43 Phil. 930

[G. R. No. 19355. October 14, 1922]

CENTRAL CAPIZ, PETITIONER, VS. FERNANDO SALAS, JUDGE OF THE COURT OF FIRST INSTANCE OF THE SEVENTEENTH JUDICIAL DISTRICT, TIMOTEO UNSON, CLARA LACSON DE UNSON, AND ISAAC ANDRADA, PROVINCIAL DEPUTY SHERIFF OF CAPIZ PROVINCE, RESPONDENTS.

D E C I S I O N

STREET, J.:

This is an original petition for the writ of certiorari, to quash an attachment issued by the respondent judge, acting as judge of the Court of First Instance in the Province of Capiz. An order to show cause why the writ should not issue having been made by this court in usual course, the respondents have answered; and the case is now before us for a determination of the question presented by the petition and answer.

It appears that an action is now pending in the Court of First Instance of the Province of Capiz wherein Timoteo Unson and wife, Clara Lacson de Unson, are seeking to recover from a corporation known as the "Central Capiz" damages to the extent of P163,643.88, for alleged breach of contract. When said action was instituted the plaintiffs applied for a writ of attachment against the property of the defendant on the ground that it was about to dispose of its property with intent to defraud, the plaintiffs. In response to this prayer for an attachment, an order for the issuance of the writ was made, and, bond having been given, an attachment was levied by the sheriff upon the property of the defendant company. Thereafter the attorneys for the corporation interposed a motion in the Court of First Instance for a discharge of the attachment on the ground that the same had been improperly or irregularly issued. This motion was denied by that court; and the present petition was thereupon filed in the Supreme Court.

The points upon which the attorneys for the petitioner rely as grounds for the annulment of the order granting this attachment are not defined in the petition, and the only point which we deem it necessary here to discuss, as affecting the jurisdiction of the court or the

irregularity of its action in issuing the attachment, is this, namely, whether the allegations of the complaint and the affidavit of Timoteo Unson in support of the application for the attachment are sufficient to justify the issuance of the writ.

In section 426 of the Code of Civil Procedure the judge or justice of the peace to whom application for an attachment is made is required to grant the writ whenever it is made to appear by affidavit of the plaintiff, or of some other person who knows the facts, that there is a sufficient cause of action, that one of the grounds for attachment specified in section 424 exists, that there is no other sufficient security for the claim, and that the amount due to the plaintiff above all legal set-offs or counterclaims is as much as the sum for which the attachment is sought.

All of these requirements are, we think, sufficiently met in the case before us. The affidavit upon which the attachment was granted was made by the plaintiff himself, Timoteo Unson, and it states that he has knowledge of the facts alleged in the complaint; that there exists a sufficient cause of action; that the case is one of those contemplated in section 424 of the Code of Civil Procedure; that the plaintiffs have no security for their demand; and that the amount claimed, over and above all set-offs, is equal to the amount for which the attachment is sought; and all of these statements are made in almost the precise words of section 426 of the Code of Civil Procedure.

Moreover, upon referring to the complaint itself to which this affidavit is annexed, it is at once seen that the claim is one for damages alleged to have been sustained by breach of contract,—which in itself is a sufficient cause of action to justify the issuance of an attachment,—and, further, that the ground of attachment therein alleged is the ground specified in No. 5 of section 412,in relation with section 426 of the Code of Civil Procedure, namely, that the defendant is about to dispose of its property with intent to defraud the plaintiff.

Under these circumstances the authority of the court to issue the attachment must, in our opinion, be upheld; and this, notwithstanding the fact that in paragraph XI of the complaint it is said that “the plaintiffs are informed, and so allege, that the defendant is attempting and intends” to dispose of its property by mortgage, with the purpose of defrauding the plaintiffs. The allegation there stands out clearly that defendant is attempting to dispose of its property with the fraudulent purpose; and when the affidavit states, as it does, that the affailant, Timoteo Unson, has knowledge of the facts alleged in the complaint, this is sufficient. In our opinion the expression “the plaintiffs are informed” does not weaken the

affidavit, which purports to be made upon personal knowledge.

It is true that this affidavit may be criticized as being couched in terms that are too general, as for instance, where it is merely stated that the case is one of those contemplated in section 424 of the Code of Civil Procedure, when it would have been better to say plainly that the cause of action arose out of breach of contract and that defendant was about to dispose of its property with intent to defraud the plaintiff, as contemplated in No. 5 of section 412, in relation with section 424 of the Code of Civil Procedure. But these facts are readily ascertainable from the complaint itself, and the mere generality of the statement in the affidavit is not fatal.

