

JOSE DE BORJA, PETITIONER, VS. SERVILLANO PLATON AND FRANCISCO DE BORJA, RESPONDENTS.

G.R. No. 48080. August 31, 1942

Ponente: BOCOBO, J.

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BOCOBO, J.:

Petitioner seeks the setting aside of an order of preliminary attachment issued on November 6, 1940, and reiterated on January 13, 1941, by the respondent Judge of the Court of First Instance against petitioner's properties.

On August 12, 1936, petitioner brought a civil action in the Court of First Instance of Rizal against Hermogena Romero, Francisco de Borja, Josefa Tangco and Crisanto de Borja to annul a second sale by Francisco de Borja to Hermogena Romero, of a large estate known as the Hacienda Jalajala, and to recover damages in the amount of P25,000. On August 29, 1936, Francisco de Borja and his wife Josefa Tangco filed an answer with three counterclaims, and on September 29, 1936, they presented two more counterclaims. Trial began September 30, 1936. Under date of August 4, 1937, defendants Francisco de Borja, Josefa Tangco and Crisanto de Borja submitted their amended answer, consisting of a general denial, special defenses, and five counterclaims and cross-complaints. In these causes for counterclaim and cross-complaint, it was alleged that plaintiff, being a son of defendants Francisco de Borja and Josefa Tangco, had been entrusted with the administration of the extensive interests of his parents, but had been unfaithful to his trust. Said defendants, therefore, prayed, *inter alia*, that the spouses Borja and Tangco be declared owners of the portion of the Hacienda Jalajala in question; that plaintiff be required to render an accounting of the products of said hacienda that he had received and to pay said spouses at least P100,000 illegally retained by him; that plaintiff be ordered to account for the proceeds of rice and bran and to pay at least P700,000 unlawfully retained by him; that plaintiff be made to deliver P20,000 which he had collected from a debtor of said spouses; that plaintiff be likewise ordered to pay another sum of P9,034 collected by him from the same debtor; and that plaintiff be required to turn over to defendants Francisco de Borja and Josefa Tangco the amount of P40,000 collected by him as indemnity of an insurance policy on property belonging to said spouses.

On July 27, 1940, Francisco de Borja and his wife filed their petition for preliminary attachment to cover their third, fourth, and fifth grounds for cross-complaint, involving a total of P69,035. In said motion, the defendants Borja and wife stated that they did not include the first and second causes for cross-complaint because the visible property of plaintiff that could then be attached was only worth about P2,000. On August 21, 1940, plaintiff presented an amended answer, setting up a counterclaim against defendants Borja and wife in the sum of P99,175.46.

The order for preliminary attachment is questioned upon several grounds, among which are: (1) that no writ of attachment can be issued in favor of a defendant who presents a counterclaim; (2) and that defendants' affidavit was fatally defective.

On the first point, we believe a writ of 'preliminary attachment may be issued in favor of a defendant who sets up a counterclaim. For the purpose of the protection afforded by such attachment, it is immaterial whether the defendants Borja and wife simply presented a counterclaim or brought a separate civil action against Jose de Borja, plaintiff in the previous case and petitioner herein. To lay down a subtle distinction would be to sanction that formalism and that technicality which are discountenanced by the modern laws of procedure for the sake of speedy and substantial justice. In the present case we see no reason why the order of the trial court should be disturbed, this question being a matter within its discretion and we find no grave abuse of that discretion.

As to the second objection of petitioner, his counsel strenuously advances the theory that the affidavit attached to the petition for a writ of preliminary attachment was fatally defective because it failed to allege that "the amount due to the plaintiff is as much as the sum for which the order is granted above all legal counterclaims" as required in section 426, Code of Civil Procedure and section 3, Rule 59, Rules of Court. Petitioner contends that his counterclaim against that of Francisco de Borja and wife being P99,175.46 whereas the latter's counterclaim totalled only P69,035, the omission of the allegation referred to is a serious defect. The trial court found, however, that the counterclaims of Francisco de Borja and wife exceed those of the petitioner Jose de Borja. It should be borne in mind that the aggregate counterclaims of Francisco de Borja and wife amounted to P869,000, which exceeds petitioner's counterclaim by P769,000 in round figures. Moreover, as the trial court had before it the evidence adduced by both sides, the petition for a writ of preliminary attachment having been filed four years after the trial had begun, we presume that the lower court, having in mind such evidence, ordered the attachment accordingly.

The order appealed from is hereby affirmed, with costs against the petitioner. So ordered.

Yulo, C. J., Moran, Ozaeta, and Paras, JJ., concur.

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