

**DESTILERIA LIMTUACO & CO., INC., PETITIONER, VS.
INTERMEDIATE APPELLATE COURT, NICOLAS AND ESTRELLA
CRODUA, ELSIE CRODUA-CENIZA AND JOEL CENIZA, RESPONDENTS.**

G.R. No. 74369, January 29, 1988

Ponente: NARVASA, J.

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NARVASA, J.:

Involved in the instant appeal on certiorari is the validity of the conclusion of the Trial Court, sustained by the Appellate Court, that the use of the word "guarantee" in two (2) ostensible mortgage deeds suffices to construe the purported mortgages as contracts of guaranty with the concomitant benefit of excussion.[1] (ART. 2058-2060).

Jesus Crodua was appointed senior sales agent of Destileria Limtuaco & Co., Inc. for Samar and Leyte (and later, also of Cebu). The "Senior Salesman Agency Contract", dated April 4, 1980, required Jesus Crodua to put up a first mortgage or a surety bond to guarantee or assure faithful compliance with his duties and responsibilities thereunder in an amount of not less than P200,000.00.[2] The pertinent stipulation reads as follows:

"9. That to guarantee the faithful settlement of accounts of the Sales-Agent with the Company, as well as to answer for any loss, if any, of merchandise or property consigned to and under the custody of the Sales-Agent and to insure compliance with all the other obligations assumed by the Sales-Agent under and by virtue of this agreement, the Sales-Agent shall execute or cause to be executed in favor of the company a first mortgage for not less than P200,000.00 on real estate for estates acceptable to the Company not later than _____ or (a surety bond for not less than P_____). All previous real estate mortgages executed and surety bonds secured in favor of the company under the previous agency agreement dated _____ between the parties are deemed valid and subsisting and form a part of the security furnished by the Sales-Agent to the Company for the faithful compliance of his sales agency agreement with the company. The company can require the Sales-Agent to increase the amount of the surety bond or the real estate mortgage from time to time. Failure of the Sales-Agent to put up the required surety bond or real estate mortgage or to increase the sum shall automatically cancel this agency agreement."

In fulfillment of that requirement, and evidently at Jesus Crodua's request, two (2) separate deeds of first mortgage were executed by his relatives. The first was executed by Estrella Crodua, married to Nicolas Cordua, over real property covered by Transfer Certificate of Title No. 38649 of the Registry of Deeds for Cebu City;[3] the second, by Elsie Crodua-Ceniza, married to Joel Ceniza, over land belonging to her, covered by Tax Declaration No. 09015.[4]

Both deeds were entitled, "Deed of Real Estate Mortgage." Each deed referred to and quoted verbatim, the provision of the agency contract (par. 9) requiring Jesus Crodua to put up a first real estate mortgage or surety bond, and set out the mortgagors' willingness and desire -

" ** to execute in favor of Destileria Limtuaco & Co., Inc., a mortgage for ONE HUNDRED THOUSAND PESOS ** on ** (the land therein described) to guarantee the settlement of accounts of Jesus V. Crodua and the compliance by him of all his other obligations with Destileria Limtuaco & Co., Inc. **."

Each deed expressed the constitution by the mortgagors -

" ** in favor of Destileria Limtuaco & Co., Inc. (of) a first mortgage for ONE HUNDRED THOUSAND PESOS ** on ** (the land therein described), subject to the condition that if Jose V. Crodua settles all his accounts with Destileria Limtuaco & Co., Inc., answers for any loss, if any, of merchandise or property consigned to and under his custody, and complies with his obligations under the Agency Agreement, then ** (the) mortgage becomes null and void and of no effect whatsoever, otherwise, it remains in full force and effect and is subject to foreclosure according to law."

Each deed finally declared that the mortgage "shall subsist and continue to be in force as long as the Agency Agreement ** is in force, or is extended and amended", and that foreclosure thereof "shall be instituted in the proper courts of Quezon City and not elsewhere."

