

**PACIFIC COMMERCIAL CO., PETITIONER, VS. PABLO S. RIVERA,
JUDGE OF FIRST INSTANCE OF OCCIDENTAL NEGROS, AND AGUSTIN
JOCSON, RESPONDENTS.**

G.R. No. 48073. December 03, 1941

Ponente: ABAD SANTOS, J.

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ABAD SANTOS, J.:

On March 8, 1937 the petitioner, as plaintiff in civil case No. 7017 of the Court of First Instance of Negros Occidental, obtained a judgment, which was affirmed by the Court of Appeals on August 31, 1939, against the respondent Agustin Jocson, for the foreclosure of a mortgage upon a parcel of land known as lot No. 2328 of the Kabankalan cadastral survey and described in transfer certificate of title No. 16387 of Negros Occidental. In due course an order was issued for the sale of the mortgaged property to satisfy the judgment obtained by the petitioner, but before the sheriff could proceed with the sale, it was discovered that the land had been confiscated by the Government for non-payment of taxes. In view of this, the petitioner asked the sheriff to suspend the sale and filed a motion in court praying for the issuance of a writ of execution authorizing the levy upon any or all of the properties of the respondent Agustin Jocson. This motion was denied by the respondent Judge on the ground that no showing was made that the respondent Agustin Jocson had lost the right to repurchase the confiscated land or that the petitioner's mortgage was not protected by its inscription in the corresponding certificate of title. Failing to secure a reconsideration of such adverse ruling, the petitioner has filed this petition for a writ of mandamus that would compel the respondent Judge to direct the issuance of the desired writ of execution.

Under the foreclosure judgment and sections 257 and 260 of the Code of Civil Procedure (now sections 3 and 6, rule 70, of the Rules of Court), the petitioner is entitled, upon failure of the respondent Agustin Jocson to satisfy such judgment in due time, to have the mortgaged property sold and, in case the proceeds of the sale are not sufficient, to a deficiency judgment upon which execution may issue immediately. The parties are not authorized to change the procedure prescribed by law. (*Diaz and Rubillos vs. Mendezona and De Poli*, 43 Phil. 472.) The legal provisions above mentioned, however, contemplate a situation where the mortgage lien subsists. In the Case before us, the lien has been extinguished when the land was confiscated by the Government for tax delinquency. The tax lien was superior to the lien in favor of the judgment creditor and the presumption is that the confiscation of the land was legally effected.

It is true that the respondent Agustin Jocson might have had the right to repurchase the confiscated land, but it was not obligatory on the part of the petitioner to have said right sold by the sheriff, in place of the mortgaged property itself. A mortgagee has the right to rely on the mortgaged property, undiminished and unimpaired by any superior lien or legal impediment brought about by the act or omission of the mortgagor. This pronouncement finds support in the case of *De los Reyes vs. Court of First Instance of Batangas*, 55 Phil. 408, wherein we held that in a mortgage foreclosure proceeding the court has jurisdiction to grant an attachment against the property of the debtor, to be levied upon property not covered by the mortgage, upon proper showing by affidavit that the value of the mortgaged property is insufficient to cover the debt and that the debtor has disposed, or is about to

dispose, of his other property with intent to defraud the creditor

The respondent Agustin Jocson alleges in his amended answer that his ownership over the land in question is intact, subject only to the obligations for taxes due and payable, and that the delinquent taxes for which said property was confiscated have already been paid. Without deciding whether such allegations are true, we hold that the petitioner should not be burdened with the task of determining whether said land has in fact been subsequently released by the Government. Besides, the point is immaterial, since in the case of *Montinola vs. Tuason and Locsin*, 35 Phil. 113, the judgment creditor in a foreclosure proceeding was allowed to collect his judgment by an ordinary execution, and the mortgagor, or his successors in interest, to redeem the property sold thereunder. Again, in *Hijos de I. de la Rama vs. Sajo*, 45 Phil. 703, cited in *Salomon and Lachica vs. Dantes*, 63 Phil. 522, it was pointed out that "the rule is well established that the creditor may waive whatever security he has and maintain a personal action, in the absence of statutory provisions."

Practical considerations further support the granting of the writ of mandamus prayed for by the petitioner. His judgment has long become final and executory. Notwithstanding the apparent solvency of the respondent Agustin Jocson, he has failed to pay the petitioner's judgment. If it be true that respondent is still the absolute owner of the mortgaged property, nothing can prevent him from offering it to the sheriff as one of the properties leviable under an ordinary execution, and by simply being present at the sale, he may direct the order in which said properties shall be sold. (Section 457 of the Code of Civil Procedure, now section 19 of rule 39 of the Rules of Court.)

There being no question that the judgment in the foreclosure action has long become final and executory, the petitioner is entitled as of right to the execution of said judgment (section 1, rule 39, Rules of Court; *Fiesta vs. Llorente*, 25 Phil. 554; *Lim vs. Singian and Soler*, 37 Phil. 817), and it accordingly becomes the legal duty of the respondent Judge to direct the issuance of the writ of execution sought by the petitioner.

The petition for a writ of mandamus is granted, with costs against the respondent Agustin Jocson. So ordered.

Diaz, Moran, Horrilleno, and Ozaeta, JJ., concur.

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