

**J. UY KIMPANG & CO., PLAINTIFF AND APPELLANT, VS.
VICENTE JAVITR ET AL., DEFENDANTS; JUAN AUTAJAY AND
S’EVERLNO MAGBANUA, SURETIES AND APPELLEES.**

G. R. No. 43461. December 16, 1937

Ponente: DIAZ, J.

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DIAZ, J.:

By virtue of a writ of execution issued by the Court of First Instance of Antique on August 8, 1933 to enforce the payment to the plaintiff of the sum of P6,678.84 plus interest costs, which the defendants Vicente Javier, Ramona Majog, Zenon Javier, Paz Javier with her husband Hugo Mabaquiao, Ramon Maza, in case G. R. No. 36414[1](civil case Mo. 1253 of the Court of First Instance of Antique), were sentenced by this court to pay, the sheriff of the aforesaid province levied upon the seven parcels of l belonging to the defendant Ramona Majog enumerated in the return of said sheriff of September 9, 1933 for the purpose of selling, as he in fact later sold, them at public auction to the highest bidder who was found in the person of Uy Cay Ju, manager of the plaintiff entity, for the sum of only P1,730. In view of the fact that this sum was not sufficient to cover the full value of the judgment that the defendants failed to deliver to the sheriff the properties which were released from the attachment by virtue of the obligation which, on December 29, 1925 with the approval of the court, they executed jointly with their sureties Severino Magbanua Juan Autajay, the plaintiff in its motion of January 23, 1934 moved the court to again order the execution of the aforesaid judgment, but this time against the properties of the two sureties. The surety Juan Autajay objected to the plaintiff's motion on the grounds: (1) That the attachment of the properties of the defendants was null void because it does not appear that they were served with a copy of the writ ordering the same; (2) that said attachment was not inscribed in the registry of property; (3) that he (Autajay) was released from his obligation as surety because his undertaking had been cancelled when the court, in its order of February 15, 1930, permitted him to withdraw therefrom; (4) that the undertaking should in any event be enforced exclusively against the other surety (Severino Magbanua) inasmuch as he did not withdraw therefrom.

After passing upon the question raised by Juan Autajay, the lower court, in its order of July 18, 1934, denied the plaintiff's motion for the following reasons:

- (a) That in view of the amount in litigation (P9,352), the justice of the peace of the capital of Antique, even in the absence of the Judge of First Instance of said province,
- (b) That the issuance of the said writ by the clerk was illegal, because only the justices the judges of First Instance may issue such writs, their power cannot in any case be delegated to the clerk;
- (c) That there was no valid attachment because, aside from the fact that the basic writ was not signed by any judge, the obligation executed by the plaintiff was not approved by the court;
- (d) That, in violation of the provisions of section 440 of Act No. 190, the discharge of the attachment levied upon the properties of the defendants was not ordered.

The plaintiff duly appealed from the order denying his motion now contends that the lower court erred:

- In holding that the justice of the peace of the capital of Antique could not issue the writ of attachment because the amount sued for was in excess of that provided by law in the cases in which justice of the peace of the provincial capitals may order an attachment;
- In holding that the writ of attachment was illegal because it was issued by the clerk not by the judge, that the order authorizing the clerk to issue the same was likewise illegal because it conferred powers which under the law could not be delegated;
- In holding that the properties of the defendants were not validly attached, because the writ of attachment was not signed by the judge;
- In holding that the obligation executed by the plaintiff was not valid, because it was not approved by the court;
- In holding that the counterobligation executed by Juan Autajay Severino Magbanua is without any legal effect;
- In holding that the plaintiff has no right to enforce the counterobligation signed by Juan Autajay Saverino Magbanua, in denying its motion for the enforcement thereof;
- In not granting its motion for reconsideration in denying its motion for new trial.

