

**JOSEPHINE CRUZ MALOLOS REPRESENTED BY HER HEIRS
EMMANUEL, MARIA MARINELA AND MARIA MARJORIE, ALL
SURNAMED MALOLOS, PETITIONERS, VS. ASIA PACIFIC FINANCE
CORPORATION AND HONORABL...**

G.R. No. 55702. January 07, 1987

Ponente: PARAS, J.

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PARAS, J.:

This is a special civil action for certiorari and mandamus seeking: (a) to set aside and nullify the Resolution of Judge Jose P. Alejandro dated August 29, 1980, denying petitioner's Motion to Dismiss on the ground of non-survival of the money claim in Civil Case No. 125887 entitled, "ASIA PACIFIC FINANCE CORPORATION v. E. FRANCISCO LINERS, CO., INC., ELIAS A. FRANCISCO and JOSEPHINE CRUZ MALOLOS," pursuant to Sec. 21, Rule 3 of the Rules of Court, and (b) to command said Judge to dismiss aforesaid case insofar as defendant Malolos is concerned.

Petitioner Josephine Cruz Malolos (deceased) is represented by her heirs Emmanuel, Maria Marinela and Maria Marjorie, all surnamed Malolos.

Private respondent Asia Pacific Finance Corporation (herein referred to as APCOR) is a quasi-banking institution organized and existing under and by virtue of the laws of the Philippines and is partly engaged in the discounting of receivables of natural as well as juridical persons.

The facts of this case are as follows:

On April 16, 1979, APCOR purchased from E. Francisco Liners Company, Inc. (herein referred to as Francisco Liner) a postdated Far East Bank and Trust Company check numbered 214070 in the amount of P105,000.00 issued in the latter's favor by herein petitioner, Josephine Cruz Malolos. The check had a maturity date of May 30, 1979. On purchase, Francisco Liners executed a Deed of Assignment of said check and as payee, endorsed the same in favor of private respondent before getting the discounted proceeds.

When deposited on its maturity date, the aforesaid check was dishonored for the reason that petitioner's bank account had already been closed. Thereupon, APCOR demanded from Francisco Liners and also from petitioner, in her capacity as drawer of the check, the payment of said check, but the obligation remained unpaid.

As a result, on August 15, 1979, APCOR filed a complaint for sum of money with preliminary attachment docketed as Civil Case No. 125887 in the then CFI of Manila (now RTC) against E. Francisco Liners, Co., Inc., Elias A. Francisco (as president of Francisco Liners), and herein petitioner (in her capacity as drawer of said check). (Private Respondent's Memorandum, Rollo, pp. 83-84). In the complaint, private respondent (then plaintiff) prayed, among others, that a writ of preliminary attachment be issued against the properties of the defendants to serve as security for the satisfaction of any judgment that may be recovered therein (Complaint, Rollo, pp. 20-24).

On August 23, 1979, respondent Judge issued an Order of Attachment on the grounds:

"x x x that defendants were guilty of fraud in contracting the obligation and had removed or disposed of their property, or are about to do so, with intent to defraud their creditors, among whom is the plaintiff herein and that there is no tangible or valuable security held on to by the plaintiff for the collection of defendants' obligation, or for the enforcement of the claim sought to be enforced."

(ANNEX B, Rollo, p. 25) and thereafter a Writ of Preliminary Attachment was issued. By virtue thereof, the levy was annotated upon the residential property of petitioner at 2555 Taal Street, Singalong, Manila, which property is covered by Transfer Certificate of Title No. 129351 of the Registry of Deeds of Manila (ANNEX C, Rollo, pp. 26-27).

Josephine Cruz Malolos died on April 27, 1980, and her counsel, on July 10, 1980, filed a Motion to Dismiss the complaint as against her pursuant to Sec. 21, Rule 3 of the Rules of Court (ANNEX D, Rollo, pp. 28-29).

Private respondent opposed the aforementioned motion and argued that while it is admitted that the action against the late Josephine Cruz Malolos is one for recovery of money and being such it does not survive, the circumstances obtaining in the case place the same among the exceptions to Sec. 21, Rule 3 of the Rules of Court (ANNEX E, Rollo, pp. 30-31).

In a Resolution dated August 29, 1980, respondent Judge ruled in favor of private respondent and denied the motion to dismiss (ANNEX G, Rollo, p. 35).