Subsequently, Destileria Limtuaco, hereafter simply Limtuaco, terminated Jesus Crodua's agency agreement, allegedly upon discovery of a shortage in his accounts in the sum of P170,380.58. To enforce payment of this liability, which Limtuaco claimed had not been satisfied by Jesus Crodua despite demands, the former filed In November, 1984 a complaint for foreclosure of real estate mortgage with the Regional Trial Court at Quezon City[5] against Jesus Crodua, and the mortgagors, Estrella and Nicolas Crodua.[6] The complaint was later amended to implead the other mortgagors, Elsie Crodua-Ceniza and her husband, Joel Ceniza, as additional defendants, and ask for the foreclosure of the property mortgaged by them to Limtuaco.[7]

Answers were in due course filed by the defendants-mortgagors. Limtuaco afterwards moved to drop Jesus Crodua as party defendant on the ground that he had left the country and was now residing abroad.[8] This the Court granted by Order dated August 1, 1985.[9]

On October 27, 1985 the defendants-mortgagors filed a motion to dismiss Limtuaco's complaint on the following grounds, to wit:

1)

the dropping of the principal debtor, Jesus Crodua, from the case resulted in the loss by Limtuaco of any cause of action against them;

2)

they were not liable under the Senior Salesman Agency Contract dated April 5, 1982 between Limtuaco and Jesus Crodua, this agreement being separate and distinct from their respective mortgage contracts dated February 24, 1982 and April 24, 1980; and

3)

they were entitled to the benefit of excussion since they were mere guarantors; hence the action against them was premature.[10]

The motion found merit in the eyes of the Trial Court which consequently dismissed the case by Order dated November 7, 1985. Notice of the order was served on Limtuaco on November 15, 1985.[11]

Five (5) days later, on November 20, 1985, Limtuaco filed a motion for reconsideration of the dismissal order. This was denied, and a copy of the resolution of denial dated January 2, 1986 was received by it on January 15, 1986.[12] On the day following, January 16, 1986, Limtuaco filed a second motion for reconsideration of the

dismissal order, which met the same fate as the first: it was denied by order of the Trial Court dated January 30, 1985 a copy of which Limtuaco received on February 12, 1986. Eight (8) days afterwards, or on February 20, 1986, Limtuaco filed a petition for certiorari with the Intermediate Appellate Court.

By judgment promulgated on April 18, 1986,[13] the Appellate Court denied Limtuaco's petition. It declared that the petition was defective in form and in substance apart from lacking in merit, but that there was no need to pass on the merits of the orders complained of, since other factors demonstrated the unavailability in the premises of the extraordinary writ of certiorari. The Court declared that the Trial Court had not gravely abused its discretion in issuing the orders complained of, these having been rendered only after hearing the parties and said orders having applied to the issues the precepts of law and jurisprudence the Court took to be in point; and if it had incurred in errors at all, these were errors of procedure or of judgment, not correctible by certiorari but only by appeal. The Court also pointed out that the order dismissing the complaint was a final one, hence appealable; since it was not appealed -- Limtuaco having opted to resort to the special civil action of certiorari, which cannot be a substitute for appeal -- the order became final and executory and was thus placed beyond the Appellate Court's power to review, reverse, modify or set aside.

The judgment of the Intermediate Appellate Court was timely appealed on certiorari to this Court by Limtuaco. Here, it seeks to induce persuasion as to the validity of the following propositions:

1)

Private respondents were liable as mortgagors not as guarantors. The provisions of their mortgage deeds make clear their intention to constitute mortgages over their real property. The term "guarantee" found in the deeds must be construed in the context of the real estate mortgage clearly intended by the parties, hence, regarded as synonymous to the word, "secure."

2)

The mortgages directly and immediately subjected the properties on which they were created to the burden of assuring fulfillment of the obligation meant to be secured (Dayrit vs. CA, 36 SCRA 548); and it was its (Limtuaco's) right, as mortgagee, to foreclose said mortgages and cause the sale of the encumbered properties to satisfy the secured outstanding indebtedness (Guanzon v. Argel, 33 SCRA 474).

It was indeed a patent error on the part of the Trial Court to hold the deeds of real estate mortgage as contracts of guaranty, giving to the mortgagors the benefit of excussion. A mortgage is clearly and completely different from a guaranty. According to Article 2047 of the Civil Code -

"By guaranty a person, called the guarantor, binds himself to the creditor to fulfill the obligation of the principal debtor in case the latter should fail to do so.

