

**THE ASIATIC PETROLEUM COMPANY (P. I.), LTD., PLAINTIFF AND APPELLANT, VS. JOSEFA VALENCIA VIUDA DE MOLINA, DEFENDANT AND APPELLEE.***G.R. No. 45486. May 24, 1939*

Ponente: MORAN, J.

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**MORAN, J.:**

On March 8, 1929, a contract of agency was entered into between plaintiff herein and one Tam Meng by the terms of which the latter was appointed selling agent by and for the goods of the former. As security for the faithful performance of the agent's obligation up to eight thousand pesos (P8,000), a mortgage was executed by Tam Meng and Tam Chio & Co. upon a parcel of land with all its improvements. The deed was annotated as a first mortgage upon the transfer certificate of title. Thereafter, the mortgagors executed upon the same property a second mortgage in favor of the herein defendant in security for a loan of five thousand pesos (P5,000) and the instrument evidencing the transaction was also duly annotated on the certificate of title. Subsequently, the mortgagor was declared insolvent. A petition was thereafter addressed by the plaintiff to the insolvent court, praying that, under the provision of section 59 of the Insolvency Act the property mortgaged to it be sold at public auction. The court acceded to the petition and ordered the sale of the property at a public auction wherein the plaintiff was the highest bidder in the amount of one thousand five hundred pesos (P1,500). Upon motion the sale was later confirmed by the court. The defendant herein, as junior mortgagee, had no notice of the petition for the sale nor of the confirmation thereof.

Plaintiff now institutes the present action against the junior mortgagee seeking to foreclose her equity of redemption. The trial court dismissed the complaint on the ground that plaintiff, by filing its motion for sale in the insolvency proceedings, has waived its mortgage security. Plaintiff appealed.

Section 59 of the Insolvency Act provides:

"When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, or an attachment or execution on property of the debtor duly recorded and not dissolved under this Act, he shall be admitted as a creditor for the balance of the debt only, after deducting the value of such property, such value to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court or a judge thereof may decide to be fair and reasonable, before the election of an assignee, or by a sale thereof, to be made in such manner as the court or judge thereof shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, or its value fixed, the creditor shall not be allowed to prove any part of his debt, but the assignee shall deliver to the creditor all such

property upon which the creditor holds a mortgage, pledge, or lien, or upon which he has an attachment or execution."

Two local authors (Attorneys Gregorio Araneta and Salvador Araneta of the Philippine bar) analyze this provision thus:

"(a) That a mortgage creditor shall be admitted as a creditor for the balance of the debt only, after deducting the value of the property;

"Such value before the election of the assignee to be ascertained by the court, or if there be a receiver by agreement between the creditor and the receiver.

"And after the election of the assignee by selling the property in such manner as the court shall direct.

"(b) That a mortgage creditor shall be admitted for the whole of the debt if the creditor releases his claim upon the property mortgaged;

"(c) That a mortgage creditor shall not be allowed to prove any part of his debt if the value of the security is not determined as in (a), or if it is not released as in (b).

"But if the value of the property mortgaged exceeds the debt the assignee may release to the creditor the debtor's right of redemption thereon, on receiving such excess.'" (Araneta on Insolvency, p. 191.)

This analysis is substantially correct.

Under the above quoted provision, there is but one mode of waiver of security, namely, its release or surrender to the receiver, sheriff or assignee. The herein appellant has in no wise made such release or surrender. What it has done was to petition the insolvency court to have its security sold and applied to its claim. This act constitutes, not a waiver, but enforcement of the security. (Cf. 7 C. J., 284; *In re Medina Quarry Co.*, 24 Am. Bankr. Rep., 770; see also Notes on Ch. 6, U. S. C. A on Bankr., p. 259.) Whether its ultimate purpose is to prove the residue of its claim before the insolvency court is here immaterial. In fact, it has not actually made such proof or ever manifested any desire to do so.

The sale of the mortgaged property at public auction may be treated as an execution sale incident to foreclosure. And, it appearing that the junior mortgagee had no notice of the sale, her equity of redemption remained unaffected. An independent suit, then, for the foreclosure of such equity of redemption is proper. (*Sun Life Assurance Co. of Canada vs. Gonzalez Diez*, 52 Phil., 271, 275.)

Judgment is reversed, and appellee is hereby ordered to exercise its equity of redemption within ninety (90) days by paying appellant the sum of six thousand live hundred pesos (P6,500) with interest at six per cent (6%) per annum from February 17, 1936, or, in default thereof, it is hereby ordered that her lien on the property be cancelled.

Avanceña, C. J., Villa-Real, Imperial, Diaz, Laurel, and Concepcion, JJ., concur.

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