The background necessary to a better grasp of the facts of the case may be briefly stated as follows: On December 20, 1925 the plaintiff filed in the Court of First Instance of Antique a verified complaint in which it alleged among other things that the defendants were indebted to it in the sum of P9,352 plus interest from May, 1918, at the rate of 12 per cent per annum; that the defendants were disposing or about to dispose of their properties with intent to defraud their creditors the plaintiff; that in order to secure plaintiff's rights, it was necessary to attach the properties of said defendants, unless they were willing to execute an obligation as a guaranty for their solvency; that to obtain such remedy, it was ready to execute the requisite obligation. Four days later, or on December 24, 1925, the plaintiff filed a motion in which, after reiterating the allegations of its complaint, it was prayed that a writ of attachment be issued against the defendants. The justice of the peace of the capital of Antique, acting in the place of the Judge of the Court of First Instance of said province, ruled favorably on the plaintiff's motion stated the following in his order of December 24, 1925.

"Wherefore, the court, being of the opinion that the plaintiff entity is entitled thereto, hereby orders the clerk of court to issue a writ of attachment against the properties of the said defendants upon the execution by the plaintiff of an obligation in the sum of ^9,500 which will respond for the damages recoverable by the defendants in case the court decides this case in their favor.

"So ordered.

"San Jose, Antique, P. I., December 24, 1925.

(Sgd.) "DELFIN HOFILENA

"Justice of the Peace of the Capital of San Jose, Antique, acting in theSeventeenth District."

After the plaintiff had executed the obligation in the sum of P9,500 as required in this order, the clerk, under the authority of said order, issued on December 29, 1925 the writ of attachment in question, notwithstanding the fact that the aforesaid obligation was not yet approved.

The provincial sheriff, upon receipt of the writ, attached the properties belonging to the defendants enumerated in the sheriff's return, the assessed value of which was noted at the bottom of said return. On the same day, December 29, 1925, the defendants executed a counterobligation in the sum of P9,500 with a view to dissolving the attachment levied upon their properties. Said counterbond, which was approved on the same date by the justice of the peace who issued the order of attachment, was signed by all the defendants their sureties Juan Autajay Severino Magbanua who bound themselves jointly severally thereunder.

On March 29, 1926, Juan Autajay prayed that he be permitted to withdraw from his obligation as surety of the defendants. In view, however, of the opposition registered by the plaintiff in which it was alleged that the purpose of Juan Autajay was merely to evade the performance of an obligation voluntarily contracted to defeat the judgment which might be entered in plaintiff's favor, the trial court denied the motion in its order of April 17, 1926 the dispositive part of which reads as follows:

"The court, after hearing the arguments of both parties, sustains the demurrer, admits the amended complaint, denies the motion of Juan Autajay, unless the defendant Vicente Javier should execute a new obligation within the period of thirty days."

Two other similar motions were filed by Autajay by the surety Magbanua on November 21 December 17, 1927, but they were not acted upon by the court for lack of prosecution. On January 31, 1930, Au'tajay filed another motion for the same purpose. To this last motion, the plaintiff objected; but the trial court granted the same under the conditions expressed in the order of February 15, 1930, to wit:

"Considering the motion of the surety Juan Autajay the statement of the Attorney Hon. Ssgundo C. Moscoso in representation of the defendants Vicente Javier others, the withdrawal of the movant Juan Autajay is hereby granted said defendants are given sixty days within which to submit to the court for approval another obligation in substitution for the one to be rendered ineffective by the withdrawal of the surety Juan Autajay."

The fact, however, remains that the defendants did not execute the new obligation required in the foregoing order.

I. The question raised under the first error alleged to have been committed by the trial court has already been resolved by this court in an analogous case wherein it was held that the justice of the peace of the capitalacting "in the absence of the Judge of First Instance" has the power to issue an order of attachment in spite of the fact that the amount litigated is in excess of that fixed by law for his ordinary jurisdiction. (*Wise & Co. vs. Larion*, 45 Phil., 314.)

Section 1, paragraph 4, of Act No. 2131 which was in force on December 24, 1925, the date of the attachment, provides that the justices of the peace in the capitals of provinces organized under the Provincial Government Act, in the absence of the judge of the province, may exercise within the province like interlocutory jurisdiction as that of the said judge, including the ' - appointment of receivers the issuance of all other orders which are not final do not involve, as the attachment under consideration, a decision of the case on its merits.

The defendants failed to prove that the Judge of the Court of First Instance of Antique was then holding sessions in said province; , in the absence of proof to the contrary, the legal presumption being that official duty has been regularly performed (sec. 334, No. 14, Act No. 190), it must be held that said judge was absent from his district on December 24, 1925. It must follow that the justice of the peace of the capital acted in full conformity with the law in issuing the aforesaid order.

