

MANUEL D. MEDIDA, DEPUTY SHERIFF OF THE PROVINCE OF CEBU, CITY SAVINGS BANK (FORMERLY CEBU CITY SAVINGS AND LOAN ASSOCIATION, INC.) AND TEOTIMO ABELLANA, PETITIONERS, VS. COURT ...

G.R. No. 98334. May 08, 1992

Ponente: REGALADO, J.

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REGALADO, J.:

The core issue in this case is whether or not a mortgagor, whose property has been extrajudicially foreclosed and sold at the corresponding foreclosure sale, may validly execute a mortgage contract over the same property in favor of a third party during the period of redemption.

The present appeal by certiorari assails the decision[1] of respondent Court of Appeals in CA-G.R. CV No. 12678 where it answered the question posed by the foregoing issue in the negative and modified the decision[2] of the then Court of First Instance of Cebu in Civil Case No. R-18616 wherein the validity of said subsequent mortgage was assumed and the case was otherwise disposed of on other grounds.

The facts which gave rise to the institution of the aforesaid civil case in the trial court, as found by respondent Court of Appeals, are as follows:

"On October 10, 1974 plaintiff spouses, alarmed of losing their right of redemption over lot 4731 of the Cebu City Cadastre and embraced under TCT No. 14272 from Mr. Juan Gandioncho, purchaser of the aforesaid lot at the foreclosure sale of the previous mortgage in favor of Cebu City Development Bank, went to Teotimo Abellana, president of defendant Association, to obtain a loan of P30,000.00. Prior thereto or on October 3, 1974, their son Teofredo Dolino filed a similar loan application for Twenty-Five Thousand (P25,000.00) Pesos with lot No. 4731 offered as security for the Thirty Thousand (P30,000.00) Pesos loan from defendant association. Subsequently, they executed a promissory note in favor of defendant association. Both documents indicated that the principal obligation is for Thirty Thousand (P30,000.00) Pesos payable in one year with interest at twelve (12%) percent per annum.

"When the loan became due and demandable without plaintiff paying the same, defendant association caused the extrajudicial foreclosure of the mortgage on March 16, 1976. After the posting and publication requirements were complied with, the land was sold at public auction on April 19, 1976 to defendant association being the highest bidder. The certificate of sale was issued on April 20, 1976 and registered on May 10, 1976 with the Register of Deeds of Cebu.

"On May 24, 1971 (sic, 1977), no redemption having been effected by plaintiff, TCT No. 14272 was cancelled and in lieu thereof TCT No. 68041 was issued in the name of defendant association."[3]

x x x

On October 18, 1979, private respondents filed the aforestated Civil Case No. R-18616 in the court a quo for the annulment of the sale at public auction conducted on April 19, 1976, as well as the corresponding certificate of

sale issued pursuant thereto.

In their complaint, private respondents, as plaintiffs therein, assailed the validity of the extrajudicial foreclosure sale of their property, claiming that the same was held in violation of Act No. 3135, as amended, and prayed, inter alia, for the cancellation of Transfer Certificate of Title No. 68041 issued in favor of therein defendant City Savings and Loan Association, Inc., now known as City Savings Bank and one of the petitioners herein.

In its answer, the defendant association therein denied the material allegations of the complaint and averred, among others, that the present private respondent spouses may still avail of their right of redemption over the land in question.

On January 12, 1983, after trial on the merits, the court below rendered judgment upholding the validity of the loan and the real estate mortgage, but annulling the extrajudicial foreclosure sale inasmuch as the same failed to comply with the notice requirements in Act No. 3135, as amended, under the following dispositive part:

"WHEREFORE, the foregoing premises considered and upon the view taken by the Court of this case, judgment is hereby rendered, as follows:

1. Declaring ineffective the extrajudicial foreclosure of the mortgage over Lot No. 4731 of the Cadastral Survey of Cebu;
2. Ordering the cancellation of Transfer Certificate of Title No. 68041 of the Registry of Deeds of the City of Cebu in the name of defendant Cebu City Savings and Loan Association, Inc. and the corresponding issuance of a new transfer certificate to contain all the annotations made in TCT No. 14272 of the plaintiffs Pascuala Sabellano, married to Andres Dolino;
3. Ordering the plaintiffs aforementioned to pay the defendant Cebu City Savings and Loan Association, Inc. the unpaid balance of the loan, plus interest; and reimbursing said defendant the value of any necessary and useful expenditures on the property after deducting any income derived by said defendant from the property.

For this purpose, defendant Association is given 15 days from receipt hereof within which to submit its statement of the amount due it from the plaintiffs Dolino, with notice to them. The payment to be made by the plaintiffs shall be within ninety (90) days from their receipt of the order approving the amount due the defendant Cebu City Savings and Loan Association, Inc.

