

ALEJANDRO ALVAREZ, PETITIONER, VS. JOSE O. VERA, JUDGE OF FIRST INSTANCE OF MANILA, AND CECILIO BAUTISTA, RESPONDENTS.

G. R. No. 45581. September 23, 1937

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is a petition for certiorari filed by the petitioner Alejandro Alvarez for the review and annulment of the order issued by the respondent judge, Honorable Jose O. Vera, on April 26, 1937, appointing a receiver in civil case No. 49220 of the Court of First Instance of Manila.

The pertinent facts necessary for the resolution of the question of law raised in this proceeding are as follows:

Tomas Morales was the owner of a city property consisting in a lot with apartments, situated at Nos. 311-315 Requesens Street and No. 1315 M. Natividad Street, Manila, covered by transfer certificate of Torrens title No. 9025. The herein petitioner claims to have bought the property in question of Tomas Morales on July 23, 1928, for the sum of P30,000. The corresponding deed of sale was executed but was not registered in the registry of deeds or noted in the certificate of title. Neither has the corresponding transfer of title been made in his name.

Inasmuch as Tomas Morales had agreed to secure the obligation contracted by one Candido Liwanag with the herein respondent Cecilio Bautista, by virtue of a building contract whereby Cecilio Bautista delivered to Candido Liwanag the sum of P7,102, said Tomas Morales constituted a mortgage on the property in question in favor of said respondent for the sum of P7,500. Said mortgage was registered in the registry of deeds and noted on the aforesaid transfer certificate of title No. 9025, on March 12, 1931.

As contractor Candido Liwanag had failed to comply with the terms of the building contract, the herein respondent Cecilio Bautista, on June 8, 1932, brought an action against him and Tomas Morales in the Court of First Instance of Manila (civil case No. 42156). The case was decided in favor of the plaintiff. Upon appeal to this court (G. R. No. 41628, 6 Phil, 1021), the judgment was modified by ordering the therein defendants to pay to the therein plaintiff the sum of P7,870 as damages, in a decision dated July 29, 1935 (Exhibit 2).

On November 27, 1935, as the defendants in said case No. 42156 had failed to comply with the order in the judgment therein, the sheriff of the City of Manila, after notice by publication in the newspaper "La Opinion", sold the mortgaged property at public auction, the same having been adjudicated to the execution creditor Cecilio Bautista who was the highest bidder.

On December 18, 1935, the herein petitioner Alejandro Alvarez, for the first time, intervened in said civil case No. 42156, by filing his opposition to the approval of said sale at public auction, alleging that he is the owner of the property which was the subject matter of the sale (Exhibit 1).

On the same date, December 18, 1935, Alejandro Alvarez filed a complaint in civil case No. 49220 of the Court of First Instance of Manila, against the herein respondent Cecilio Bautista, and Tomas Morales, Candido Liwanag

and the sheriff of the City of Manila, praying that the mortgage, constituted by Tomas Morales in favor of Cecilio Bautista on the property in question, be declared null and void, for being fraudulent; that the registration of said mortgage in the registry of deeds and the notation thereof in certificate of title No. 9025 be cancelled, and that the sale at public auction be annulled.

On January 27, 1936, the Court of First Instance of Manila, then presided over by the Honorable Quirico Abeto, issued an order in civil case No. 42156, overruling the opposition of the herein petitioner Alejandro Alvarez and approving the sale at public auction in favor of the therein plaintiff and herein respondent Cecilio Bautista, ordering at the same time the therein defendants Tomas Morales and Candido Liwanag to pay jointly and severally to said plaintiff the sum of P4,543.65, representing the unpaid balance of the debt.

By virtue of said approval, the register of deeds of the City of Manila issued the corresponding transfer certificate of title in the name of the herein respondent Cecilio Bautista, without notation of any lien in favor of the petitioner Alejandro Alvarez, thereby cancelling transfer certificate of title No. 9025 in the name of Tomas Morales.

On April 20, 1936, the herein respondent filed an answer to the complaint in the above-mentioned civil case No. 49220 instituted by the herein petitioner Alejandro Alvarez (Exhibit 3).

