

ENRIQUE SOMES, PLAINTIFF AND APPELLEE, VS. THE GOVERNMENT OF THE PHILIPPINE ISLANDS, REPRESENTED BY THE DIRECTOR OF LANDS AND THE SHERIFF OF THE CITY OF MANILA, DEFENDANTS AND A...

G.R. No. 42754. October 30, 1935

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

This is an action brought by the plaintiff to annul a certain judgment obtained by the defendant, Government of the Philippine Islands, in its favor in a mortgage foreclosure proceedings and to obtain a preliminary injunction against said defendant and the sheriff of the City of Manila restraining them from executing said mortgage and selling the mortgaged property at public auction. The Government appealed from the judgment of the court holding the foreclosure suit premature and converting the preliminary injunction therein issued into a final one and ordering the defendants to refrain from selling the mortgaged property at public auction until further order, without costs.

In the Court of First Instance of Manila, Vicente Somes, son of the herein plaintiff, instituted civil case No. 30590 against his wife Nieves Chofre, the intervenor. The latter obtained judgment for support against her husband at the rate of P150 a month. On appeal, this court affirmed the judgment and it then appeared that the intervenor was entitled to the sum of P5,000 as accrued pensions. She applied for and obtained a writ of execution of the judgment rendered in her favor and the sheriff, on March 22, 1928, attached the property mortgaged to the Government, said attachment having been noted on transfer certificate of title No. 25909 on said date. On May 6, 1927, a petition of the intervenor, filed in civil case No. 30590, praying that Vicente Somes be restrained from alienating or encumbering the property mortgaged, was noted on the title in question as notice of lis pendens.

Sometime later, the plaintiff instituted civil case No. 33265 in said Court of First Instance of Manila against his son Vicente Somes praying in his complaint for the annulment of the deed of sale of the property and the improvements thereon described in original certificate of title No. 5069, executed by him in favor of his son on March 22, 1926, and also for the cancellation of transfer certificate of title No. 25909 obtained by his son in question. He amended his complaint by joining the Director of Lands as defendant, in representation of the Government of the Philippine Islands and prayed, furthermore, for the annulment of the mortgage constituted by his son in favor of the Government on May 4, 1926, and the cancellation of the notation thereof made by the registry of deeds in his books on July 21st of said year. The mortgage was constituted to secure the loan of P8,000 granted by the Government to Vicente Somes who then appeared as owner of the property and its improvements according to said transfer certificate of title No. 25909. Nieves C'hofre intervened in the case, Manuel Pellicer was appointed receiver of the property and the intervenor prayed that judgment be rendered in her favor for her credit for pensions against her husband and that the money be taken by the receiver from the rentals of the property. In said case notices of Us pendens were issued which the register of deeds of the City of Manila noted on transfer certificate of title No. 25909, and the court issued a preliminary injunction directed to said defendants, restraining

them, until further order, from executing the judgment in the foreclosure suit or from selling the mortgaged property at public auction. After trial, the court rendered judgment upholding the validity of the sale as well as the mortgage and absolving the defendants and the intervenor. The plaintiff appealed and the case was docketed in this court as No. 38552.[1] Sometime later, this court rendered judgment affirming the appealed judgment in toto.

Pending the case G. R. No. 38552, and before this court rendered its judgment, the Government of the Philippine Islands, represented by the Director of Lands, brought action against Vicente Somes to foreclose the mortgage executed by the latter, which action was docketed in the Court of First Instance of Manila as No. 38999 Neither the receiver Manuel Pellicer, nor the plaintiff Enrique Somes, nor the intervenor Nieves Chofre were joined therein as defendants. Hearing was held by default of Vicente Somes after which the court rendered judgment against him in favor of the Government for the sum of P8,000, with interest thereon, and ordered that, upon failure to pay the judgment, the mortgaged property be sold in accordance with law. The judgment so rendered was not appealed and it became final.

The Government claims that the appealed judgment erred in having declared the judgment rendered in the mortgage foreclosure proceedings null and void, in having restrained it and the sheriff of Manila from executing said judgment and in having denied its motion for a new trial.

