44 Phil. 763

[G.R. No. 19026. April 03, 1923]

PHILIPPINE NATIONAL BANK, PLAINTIFF AND APPELLEE, VS. UMBERTO DE POLI AND WISE & CO., DEFENDANTS AND APPELLANTS.

D E C I S I O N

AVANCEÃ‘A, J.:

In a document (Exhibit A) dated October 22, 1920, and duly registered, Umberto de Poli mortgaged the properties therein described to the Philippine National Bank as security for a loan, credit or overdraft not exceeding P650,000.

Later, on November 15, 1920, in another document also duly registered (Exhibit B), Umberto de Poli and the Philippine National Bank agreed to release some of the properties from the mortgage and replace them with other properties which were described in the latter document.

Umberto de Poli having violated the conditions of the mortgage, the Philippine National Bank, on December 7, 1920, filed a complaint against Umberto de Poli, Henry Hunter Bayne and J. G. Lawrence, the latter two being the persons who were holding the goods and the keys of the warehouses where they were kept, and who refused to deliver them.

On the next day, December 8, 1920, Umberto de Poli was adjudged insolvent, and in his place and stead Mr. Henry Hunter Bayne appeared, he being the assignee in insolvency appointed by the court. Later the Chartered Bank of India & Australia, the American Foreign Banking Corporation and Wise & Co. intervened in the case, claiming to be creditors of the insolvent.

The object of this action is to recover from the defendants the possession of the properties mortgaged, described in Exhibits A and B, or their value of

P662,000, plus P4,000 as damages.

After the commencement of this action and the adjudication of insolvency of the defendant Umberto de Poli, certiorari proceedings were instituted in this court against the Honorable Judge who had the case under consideration on the ground that insolvency proceedings having been commenced against Umberto de Poli, the Court of First Instance of Manila lost its jurisdiction over this case, the same having been absorbed by the insolvency proceeding.

This court, in a decision published March 15, 1921,[1] denied the application for a writ of certiorari, declaring that the Court of First Instance continued to have jurisdiction over the case notwithstanding the insolvency proceeding.

In the course of the proceedings in this case, the plaintiff Bank, making use of the right granted it by rule 33 of Act No. 2938 and the contract of October 22, 1920, sold some of the mortgaged property.

After trial, the court below rendered judgment declaring the plaintiff to be entitled to recover the mortgaged goods and holding the sale made by the plaintiff of some of the goods valid. To this judgment the assignee in insolvency of Umberto de Poli, and Wise & Co. took an exception.

The jurisdiction of the Court of First Instance of Manila to try and decide this cause is again challenged on the ground that it was absorbed by the, insolvency proceedings against Umberto de Poli. The decision of this court, however, solving this question is, at least, the law in the case and we abide by it.

Appellants claim that the mortgage on the properties described in the document of November 15, 1920, constitutes an unlawful preference.

The mortgage evidenced by the second document was but a partial substitution of the mortgage contained in the first. It was stipulated in the second document that some of the properties covered by the first document should be released in order that they might be used by Umberto de Poli in his business, and in lieu thereof other properties should be mortgaged, which were described in the second document. It clearly appears that the second mortgage was merely a partial substitution for the first. For this reason, although this second mortgage was

made on November 15, 1920, that is, within thirty days prior to the adjudication of the insolvency of Umberto de Poli, which took place on December 8th of that same year, it does not constitute an unlawful preference. A mere exchange of securities of equal value may be made at any time without the same being held to constitute an unlawful preference.