No award of damages or costs to either party.

SO ORDERED."[4]

Not satisfied therewith, herein private respondents interposed a partial appeal to respondent court with respect to the second and third paragraphs of the aforequoted decretal portion, contending that the lower court erred in (1) declaring that the mortgage executed by the therein plaintiff spouses Dolino is valid; (2) permitting therein Cebu City Savings and Loan Association, Inc. to collect interest after the same foreclosure proceedings and auction sale which are null and void from the beginning; (3) not ordering the forfeiture of the capital or balance of the loan with usurious interest; and (4) not sentencing therein defendant to pay damages and attorney's fees to plaintiffs.[5]

On September 28, 1990, respondent Court of Appeals promulgated its decision modifying the decision of the lower court, with this adjudication:

"WHEREFORE, PREMISES CONSIDERED, the decision appealed from is hereby MODIFIED declaring as void and ineffective the real estate mortgage executed by plaintiffs in favor of defendant association. With this modification, the decision is AFFIRMED in other respects."[6]

Herein petitioners then filed a motion for reconsideration which was denied by respondent court in its resolution

dated March 5, 1991, hence the present petition which, in synthesis, postulates that respondent court erred in declaring the real estate mortgage void, and also impugns the judgment of the trial court declaring ineffective the extrajudicial foreclosure of said mortgage and ordering the cancellation of Transfer Certificate of Title No. 68041 issued in favor of the predecessor of petitioner bank.[7]

The first submission assailing the judgment of respondent Court of Appeals is meritorious.

Said respondent court declared the real estate mortgage in question null and void for the reason that the mortgagor spouses, at the time when the said mortgage was executed, were no longer the owners of the lot, having supposedly lost the same when the lot was sold to a purchaser in the foreclosure sale under the prior mortgage. This holding cannot be sustained.

Preliminarily, the issue of ownership of the mortgaged property was never alleged in the complaint nor was the same raised during the trial, hence that issue should not have been taken cognizance of by the Court of Appeals. An issue which was neither averred in the complaint nor ventilated during the trial in the court below cannot be raised for the first time on appeal as it would be offensive to the basic rule of fair play, justice and due process.[8]

Nonetheless, since respondent Court took cognizance thereof and, in fact, anchored its modificatory judgment on its ratiocination of that issue, we are inclined to liberalize the rule so that we can in turn pass upon the correctness of its conclusion. We may consider such procedure as analogous to the rule that an unassigned error closely related to an error properly assigned, or upon which the determination of the question properly assigned is dependent, may be considered by an appellate court.[9] We adopt this approach since, after all, both lower courts agreed upon the invalidity of the extrajudicial foreclosure but differed only on the matter of the validity of the real estate mortgage upon which the extrajudicial foreclosure was based.

In arriving at its conclusion, respondent court placed full reliance on what obviously is an obiter dictum laid down in the course of the disquisition in *Dizon vs. Gaborro, et al.* which we shall analyze.[10] For, as explicitly stated therein by the Court, "(t)he basic issue to be resolved in this case is whether the 'Deed of Sale with Assumption of Mortgage' and the 'Option to Purchase Real Estate,' two instruments executed by and between petitioner Jose P. Dizon and Alfredo G. Gaborro (defendant below) on the same day, October 6, 1959, constitute in truth and in fact an absolute sale of the three parcels of land therein described or merely an equitable mortgage or conveyance thereof by way of security for reimbursement or repayment by petitioner Jose P. Dizon of any and all sums which may have been paid to the Development Bank of the Philippines and the Philippine National Bank by Alfredo G. Gaborro x x x." Said documents were executed by the parties and the payments were made by Gaborro for the debt of Dizon to said banks after the Development Bank of the Philippines had foreclosed the mortgage executed by Dizon and during the period of redemption after the foreclosure sale of the mortgaged property to said creditor bank.

The trial court held that the true agreement between the parties therein was that Gaborro would assume and pay the indebtedness of Dizon to the banks and, in consideration thereof, Gaborro was given the possession and enjoyment of the properties in question until Dizon shall have reimbursed him for the amount paid to the creditor banks. Accordingly, the trial court ordered the reformation of the documents to the extent indicated and such particular relief was affirmed by the Court of Appeals. This Court held that the agreement between the parties is one of those innominate contracts under Article 1307 of the Civil Code whereby the parties agreed "to give and to do" certain rights and obligations, but partaking of the nature of antichresis.