On July 23, 1936, upon petition of the purchaser Cecilio Bautista, a writ of possession of the property in question was issued in his favor in civil case No. 42156, by virtue of which the sheriff of the City of Manila delivered the possession thereof to him. The herein petitioner, however, has been receiving the rental of the property up to the present.

Inasmuch as the real estate taxes on the property in question, corresponding to the years 1932 and 1933, had not been paid, the government of the City of Manila distrained the same with all its improvements. The herein respondent Cecilio Bautista, however, redeemed said property on November 26, 1932, by paying said taxes. Thereafter, said respondent has been the one paying the taxes of the property in question, including the premiums on the insurance policy of the apartments.

On April 7, 1937, the herein respondent Cecilio Bautista filed in said civil case No. 49220 of the Court of First Instance of Manila a motion praying for the appointment of a receiver of the property in question as well as of the rental thereof, alleging as a reason therefor the fact that it is he who has been paying the real estate tax and insurance of the property; that said property is in danger of being materially injured and the rental thereof run the risk of being lost; and that the petitioner has not filed any bond to secure the reimbursement to the movant of the rents due and accumulated in case the latter won the case (Exhibit A). This motion, which is not under oath and is not accompanied by a supporting affidavit, was set for hearing on April 1, 1937. The plaintiff having failed to appear in order to oppose the motion in question, the court, *motu proprio*, transferred the hearing thereof to give him the opportunity to file his opposition thereto.

On April 26, 1937, the respondent judge, Honorable Jose O. Vera, overruling the opposition of the petitioner, granted said motion in an order entered to that effect on said date, the pertinent part of which reads as follows:

"The defendant Cecilio Bautista, in applying for the appointment of a receiver during the pendency of the hearing of this case, has alleged that he has no other plain, speedy and adequate remedy to protect his rights, and that the property in question is in danger of deteriorating or of being damaged, unless his petition is granted. He likewise alleges it unjust that, altho he is paying the real estate tax and the insurance of the property, and it appears from his allegations that he is the legal owner thereof, the same is in the possession of the plaintiff who, while he collects as he is in fact collecting the rents, pays no attention to the due conservation thereof and to the payment of insurance and other taxes.

"The court is of the opinion that, taking into consideration all the facts appearing in the allegations of both

parties and their statements in open court, the petition is just and, therefore, grants it."

In deciding said motion, the respondent judge did not require the other respondent Cecilio Bautista to file any bond to secure payment of the damages that might be caused to the petitioner as a result of the appointment of a receiver.

The payments made by the respondent Cecilio Bautista for real estate taxes up to April 7, 1937, the date on which he filed his motion for the appointment of a receiver, amounted to P1,076.65.

The only question to be decided in this proceeding is whether or not the respondent judge abused his discretion in ordering the appointment of a receiver in civil case No. 49220 of the Court of First Instance of Manila, in spite of the fact that the motion filed to that effect is not under oath nor accompanied by a supporting affidavit, and the corresponding bond had not been filed.

On this point this court has established the following doctrines:

"Under section 174 of the Code of Civil Procedure the appointment of a receiver lies within the sound discretion of the court. (Mendoza vs. Arellano and B. de Arellano, 36 Phil., 59.) In the American courts the same principle obtains. (53 C. J., 34.) It is not a matter of strict or absolute right or an imperative requirement. (Id.) Even when stipulated for by the parties the appointment of a receiver is not a matter of right. (Carolina Portland Cement Co. vs. Baumgartner, 99 Fla., 987.)" (Sanson vs. Barrios, 63 Phil., 198.)

"The writ of certiorari will not lie to set aside an order appointing a receiver in a foreclosure suit, only because the finding of fact of the court (that the mortgaged property was in danger of being wasted and that its value was probably insufficient to discharge the mortgage debt), was based partly on the report of a commissioner appointed for the purpose, and as to such report no hearing was had. The irregularities which such procedure might involve do not go to the jurisdiction of the appointing court as to justify this court to review by certiorari the proceedings had in the court below." (Munoz vs. Locsin and Melendreras Vda. de Munoz, 63 Phil., 811.)

