

ISIDORO DE SANTOS, PETITIONER, VS. ALEX. REYES, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND EL HOGAR FILIPINO, RESPONDENTS.

G. R. No. 45494. March 30, 1937

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

In his petition filed under section 499 of the Code of Civil Procedure, the petitioner prays that the respondent judge be compelled to approve and certify to this court the bill of exceptions presented by him in civil cases Nos. 41033 and 43373 of the Court of First Instance of Manila in connection with his appeal from the order of January 16, 1937, entered in both cases.

The pertinent facts which gave rise to the petition are as follows: On August 31, 1933, judgment was rendered in the former case ordering the petitioner, then defendant, to pay to El Hogar Filipino the sum of P636,658.74, plus the interest on the sum of P555,904.36 at 9 per cent per annum from August 1, 1933, until fully paid, and dismissing the petitioner's cross-complaints and counterclaims, without special pronouncement as to costs. Inasmuch as the judgment was based upon the compromise agreement made by the parties, it was provided therein, in accordance with the conditions set forth in the compromise, that it shall not be executed by selling the mortgaged properties at public auction in conformity with sections 256 and 257 of the Code of Civil Procedure, as long as the conditions stipulated in paragraphs 4, 6 and 7 of the compromise are complied with; that the administration by the receiver shall be subject to clauses 5, the last part of 7, and 8 of the agreement, and that in case the judgment has to be executed pursuant thereto, or the agreement relative to the administration by the receiver becomes ineffective for any cause whatsoever, the mortgaged properties described in, paragraphs VII and VIII of the complaint shall be sold in accordance with sections 256 and 257 of the Code of Civil Procedure and the proceeds thereof applied to the unpaid balance of the entire judgment. In paragraph 4 of the compromise agreement, the parties stipulated that John Gordon, one of the creditors of the petitioner, be appointed receiver of the properties mortgaged by the latter, which post he shall occupy until his credit becomes less than P10,000. It was agreed in paragraph 5 that the receiver be granted, as monthly compensation, 3 per cent of the net income of the properties under administration, the petitioner 16 per cent, El Hogar Filipino 65 per cent as amortization of the petitioner's debt, the Bank of the Philippine Islands 7 per cent in the same concept, and John Gordon 12 per cent also as partial payment of his credit. It was stipulated in paragraph 6 that the judgment shall, in no case, be executed within three years and while the annual net income of the properties, estimated at P74,920.12 by the petitioner, does not decrease by 5 per cent. It was stipulated in paragraph 7 that if at the expiration of three years the creditors should have collected all the accrued interest and not less than 25 per cent of their respective credits, the suspension of the execution of the judgment shall be extended two years, the properties to continue under administration.

In October 1936, El Hogar Filipino filed two motions praying that a writ of execution of the judgment be issued; that the receiver be ordered to render a final accounting; that the properties under administration be turned over to

the sheriff and that they be sold at public auction to apply the proceeds thereof to the unpaid balance of the judgment. The grounds alleged therein were that the period of three years had already elapsed and the net income produced by the properties had decreased by more than the amount fixed in the compromise agreement. The petitioner vigorously opposed these motions alleging, among other grounds, that the judgment is null and void and cannot be executed because it was based upon a compromise the estimates of which had subsequently turned out to be erroneous, inasmuch as, according to the accounts presented by the receiver, the net income estimated by him at P74,920.12 per annum had been substantially reduced to P48,942.71, and that in justice and equity the court should fix at twenty years the period of time during which he should pay his debts and the administration of his properties should continue. After hearing the parties, the court, on January 16, 1937, issued the order in question providing: That the receiver render a final accounting of his administration; that he turn over the mortgaged properties under administration to the sheriff of Manila, and that the judgment rendered in civil case No. 41033 be forthwith executed by selling the mortgaged properties at public auction and applying the proceeds thereof to the unpaid balance of the judgment debt, deducting therefrom the payments made by the receiver to the creditors on account of the capital and interest thereon. The petitioner excepted to the order, announced his intention to appeal therefrom and presented his bill of exceptions on January 27, 1937. The attorney for El Hogar Filipino objected to the approval of the bill of exceptions and on March 1, 1937, the court issued an order disapproving it on the ground that, as the appealed order was interlocutory in character, the appeal taken was premature. This latter order gave rise to the present petition.

Counsel for the petitioner maintains that the order of January 16, 1937, is final and appealable because it is thereby attempted to execute a judgment which the petitioner claims to be null and void on the ground that it was based upon a compromise the principal facts of which were stipulated through a substantial error, since, as already stated, the estimate made by him of the annual net income had turned out to be erroneous as shown by the accounts rendered by the receiver. This court is of the opinion and so holds that his contention is untenable. Section 123 of the Code of Civil Procedure provides that incidental orders not definitely settling or concluding the rights of the parties or creating a legal state between them are not appealable. (*Dais vs. Garduno and Altavas*, 49 Phil., 165; *Mendoza vs. Parungao*, 49 Phil., 271; *Vicencio vs. De Borja*, 50 Phil., 148; *Feliciano vs. Feliciano*, 50 Phil., 552; *Heirs of Gregoire vs. Baker*, 51 Phil., 75; *Sancho vs. Lizarraga*, 55 Phil., 601.) As the action in which the judgment was rendered was for the foreclosure of a real estate mortgage, the title to the property cannot be understood as transferred to the purchaser at public auction until said sale has been approved by the court, in accordance with the provision of section 257 of said Code. Therefore, the order directing the issuance of a writ of execution of the judgment is neither final nor appealable and the rights of the parties relative to said sale have not yet been conclusively determined. (*Banco Espanol-Filipino vs. Amechazurra*, 11 Phil., 166.)

Assuming, however, that the order in question were appealable, there is another reason in support of the denial of the remedy applied for, which is that if, as claimed by the petitioner, the nullity invoked by him is based upon the error in his estimate of the net annual income of the mortgaged properties, he cannot now set up such error against El Hogar Filipino as a ground for annulment of the judgment because the latter has withdrawn from the suit already begun, as a consequence of the compromise made by them. (Art. 1817, paragraph 2, of the Civil Code; *McCarthy vs. Barber Steamship Lines*, 45 Phil., 488.) It would really be unjust to El Hogar Filipino to have the judgment annulled only because the estimate made by the petitioner proved erroneous. Furthermore the causes of the diminution of the net income are not imputable to the former.

For all the foregoing, the petitioner's petition is denied, with costs. So ordered.

Avancena, C. J., Abad Santos, Diaz, and Laurel, JJ., concur.

Villa-Real and Conception, JJ., concur in the result.

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