

ALEIDA SAAVEDRA, PETITIONER, VS. W. S. PRICE, FORTUNATO BORROMELO, JUDGE OF THE COURT OF FIRST INSTANCE OF LEYTE, AND ANASTASIO ANOVER, PROVINCIAL SHERIFF OF LEYTE, RESPONDENTS. ...

G.R. No. 46702. October 06, 1939

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

This is a proceeding instituted by the petitioner to annul the order of May 8, 1939, entered by the Court of First Instance of Leyte, which provided for the sale at public auction of the real property described in Transfer Certificate of Title No. 395 issued in favor of the petitioner, so that the proceeds thereof may be applied to the payment of the credit of the respondent W. S. Price in the sum of P15,000.

In civil case No. 3569 of the Court of First Instance of Leyte, Saavedra et al. vs. Martinez et al. (58 Phil., 767), this court, on appeal, rendered judgment in case which reads as follows,

"Wherefore, the judgment appealed from is hereby modified to the effect that the deed of sale, Exhibit C, executed by Ceferino Ibanez in favor of Rafael Martinez is declared rescinded and without force and effect, and the register of deeds of Leyte is hereby ordered to cancel transfer certificate of title No. 294 issued in favor of the said Martinez, and to issue, in lieu thereof, another transfer certificate of title in favor of Ceferino Ibanez and his wife, Aleida Saavedra, with a notation thereon of (1) the mortgage constituted in favor of W. S. Price to secure the payment of the sum of P15,000 and (2) the judgment rendered by this court in case G. R. No. 33795, civil case No. 7957 of the Court of First Instance of Cebu; without prejudice to any right of action which Rafael Martinez may have against Ceferino Ibanez in accordance with the law. As thus modified, the judgment appealed from is hereby affirmed in all other respects, with the costs of both instances against Ceferino Ibanez and Rafael Martinez."

In civil case No. 3707 of the Court of First Instance of Leyte, W. S. Price, plaintiff vs. Ceferino Ibanez et al., defendants, said court rendered judgment ordering the defendants to pay the plaintiff within ninety days the sum of P15,000, with the legal interest thereon from January 16, 1934, and in case of default on their part, that the real property subject matter of the mortgage be sold at public auction so that the proceeds thereof may be applied to the payment of the sum in question and the interest thereon. On appeal, this court, in case G. R. No. 44974, (38 Off. Gaz., 2410), modified the judgment of the lower court as follows:

"The judgment appealed from is modified and Rafael Martinez and Ceferino Ibanez are ordered to pay the sum of P15,000 to plaintiff within the period of ninety days to be counted from the date this decision becomes final, without pronouncement as to costs."

After the period of ninety days had elapsed and Rafael Martinez and Ceferino Ibanez failed to pay the sum in question with the interest thereon, the respondent Price filed a motion praying that the real property mortgaged be sold at public auction for the payment of his mortgage credit and its interest. The motion was set for hearing on

April 22, 1939, but on motion of the petitioner the court postponed it definitely for May 6, 1939. On the 4th of said month, the attorneys for the petitioner again sought the postponement of the hearing by reason of the bad weather then prevailing, but the court proceeded with the hearing of the motion on the date fixed, and on the 8th of May it entered the order directing the sale of the mortgaged realty for the payment of the judgment obtained by the respondent W. S. Price. The petitioner asked for the reconsideration of the order and the court denied the motion filed to that effect.

The petitioner now claims that the respondent Judge acted with abuse of his discretion in not transferring the hearing of the motion for the sale of the mortgaged realty and that he exceeded his jurisdiction in ordering the sale of said property.

In connection with the first contention, we hold that the court made good use of its discretion in denying the postponement on the ground that said hearing had already been postponed definitely to another date upon petition of the petitioner herself. Furthermore, with respect to a mere motion to sell the mortgaged realty, the court could hear it *ex parte* without the presence of the petitioner because in the judgment rendered by the court and affirmed by this court, it had already been ordered previously that if the defendants Rafael Martinez and Ceferino Ibañez should fail to pay the debt of P15,000 within 90 days, the mortgaged realty must be sold in accordance with the law (*Government of the Philippine Islands vs. De las Cajigas*, 55 Phil., 667).

As to the second point, it is contended that since the petitioner is not the debtor and as she, on the other hand is the owner of the mortgaged realty, she merely acted as surety to Rafael Martinez, the principal debtor, and as such she is entitled to the benefit of the exhaustion of the property of the principal debtor, in accordance with the provisions of article 1830 of the Civil Code. Basing her claim on this alleged defense, the petitioner contends that the court should not have ordered the sale of the real property in question. We are of the opinion that this last contention is likewise unfounded and untenable. In the first place, this alleged defense should have been interposed before the judgment was rendered in this case and it is too late to raise it for the first time as a ground for opposing the motion to sell the real property in question. In the second place, the contention that the mortgaged real property belonging to the petitioner cannot be sold to pay the debt for the reason that she is a mere surety of Rafael Martinez, finds no support in the law. It is a fact that the principal debtors, according to the judgment of this court, are Rafael Martinez and Ceferino Ibanez and that the mortgaged property belongs to the petitioner, but the lien imposed upon the property was legal and valid in accordance with article 1857 (paragraph 3) of the Civil Code, and in case of default, which took place herein, said property is subject to sale, in accordance with the provisions of articles 1858 and 1876 of the same Code and of sections 256 and 257 of the Code of Civil Procedure. It is true that the petitioner is a surety with regard to Rafael Martinez and as such surety she is entitled to resort to the actions and remedies against him which the law affords her, but we should not lose sight of the fact that she was sued not as a surety but as a mortgage debtor for being the owner of the mortgaged property.

The order of May 8, 1939, appealed from, being in accordance with law, for the reason that it was rendered by the respondent Judge in the exercise of his jurisdiction and discretion, the petition for certiorari is hereby denied, with the costs to the petitioner. So ordered.

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

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