The appealed judgment does not expressly declare null the judgment of foreclosure of mortgage rendered in case No. 38999 but found, and it so held, that the action for foreclosure brought by the Government was premature. This conclusion and the conversion of the preliminary injunction therein issued into a final or permanent one were premised on the opinion that under section 255 of the Code of Civil Procedure, the plaintiff, the intervenor and the receiver, Pellicer, should have been joined as defendants in the mortgage foreclosure proceedings for having a material and direct interest in the property mortgaged and because the validity of the mortgage was still undetermined and undecided by final judgment; that the property mortgaged being in custodia legis, the Government could not bring such action for foreclosure without first securing permission of the court, and that as the notices of lis pendens had been noted on transfer certificate of title No. 25909 the necessity of joining the plaintiff and the intervenor as defendants was still more obvious and inevitable under said section 255.

We shall first determine whether the authorization of the court, which appointed the receiver, was absolutely necessary in order that the Government's action for the foreclosure of its mortgage would lie. It should be remembered that the Government's mortgage had been constituted long before the appointment of the receiver and that it had not brought the action for the purpose of obtaining possession of the mortgaged property. Thus viewed, it seems clear that the court's permission was unnecessary or that the absence thereof had the effect of annulling the mortgage foreclosure proceedings as well as the final judgment rendered therein. But whatever be the conclusion reached on this point, it is evident that the question is now already academic because under the final and executory judgment rendered by this court in case G. R. No. 38552, the Government's mortgage was held valid and effective. Under the circumstances, the only thing left for the receiver therein appointed to do, would be to render his final accounting so that the funds available may be applied in accordance with law. Consequently, we hold that the permission to bring the action for foreclosure was unnecessary and that this question, as things now are, is purely academic.

As to the question whether the plaintiff, the intervenor and the receiver had an interest in the mortgaged property and whether under the provisions of section 255 of the Code of Civil Procedure they should have been joined as defendants in the complaint for foreclosure of mortgage, it appears that we are confronted with the same conclusion that the question is now an academic one inasmuch as the Government's mortgage has already been finally declared valid and effective. But in addition to this reason, the contention that said parties should be joined as defendants is untenable because their interest, if any, was subordinate and inferior to the Government's

mortgage right. The precept of section 255 relative to the joinder of the person claiming an interest subordinate to a mortgage as defendant is not mandatory in character but merely directory. It has been so maintained and held by this court in the case of *Fanlo vs. Albaladejo* (G. R. No. 14005 [1]), when it said:

"Upon the first point, it will be noted that section 255 of the Code of Civil Procedure requires the plaintiff in a mortgage foreclosure proceeding to set forth in this complaint the names of all persons having or claiming an interest in the premises subordinate in right to that of the holder of the mortgage and to make such parties defendants in the action. In the case at bar the Torrens title which showed that the Philippine Agricultural Bank, of which the Philippine National Bank is the successor, held & second mortgage upon the property; and there was no good reason why the plaintiff should not have complied with the requirement of the statute by making the second mortgagee a party defendant. It is to be admitted that the provision of the Code of Civil Procedure above referred to is directory only and that the second mortgagee was not a necessary party."

The precept not being mandatory there was no imperative necessity to join the plaintiff, the intervenor or the receiver as defendants, and this conclusion is supported by the following considerations contained in the above cited case:

"According to the decisions of the American courts, the great weight of judicial authority is to the effect that a junior mortgagee is not a necessary party in a foreclosure suit, in the sense that his participation therein is necessary to the jurisdiction of the court or to a valid determination of the controversy. Even though he is not joined as a party, the court has jurisdiction to try the foreclosure suit and render a valid decree between the parties before it.

" The question as to the necessity of making a junior encumbrancer a party to a suit to foreclose a senior mortgage is involved in some confusion, which for the most disappears when the distinction is observed between that question as affecting the jurisdiction of the court as to the proper practice to be pursued in foreclosure proceedings, and as affecting the barring or cutting off of the junior lien. By the great weight of authority, a junior mortgagee or incumbrancer is not a necessary party to a proceeding at law or in equity to foreclose a real estate mortgage, so far as concerns the jurisdiction of the court to render a decree of foreclosure binding on all the parties to the proceeding, though he is a necessary party in order to foreclose and bar any right of redemption he has in the property by virtue of his lien.' (19 R. C. L., p. 530; *Jones vs. Williams*, 155 N. C, 179; 36 L. R. A. [N. S.], 426 and note under it.)

" 'A junior encumbrancer not made a party to a foreclosure proceeding by a senior mortgagee is not concluded by the decree in respect to questions affecting the validity or priority of the senior mortgage, nor is he barred thereby of his right of redemption. And according to numerous decisions his rights are not in any way affected thereby.' (27 Cyc, 1797; *Jones on Mortgage*, vol. 3, sec. 1588.)