If a person binds himself solidarily with the principal debtor, the provisions of Section 4, Chapter 3, Title I of this Book shall be observed. (Re joint and solidary obligations: ARTS. 1207-1222) In such case the contract is called a suretyship." [14]

A real estate mortgage, on the other hand, according to the same Code, is a contract embodied in a public instrument recorded in the Registry of Property, by which the owner of an immovable (or an alienable real right imposed upon immovables) directly and immediately subjects it, whoever the possessor may be, to the fulfillment of the obligation for whose security it was constituted.[15] "It is a contract in which the debtor guarantees to the creditor the fulfillment of a principal obligation, subjecting for the faithful compliance therewith a real property in case of non-fulfillment of said obligation at the time stipulated." [16]

While both a contract of guaranty (or suretyship) and one of mortgage have as their object the assurance or guarantee of the performance of a particular principal obligation, in a contract of guaranty, no property is given for this purpose at all; reliance is solely placed on the solvency or credit of the guarantor or surety. In a mortgage, however, it is property, immovable or movable, that is specifically encumbered and subjected to that function of assuring or guaranteeing the satisfaction of that principal obligation.[17] It is the property, rather than the individual financial capacity of the guarantor or surety, that is chiefly relied upon to answer for or guarantee the payment of the debt. Indeed, the rule is that a third party creating a mortgage over his property to guarantee the obligation of a principal debtor, may not be held personally liable for the obligation, his liability being limited to the value of the property mortgaged. It is of the essence of contracts of mortgage that when the principal obligation becomes due, the things in which the pledge or mortgage consists may be alienated for the payment to the creditor.[18] The action or proceeding against the guarantor or surety is a personal one[19] and in personam.[20] That against the mortgagor is a real action,[21] as well as quasi in rem.[22]

Now, the deeds executed by Estrella and Nicolas Crodua, on the one hand, and by Elsie Crodua-Ceniza and her husband, on the other, are clearly deeds of mortgage. They are so entitled. They are embodied in public instruments and duly recorded in the Registry of Property. They were drawn up in response to the requirement in the agreement between Limtuaco and Jesus Crodua for the execution either of "a first mortgage" or a "surety bond" --- "to guarantee the faithful settlement of accounts of the Sales-Agent with the Company as well as to answer for any loss, if any, of merchandise or property consigned to and under the custody of the Sales-Agent and to insure compliance with all the other obligations assumed by the Sales-Agent under and by virtue of ** (said) agreement" -- the term "first mortgage " being used no less than three (3) times. The parties are denominated "mortgagors" and "mortgagees." They clearly state that the mortgagors were thereby constituting a first mortgage on their property to guarantee or secure Jesus Crodua's obligations. The mortgage was constituted over particularly described property, and was declared "subject to foreclosure according to law."

The Trial Court disregarded all these clear indications, features and characteristics of a real estate mortgage. Seizing instead upon the single word "guarantee" in the clause, "to guarantee the faithful settlement of accounts ** as well as to answer for any loss, if any, of merchandise or property ** and to insure faithful compliance with all other obligations ** " ; and ignoring, too, the terms "answer for" and "insure" found in the same clause --- as well as the obvious fact that the word is synonymous to "secure, assure, ensure, answer for, serve as warrant," and that indeed the Civil Code employs the word in the context of a mortgage or pledge: it says, in Article 2089, that where several things are given by way of mortgage or pledge, the parties may agree that "each one of them guarantees only a determinate portion of the credit" --- utilized that solitary word, "guarantee" as basis for declaring the deeds to be contracts of guaranty instead of mortgage, and construed them as granting to the mortgagors the benefit of excussion under Article 2058 of the Civil Code. In doing so, the Court not only ignored and disregarded, but even distorted the obvious meaning of language. This was utterly unjustified and unjustifiable. It was in the premises a whimsical, capricious, arbitrary act of judgment or exercise of discretion, an error of so serious a nature as to call for the extension of this Court's correcting hand.

There can thus be no doubt that from the substantive aspect, Limtuaco had every reason to complain against and seek negation of the Trial Court's order of dismissal of its complaint dated November 7, 1985. It is in the procedural aspect that Limtuaco's cause would seem to falter.