The following citations made by the appellee are decisive on this question:

> "It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws: Stevens *vs*. Blanchard, 3 Cush., 169; and the same thing has been determined with reference to the Bankrupt Act, 14 Stat. at L., 515; Cook *vs*. Tullis, 18 Wall., 340 (85 U. S. XXI., 937); Clark *vs*. Iselin, 21 Wall., 360 (88 U. S. XXII., 568); Watson *vs*. Taylor, 21 Wall., 378 (88 U. S. XXII., 576) ; and Burnhisel *vs*. Firman, not yet reported (89 U. S. XXII., 766). The reason is that the exchange takes nothing away from the other creditors." (Sawyer and Frazier *vs*. Turpin, 91 U. S., 114; 23 L. ed., 235, 237.)
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> "There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him. His creditors can only complain if he waste his estate or give preference to one over another in its disposition." (Cook *vs*. Tullis, 18 Wall., 332; 21 L. ed., 933.)
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> " 'A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be

> conducted without any purpose to defraud or delay his creditors or give preference to anyone, and does not impair the value of his estate. An insolvent is not bound in the misfortune of his insolvency to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously.' Substantially, the same doctrine was announced in Clark *vs*. Iselin, 21 Wall., 360 (88 U. S. XXII., 568); Sawyer *vs*. Turpin, 91 U. S., 114 (XXIII., 235)." (Stewart *vs*. Platt, 101 U. S., 731; 25 L. ed., 816, 819.)

It is claimed, however, that the securities substituted, as they appear in the corresponding "quedans" (warehouse receipts), are worth less by P7,622.50 than the substitutes. But this assertion cannot be verified because said "quedans" are not in the record. On the contrary, the evidence of record (Exhibits BB and CC in connection with the testimony of the witness Gregorio Litawa) shows that the value of the securities substituted is greater by P4,454 than the substitutes. Moreover, even admitting that they are less by P7,622.50, as appellants claim, this difference is so small relatively to the total value (P438,148) that, under sound principles, it cannot render the substitution fraudulent. "Equal value" means substantially, not mathematically, equal. If what makes a substitution fraudulent is the intention to defraud the creditors or to give preference to some of them to the prejudice of the others, it cannot be supposed, in reason, that in this case the substitution was made with such an intention simply on account of this small difference, which, on the other hand, is ordinarily the case with goods previously deposited in large lots.

It is true that there is in the first document a clause providing that in the event that the pledgee should deliver to the debtor the possession of the mortgaged goods for the sale thereof, it should not be construed as a cancellation of the pledge and the debtor shall render an account of the proceeds of the sale, and turn them over to the creditor. Appellants infer from this clause that the plaintiff received the value of the securities released. But the release of those securities was not made by virtue of this clause, but in order to enable Umberto de Poli to use them in his business, as is clearly stated in the second document evidencing the substitution.

Appellants assail the sufficiency of the description of the 165 bales of knotted hemp, 159 cases of spooled hemp and 500 bales of hemp, all marked U. D. P., which appear to have been pledged in the first document (Exhibit A). According to appellants, there were other bales and cases of hemp bearing the same mark, which were mortgaged to other banks. But aside from the fact that the above-mentioned bales and cases of hemp mortgaged to plaintiff had their respective "quedans" (A-77, A-78, and A-79), the record shows that before they were mortgaged to the plaintiff, they were inspected by its employees and separated from the others in the warehouse by putting pasteboard labels thereon, which sufficiently identified and distinguished them.

Appellants claim that there were attached goods which were not mortgaged, and mention the 160 bales of tobacco which appear in the return of the attachment and which do not appear in the document of mortgage, but according to the evidence, this tobacco is that referred to in "quedan" A-67, which, after the stems were removed, was packed again.

Reference is also made by appellants to 696 bales of maguey and 729 bales of *barili* tobacco, which were attached, but we believe that the former are the same 686 bales of maguey, and the latter the 717 bales of tobacco from La Union, which are referred to in "quedans" A-66 and A-73, respectively, mentioned in the document of mortgage. The differences noted in the return of the attachment and in the document of mortgage as to these goods must have been due to a clerical mistake.

When the sheriff levied the attachment, he did not find the 1,600 bales of loose hemp referred to in "quedan" A-82 mentioned in the document of mortgage, and as the appellee pointed out 419 bales as part of this lot of hemp, said bales were, by agreement of the parties, deposited with the appellee, subject to the decision that might be rendered as to them. After an examination of the evidence, we find that said 1,600 bales of hemp were later classified and packed, and the 419 bales deposited with appellee are a part thereof.