II. There is no doubt that, under the provisions of sections 425, 426 427 of Act No. 190, only the justices, judges of First Instance, justices of the peace or municipal judges may issue an order of attachment when prayed for, provided the legal requisites are present. In the case at bar all the requirements of the law were complied with.

Inasmuch as the order of December 24, 1925 under which the questioned writ of attachment was issued, was entered by a competent judge, it cannot be alleged that said writ was a mere capricious act of the clerk. On the contrary, it may should be inferred that the writ was issued in strict compliance with a perfectly valid order given to him. The law does not provide or state that the writs of attachment must be issued by the very justice or judge who is to authorize it; it simply determines the judicial authority who shall have the power to grant an attachment. Even supposing that the writ in dispute is defective because it was not signed by the judge who authorized its issuance, it is now too late to raise the question after the same was accepted believed to be valid not only by the defendants but by their sureties. It is noteworthy that in their eounterobligation they made it understood that they were aware of the issuance of a writ of attachment against the defendants; that the properties of the latter had been attached by the sheriff; that all wanted or at least prayed that said attachment be discharged; that they offered to execute, as in fact they immediately did execute, the counterobligation required. The general rule La that "irregularities defects in attachment or garnishment proceedings which render the attachment merely voidable not void, are deemed to be waived unless promptly taken advantage of by appropriate mode of raising objection thereto." (4 Am. Jur., par., 616, p. 923.)

In the case of *Hammond vs. Starr* (79 Cal., 556, 559; 21 Pac, 971), it was held that:

"Irregularities in affidavit undertaking or in proceedings to procure attachment, if waived in attachment suit, cannot be taken advantage of by sureties in collateral proceedings on undertaking given to secure release of attachment."

In the case of *Moffitt vs. Garrett*, the Supreme Court of Oklahoma (100 Pac. Rep., 533), construing two legal provisions of said State, 4404 4376 (4851 4821), which are analogous to section 440 of Act No. 190, adhering to the decisions of the courts of Iowa, New York, Illinois, Wisconsin, Missouri, Michigan, Minnesota, Texas, Washington, Rhode Island, California, Oregon, North Dakota South Dakota, held that:

"The courts in these states have held that the execution of a bond under in accordance with these statutes estops the defendant from controverting the attachment, renders the obligors in the bond absolutely liable for the amount of any judgment the plaintiff recovers in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out." And concluded that:

"The obligors in the bond are precluded estopped from traversing the truth of the allegations of the affidavit, or setting up that the defendant in the attachment was not the owner of the property levied on."

What has been stated also disposes of the contention advanced by the sureties-appellees to the effect that the defendants were not given a copy of the order of attachment, which is an essential requisite prescribed by section 429 of Act No. 190. The inference must be drawn that they were notified of said order; otherwise, they would not have stated in their counterobligation that:

"The defendant having prayed for the discharge of the attachment levied upon his properties in an action pending in the Court of First Instance of the Province of Antique, Philippine Islands, in which J. Uy Kimpang & Co. is plaintiff Vicente Javier others, defendant, * * *." The other contention that the plaintiffs motion praying for the issuance of a writ of attachment was not sworn to as required by law, is likewise disposed of. It was unnecessary that the same should be under oath because it was merely a repetition or renewal of what was already prayed for in the complaint which was verified. In order not to nullify the purposes of the law, technicalities should be disregarded, especially when, as in the case under advisement, there was substantial compliance therewith. On the other hand, the law enjoins that the provisions of the Code of Civil Procedure shall be liberally construed in order to promote its object assist the parties in obtaining speedy justice, bearing in mind, in construing applying them, their spirit purpose, rather than their strict letter (see. 2, Act No. 190, *Garcia vs. Ambler Sweeney*, 4 Phil., 81).

The conditions of the counterobligation executed by the defendants the sureties-appellees are as follows:

"Should the judgment be favorable to the plaintiff, the defendant, upon being required, shall redeliver to the officer of the court the property discharged from the attachment, in order that it may be applied to the payment of the judgment, in case of failure to do so, the defendant his sureties, when required, shall pay to the plaintiff the full value of the attached property." (Paga 16, Bill of Exceptions.)