Hence, on appeal to this Court, the judgment of the Court of Appeals in that case was affirmed but with the following pronouncements:

"The two instruments sought to be reformed in this case appear to stipulate rights and obligations between the

parties thereto pertaining to and involving parcels of land that had already been foreclosed and sold extrajudicially, and purchased by the mortgage creditor, a third party. It becomes, therefore, necessary, to determine the legality of said rights and obligations arising from the foreclosure and sale proceedings not only between the two contracting parties to the instruments executed between them but also in so far as the agreement affects the rights of the third party, the purchaser Bank.

x x x

"Under the Revised Rules of Court, Rule 39, Section 33, the judgment debtor remains in possession of the property foreclosed and sold, during the period of redemption. If the judgment debtor is in possession of the property sold, he is entitled to retain it, and receive the fruits, the purchaser not being entitled to such possession. (Riosa vs. Verzosa, 26 Phil. 86; Velasco vs. Rosenberg's Inc., 32 Phil. 72; Pabico vs. Pauco, 43 Phil. 572; Power vs. PNB, 54 Phil. 54; Gorospe vs. Gochangco, L-12735, Oct. 30, 1959).

x x x

"Upon foreclosure and sale, the purchaser is entitled to a certificate of sale executed by the sheriff. (Section 27, Revised Rules of Court). After the termination of the period of redemption and no redemption having been made, the purchaser is entitled to a deed of conveyance and to the possession of the properties. (Section 35, Revised Rules of Court). The weight of authority is to the effect that the purchaser of land sold at public auction under a writ of execution has only an inchoate right to the property, subject to be defeated and terminated within the period of 12 months from the date of sale, by a redemption on the part of the owner. Therefore, the judgment debtor in possession of the property is entitled to remain therein during the period for redemption. (Riosa vs. Verzosa, 26 Phil. 86, 89; Gonzales vs. Calimbas, 51 Phil. 355).

"In the case before Us, after the extrajudicial foreclosure and sale of his properties, petitioner Dizon retained the right to redeem the lands, the possession, use and enjoyment of the same during the period of redemption. And these are the only rights that Dizon could legally transfer, cede and convey unto respondent Gaborro under the instrument captioned Deed of Sale with Assumption of Mortgage (Exh. A-Stipulation), likewise the same rights that said respondent could acquire in consideration of the latter's promise to pay and assume the loan of petitioner Dizon with DBP and PNB.

"Such an instrument cannot be legally considered a real and unconditional sale of the parcels of land, firstly, because there was absolutely no money consideration therefor, as admittedly stipulated, the sum of P131,831.91 mentioned in the document as the consideration 'receipt of which was acknowledged' was not actually paid; and, secondly, because the properties had already been previously sold by the sheriff at the foreclosure sale, thereby divesting the petitioner of his full right as owner thereof to dispose and sell the lands." (Emphasis ours.)

It was apparently the second reason stated by the Court in said case which was relied upon by respondent court in the present case on which to premise its conclusion. Yet, as demonstrated by the relevant excerpts above quoted, not only was that obiter therein unnecessary since evidently no sale was concluded, but even inaccurate, if not inconsistent, when considered in the context of the discussion in its entirety. If, as admitted, the purchaser at the foreclosure sale merely acquired an inchoate right to the property which could ripen into ownership only upon the lapse of the redemption period without his credit having been discharged, it is illogical to hold that during that same period of twelve months the mortgagor was "divested" of his ownership, since the absurd result would be that the land will consequently be without an owner although it remains registered in the name of the mortgagor.

That is why the discussion in said case carefully and felicitously states that what is divested from the mortgagor is only his "full right as owner thereof to dispose (of) and sell the lands," in effect, merely clarifying that the mortgagor does not have the unconditional power to absolutely sell the land since the same is encumbered by a lien of a third person which, if unsatisfied, could result in a consolidation of ownership in the lienholder but only

after the lapse of the period of redemption. Even on that score, it may plausibly be argued that what is delimited is not the mortgagor's *jus disponendi*, as an attribute of ownership, but merely the rights conferred by such act of disposal which may correspondingly be restricted.

At any rate, even the foregoing considerations and arguments would have no application in the case at bar and need not here be resolved since what is presently involved is a mortgage, not a sale, to petitioner bank. Such mortgage does not involve a transfer, cession or conveyance of the property but only constitutes a lien thereon. There is no obstacle to the legal creation of such a lien even after the auction sale of the property but during the redemption period, since no distinction is made between a mortgage constituted over the property before or after the auction sale thereof.

Thus, a redemptioner is defined as a creditor having a lien by attachment, judgment or mortgage on the property sold, or on some part thereof, subsequent to the judgment under which the property was sold.[11] Of course, while in extrajudicial foreclosure the sale contemplated is not under a judgment but the proceeding pursuant to which the mortgaged property was sold a subsequent mortgage could nevertheless be legally constituted thereafter with the subsequent mortgagee becoming and acquiring the rights of a redemptioner, aside from his right against the mortgagor.