As has been stated above, the appellee sold to third persons, without the intervention of the assignee in insolvency, some of the mortgaged goods, and appellants contend that this sale was illegal and void.

In the document of mortgage the creditor was expressly authorized, in case of a violation of any of the conditions of the contract, to sell the mortgaged goods or part thereof at private sale without previous notice or advertisement of any kind, for the purpose of applying the proceeds of the sale on the payment of the debt. This stipulation is perfectly valid. Article 1255 of the Civil Code authorizes the contracting parties to make the stipulations, clauses and conditions they may deem fit, provided the same are not contrary to law, morals or public order. In the case of Peterson *vs*. Azada (8 Phil., 432) a similar stipulation was held to be within the authority granted by the aforecited article 1255 to the contracting parties. In that case, to secure the payment of a loan, the debtor turned over to his creditor certain jewels listed at the bottom of the document evidencing the loan, with a note to the effect that in case the debt was not paid on or before its maturity, the creditor was authorized to sell said jewels, with the intervention of the debtor, at the best obtainable price in the market. Pursuant to this stipulation, the creditor sold the jewels, with the intervention of the debtor, at private sale. This court held that this stipulation was not contrary to law, morals or public order, and was valid. The only difference between that case and the one now before us lies in that here the sale was made without the intervention of the debtor. But this does not affect the question, since in the present case, the intervention of the debtor was previously waived by the latter at the time of the making of the contract.

Moreover, Act No. 2938, creating the appellee Bank, in its section 33, grants the latter express authority to sell the mortgaged goods under those conditions. The constitutionality of this Act is challenged in so far as it grants this power to the appellee, but the fact that the parties themselves may stipulate to this effect is in itself alone a sufficient refutation of the argument advanced against its constitutionality.

Therefore the sale made by the appellee of some of the goods mortgaged (Exhibit FF) is perfectly valid, not only because the same is authorized by the contract made by the parties, but also because it is in accordance with law.

When, at the hearing in the court below, the defendants-appellants rested, they reserved their right to present a stipulation upon certain facts and, in case that should not be possible, to introduce more evidence. They now contend

that the trial court erred in rendering judgment without giving them an opportunity to introduce said evidence. But it does not apear in the record that the lower court granted them that right. On the other hand, it does not appear that after the defendants rested and before the judgment was rendered, which was three months thereafter, the defendants ever informed the court as to what they had done toward the making of said stipulation, nor urged the reception of the evidence that they intended to introduce. Under such circumstances, we hold that the lower court did not err in rendering judgment without any further hearing.

The judgment appealed from is affirmed, with the costs against the appellants. So ordered.

Araullo, C.J., Street, Villamor, and *Romualdez, JJ.,* concur.

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[1] Chartered Bank of India, Australia and China *vs*. Imperial, and National Bank, R. G. No. 17222, not reported.

DISSENTING

MALCOLM, J.:

Notwithstanding the learned opinion, prepared for the majority by Mr. Justice Avanceña, in this important case, I am forced to state that, according to my view, a number of errors were committed by the trial court which require the reversal of the decision. The case can be best understood by making a brief statement of the case and the facts and by thereafter announcing decisive propositions.

The plaintiff in this case, the Philippine National Bank, is a banking corporation created by the Philippine Legislature. The principal defendant,

Umberto de Poli, was, up to the time he was declared insolvent on December 8, 1920, a merchant engaged in the import and export business in the City of Manila. In connection with his import and export business he also conducted the business of a public warehouseman.

In order for De Poli to carry on his business, he obtained large credits from various banking institutions in the City of Manila, including the Philippine National Bank. To secure the payment of these credits, he issued and signed warehouse receipts on his property, consisting principally of hemp, maguey, and tobacco.