Hence, this petition.

Without giving due course to the petition, the Court required respondents to comment (Rollo, p. 39) which order private respondent complied with on March 20, 1981 (Rollo, pp. 48-58). Thereafter, petitioners were required to file a Reply thereto (Rollo, p. 60) which pleading was filed on July 20, 1981 (Rollo, pp. 66-74).

Acting on the petition, the Court, on August 3, 1981, resolved (a) to give due course to the petition; (b) to consider respondent's comment as ANSWER; and (c) to require the parties to file their respective MEMORANDA (Rollo, p. 75). Private respondent filed its Memorandum on October 20, 1981. On the other hand petitioners whose counsel of record withdrew from the case (Rollo, p. 117) through their new counsel moved that they be allowed to adopt by reference as their Memorandum, their basic petition and their Reply-Comment already filed with this Court which motion was noted in the resolution of the Second Division of this Court dated November 15, 1982 (Rollo, p. 122).

On November 21, 1984, the case was considered submitted for deliberation (Rollo, p. 123).

The sole issue to be resolved in this case is whether or not an attachment levied on some properties of the defendant constitutes an exception to the general rule of non-survival of the money claim as provided for in Sec. 21, Rule 3 of the Rules of Court.

Petitioners' contention is that upon the death of Josephine Cruz Malolos on April 27, 1980, respondent Court ceased to have any jurisdiction over the subject matter of Civil Case No. 125887, the same being a money claim, in so far as Josephine Cruz Malolos is concerned, pursuant to Sec. 21, Rule 3 of the Rules of Court; that in not dismissing said Civil Case No. 125887, respondent judge not only acted without or in excess of jurisdiction, and with grave abuse of discretion but also neglected to perform an act which the law specifically enjoins him to do to the prejudice and damage of petitioners. (Rollo, pp. 4-5).

On the other hand, private respondent argues that Sec. 21, Rule 3 of the Rules of Court admits of exceptions and one of them is when an attachment has been levied on some of the properties of the defendant, on motion of the

plaintiff, to secure the payment of the latter's money claim in which case the pending action should not be dismissed but may be continued against the executor or administrator, invoking the ruling in the case of *Macondray Co., Inc. v. Dungao*, 11 SCRA 72, where it was held that:

"There seems to be no doubt that the action brought by the plaintiff corporation is for collection or recovery of money. The prayer of the complaint unmistakably appears to be for recovery or collection of sum of money. And although at the bottom of the promissory note sued upon and before the signature of the obligor there appears the following: 'The payment of this note is secured by the mortgage on personal property', yet it does not appear that the plaintiff sought to foreclose it, as the personal property mortgaged to secure the payment of the promissory note is not described in the complaint. The attachment levied on some properties of the defendant, on the plaintiff's motion, to secure payment of its money claim, might constitute an exception to the general rule on claims that do not survive as provided for in Section 21 of Rule 3, Rules of Court. But after the discharge of the attachment upon the filing of a bond by the surety company, the property attached becomes free from any specific lien and reverted to its previous condition." (underscoring supplied). (Private Respondent's Comment, Rollo, pp. 48, 55-56).

Private respondent insists that in above-cited case, although the complaint is for the collection of a sum of money, the nature of the same changed when a writ of attachment was issued against the properties of defendant; that by virtue of said attachment levy a lien was constituted over said property levied upon, and only upon the filing of a bond by a Surety Company will the attachment be discharged, rendering the property previously attached free from any specific lien. With the filing of the requisite bond, the attachment was discharged. On the other hand, in the instant case, no discharge of the attachment has as yet been made, thus, the case must be continued, this time against the executor or administrator — argues the private respondent.

The petition is impressed with merit.

There is no question that the action in the court below is for collection or recovery of money.

It is already a settled rule that an action for recovery of money or for collection of a debt is one that does not survive and upon the death of the defendant the case should be dismissed to be presented in the manner especially provided in the Rules of Court (*Villegas and Santos v. Zapanta and Zorilla*, 104 Phil. 973). This is explicitly provided in Sec. 21, Rule 3 of the Rules of Court which states that:

"SEC. 21. Where claim does not survive. — When the action is for recovery of money, debt or interest thereon, and the defendant dies before final judgment in the Court of First Instance, it shall be dismissed to be prosecuted in the manner especially provided in these rules."