The order of November 7, 1985 was a final order, not an interlocutory or incidental one, within the meaning of Section 2, Rule 41 of the Rules of Court which specifies the judgments or orders which are subject to appeal. It finally disposed of the pending action, leaving nothing more to be done by the trial court with respect to the merits, thus putting an end to the litigation at said court's level.[23]

The obvious remedy against such a final order of a Regional Trial Court is an appeal in accordance with Rule 41 of the Rules of Court.[24] But instead of resorting to this ordinary remedy of appeal, Limtuaco's counsel availed of the extraordinary remedy of a special civil action of certiorari in the Intermediate Appellate Court, under Rule 65 of the Rules of Court. The choice was clearly wrong. The availability of the right of appeal obviously precluded recourse to the special civil action of certiorari. This is axiomatic. It is a proposition made plain by Section 1 of Rule 65 which lays down, as a condition for the filing of a certiorari petition that there be "no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law." In the case at bar, the remedy of appeal indisputably existed and could have been availed of. There has furthermore been no showing, or even an attempt to show, that appeal would not have been as adequate and efficacious a remedy, although not quite as speedy, as a special civil action of certiorari, a circumstance which might have excused the failure to appeal and render appropriate the resort to certiorari.[25] Clearly erroneous therefore, was the choice of remedy of Limtuaco's counsel to obtain a review and reversal of the Trial Court's Order of November 7, 1985.

Limtuaco's counsel also erred in filing a second motion for the reconsideration of the Order of November 7, 1985. Such a second motion is clearly proscribed by paragraph 4 of this Court's Interim Rules: "No party shall be allowed a second motion for reconsideration of a final order or judgment." [26] The time during which such an unauthorized second motion for reconsideration was pending, could not therefore be deducted from the 15-day period of appeal, unlike the period during which the first motion was pending.[27] It thus appears that the period of appeal lapsed, and the order sought to be appealed consequently became final and executory, during the time that the second motion for reconsideration was pending. It would seem that the remedy of appeal was lost to Limtuaco; and by established jurisprudence, it could not remedy the situation by substituting the special civil action of certiorari for the lost appeal.[28]

The case at bar may of course be resolved by simply applying the doctrine that the extraordinary remedy of certiorari cannot be resorted to as a substitute for the lapsed remedy of appeal. This, however, would result in the infliction of an injustice on a party by a judgment that evidently was rendered whimsically and capriciously, ignoring and disregarding uncontroverted facts and familiar legal principles without any valid cause whatsoever. Relief to that party would be foreclosed on account of its counsel's mistake in not taking account of the relatively new proscription of second motions for reconsideration, and in the choice of remedies for the vindication of his clients' rights. The mistake was occasioned no doubt by said counsel's overmastering desire to correct a clear and patent error and his perhaps overconfident expectation of bringing this about by laying the facts and the law before the court a second time. Certainly, counsel cannot be faulted for lack of diligence and zeal. He filed his first motion for reconsideration on November 20, 1985 on the 5th day after receiving a copy of the order dismissing his client's case. He filed his second motion for reconsideration on January 16, 1986, one day following his receipt of the order denying his first MR. At that time, he of course had up to the 26th of January to perfect an appeal. He went up to the Court of Appeals on certiorari on February 20, 1986, on the 8th day after receipt of the denial of his second motion for reconsideration. There is, too, no showing of any prejudice suffered by the Croduas by the mistaken invocation of remedies by Limtuaco's counsel. The delay from January 26, 1986 (when appeal could and should have been perfected by Limtuaco) to February 20, 1986 (when the certiorari action was filed) cannot be accorded any significance.

The peculiar circumstances of this case warrant, as we held in *Republic v. Court of Appeals*, 107 SCRA 504, 524, the "exercise once more of our exclusive prerogative to suspend our own rules or to exempt a particular case from its operation as in ** *Republic of the Philippines vs. Court of Appeals, et al.*, (83 SCRA 459, 478--480 [1978]), thus: '*** The Rules have been drafted with the primary objective of enhancing fair trials and expediting justice. As a corollary, if their applications and operation tend to subvert and defeat instead of promote and enhance it, their suspension is justified. ***.' "[29] And, as we stated in a fairly recent case[30] -

"We cannot just ignore petitioner's plea for a review of his case in this instance. There is not the slightest indication of malice on his part or of a desire to delay the proceedings and to transgress the rules on procedure. If at all, his was an honest mistake or miscalculation worsed by some fortuitous occurrence which we deem condonable under the circumstances. For we have, in many cases, granted relief where a stringent application of the requirement of timeliness of pleadings would have denied a litigant substantial justice and equity. Suffice it to note that the rules on technicality were promulgated to secure not to override substantial justice. (Gregorio vs. CA, 72 SCRA 120) As it should be in this case especially because the petition appears also to be impressed with merit."