"It follows that the validity of the judgment of foreclosure in this case was in no wise affected by the failure of the plaintiff to join the junior encumbrancer as a party defendant. It will be observed that no attempt is made to impeach the judgment on the ground that the prior mortgage of the plaintiff was fraudulent or simulated.

"The trial court was therefore in error in so much of the order of September 25, 1917, as annuls the prior judgment and provides for the reformation of the pleadings and the inclusion of the complaining party."

In *Sun Life Assurance Co. of Canada vs. Gonzalez Diez* (52 Phil., 271), this court reiterated the same doctrine in the following terms:

"In the present appeal question is made as to the right of the first mortgage creditor to maintain this action. We are of the opinion, however, that the criticism directed against the appealed decision on this point is not well founded. A second mortgagee acquires only a mortgage lien upon what is called the equity of redemption vested in the mortgagor, and his rights are strictly subordinate to the superior lien of the first mortgagee. Having acquired this right the second mortgagee is a proper and in a sense even a necessary party to a

foreclosure proceeding brought by the first mortgagee; for, in the closing words of section 255 of our Code of Civil Procedure, it is expressly provided that all persons having or claiming an interest in the mortgaged premises subordinate in right to that of the holder of the foreclosing mortgage creditor shall be made defendants in the foreclosure proceeding. Accordingly, if in the original foreclosure proceeding the attention of the court had been directed to the fact that a second mortgage had been executed in favor of Gonzalez Diez, it would have been peremptorily required that the second mortgagee should be made a party.

"But the second mortgagee was not an indispensable party to the proceeding to foreclose the first mortgage, because appropriate relief could be granted by the court to the first mortgagee, in the original foreclosure proceeding, without affecting the rights of the second mortgagee. But the failure on the part of the first mortgagee to make the second mortgagee a defendant was that the decree entered in the original foreclosure proceeding did not have the effect of depriving the second mortgagee of his right of redemption. It is well recognized doctrine that a decree of foreclosure in a suit to which the holders of a second lien are not parties leaves the equity of redemption in favor of such lien holders unforeclosed and unaffected. (*Sioux City etc. R. Co. vs. Trust Co.*, 82 Fed., 124; 173 U. S., 99; 43 Law. ed., 628.) From this circumstance arises the necessity, which confronted the plaintiff in this case, of bringing an independent foreclosure proceeding against the second mortgagee; and the fact that the plaintiff, as first mortgagee, 'has already foreclosed as against the original debtor and his transferee, is no obstacle whatever to the maintenance of such action against the second mortgagee. The purpose of the second proceeding is not to obtain a second decree against the second mortgagee for the same relief covered by the first decree but to secure the foreclosure of an equity of redemption which was not touched by the first suit (*Curtis vs. Gooding*, 99 Ind., 45; *Shirk vs. Andrews*, 92 Ind., 509; *Morey vs. City of Duluth*, 69 Minn., 5). The right of a court to entertain such a proceeding as that now before us is recognized in a standard encyclopedic work in the following words: 'After completed foreclosure under a senior mortgage, a junior encumbrancer may be given, by the court, the right to redeem the senior mortgage and protect his own lien. Where a junior encumbrancer has been given, by the court, the right to redeem after the completed foreclosure under a senior mortgage, he must, exercise his right within the time limited or be barred thereof.' (*Mortgages*, 42 C. J., 374.)"

In *Government of the Philippine Islands vs. De las Cajigas* (55 Phil., 667), this court reaffirmed the same doctrine when it said:

"The first assignment of error raises the question whether the foreclosure proceeding was conducted against all of the indispensable parties, and particularly it is insisted that the heirs of Dolores G. Azaola de Cajigas should have been impleaded. It will be noted, however, that the property in question is covered by a Torrens title, and the mortgage was executed by the administrator, with the approval of the court, after the death of Dolores G. Azaola de Cajigas, the original owner. Under section 89 of the Land Registration Act (No. 496) real estate registered under the Torrens system passes upon the death of the owner to the executor or administrator of the deceased, whether such owner dies testate or intestate. There can be, therefore, no question as to the validity of the mortgage, and inasmuch as the legal title was vested in the administrator when the mortgage was executed, such administrator was the only indispensable party defendant in the foreclosure proceeding. The interest of the heirs of the original owner was derivative and contingent, and for the purposes of foreclosure they were represented by the administrator who was the true party in interest; and even supposing that the heirs might have been proper parties in interest within the meaning of section 255 of the Code of Civil Procedure, a valid foreclosure could be effected although they were not impleaded. As was pointed out in *Sun Life Assurance Co. of Canada vs. Gonzalez Diez* (52 Phil., 271), the effect of the failure to make a subordinate lienholder a party to a foreclosure proceeding is, not that the foreclosure is void as between the parties to the proceeding, but that the foreclosure is ineffective as against such subordinate lienholder, with the consequence that there remains in him an unforeclosed equity of redemption. The same reasoning holds with respect to Jose de las Cajigas in his character as transferee of the subordinate lien originally vested in Encarnacion Serra. The failure to implead him formally as a party, in lieu of the administrator of Encarnacion Serra, when the transfer was made known to the court, did not invalidate the foreclosure, but at most might have left in him a right of redemption, upon

