

CIRIACO CHUNACO, PLAINTIFF AND APPELLANT, VS. TRIA, ALBINO RICO, MARGARITA DE LOS SANTOS, FRANCISCO R. MALABANAN, PAZ NADRES VILLA AND ANDRES M. ILAGAN, DEFENDANTS AND APPELLEES.*G. R. No. 43101. September 29, 1936*

Ponente: AVANCEÑA, C.J.

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This case was originally instituted on August 21, 1933, by Ciriaco Chunaco against Delfina Tria for the recovery of the amount of P2,179.10 with legal interest thereon from the filing of the complaint; of another sum of P500 for damages, and of P400 for attorney's fees. On said date the plaintiff asked for the attachment of the defendant's property.

It is inferred from the allegations of the complaint and from the document attached to it as a part thereof that one Angel Pintor was an agent of the plaintiff to purchase palay and sell rice, coconut wine and other products in the municipality of Naga, Province of Camarines Sur. The defendant Delfina Tria signed a contract of suretyship in favor of the plaintiff, whereby she bound herself jointly and severally with Angel Pintor to secure to the plaintiff the payment of any amount resulting, after liquidation, in favor of said plaintiff and against the principal obligor Angel Pintor. To secure this obligation, the defendant mortgaged certain parcels of land described in the document of suretyship. After a liquidation of accounts made on December 20, 1929, between the plaintiff and Angel Pintor, it appeared that the latter was indebted to the former in the specific sum of P2,179.10. Notwithstanding the demands made by the plaintiff to Angel Pintor for the payment of this amount, the latter has failed to make payment, for which reason this case was instituted against the defendant as joint and several surety, for the recovery thereof. Angel Pintor has not been joined as a defendant.

On September 6, 1933, the plaintiff filed another amended complaint which was admitted by the court. The said second complaint is for the foreclosure of a mortgage. In as much as the defendant, as alleged in the amended complaint, has sold the mortgaged parcels of land to Albino Rico, Margarita de los Santos, Francisco Malabanan, Paz Nadres and Andres Ilagan, in different contracts, they were joined as defendants. Francisco Malabanan and Paz Nadres filed a demurrer to the amended complaint but it was overruled. All the defendants answered the amended complaint.

After the filing of the amended complaint, without the plaintiff's reproducing his petition for an attachment, the court granted the petition filed with the original complaint

At this stage of the proceedings, the court, without calling the case for trial for the presentation of evidence, rendered a resolution on November 14, 1934, declaring that the facts alleged in the complaint do not constitute a cause of action against each and every one of the defendants, and ordered the plaintiff to amend his complaint by joining Angel Pintor as defendant, and to refrain from prosecuting the attachment. The plaintiff refused to amend his complaint and asked that judgment be rendered in accordance therewith. The court, in a decision rendered on

December 4, 1934, dismissed the complaint, with the costs to the plaintiff. The plaintiff appealed from said resolution.

The court, in dismissing the complaint and in holding that the facts alleged therein do not constitute a cause of action, based its opinion on the premise that, as the obligor Angel Pintor was not joined as a defendant, it cannot be declared that the account between him and the plaintiff is liquidated and, it not being liquidated, the liability of the defendant as a surety, under the terms of the contract of suretyship, has not yet arisen. However, it is alleged in the complaint that the account between the plaintiff and the obligor Angel Pintor has already been liquidated and this is sufficient to prevent the court from dismissing the complaint on the grounds alleged in its decision, the question of whether or not there really was such a liquidation being, at all events, a question of evidence. Furthermore, as the defendant had bound herself jointly and severally with the obligor Angel Pintor, the action of the plaintiff may be directed only against her, without the necessity of joining Angel Pintor (art. 1144, Civil Code).

With respect to the other defendants, inasmuch as they had purchased the mortgaged parcels and are in possession thereof, as alleged in the amended complaint, and inasmuch as the action brought is a foreclosure suit, they are duly joined in this case as defendants.

As to the attachment levied, notwithstanding the fact that, according to the amended complaint, the action brought is a foreclosure suit, it should be remembered that the plaintiff asked for it when the action brought by him was simply for the recovery of a certain sum of money. Furthermore, an attachment is not absolutely incompatible with a foreclosure suit, as it may lie if the mortgage, by reason of deterioration or any other cause, becomes insufficient to secure the debt. At all events, the dissolution of the attachment may, in the course of the proceedings, be decreed by the court if a petition to that effect is presented to it.

For the foregoing considerations, the appealed judgment is reversed, and the case is ordered remanded to the court of origin for final determination, with the costs to the appellee. So ordered.

Villa-Real, Abad Santos, Imperial, Diaz, and Laurel, JJ., concur.

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