We are not unaware that respectable decisions from American courts can be cited in which a stricter doctrine is announced than we are inclined to apply in this jurisdiction. The provisions of our Code of Procedure relative to attachment are expressed in very broad terms, and we see no sufficient reason for adopting a construction of those provisions which would interpose technical obstructions, of doubtful propriety, to the usefulness of the remedy. In this connection it may not be out of place to refer to the admonition contained in section 2 of our Code of Civil Procedure to the effect that the provisions of this Code, and the proceedings under it, shall be liberally construed in order to promote its objects and assist the parties in obtaining speedy justice. It must be remembered in cases of this kind that the bond which is required upon the issuance of attachment is intended to supply, and does in fact supply, a reasonable safeguard against the abuse of the writ.

In passing upon this petition we are not concerned with the question whether the defendant was in fact attempting to dispose of its property with intent to defraud the plaintiff. That is a question of fact which in no wise affects the jurisdiction of the court or the regularity of its action in granting the attachment; and though proper to be ventilated, as it was ventilated at the hearing of the motion to dissolve the attachment in the lower court, that question cannot be reviewed in this proceeding.

The petition in our opinion shows no sufficient ground for the issuance of the writ prayed for; and it is accordingly denied, with costs. So ordered.

Araullo, C. J., Johnson, Avanceña, Villamor, Ostrand, and *Romualdez, JJ.*, concur.

DISSENTING

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

There is no dispute about any of the material facts which are fully and fairly stated in the majority opinion.

This is a petition for a writ of certiorari, and, in legal effect, to quash the writ of attachment which was issued out of the Court of First Instance in a case wherein Timoteo Unson and Clara Lacson de Unson, his wife, were plaintiffs, and the petitioner here was defendant, in which a writ was issued and the property of the defendant levied upon to secure payment of damages, amounting to P165,000, arising out of alleged breaches of contracts. The complaint in that action is very exhaustive, but the only allegation for an attachment anywhere in it is found in the following language:

> "The plaintiffs are informed, and they so allege, that the defendant tries and intends to dispose of its property by mortgage to the commercial partnership 'La Basconia' which is the owner of a great majority of the shares of La Central and is controlling the same, and besides this, it tries and intends also to dispose and transfer by way of another mortgage said property to another corporation known as 'Honolulu Iron Works;' all this with intent to defraud the plaintiffs and to make it impossible for them to collect any judgment that may be rendered by the court in their favor, making 'La Basconia,' the partnership having control of the defendant, and the 'Honolulu Iron Works' claim preference and priority in the *Terceria* case at least as to the credit in such amount that the plaintiffs would be unable to collect the amount or any party of any judgment which might be rendered in their favor."

An attachment does not exist as a matter of right, is a harsh remedy and is purely a special statutory proceeding, without which the property of the defendant cannot be attached.

The question here involved is whether or not the above language of the complaint is sufficient to authorize the court to issue an attachment.

In the case of Leung Ben vs. O'Brien, decided by this court on April 6, 1918, in an able and exhaustive opinion by Justice Street, found in volume 38 Philippine Reports, p. 182, this court held:

> "1. CERTIORARI; ISSUANCE OF ATTACHMENT WITHOUT STATUTORY AUTHORITY.—Where a Court of First Instance issues an attachment for which there is no statutory authority, it is acting irregularly and in excess of its jurisdiction in the sense necessary to justify the Supreme Court in entertaining an application for a writ of certiorari and quashing the attachment.
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> "2. ID.; ID.; INADEQUATE REMEDY.—In such case the remedy on the attachment bond or by appeal would not be sufficiently speedy to meet the exigencies of the case. Attachment is an exceedingly violent measure and its unauthorized issuance may result in the infliction of damage which could never be repaired by any pecuniary award at the final hearing.
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> "3. ID.; ID.; DISTINCTION BETWEEN JURISDICTION OVER PRINCIPAL CAUSE AND OVER ANCILLARY REMEDY.—There is a clear distinction to be noted between the jurisdiction of a Court of First Instance with respect to the principal cause of action and its jurisdiction to grant an auxiliary remedy, like attachment. A court, although it may have unquestioned jurisdiction over the principal cause of action, may nevertheless act irregularly or in excess of its jurisdiction in granting the auxiliary remedy. In such case the party aggrieved may prosecute a proceeding by writ of certiorari in the Supreme Court. (Herrera vs Barretto and Joaquin, 25 Phil., 245, distinguished.)"

That was good law and is now the law of this court, and, yet, the majority opinion in the instant case apparently holds that attachment proceedings should be liberally construed, and that the defendant in the writ has an adequate remedy upon the bond.