"In the appointment of receivers, the Philippine Code of Civil Procedure gives the judges of the Courts of First Instance an unusually wide discretion, and subsection 4 of section 174 of the Code has no direct counterpart in any American or English statute. But the discretion thus conferred must not be exercised arbitrarily, and sound reasons for the appointment of a receiver should appear in the record of the case." (Tuason vs. Concepcion, 54 Phil., 408.)

"The appointment of a receiver pendente lite is largely a matter in the discretion of the lower court which will not be disturbed upon appeal, unless there has been a clear abuse, but such discretion is not absolute or arbitrary, and is to be exercised for the promotion of justice and where no other adequate remedy exists." (Teal Motor Co. vs. Court of First Instance of Manila, 51 Phil., 549.)

"In an action in ejectment, not only the soil but everything thereon growing is in litigation and though the power should be sparingly used, it may sometimes be found necessary in such cases to appoint a receiver in order to prevent waste and the exercise of the court's discretion in that respect will not be reviewed by certiorari." (Almarez and Avila vs. Florentine 46 Phil, 407.)

"The receivership here in question may possibly prove of little efficacy, but certiorari goes to the jurisdiction and will not lie to correct mere errors of judgment on the part of the lower tribunals." (Berbari vs. Imperial and Chicote, 43 Phil., 222, 225.)

It is inferred from the foregoing quotations that this court has constantly held that the appointment of a receiver lies within the jurisdiction of the court, which has a wide discretion in the exercise of such power. A mere error of judgment on the part of the court, acting within its jurisdiction, cannot be remedied by certiorari. Whether or not there is necessity of a receiver is a matter to be determined by the competent court, and this court will not interfere

in the exercise of such discretion by certiorari, unless the lower court has acted with abuse thereof.

In the case under consideration, when the property in question was mortgaged to the herein respondent Cecilio Bautista by Tomas Morales to secure an obligation contracted by one Candido Liwanag with the former—which mortgage was duly noted on transfer certificate of title No. 9025 issued in the name of said Tomas Morales and registered in the registry of deeds on March 12, 1931—there was no notation thereon of any sale or transfer of said property in favor of the herein petitioner Alejandro Alvarez. In civil case No. 42156, Cecilio Bautista brought an action against Candido Liwanag and Tomas Morales on June 8, 1932, for the foreclosure of the mortgage in question, judgment having been rendered in his favor in the lower court, and in this court on appeal on July 29, 1935. After the notices by publication made in the newspaper "La Opinion" of the City of Manila, the sheriff sold the property at public auction, the same having been adjudicated to said mortgagee Cecilio Bautista for the reason that he was the highest bidder. During all that time, the herein petitioner Alejandro Alvarez neither filed any opposition nor intervened therein to protect his alleged rights. It was only on December 18, 1935, when he filed his opposition to the confirmation of said sale (Exhibit 1). In spite of the fact that, according to allegation of said petitioner, he had acquired the property by purchase from Thomas Morales on June 23, 1928, and was already the absolute owner thereof from said date, he did not care to take the necessary steps for the transfer of the title thereto of the lien in his favor. Furthermore, while it was he who had been receiving the rents, he allowed the government of the City of Manila to distrain the property for nonpayment of the real estate taxes as well as the insurance premiums for the subsequent years. In the opinion of this court, these facts are sufficient to warrant the appointment of the receiver, and the respondent judge, in doing so, committed no abuse of discretion.

With respect to the lack of an oath in the motion Exhibit A and of the supporting affidavit, suffice it to quote the decision of this court, in the case of Sabado vs. Cristina Gonzales, Inc. (53Phil., 770, 778), which reads as follows:

"The second point raised by counsel for the petitioner may at first blush seem to rest on a more solid foundation but this impression disappears upon closer examination. In the case of AMriano Velasco & Co. vs. Gochuico & Co. (28 Phil., 39), this court, speaking through Justice Moreland, said: 'A proceeding for the appointment of a receiver should be by petition and not by motion. The petition should be by petition and not by motion. The petition should be verified and should have attached to it such affidavits as the petitioner may deem necessary for the sub-stantion of allegations set forth in the petition.'

