

**ELEAZAR V. ADLAWAN AND ELENA S. ADLAWAN, PETITIONERS, VS.
HON. JUDGE RAMON AM. TORRES, AS PRESIDING JUDGE OF BRANCH
6, REGIONAL TRIAL COURT CEBU CITY, ABOITIZ & COMPANY,
INC. AN...**

G.R. Nos. 65957-58. July 05, 1994

Ponente: QUIASON, J.

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QUIASON, J.:

This is a petition for certiorari and mandamus with preliminary injunction or restraining order to nullify: (1) the Order dated September 14, 1983 of respondent Judge Ramon Am. Torres of the Regional Trial Court, Branch 6, Cebu City, in Civil Case No. CEB-1185 and the Order dated September 26, 1983 of Judge Emilio A. Jacinto of Branch 23 of the same court in Civil Case No. CEB-1186, which granted the motion for the issuance of writs of preliminary attachment for the seizure of the property of petitioners by respondent Provincial Sheriffs; and (2) the Order dated December 12, 1983 of respondent Judge Ramon Am. Torres in the consolidated cases, Civil Case No. CEB-1185 and Civil Case No. CEB-1186.

I

In a complaint dated April 24, 1982 filed with the Court of First Instance of Cebu, now Regional Trial Court, (Civil Case No. R-21761), respondent Aboitiz and Company, Inc. (Aboitiz) sought to collect from petitioners a sum of money representing payments for: (1) the unpaid amortizations of a loan; (2) technical and managerial services rendered; and (3) the unpaid installments of the equipment provided by respondent Aboitiz to petitioners (Rollo, p. 37).

Acting on the ex parte application for attachment, the Executive Judge of the Court of First Instance of Cebu, issued on May 14, 1982, an order directing the issuance of the writ of preliminary attachment against the property of petitioners upon the filing by respondent Aboitiz of an attachment bond.

Subsequently, the case was raffled to Branch 11 of the Court of First Instance of Cebu, which issued a writ of attachment addressed to the Provincial Sheriffs of Cebu and the City Sheriff of Davao City. It was the Sheriff of Davao City who enforced the writ of attachment, resulting in the seizure of heavy construction equipment, motor vehicle spare parts, and other personal property with the aggregate value of P15,000,000.00. The said court also granted the motion of respondent Aboitiz to take possession and custody of the attached property of petitioners and ordered the Provincial Sheriff of Davao to deliver the property to respondent Aboitiz.

Petitioners moved for a bill of particulars and to set aside the ex parte writ of attachment. Finding merit in the motion to set aside the writ, Branch 11 ordered on July 6, 1982 the lifting of the writ and, consequently, the discharge of the property levied upon.

Respondent Aboitiz filed an urgent ex parte motion, praying for the stay of the July 6, 1982 Order for a period of

15 days for it to be able to appeal the order. The motion was favorably acted upon.

However, on July 13, 1982, respondent Aboitiz filed a notice of dismissal of its complaint in accordance with Section 1, Rule 17 of the Revised Rules of Court. Consequently, Branch 11 issued an order confirming the notice of dismissal, emphasizing that all orders of the court issued prior to the filing of said notice of dismissal had been rendered *functus officio*, and considering all pending incidents in the case as moot and academic.

Petitioner Eleazar Adlawan filed a motion praying that the July 6, 1982 Order be implemented and enforced. On December 20, however, Branch 11 denied the motion on account of the filing by respondent Aboitiz before Branch 16 of the Court of First Instance of Cebu in Lapu-lapu City of an action for delivery of personal property (Civil Case No. 619-L), and the filing by petitioner Eleazar Adlawan before Branch 10 of the same court of an action for damages in connection with the seizure of his property under the writ of attachment.

In the replevin suit, Branch 16 ordered the seizure and delivery of the property described in the complaint. Said property were later delivered by the provincial sheriff to respondent Aboitiz. Alleging that while his office was situated in Cebu City, Adlawan was a resident of Minglanilla, and therefore, the Lapu-lapu City court should not entertain the action for replevin. Petitioner Eleazar Adlawan filed an omnibus motion praying for the reconsideration and dissolution of the writ of seizure, the retrieval of the property seized, and the dismissal of the complaint. He also averred that the property seized were in *custodia legis* by virtue of the writ of attachment issued by Branch 11. His omnibus motion was denied. Subsequently, he filed a motion for reconsideration which was not granted.

