

BANK OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. GREGOEIO YULO, DEFENDANT AND APPELLANT.*G. R. No. 9358. September 24, 1915*

Ponente: JOHNSON, J.

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On the 7th of October, 1912, the plaintiff filed its complaint in the Court of First Instance of the Province of Iloilo, for the purpose of recovering of the defendant the sum of P43,212.95, together with interest at 8 per cent, and P2,000 as costs. The plaintiff also alleged that, to secure the payment of said sum, the defendant, on the 26th of June, 1907, had executed and delivered a mortgage upon certain property particularly described therein, and prayed for a judgment for the amount above stated. To the petition of the plaintiff the defendant filed a general denial.

Upon the issue thus presented, the cause was brought on for trial. After hearing the evidence, the Honorable James S. Powell, judge, rendered a judgment in favor of the plaintiff and against the defendant for the sum of P41,275.18 with interest, from the 21st of January, 1913, at 8 per cent until paid and for the further sum of P2,000 as attorney's fees, as provided in said mortgage, and costs. The lower court further ordered "that the said sums be paid into this court by the defendant on or before the first day of the next term of this court immediately succeeding this January term, 1913, said principal and interest and costs, and, in default of such payment, the land and other improvements named in said mortgage will be sold to realize the amount due on said mortgage, with the costs." From that judgment the defendant appealed to this court and made the following assignments of error: "(1.) The court erred in not ordering the sale of the various properties for the aliquot parts of the debt as provided for in the mortgage. (2.) The court erred in rendering judgment against the defendant for the fees of counsel for the plaintiff."

In support of the first assignment of error, the appellant cites article 1860 of the Civil Code. In reply to that argument, the appellee calls our attention to sections 256 and 257 of the Code of Procedure in Civil Actions, as well as the decisions of this court in the cases of Banco Español-Filipino vs. Donaldson Sim & Co. (5 Phil. Rep., 418) and Yangco vs. Cruz Herrera (11 Phil. Rep., 402). In the case of Banco Español-Filipino vs. Donaldson Sim & Co. this court said, speaking through its Chief Justice, "the sale of the pledged articles should be had in accordance with the provisions of the present Code of Civil Procedure, and not in accordance with those of the code in force at the time the contract was made."

The present case is even stronger than that, for the reason that the contract in the present case was made after the adoption of the new Code of Procedure in Civil Actions. The doctrine announced in the case of Banco Español-Filipino vs. Donaldson Sim & Co. is further confirmed by the case of Yangco vs. Cruz Herrera *supra*. In that case this court said, speaking through Justice Tracey, "Even though a clause be inserted in a mortgage fixing a tipo or upset price to become operative in the event of foreclosure, nevertheless, the sale must take place and the property must be awarded to the highest bidder. Parties cannot, by agreement, contravene the statutes and interfere with the lawful procedure of the courts." See also Warner, Barnes & Co. vs. Jaucian, 13 Phil. Rep., 4.

It would seem unnecessary to cite the foregoing decisions against the contention of the appellant for the reason that paragraph 7 of the mortgage expressly provides that, even though the mortgage contains an "upset price," the defendant expressly gave his consent to have the property sold in accordance with the provisions of the Code of Procedure in Civil Actions.

We find no reason for reversing or modifying the decision of the lower court, based upon the first assignment of error. With-reference to the second assignment of error, that the lower court should not have imposed a judgment upon the defendant for P2,000 as attorney's fees, it may be said, that the mortgage contains a provision for the payment of P2,000, in case the plaintiff is compelled to resort to the courts to recover the amount due on said mortgage, "por gastos y costas." In view of that provision, we are of the opinion that it was only intended that the plaintiff should recover of the defendant, in case an action was brought for the foreclosure of said mortgage, his costs and expenses necessarily incurred in the foreclosure of the mortgage. We do not believe that it was an absolute promise to pay P2,000 as attorney's fees. The mortgage does not contain a stipulation to that effect. We are of the opinion, and so hold, that the purpose of said clause in the mortgage was simply to permit the plaintiff to recover his expenses and costs, in case an action was brought. There is no proof in the record to show what were the expenses incurred by virtue of the present action by the plaintiff. In our opinion, therefore, that part of the judgment of the lower court should be modified, and the plaintiff should be permitted to recover, in addition to the sum for which judgment was rendered by the lower court, his costs only.

With that modification, the judgment of the lower court is hereby affirmed. So ordered.

Arellano, C. J., Torres, Carson, Trent, and Araullo, JJ., concur.

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