

KUENZLE & STREIFF, PLAINTIFF AND APPELLANT, VS. JOSE TAN SUNCO ET AL., DEFENDANTS AND APPELLEES.

G.R. No. 5208. December 01, 1909

Ponente: MORELAND, J.

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MORELAND, J.:

This is an action to set aside four judgments rendered by a justice of the peace of the city of Manila upon the ground that they were procured by collusion and fraud, to the injury and damage of the plaintiff.

The court below, after hearing the evidence offered upon the trial, found against the plaintiff and rendered a judgment in favor of the defendant dismissing the plaintiff's complaint, with costs.

The plaintiff did not make a motion for a new trial in the court below and this court can not, therefore, look into the evidence but must confine itself to the facts stated in the opinion of the court below for the purpose of ascertaining whether or not the judgment of that court can be sustained.

It appears from the opinion of the court below that Tan Sunco was a surety for Chung Chu Sing for the payment by the latter of the purchase price of certain merchandise purchased by said Chung Chu Sing of Ed. A. Keller & Co.; that the time within which said merchandise was to be paid for under the terms of its purchase had expired long before said four judgments were obtained, and that the debt remained unpaid; that the total debt was composed of four invoices of varying amounts—P395.50, P450, P565, and P320.20; that an action had been commenced against the said debtor, Chung Chu Sing, by the present plaintiff for the recovery of the indebtedness due it; that shortly before judgment was secured in that action the said Tan Sunco began four separate actions against the said debtor upon the said invoices in the court of the justice of the peace of the city of Manila; that soon thereafter the said Sunco and the said debtor appeared before said court, and the said debtor then and there confessed judgment in favor of said Tan Sunco in each one of said actions, Tan Sunco thereby obtaining against the said debtor four separate judgments; that immediately upon the recovery of said judgments the plaintiff in those actions, Sunco, caused to be levied thereunder executions upon all of the property of said debtor, which property was not more than sufficient to pay the judgments under which the levies were made; that thereupon the action at bar was begun and the sales under said executions were enjoined pending the determination thereof. These are the admitted facts.

The plaintiff in this action contends that said four judgments ought to be set wholly aside on account of their having been obtained, as he claims, by collusion and fraud, because the debtor did not owe anything to Sunco at the time the four judgments were secured, basing that contention on the fact, which is admitted, that Sunco had not yet paid the sums for which he had become surety and in connection with which he obtained the judgments.

We think that article 1843 of the Civil Code is applicable to this case. In their purposes articles 1838 and 1843 are quite distinct, although in perfect harmony, the latter making more clearly effective the purpose of the former. Article 1838 provides for the enforcement of the rights of the surety against the debtor after he has paid the debt. Article 1843 provides for his protection before he has paid but after he has become liable to do so. The one gives

a right of action after payment, the other a protective remedy before payment. (Supreme court of Spain, March 22, 1901.) The one is a substantive right, the other of the nature of a preliminary remedy. The one gives a right of action which, without the provisions of the other, might be worthless. The remedy given in article 1843 purposes to obtain for the surety "relief from the burden of his suretyship or a guaranty to defend him against any proceedings of the creditor and from the danger of insolvency of the debtor." (Last paragraph of art. 1843.) Article 1838, speaking strictly, has no such purpose. When the surety's rights under this article become available, he is past the point where a preliminary protective remedy is of any value to him.

It being evident that the purpose of article 1843 is to give to the surety a remedy in anticipation of the payment of the debt, which debt, being due, he could be called upon to pay at any time, it remains only to say, in this connection, that the only procedure known under our present practice to enforce that right is by action. (Manresa, Civil Code, vol. 12, p. 320.) The defendant Sunco availed himself of that right against the debtor. The methods employed by him to realize his end were unusual but not of themselves fraudulent. We agree with the trial court that the evidence adduced is entirely insufficient to establish such fraud and collusion as would justify a decision setting aside the judgments assailed. (Arts. 1291, 1297, Civil Code; Peña vs. Mitchell, 9 Phil. Rep., 587; Jones vs. Brittan, 13 Fed. Cas., No. 7455; Oberly vs. Oberly, 190 Pa. St., 341; Caldwell vs. Fifield, 24 N. J. L., 150.) The facts stated in the opinion of the court below abundantly justify the conclusion.

But while the surety has the right to obtain as he did the judgments against the principal debtor, he ought not to be allowed to realize on said judgments to the point of actual collection of the same until he has satisfied or caused to be satisfied the obligation the payment of which he assures. Otherwise, a great opportunity for collusion and improper practices between the surety and his principal would be offered which might result to the injury and prejudice of the creditor who holds the claim against them.

The judgment of the court below is, therefore, affirmed, with costs against the appellant. But the said Sunco shall not execute said judgments against the property of the judgment debtor until he has paid the debt for which he stands surety. So ordered.

Arellano, C. J., Torres, Johnson, Carson, and Elliott, JJ., concur.

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