The denial of his omnibus motion led petitioner Eleazar Adlawan to file a petition for certiorari and mandamus in the Supreme Court (G.R. No. 63225). The Third Division of this Court ruled on April 3, 1990 that since attachment is an ancillary remedy, the withdrawal of the complaint left it with no leg to stand on. Thus, the Court disposed of the case as follows:

"WHEREFORE, in view of the foregoing, this Court rules that the attached properties left in the custody of private respondent Aboitiz and Company, Inc. be returned to petitioner Eleazar V. Adlawan without prejudice to the outcome of the cases filed by both parties" (Rollo, p. 324).

Respondent Aboitiz filed a motion for reconsideration of the decision, contending that the replevin case was distinct and separate from the case where the writ of attachment was issued. It argued that the writ of replevin, therefore, remained in force as the Third Division of the Supreme Court had not found it illegal. The motion was, however, denied with finality in the Resolution of July 11, 1990.

Undaunted, respondent Aboitiz filed a second motion for reconsideration with a prayer that the dispositive portion of the decision be clarified. It asserted that because the writ of preliminary attachment was different from the writ of replevin, we should rule that the property subject of the latter writ should remain in *custodia legis* of the court issuing the said writ.

In the Resolution dated September 10, 1990, the Third Division stated that "the properties to be returned to petitioner are only those held by private respondent (Aboitiz) by virtue of the writ of attachment which has been declared non-existent." Accordingly, the dispositive portion of the April 3, 1990 decision of the Third Division of this Court was modified to read as follows:

"WHEREFORE, in view of the foregoing, this Court rules that the properties in the custody of the private respondent Aboitiz & Company by virtue of the writ of attachment issued in Civil Case No. R-21761 be returned to the petitioner, but properties in the custody of the private respondent by virtue of the writ of replevin issued in Civil Case No. 619-L be continued in *custodia legis* of said court pending litigation therein."

The Decision in G.R. No. 63225 having become final and executory, entry of judgment was made on November 15, 1990. This should have terminated the controversy between petitioners and respondent Aboitiz insofar as the Supreme Court was concerned, but that was not to be. On September 9, 1983 respondent Aboitiz filed against petitioners two complaints for collection of sums of money with prayers for the issuance of writs of attachment in the Regional Trial Court, Branch 23, Cebu City, docketed as Civil Cases Nos. CEB-1185 and CEB-1186. The complaint in Civil Case No. CEB--1185 alleged that petitioner Eleazar Adlawan (defendant therein) was awarded a contract for the construction of the Tago Diversion Works for the Tago River Irrigation Project by the National Irrigation Administration and that respondent Aboitiz (plaintiff therein) loaned him money and equipment, which indebtedness as of June 30, 1983 totalled P13,430,259.14. Paragraph 16 of the complaint states:

"16. That, in view of the enormous liabilities which the defendants have with the plaintiff, defendants executed a real estate mortgage covering eleven (11) parcels of land in favor of Philippine Commercial and Industrial Bank (PCIB) to secure a P1,000,000.00 loan with said bank and was able to remove, conceal and dispose of their properties, obviously to defraud the plaintiff, x x x" (Rollo, pp. 65-66).

The complaint in Civil Case No. CEB-1186 alleged that petitioner Eleazar Adlawan (defendant therein) was awarded a contract for the construction of the Lasang River Irrigation Project by the National Irrigation Administration and that respondent Aboitiz (plaintiff therein) loaned him money and equipment, which indebtedness as of June 30, 1983 totalled P5,370,672.08. Paragraph 15 of the complaint is similarly worded as paragraph 16 of the complaint in Civil Case No. CEB-1185.

Civil Case No. CEB-1185 was raffled to the Regional Trial Court, Branch 6, presided by respondent Judge Ramon Am. Torres. On September 14, 1983, respondent Judge ordered the issuance of a writ of attachment upon respondent Aboitiz' filing of a bond of P5,000,000.00. Similarly, in Civil Case No. CEB-1186, which was raffled to Branch 23, presiding Judge Emilio A. Jacinto ordered the issuance of a writ of attachment upon the filing of a bond of P2,500,000.00. Accordingly, in Civil Case No. CEB-1185, the Acting Provincial Sheriff of Cebu issued separate writs dated September 26, 1983 addressed to the Sheriffs of Cebu, Davao and Metro Manila. No writ of preliminary attachment was, however, issued in Civil Case No. CEB-1186.

Petitioners then filed in Civil Cases Nos. CEB-1185 and CEB-1186 urgent motions to hold in abeyance the enforcement of the writs of attachments. They alleged in the main that since their property had been previously attached and said attachment was being questioned before the Supreme Court in G.R. No. 63225, the filing of the two cases, as well as the issuance of the writs of attachment, constituted undue interference with the processes of this court in the then pending petition involving the same property.