WHEREFORE, the judgment of the Court of Appeals promulgated on April 18, 1986 and the Order of the Trial Court dated November 7, 1985 are set aside. The petitioner's action for foreclosure of mortgage against the private respondents, docketed as Civil Case No. Q-44423, is reinstated and the Regional Trial Court at Quezon City now having jurisdiction over the action is ordered to proceed therewith and decide it in due course, with all deliberate dispatch. Costs against private respondents. This judgment is immediately executory and no extension of time to file a motion for reconsideration thereof will be entertained.

Teehankee, C.J., Cruz, Paras,[*] and Gancayco, JJ., concur.

[1] Arts. 2058-2060, Civil Code of the Philippines

[2] Rollo, pp. 20, 31-36

[3] Id., pp. 20-21, 58, 61

[4] Id., pp. 28, 78, 81

[5] Docketed as Civil Case No. Q-44423; Rollo, p. 50

[6] See footnote 2, *supra*

[7] Rollo, p. 64

[8] Id., p. 5; SEE Sec. 2 (c), Rule 4 in relation to Sec. 17, Rule 14, and Sec. 18, Rule 17, of the Rules of Court

[9] Id., p. 55

[10] Id., pp. 56-63

[11] Id., pp. 24-25

[12] Id., p. 6

[13] Purisma, J., ponente; Griño-Aquino, Racela, Jr. and Imperial, JJ., concurring

[14] Italics supplied

[15] Arts. 2124, 2125, 2126. Note that Art. 2125 states that "If the instrument is not recorded, the mortgage is nevertheless binding between the parties."

[16] Paras, E. L., Civil Code of the Phils., Anno., 10th ed., Vol. v, p. 852, citing 12 Manresa, p. 460

[17] The Civil Code (last par., ART. 2089) employs the word, guarantee, in the context of a mortgage or pledge in this wise: "From these provisions (re indivisibility of a mortgage) is excepted the case in which, there being several things given in mortgage or pledge, each one of them guarantees only a determinate portion of the credit."

[18] ART. 2087, Civil Code

[19] See *de la Cruz v. Seminary of Manila*, 18 Phil. 330

[20] See *Grey Alba v. de la Cruz*, 17 Phil. 49, 61

[21] Sec. 2 [a], Rule 4, Rules of Court

[22] *Banco Espanol-Filipino v. Palanca*, 37 Phil. 921, 928

[23] SEE cases collated in *Moran*, Comments on the Rules, 1979 ed., Vol. 2, p. 388

[24] As amended by Section 39 of the Judiciary Reorganization Act of 1980 (Batas Pambansa Blg. 129), effective August 14, 1981, and the Interim Rules promulgated by this Court in implementation of said Act (Secs. 16, 18-20).

[25] SEE *Moran*, Comments on the Rules, 1980 ed., Vol. 3, pp. 177-178 and cases therein collected

[26] NOTE, HOWEVER, that Section 4, Rule 37 of the Rules provides that, "A second motion for new trial based on a ground not existing nor available when the first motion was made, may be filed within the time herein provided excluding the time during which the first motion had been pending."

[27] SEE Sec. 3, Rule 41, Rules of Court.

[28] SEE cases collated in *Moran*, op. cit., p. 178, footnote 4

[29] Citing also *de las Alas v. C.A.*, 83 SCRA 200-216, in turn citing *Gregorio v. C.A.*, 72 SCRA 120.

[30] *Jovencio Lagunzad v. C.A. and Province of Leyte*, G.R. No. 52007, Sept. 24, 1987, per Sarmiento, J.; SEE, also, *Peo. v. Tamani*, 55 SCRA 153, 157; *A-One Feeds, Inc. v. C.A.*, 100 SCRA 590, 594

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