On June 14, 1920, De Poli had a credit by way of overdraft with the Philippine National Bank in the sum of P650,000. Probably because the *quedans* which De Poli had issued to the Philippine National Bank to secure the overdraft were not negotiable, on October 22, 1920, De Poli executed and delivered to the Bank the contract of pledge Exhibit A. This document was duly registered in the office of the registry of deeds of Manila on November 5, 1920.

On November 15, 1920, De Poli executed and delivered to the Bank the instrument Exhibit B, which purports to be an amendment to the contract of pledge Exhibit A. The latter instrument was registered in the office of the registry of deeds of Manila on November 16, 1920.

During the month of November, 1920, De Poli was generally known to be insolvent. While, however, the other banks were holding meetings to decide what would be the proper steps to take to protect themselves, the Philippine National Bank on December 7, 1920, commenced foreclosure proceedings pursuant to the instruments Exhibits A and B. On the following day, the property claimed by the Philippine National Bank was seized by the sheriff. On the same day, that is, December 8, 1920, a petition in insolvency was presented to the Court of First Instance by the Chartered Bank of India, Australia and China, the Hongkong & Shanghai Banking Corporation, and W. F. Stevenson & Co., Ltd. Later, the case was taken to the Supreme Court by certiorari and prohibition, with an unfavorable outcome to the parties last mentioned.

In the lower court, on the issues above set forth, between the Philippine

National Bank on the one hand and the parties interested in the insolvency of Umberto de Poli on the other, judgment was rendered declaring that the Philippine National Bank has the right to the property described in the documents Exhibits A and B, and that the sale by the Bank of this merchandise was valid and legal. It is from this judgment that appeal has been taken to this Court on six errors.

First proposition.—The trial court was without jurisdiction to proceed with this action, pending the determination of the insolvency proceedings.

The decision in case No. 17222 of this court, entitled Chartered Bank of India, Australia and China *vs*. Imperial, and National Bank, is not *res judicata* as claimed by the appellee, although it may constitute the law of the case. This is clear because the judgment of the Supreme Court was only grounded on the opinion of three members.

The clear and unequivocal provisions of the Insolvency Law mean, if they mean anything, that every civil action or proceeding of whatever nature must, upon application of the debtor, or of any creditor or of the assignee of the estate be stayed, save and except only those actions in which the amount due the creditor may be in dispute, and even in those cases may only proceed to judgment for the purpose of ascertaining the amount due. The purpose of the law will be defeated if various legal proceedings in various courts shall be permitted to go on notwithstanding the adjudication of insolvency. (Insolvency Law, secs. 24, 32, 60; Bastida *vs*. Peñalosa [1915], 30 Phil., 148; De Amuzategui *vs*. Macleod [1915], 33 Phil., 80; Hill *vs*. Harding [1883], 107 U. S., 631.)

Second proposition.—The document, Exhibit B, constituted an illegal preference under the Insolvency Law.

The contract of pledge Exhibit B was executed by De Poli on November 15, 1920, and he was declared insolvent on December 8, 1920. In other words, the transfer was accomplished within thirty days before the filing of the petition against him. At the time Exhibit B was executed, the Philippine National Bank not only had reasonable cause to believe that De Poli was insolvent as is required by law but it actually knew that he was insolvent. The property covered

by Exhibit B was not merely in substitution of other property released by it from the pledge Exhibit A, and there was no fair exchange of securities. (Note in this connection the fourth paragraph of the contract of pledge Exhibit A, and section 70 of the Insolvency Law.)

Third proposition.—The sale made by the Philippine National Bank of the property described in Exhibit FF was illegal and void.