the existence of which right it is not necessary here to pass an opinion. While the subordinate lienholder is, a proper party defendant in order to make a decree of foreclosure completely binding on all interests, he is not an absolutely indispensable party in the foreclosure proceeding."

It will be seen from the three cases above cited that while section 255 requires the joinder as defendants of persons claiming an interest subordinate to the mortgage sought to be foreclosed, failure to comply therewith does not invalidate the foreclosure proceeding had because the jurisdiction of the court was not in the least affected thereby. As indicated in said cases, if the attention of the court which had cognizance of the foreclosure of the mortgage had been directed to the necessity of joining the plaintiff, the intervenor and the receiver as defendants, the court would have been obliged to require such joinder, but the absence of said parties at the hearing in no way detracted from its jurisdiction nor had the effect of invalidating the proceeding or the judgment rendered therein. Such judgment, however, cannot effect any tenable right of the parties who had not appeared or were not impleaded therein. We hold, therefore, that the failure to implead the plaintiff, the intervenor and the receiver as defendants did not constitute sufficient cause to prevent the execution of the judgment rendered in the foreclosure suit.

The appealed judgment was finally based on the fact that both the plaintiff and the intervenor had succeeded in having notices of *Us pendens* noted on transfer certificate of title No. 25909. It seems that it is desired to attribute to these notations a legal effect similar to a lien. This is not, however, the effect of a notice of *Us pendens* under sections 79 of Act No. 496, and 401 of the Code of Civil Procedure. The notation of a notice of *Us pendens* does not create a non-existent right or lien and only means that a person who purchases or contracts on the property in dispute does so subject to the result of the pending litigation. The notation of the plaintiff's notice produced no effect whatsoever against the Government's mortgage not only because the latter was prior to the former but also because once the mortgage is declared valid and effective by final judgment, the plaintiff can no longer enforce any preferential right. As to the intervenor's notice, she had in fact no right to the notation thereof on the ground that the right which she tried to protect arose from a mere judgment for a sum of money and as, such was personal in character. The action brought by the husband against her was likewise in personam and the suit between them did not involve the mortgaged property (secs. 79 of Act No. 496, and 401 of the Code of Civil Procedure). It is contended that she executed the judgment obtained by her against her husband, which amounted to about P5,000 on the date of the notation of the notice of *Us pendens*, but the execution alone was insufficient and conferred on her no preferential right over the mortgage. It appears, as stated, that the sheriff attached the property on March 22, 1928, and this attachment was noted on transfer certificate of title No. 25909 on the same date, but the lien so created and recorded is in all respects inferior to the Government's mortgage which was lawfully constituted from its registration on July 21, 1926 (secs. 445, 453, 454 and 463 of the Code of Civil Procedure, and articles 1923, 1926 and 1927 of the Civil Code). We hold, therefore, that the notices of *Us pendens* and the attachment did not constitute justifiable or lawful cause to prevent the execution of the judgment of foreclosure of mortgage obtained by the Government.

In view of the foregoing, the appealed judgment is reversed, the judgment rendered in mortgage foreclosure proceedings No. 38999 of the Court of First Instance of Manila is valid and legal, the preliminary injunction issued against the defendants is set aside and the latter are absolved from the complaint and the complaint in intervention, with the costs of both instances to the plaintiff and the intervenor. So ordered.

Avanceña, C.J., Malcolm, Villa-Real, Abad Santos, Hull, Vickers, Butte, Goddard, and Recto, JJ., concur.

Judgment reversed.

[1] *Somes vs. Somes*, 59 Phil, 28.

[1] Promulgated March 26, 1919, not reported.

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