It must be remembered that the defendants the sureties-appellees not only failed to object to the procedure followed by the clerk but, as already stated, executed the counterobligation required by law for the discharge of the attachment levied upon the properties of the defendants, that Autajay Magbanua were the ones who signed the counterobligation as sureties submitted the same to the justice of the peace of the capital for approval. It must also be remembered that in all the motions which they subsequently filed in these proceedings, the said sureties confined themselves to the request that they be permitted to withdraw from their obligation for the reason that it was against their interest to continue being sureties of the defendants. Under these circumstances, we believe we should adhere to the rule that:

"All objections to the writ will be waived by moving to set aside the attachment on other grounds failing to make the objections before giving bond for the release of the property." (6 C. J., par. 346, p. 190.) because,

"After issue made trial begun upon the merits of a case, it is too late for an objection to the petition or attachment for want of verification." (Id.)

For the reasons given, we hold that the trial court committed the second error assigned by the appellant.

III. The question whether or not there was a valid attachment is impliedly resolved in the discussion of the appellant's second assignment of error. The omission referred to by the trial court could be supplied was not in any wise capital, because, as already said, the writ signed by the clerk was issued by him in compliance with the order entered on December 24, 1925 by the justice of the peace of the capital who was authorized by law (Act No. 2131) to do so in the absence of the Judge of First Instance of the District.

IV. Inasmuch as both the defendants the sureties-appellees, by executing the counterobligation required by law for the discharge of the attachment, had accepted the obligation filed by the plaintiff with the justice of the peace of the capital for the issuance of the writ of attachment against the defendants, it is now too late futile to allege that the said obligation is invalid for lack of approval by the judge. They are estopped from doing so by their own acts, inasmuch as their failure to question the said obligation at the proper time constitutes a waiver of their right. One who has any objection to the sufficiency or validity of an obligation in attachment proceedings, should record the same before executing the counterobligation required for the discharge of the attachment; otherwise, it will be understood that he does not question, or that he renounces his right to question, the sufficiency or validity of the said obligation.

V. There is no importance in the fact that it does not appear in the record that the court had dissolved, after the approval of the aforesaid counterobligation, the attachment levied upon the properties of the defendants. It must be assumed that the court discharged it by virtue of the said counterobligation; otherwise, the reason for approving it cannot be explained, said approval would have no finality.

In the case of Rosenthal vs. Perkins (123 Cal., 240), where a similar question was involved, the court said:

"Where the goods were in fact released as a consequence of the bond being given, the undertaking for the release of the attached property recited that it was given pursuant to an order of the court requiring it to be given, the officer accepted the bond surrendered the property, it must be presumed that an order discharging the attachment was made * * * that the officer regularly performed his duty in releasing the goods."

VI VII. Inasmuch as the trial court committed the preceding five errors, it must follow that it also committed errors 6 and 7 which are a necessary consfrjuence thereof. The counterobligation executed by the sureties-appellees is enforceable under the provisions of section 440 of Act No. 190 (Bautista vs. Joaquin, 46 Phil., 885), because, when the defendants were required to deliver to the sheriff the properties released from the attachment, they could not do so, in at least three of said properties (Exhs. A, B E of the opposition of the appellee Juan Autajay, dated June 11, 1934) were sold after their release, the appellees failed to prove that the defendants had other properties susceptible of attachment execution.

It is superfluous to state that there is no basis for the contention of the appellee Juan Autajay that he was released from his obligation as surety of the defendants, because he was never so released in view of the failure of the defendants to execute the new obligation required by the order of February 15, 1930 which has hereinbefore been referred to.

Wherefore, the order of July 18, 1934 is set aside the lower court is ordered to issue another writ of execution against the properties of the sureties-appellees, to the extent of the value of their obligation of December 29, 1925, with a view to satisfying the unpaid portion of the judgment rendered in civil case No. 1253 of the Court of First Instance of Antique, without prejudice to the right of the said sureties to recover from the defendants the amount that may be paid by virtue of the execution herein ordered. The costs will be assessed against the appellees. So ordered.

Villa-Real, Abad Santos, Imperial, Laurel, Concepcion, JJ., concur.

[1] Uy Kimpang & Co. vs. Javier, March 31,1933 (58 Phil., 906) had no power to issue the writ of attachment in question;

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