The merchandise mentioned in Exhibit FF was sold by the Philippine National Bank at private sale without any authority of the court in insolvency and without the consent of the assignee. The sale was made by virtue of section 33 of Act No. 2938 which provides as follows:

> "If, from any cause whatsoever, any of the securities specified for the loans provided for in this Act or accepted by said Bank as security for loans or discount decline or depreciate in market value in part or as a whole, or on nonperformance of any promise made to secure the loan or discount, or upon bills
> of exchange, notes, and checks, the said Bank may demand additional securities or may forthwith declare any such obligation due and payable *and upon three days' notice, if practicable, or without such notice, if otherwise demand, sell, assign, transfer, and deliver the whole of said securities or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession of, or thereafter given unto or left in the possession of the said Bank for safekeeping or otherwise, at any brokers' board or at public or private sale, at the option of said Bank, without either demand, advertisement, or notice of any kind, and at such sale, if public, the said Bank may itself purchase the whole or any part of the property sold*, free from any right of redemption on the part of the mortgagor or pledgor. In case of sale for any cause, after deducting all costs or expenses of any kind for collection, sale or delivery, the said Bank may apply the residue of the proceeds of the sale so made, to pay one or more or any or all of the said liabilities to the said Bank, as its general manager shall deem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, returning the overplus, if any, to the mortgagor or pledgor who shall remain liable to and pay to said Bank or any deficiency arising upon such

sale or sales."

The section of the Charter of the Philippine National Bank which is above quoted is invalid for the very good reason that it deprives a person of his property without due process of law. The law attempts to prescribe a particular secret procedure for the foreclosure of certain securities for a particular bank, which, of course, operates as a discrimination against other persons holding the same kind of securities. (Mahoney *vs*. Tuason [1919], 39 Phil., 952.)

In my opinion, therefore, the P662,000 involved in this case have been wrongly adjudicated to the plaintiff, by a court without jurisdiction, in conformity with an illegal preference under the Insolvency Law, and by reason of a private sale pursuant to a section of the Charter of the Philippine National Bank which is invalid.

DISSENTING

JOHNS, J., with whom concurs **OSTRAND, J.:**

I agree with the majority opinion upon all legal questions, except as to appellants' fifth assignment of error to the effect that "the trial court erred in holding that the sale made by the plaintiff bank of the property described in Exhibit FF was legal and valid."

In the instant case, the sale was made under section 33, Act No. 2938, which is "An Act to amend Act Numbered Twenty-six hundred and twelve, entitled 'An Act creating the Philippine National Bank,' as amended by Act Numbered Twenty-seven hundred and forty-seven," known as the Legislative Act creating the Philippine National Bank.

Among other things, section 33 provides:

> "* * * The said bank may demand additional securities or may forthwith declare any such obligation due and payable and upon three days' notice, if practicable, or without such notice, if otherwise demand, sell, assign, transfer, and deliver, etc., at any brokers' board or at public or private sale, at the option of said Bank, without either demand, advertisement, or notice of any kind, and at such sale, if public, the said Bank may itself purchase the whole or any part of the property sold * * *."

In so far as the above provisions discriminate in favor of the Philippine National Bank or give it rights, which are not common to all other banks, or in so far as they authorize the sale of any property "without either demand, advertisement, or notice of any kind," it is my opinion that all of such provisions are unconstitutional, null and void, and give the Bank an arbitrary and autocratic power, which ought not to be sanctioned or approved by the court. This is especially true where the debtor is insolvent at the time the power was exercised and conferred.

The record shows that at the time the power was given Umberto de Poli was insolvent, and that the Bank knew that he was insolvent.

Whatever may be the rule between the parties to the instrument, in such cases, in the interest of justice, a debtor known to be insolvent has no legal right to confer arbitrary, autocratic power upon one of his creditors at the expense of, and to the prejudice of, other creditors. Under such conditions the rights of his remaining creditors should be considered, respected and protected, and no insolvent debtor should have the right by any act, word or deed to in any manner favor one creditor at the expense of another. In all of such cases, the property should only be sold after reasonable notice to all parties in interest, to the end that the rights of all creditors would be protected.

In my opinion, the chattel mortgages were valid, but the sale made under them in the manner in which it was made is void, and to that extent I dissent.

Date created: October 02, 2018