It appears from the original, which is in Spanish, that the above quotation from the complaint is all one continued sentence, and when analyzed, it should be construed to mean that the plaintiffs are informed and believe, and upon such information and belief allege, that the defendant in that action is trying and intending to dispose of the property which it had formerly mortgaged "to the commercial partnership 'La Basconia,' " and are informed and believe, and, for such reason, allege that it is also trying and intending to dispose of the property by way of another mortgage to another corporation known as the "Honolulu Iron Works." None of such allegations for an attachment are in the positive form, and all of them are made on information and belief. Hence, the question is squarely presented whether allegations for an attachment made on information and belief in the body of a complaint are

sufficient to give the lower court jurisdiction to issue the writ.

In the instant case, if the plaintiff, who made the affidavit for an attachment, was indicted for perjury, he could plea that it was made on information and belief, and the plea would have to be sustained, and, yet, that is the true test of the validity of an affidavit for an attachment. This identical question was squarely decided in the case of Miller vs. Munson (34 Wis., 579), which was an action in the nature of trover for a quantity of hops, in which a writ of attachment was issued, and the decision turned upon the validity of the affidavit for an attachment. After stating in due form the amount of the indebtedness to the defendant, and that it was due upon an express contract, the affidavit recites:

> " 'And this affiant further states that he has good reason to believe, and does believe, that the said Travis has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, *any* of his property, with intent to defraud his creditors.' "

The opinion says:

> "The only question necessary to be determined on this appeal is whether the affidavit for the writ of attachment is sufficient to support the writ. If it is sufficient, the judgment should be reversed; if not, the judgment should be affirmed.
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> "The purpose of the law which requires that a certain affidavit be made before the writ can issue is to protect the alleged debtor from so severe a process, unless the creditor, or some person in his behalf, under the responsibilities of an oath, shall assert the existence of certain facts which the law adjudges good grounds for issuing the writ. This requirement of the law would afford the debtor no protection whatever, unless the affiant is liable to be punished criminally if he willfully swears falsely in such affidavit.
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> "Can perjury be assigned upon this affidavit? If it can be proved that the affiant had no reason to believe, and did not believe, when he made the affidavit, that Travis had made or was about to make the fraudulent disposition of his property therein mentioned, can the affiant be lawfully indicted, convicted and sent to the state prison for perjury committed in swearing to the facts stated in such

affidavit?"

The judgment was affirmed.

Corpus Juris, volume 6, p. 102, paragraph 149, says:

> "* * * the affidavit is the jurisdictional basis of the proceeding, and if there is no affidavit, or the affidavit is fatally defective, the writ of attachment and all the subsequent proceedings in the attachment are void."

Paragraph 150:

> "In some jurisdictions, if facts sufficient to justify the issuance of a writ of attachment are alleged in a duly verified bill or petition, the writ may issue without a separate affidavit setting forth such facts."

The law in the Philippine Islands does not require an affidavit separate and distinct from the complaint.

Corpus Juris, vol. 6, p. 110, further says:

> "It should, however, be reasonably specific, as it is intended to be a safeguard against abuse of the right of attachment and a protection to the debtor against the wrongful employment of that remedy, and it should be so direct and unequivocal that perjury can be assigned for swearing to it falsely."
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> "*If perjury cannot be assigned* upon the affidavit it will not be sufficient even though it is in the exact language of the statute." (6 Corpus Juris, p. 112.)
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> "* * * The allegations relative thereto must set out such facts and circumstances as may be necessary to establish the ground relied on positively and unequivocally and not simply on information and belief * * *." (6 Corpus Juris, p. 114.)
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> "In Michigan" it is held that "the affidavit for an attachment in an action of tort

> must be made upon the personal knowledge of the affiant. 100 Mich. 375, 58 NW. 1118." (6 Corpus Juris, p. 114 [e]).

In the notes and as illustrations on p. 115, Corpus Juris, vol. 6, says:

> "(1) Where the statute requires plaintiff to swear that he 'verily believes,' an affidavit 'to the best of his knowledge and belief was insufficient. Stadler vs. Parmlee, 10 Iowa, 23. (2) Where the statute requires affiant to swear to the best of his knowledge and belief, an affidavit that the debt is due, as affiant believes, is insufficient. Bergh vs. Jayne, 7 Mart. N. S. (La.) 609. (3) A statement that affiant knew or believed did not comply with a statutory requirement that the affidavit should be made on the knowledge or belief of plaintiff, and an affidavit stating the knowledge of affiant, or that he had good reason to believe, was not a compliance with a requirement that the affidavit should state what plaintiff knew or believed. Dean vs. Oppenheimer, 25 Md., 368. (4) An affidavit alleging merely 'that it is the belief of the affiant' was not a sufficient compliance with a statute authorizing attachment, where there was a good reason to believe that the debtor was about to dispose of his property fraudulently. Stevenson vs. Robbins, 5 Mo., 18. (5) A statement that affiant 'thinks' is not the equivalent of the statement required by statute that affiant 'believes.' Rittenhouse vs. Harman, 7 W. Va., 380."