Said provision of the Rules was in turn interpreted by the Supreme Court in *Dy v. Enage* (70 SCRA 117 [1976]) stating that "The language of Section 21 of Rule 3 is too clear in this respect as to require any interpretation or construction. It very explicitly says that 'when the action for recovery of money, debt or interest thereon, and the defendant dies before final judgment in the Court of First Instance, it shall be dismissed to be prosecuted in the manner specially provided by the rules,' meaning, Section 5 of Rule 86 and its related provisions."

Earlier, Secs. 119 and 700 of Act 190 (Code of Civil Procedure) from which this Rule was derived were interpreted by the Supreme Court in *Pabico v. Jaranilla, et al.* (60 Phil. 247, 251) to be mandatory in character and confers no jurisdiction upon the Court. (Moran, Comments on the Rules of Court, 1970 ed. p. 215).

The reason for the dismissal of the case is that upon the death of the defendant a testate or intestate proceeding shall be instituted in the proper court wherein all his creditors must appear and file their claims which shall be paid proportionately out of the property left by the deceased (1 Moran, Comments on the Rules of Court, 1979 ed., p. 219).

The purpose of the rule is to avoid useless duplicity of procedure — the ordinary action must be wiped out from the ordinary court (*Ignacio v. Pampanga Bus Co.*, May 23, 1963, 20 SCRA 126).

The case of *Macondray v. Dungao*, *supra*, cited by private respondent to support its position does not fall squarely with the case at bar.

In the above-cited case, the facts are as follows: (1) the promissory note executed by defendant *Dungao* represented the purchase price of the car and trucks which said defendant bought from *Macondray* on installment; (2) a writ of attachment was issued on August 16, 1949, but this was later on dissolved on September 21, 1949, when the defendant put up a surety bond; and (3) the promissory note sued upon in the cited case was secured by a mortgage on personal property and the proper action should have been a foreclosure of mortgage.

In the present case, the money claim arose out of a pure and simple debt, which as afore-mentioned, under the provision of Rule 3, Sec. 21 of the Rules of Court shall be dismissed and must be brought before the probate court (1 *Moran*, *Comments on the Rules of Court*, 1970 ed., pp. 215-216).

In the light of the foregoing considerations, the conclusion is inevitable that the trial court deviated from the procedure laid down by the above-mentioned provisions of the Rules. The fact that a writ attachment has been issued cannot provide an excuse for such deviation, as a writ of attachment is a remedy ancillary to the principal proceedings. (*Gruenberg v. Court of Appeals*, 138 SCRA 471 [1985]). Consequently, if it is mandatory, under Rule 3 Sec. 21 of the Rules of Court that the principal proceeding or action be dismissed for non-survival of the money claim, the purpose of the attachment which is to secure the outcome of the trial no longer exists and so with the reasons for the issuance of the writ in this case, insofar as the deceased debtor is concerned.

Corollary thereto, it has been held that a court order which violates the Rules constitutes grave abuse of discretion as it wrecks the orderly procedure prescribed for the settlement of claims against deceased persons designed to protect the interests of the creditors of the decedent. Allowing the private respondent to attach petitioners' properties for the benefit of her claim against the estate would give an undue advantage over other creditors against the estate. (*Gruenberg v. Court of Appeals*, *supra*) citing *Dy v. Enage*, *supra*). Therefore, under the same principle, a writ of attachment already issued in connection with a money claim which has to be dismissed because of the death of the defendant before final judgment cannot provide an exception to the general rule, and must accordingly be dissolved.

PREMISES CONSIDERED, (a) the Resolution of respondent Judge dated August 29, 1980 is hereby SET ASIDE; (b) the Writ of Mandamus is hereby issued commanding the incumbent Judge of the trial court involved to dismiss Civil Case No. 125887, but only insofar as Josephine Cruz Malolos' heirs are concerned, without prejudice to the filing of the claim in the estate proceedings of the deceased and (c) We hereby direct the Register of Property of Manila to cancel the Notice of Levy made on subject properties pursuant to an Order of Attachment issued in said Civil Case.

SO ORDERED.

Feria, (Chairman), Fernan, Alampay, and Gutierrez, Jr., JJ., concur.

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