1, 1931, and with interest on the balance thereof at the rate of 9 per cent per annum from July 8, 1931."

The affidavit above referred to reads as follows:

"AFFIDAVIT

"B. C. M. Johnston, of legal age and a resident of the City of Manila, being duly sworn states:

"That he is the Manager of the Hongkong & Shanghai Banking Corporation, the plaintiff in the above entitled cause, and that he knows that there exists a cause of action in favor of said plaintiff and against the defendant, as appears in the complaint on file in this case, reference to which is hereby made as an integral part of this affidavit.

"That the complaint is one for the recovery of money on a cause of action arising from a fraud; and

"That as set out in the complaint, the defendant in said cause has been guilty of fraud in contracting the debt and in incurring the obligation upon which this action is brought.

(Sgd.) "B. C. M. JOHNSTON

"Subscribed and sworn to before me this 11th day of July, 1931, affiant exhibiting to me his cedula certificate No. F-14401, issued at Manila, P. I., January 19, 1931.

"Doc. No. 420 (Sgd.) "DOMINGO A. GUEVARA

"Page 71

Notary Public

"Book III

"Until December 31, 1932"

Section 426 of Act No. 190 provides:

"Sec. 426. Granting order of attachment.—A judge or justice of the peace shall grant an order of attachment when it is made to appear to the judge or justice of the peace by the affidavit of the plaintiff, or of some other person who knows the facts, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and twenty-four, and that there is no other sufficient security for the claim sought to be enforced by the action, and that the amount due to the plaintiff above all legal set-offs or counterclaims is as much as the sum for which the order is granted."

From a perusal of said section it is obvious that the law does not require conclusive evidence to establish the requisites necessary in order a justice or judge may issue a writ of attachment; all what the law requires is the presentation of prima facie evidence which shows the existence of said grounds. This is the reason why it calls for affidavit in lieu of other material and competent evidence.

As alleged in the affidavit affiant made a part of his statement all material and necessary averments contained in the complaint undoubtedly for the purpose of making a complete narration of the facts and at the same time to avoid superfluous repetition. In substance, it was alleged in the complaint that the defendants in the civil action were guilty of fraud at the time they incurred in the obligations set forth and that Rafael Fernandez secured from the plaintiff the amount of over P1,000,000, which is the subject matter of the action, thru conspiracy and

collusion with the defendants-petitioners, having delivered said Fernandez warehouse receipts and share certificates which were forged and valueless.

It is argued that the original affidavit was fatally defective because it failed to recite: (1) That the plaintiff in the action has no other sufficient security for the claims sought to be enforced, and (2) that the amount due to it above all legal set-offs or counterclaims is as much as the sum for which the order is prayed for. While it may be conceded that the original affidavit as well as the complaint are lacking of such specific averments, still from the above quoted allegations the same facts can be reasonably inferred. If the action was brought by plaintiff to recover the amount of over P1,000,000 which it lost in the manner above described and if it is specifically alleged that the security given by the defendants became valueless because they were all forged it is hard to conceive how one could not deduce the inference that no other security has been given the plaintiff with the exception of those specifically alleged in the complaint. The same inference was undoubtedly gathered by the respondent judge when he granted the attachment upon said original affidavit and as far as I am concerned I believe he did not exceed in the exercise of the jurisdiction conferred upon him by the law. As to the other ground, the same thing could be said.

In deciding this case I believe technicalities of law should be overlooked in order to attain the ends of justice. If the main action fails the petitioners, as defendants, will get compensation for any damage or injury they may have suffered upon the bond given by plaintiff-respondent, while should the action prosper and the attachment is already quashed plaintiff would not get anything so much so as there are other creditors who are claiming big amounts from the same defendants.

Based on the foregoing reasons I dissent from the majority's decision and I am of the opinion that the liberal construction of the statute on attachment should have been applied in this particular instance and the petition denied.

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