Upon motion of respondent Aboitiz, Branch 23 issued on October 13, 1983, an order directing the transfer to Branch 6 of Civil Case No. CEB-1186 for consolidation with Civil Case No. CEB-1185.

Meanwhile, in its comment on petitioners' motion to withhold the enforcement of the writs of attachment, respondent Aboitiz alleged that the voluntary dismissal of Civil Case No. R-21761 under Section 1, Rule 17 of the Revised Rules of Court was without prejudice to the institution of another action based on the same subject matter. It averred that the issuance of the writ of attachment was justified because petitioners were intending to defraud respondent Aboitiz by mortgaging 11 parcels of land to the Philippine Commercial and Industrial Bank (PCIB) in consideration of the loan of P1,100,000.00, thereby making PCIB a preferred creditor to the prejudice of respondent Aboitiz, which had an exposure amounting to P13,430,259.14.

Petitioners then filed a rejoinder to said comment, contending that since the property subject of the writ of attachment have earlier been attached or replevied, the same property were under custodia legis and therefore could not be the subject of other writs of attachment.

On December 12, 1983, respondent Judge issued an order finding no merit in petitioners' motion for reconsideration and directing the sheriffs of Cebu, Davao and Metro Manila "to proceed with the enforcement and implementation of the writs of preliminary attachment." Respondent Judge ruled that the writs of attachment were issued on the basis of the supporting affidavits alleging that petitioner had removed or disposed of their property with intent to defraud respondent Aboitiz (Rollo, pp. 109-113).

On December 15, petitioners filed an ex parte motion praying: (1) that the December 12, 1983 Order be set for hearing; (2) that they be given 15 days within which to either file a motion for reconsideration or elevate the matter to this Court or the then Intermediate Appellate Court; and (3) that within the same 15-day period the implementation or enforcement of the writs of attachment be held in abeyance.

On the same day, respondent Judge issued an order holding in abeyance the enforcement of the writs of preliminary attachment in order to afford petitioners an opportunity to seek their other remedies (Rollo, p. 116).

On December 27, petitioners filed the instant petition for certiorari and mandamus. They alleged that respondent Judge gravely abused his discretion in ordering the issuance of the writs of preliminary attachment inasmuch as the real estate mortgage executed by them in favor of PCIB did not constitute fraudulent removal, concealment or disposition of property. They argued that granting the mortgage constituted removal or disposition of property, it was not per se a ground for attachment lacking proof of intent to defraud the creditors of the defendant.

Petitioners contended that in Civil Case No. 21761, Branch 11 had ruled that the loan for which the mortgage was executed was contracted in good faith, as it was necessary for them to continue their business operations even after respondent Aboitiz had stopped giving them financial aid.

Petitioners also contended that respondent Judge exceeded his jurisdiction when he issued the Order of December 12, 1983, without first hearing the parties on the motion for attachment and the motion to dissolve the attachment. Moreover, they argued that respondent Judge gravely abused his discretion in proceeding with the case, notwithstanding that his attention had been called with regard to the pendency of G.R. No. 63225 in this Court.

As prayed for by petitioners, we issued a temporary restraining order on January 6, 1984 "enjoining the respondents from enforcing or implementing the writs of preliminary attachment against the property of petitioners, all dated September 26, 1983 and issued in Civil Cases Nos. CEB 1185 and 1186" (Rollo, p. 118).

II

The resolution of this case centers on the issue of the legality of the writ of attachment issued by respondent Judge in the consolidated cases for collection of sums of money.

The affidavit submitted by respondent Aboitiz in support of its prayer for the writ of attachment does not meet the requirements of Rule 57 of the Revised Rules of Court regarding the allegations on impending fraudulent removal, concealment and disposition of defendant's property. As held in *Carpio v. Macadaeg*, 9 SCRA 552 (1963), to justify a preliminary attachment, the removal or disposal must have been made with intent to defraud defendant's creditors. Proof of fraud is mandated by paragraphs (d) and (e) of Section 1, Rule 57 of the Revised Rules of Court on the grounds upon which attachment may issue. Thus, the factual basis on defendant's intent to defraud must be clearly alleged in the affidavit in support of the prayer for the writ of attachment if not so specifically alleged in the verified complaint. The affidavit submitted by respondent Aboitiz states:

"REPUBLIC OF THE PHILIPPINES)

CITY OF CEBU.....) S.S.