In either case, what bears attention is that since the mortgagor remains as the absolute owner of the property during the redemption period and has the free disposal of his property, there would be compliance with the requisites of Article 2085 of the Civil Code for the constitution of another mortgage on the property. To hold otherwise would create the inequitable situation wherein the mortgagor would be deprived of the opportunity, which may be his last recourse, to raise funds wherewith to timely redeem his property through another mortgage thereon.

Coming back to the present controversy, it is undisputed that the real estate mortgage in favor of petitioner bank was executed by respondent spouses during the period of redemption. We reiterate that during said period it cannot be said that the mortgagor is no longer the owner of the foreclosed property since the rule up to now is that the right of a purchaser at a foreclosure sale is merely inchoate until after the period of redemption has expired without the right being exercised.[12] The title to land sold under mortgage foreclosure remains in the mortgagor or his grantee until the expiration of the redemption period and conveyance by the master's deed.[13] To repeat, the rule has always been that it is only upon the expiration of the redemption period, without the judgment debtor having made use of his right of redemption, that the ownership of the land sold becomes consolidated in the purchaser.[14]

Parenthetically, therefore, what actually is effected where redemption is seasonably exercised by the judgment or mortgage debtor is not the recovery of ownership of his land, which ownership he never lost, but the elimination from his title thereto of the lien created by the levy on attachment or judgment or the registration of a mortgage thereon. The American rule is similarly to the effect that the redemption of property sold under a foreclosure sale defeats the inchoate right of the purchaser and restores the property to the same condition as if no sale had been attempted. Further, it does not give to the mortgagor a new title, but merely restores to him the title freed of the encumbrance of the lien foreclosed.[15]

We cannot rule on the complaint of petitioners that the trial court erred in declaring ineffective the extrajudicial foreclosure and the sale of the property to petitioner bank. The court below spelled out at length in its decision the facts which it considered as violative of the provisions of Act No. 3135, as amended, by reason of which it nullified the extrajudicial foreclosure proceeding and its effects. Such findings and ruling of the trial court are already final and binding on petitioners and can no longer be modified, petitioners having failed to appeal

therefrom.

An appellee who has not himself appealed cannot obtain from the appellate court any affirmative relief other than the ones granted in the decision of the court below.[16] He cannot impugn the correctness of a judgment not appealed from by him. He cannot assign such errors as are designed to have the judgment modified. All that said appellee can do is to make a counter-assignment of errors or to argue on issues raised at the trial only for the purpose of sustaining the judgment in his favor, even on grounds not included in the decision of the court a quo nor raised in the appellant's assignment of errors or arguments.[17]

WHEREFORE, the decision of respondent Court of Appeals, insofar as it modifies the judgment of the trial court, is REVERSED and SET ASIDE. The judgment of said trial court in Civil Case No. R-18616, dated January 12, 1983, is hereby REINSTATED.

SO ORDERED.

Melencio-Herrera, (Chairman), Paras, Padilla, and Nocon, JJ., concur.

[1] Justice Manuel C. Herrera, ponente; Justices Eduardo R. Bengson and Jainal D. Rasul, concurring.

[2] Per Judge Valeriano P. Tomol, Jr., presiding over Branch I.

[3] Rollo, 61.

[4] Ibid., 57-58.

[5] Ibid., 63.

[6] Ibid., 65.

[7] Ibid., 4-6.

[8] Vencilao, et al. vs. Vano, et al., 182 SCRA 491 (1990); Gevero, et al., vs. Intermediate Appellate Court, et al., 189 SCRA 201 (1990).

[9] Philippine Commercial and Industrial Bank vs. Court of Appeals, et al., 159 SCRA 24 (1988); Roman Catholic Archbishop of Manila, et al. vs. Court of Appeals, et al., 198 SCRA 300 (1991).

[10] 83 SCRA 688 (1978).

[11] Sec. 29 (b), Rule 39, Rules of Court.

[12] De Castro vs. Intermediate Appellate Court, et al., 165 SCRA 654 (1988).

[13] Kling vs. Ghilarducci, 3 Ill. 2d 454, 121 NE2d 752, 46 ALR 2d 1189.

[14] Mateo vs. Court of Appeals, et al., 99 Phil. 1042 (1956).

[15] 55 Am. Jur. 2d, Mortgages 781.

[16] Alba vs. Santander, et al., 160 SCRA 8 (1988).

[17] Aparri vs. Court of Appeals, et al., 13 SCRA 611 (1965); Carbonel vs. Court of Appeals, et al., 147 SCRA 565 (1987); Dizon, Jr. vs. National Labor Relations Commission, et al., 181 SCRA 472 (1990).

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