"That this is a sound rule of procedure will not be disputed, and its non-observation by the interested party may well serve as sufficient justification for refusing to appoint a receiver. It should therefore be generally followed and the failure to do so may be regarded as an error. But this error does not necessarily go to the jurisdiction of the court and, if so, a writ of certiorari will not lie to set aside an appointment of a receiver, made without the observation of the procedure indicated, unless there has been such a gross abuse of discretion on the part of the court as to virtually amount to a failure of jurisdiction."

With respect to the failure to file a bond to answer for any damage that might accrue to the therein plaintiff and herein petitioner Alejandro Alvarez, by reason of the appointment of the receiver, the pertinent part of Section 177 of the Code of Civil Procedure reads as follows:

"SEC. 177. Obligations for damages on appointment of reciever.— If a receiver be appointed upon ex parte application, the court, before making the order, may require from the plaintiff or person filling the application for such appointment, an obligation with sufficient surities, to be approved by the court, * * *."

From the above-quoted legal provisions, it will be seen, in the first place, that the filling of said bond refers to cases where the petition for the appointment of a receiver is made ex parte. Such is not the case under consideration. The petitioner Alejandro Alvarez was duly notified of the petition for the appointment of a receiver

Exhibit A. Said petition was set for hearing but, for failure of the petitioner to appear, the court, *motu proprio*, transferred it in order to give him the opportunity to file his written opposition thereto, which he in fact did on April 17, 1937.

In section 177 of the Code of Civil Procedure is not obligatory. The court may require it or not at its discretion, as the petitioner himself so admits on page 4 of his memorandum in support of his petition.

Furthermore, it being a question of procedure, the filling of a bond provided for in said section 177 does not necessarily affect the jurisdiction of the court as to warrant the issuance of a writ of certiorari. In the case of *Sabado vs. Cristina Gonzalez, Inc.*, supra, this court laid down the following doctrine:

"An error in procedure in suing for the appointment of a receiver does not necessarily go to the jurisdiction of the court and certiorari will not lie to set aside the appointment unless the error is substantially prejudicial to the adverse party or unless there has been such a gross abuse of discretion on the part of the court as to virtually amount to a failure of jurisdiction."

Therefore, the case, in brief, is that the petitioner Alejandro Alvarez, on the one hand, claims to be the owner of the property in litigation, for having purchased the same—without registering said purchase—from Tomas Morales, the original owner thereof, prior to the constitution of the duly registered mortgage on the same property by said Tomas Morales in favor of the herein respondent Cecilio Bautista. On the other hand, said respondent Cecilio Bautista likewise claims to be the owner of the same property, for having purchased it at a public auction sale, by virtue of a writ of execution issued in his favor in an action brought by him against Tomas Morales, for the foreclosure of the said mortgage. Notwithstanding the writ of possession issued in favor of the respondent Cecilio Bautista, the petitioner continues to be in possession of the real property and its improvements, and to collect the rents. The appointment of a receiver is, therefore, the most expedient and the most adequate means of conserving and administering the property in litigation, during the pendency of the action, which is precisely what has been done by the respondent judge.

For the foregoing considerations, this court is of the opinion and so holds: (1) That in a litigation where the plaintiff claims to be the owner of a property registered under the Torrens system, together with the improvements thereon, for having acquired it by purchase from the original owner thereof, and is in possession of the same—without registering such purchase—prior to the constitution of the mortgage thereon by the original owner in favor of the defendant, who opportunely registers the lien and later purchases the same property at an execution sale and obtains a writ of possession thereof, which is disregarded, the appointment of a receiver lies for the expedient and adequate conservation of said property and the rents thereof during the pendency of the case; (2) that while the lack of an oath in a motion praying for the appointment of a receiver constitutes a defect which may give rise to the denial of the said motion, it does not affect the jurisdiction of the court and can not serve as a ground for certiorari; (3) that the filing of a bond by the applicant is a requisite which the court may require when the appointment of a receiver is applied for *ex parte*, and, as such requisite is procedural in character and it depends upon the sound discretion of the person appointing the receiver to require it or not, the omission thereof can not be a ground for certiorari, and (4) that, under such circumstances, the court which orders the appointment of a receiver does not commit an abuse of discretion.

Wherefore, the petition for certiorari is denied, with costs to the petitioner.

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

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