I, ROMAN S. RONQUILLO, of legal age, married and a resident of Cebu City, after being sworn in accordance with law, hereby depose and say:

That I am the Vice-President of the plaintiff corporation in the above-entitled case;

That a sufficient cause of action exists against the defendants named therein because the said defendants are indebted to the plaintiffs in the amount of P13,430,259.14 exclusive of interests thereon and damages claimed;

That the defendants have removed or disposed of their properties with intent to defraud the plaintiff, their creditor, because on May 27, 1982 they executed a real estate mortgage in favor of Philippine Commercial and Industrial Bank (PCIB) covering eleven (11) of their fifteen (15) parcels of land in Cebu to secure a P1,100,000.00 loan with the same bank;

That this action is one of those specifically mentioned in Section 1, Rule 57 of the Rules of Court, whereby a writ preliminary attachment may lawfully issue because the action therein is one against parties who have removed or disposed of their properties with intent to defraud their creditor, plaintiff herein;

That there is no sufficient security for the claims sought to be enforced by the present action;

That the total amount due to the plaintiff in the above-entitled case is P13,430,259.14, excluding interests and claim for damages and is as much the sum for which an order of attachment is herein sought to be granted; above all legal counter-claims on the part of the defendants.

IN VIEW WHEREOF, I hereunto set my hand this 24th day of August 1983 at Cebu City, Philippines.

(Sgd.)

RAMON S. RONQUILLO

Affiant"

(Rollo, pp. 171-172)

It is evident from said affidavit that the prayer for attachment rests on the mortgage by petitioners of 11 parcels of land in Cebu, which encumbrance respondent Aboitiz considered as fraudulent concealment of property to its prejudice. We find, however, that there is no factual allegation which may constitute as a valid basis for the contention that the mortgage was in fraud of respondent Aboitiz. As this Court said in *Jardine-Manila Finance, Inc. v. Court of Appeals*, 171 SCRA 636 (1989), "[T]he general rule is that the affidavit is the foundation of the writ, and if none be filed or one be filed which wholly fails to set out some facts required by law to be stated therein, there is no jurisdiction and the proceedings are null and void."

Bare allegation that an encumbrance of a property is in fraud of the creditor does not suffice. Factual bases for such conclusion must be clearly averred.

The execution of a mortgage in favor of another creditor is not conceived by the Rules as one of the means of fraudulently disposing of one's property. By mortgaging a piece of property, a debtor merely subjects it to a lien but ownership thereof is not parted with.

Furthermore, the inability to pay one's creditors is not necessarily synonymous with fraudulent intent not to honor an obligation (*Insular Bank of Asia & America, Inc. v. Court of Appeals*, 190 SCRA 629 [1990]).

Consequently, when petitioners filed a motion for the reconsideration of the order directing the issuance of the writ of attachment, respondent Judge should have considered it as a motion for the discharge of the attachment and should have conducted a hearing or required submission of counter-affidavits from the petitioners, if only to gather facts in support of the allegation of fraud (*Jopillo, Jr. v. Court of Appeals*, 167 SCRA 247 [1988]). This is

what Section 13 of Rule 57 mandates.

This procedure should be followed because, as the Court has time and again said, attachment is a harsh, extraordinary and summary remedy and the rules governing its issuance must be construed strictly against the applicant. Verily, a writ of attachment can only be granted on concrete and specific grounds and not on general averments quoting perfunctorily the words of the Rules (*D.P. Lub Oil Marketing Center, Inc. v. Nicolas*, 191 SCRA 423 [1990]).

The judge before whom the application is made exercises full discretion in considering the supporting evidence proffered by the applicant. One overriding consideration is that a writ of attachment is substantially a writ of execution except that it emanates at the beginning, instead of at the termination of the suit (*Santos v. Aquino, Jr.*, 205 SCRA 127 [1992]; *Tay Chun Suy v. Court of Appeals*, 212 SCRA 713 [1992]).

We need not discuss the issue of whether or not Civil Cases Nos. CEB-1185 and CEB-1186 constituted undue interference with the proceedings in G.R. No. 63225 in view of the entry of judgment in the latter case.

WHEREFORE, the petition is GRANTED and the Temporary Restraining Order issued on January 6, 1984 is made PERMANENT. Respondent Judge or whoever is the presiding judge of the Regional Trial Court, Branch 6, Cebu City, is DIRECTED to PROCEED with the resolution of Civil Cases Nos. CEB-1185 and CEB-1186 with deliberate dispatch.

SO ORDERED.

Cruz, (Chairman), Davide, Jr., Bellosillo, and Kapunan, JJ., concur.

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