Ruling Case Law, vol. 2, p. 806, says:

> "6. CONSTRUCTION OF STATUTES CREATING REMEDY.—Proceeding upon the theory that the remedy by attachment was unknown at common law and is purely of statutory origin, and influenced by the further consideration that the remedy is harsh and extraordinary in its character, the courts generally, in the absence of any express provisions relating to the construction of the statutes, are inclined to interpret the enactments creating the remedy strictly in favor of those persons against whom it may be invoked."

Page 830:

> "38. KNOWLEDGE OE INFORMATION AND BELIEF OF AFFIANT.—The prevailing view is that an affidavit for attachment which is expressed to be made on information and belief is not sufficient. The affidavit, it is held, must state the grounds for attachment positively, and this requirement is not satisfied by allegations on information and belief merely."

It is very significant that such leading and standard textbooks agree that an affidavit for an attachment cannot be made on information and belief, and that the authorities sustain the text. Yet, without citing any authority, the majority opinion says:

> "We are not unaware that respectable decisions from American courts can be cited in which a stricter doctrine is announced than we are inclined to apply in this jurisdiction."

It will be noted that not a single decision of any court is cited in the majority opinion.

That opinion relies upon the verification of the complaint, which is as follows:

> "I, Timoteo Unson, being first duly sworn, depose: That I am one of the plaintiffs in the above entitled case and know the facts alleged in the foregoing complaint."

It is conceded that the verification of the complaint is in the positive form. But it must also be conceded that tho verification of the complaint is not any part of the body of the complaint. The verification does not add to, or take from any of, the allegations in the complaint. In construing a complaint as to whether it states facts sufficient to constitute a cause of action, no one ever examines or considers the verification, and in construing an indictment as to whether it states facts sufficient to constitute a crime, no one ever looks to see whether it is verified or how it is verified. We have yet to learn that a verification of a pleading is a part of the pleading itself, or that you have a right to examine the verification of a complaint to determine whether or not it states facts sufficient to constitute a cause of action, and, yet, because the verification of the complaint is in the positive form, the majority opinion apparently holds that it should be construed to aid the complaint. Again, in the final analysis, what Timoteo Unson swore to in the verification is "that I know the facts alleged in the foregoing complaint" to be true, and the facts alleged in the foregoing

complaint are that he is informed and believes and, therefore, alleges that the defendant in the writ is trying and attempts to dispose of its property. That is to say that he knows that he is informed and believes as to what he says. In any event the verification does not aid the complaint and would not support a prosecution for the crime of perjury. It also appears that the petitioner is a registered corporation with all of its assets in the Philippine Islands; that Timoteo Unson is one of its heaviest stockholders, and it might be well contended that the purpose of the violent remedy of attachment is to crush the corporation and to seize its assets at the expense of its other creditors.

The majority opinion cites and relies upon section 426 of the Code of Civil Procedure as it relates to section 424, as it further relates to section 412, each of which is construed in the exhaustive opinion in the case of Leung Ben vs. O'Brien above quoted.

With all due respect to the majority opinion and its writer, if it be a fact that an attachment can issue upon a complaint which alleges jurisdictional grounds upon information and belief, then it could be issued upon anyone of the grounds specified in section 412 of the Code of Civil Procedure. All that the plaintiff in the writ would be required to do is to allege in his complaint on information and belief that "the defendant is about to depart from the Philippine Islands with intent to defraud his creditors," or, second, that he is informed and believes that in the course of his employment, an agent or a clerk has embezzled or wrongfully violates his duty; or, third, that he is informed and believes that in an action to recover the possession of personal property that it "has been concealed, removed, or disposed of, to prevent its being found or taken by the officer;" or, fourth, that he is informed and believes "that the defendant has been guilty of a fraud in contracting the debt or in concealing or disposing of the property," or, fifth, that he is informed and believes that "the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

All of the authorities hold that an attachment is a harsh remedy, and that it is a special proceeding, and it was never the purpose or intent of the Legislature that any plaintiff could procure an attachment of property founded upon an allegation made on information and belief. All of the jurisdictional facts should be stated in the positive form to the end that, if they are false, the affiant could be prosecuted for the crime of perjury.

To hold that an attachment can be issued upon information and belief would, in legal effect, nullify the statute, and would permit plaintiff at his option to have the property of the defendant attached without any regard to the jurisdictional facts provided for in the statute.

For the reason that the jurisdictional facts alleged in the body of the complaint are founded upon information and belief only, upon the authority of the case of Leung Ben vs. O'Brien, *supra*, the writ should be granted.

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