SUPREME COURT
FIRST DIVISION

FUA CAM LU,
Plaintiff-Appellee,

-versus-

G.R. No. 48797
July 30, 1943

YAP FAUCO and YAP SINGCO,
Defendants-Appellants.
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D E C I S I O N

The plaintiff-appellee, Fua Cam Lu, obtained in Civil Case No. 42125 of the Court of First Instance of Manila a judgment sentencing the defendants-appellants, Yap Fauco and Yap Singco, to pay P1,538.04, with legal interest and costs. By virtue of a writ of execution, a certain parcel of land belonging to the appellants, assessed at P3,550 and situated in Donsol, Sorsogon, was levied upon by the provincial sheriff of Sorsogon who, on November 15, 1933, made a notice, duly posted in three conspicuous places in the municipalities of Donsol and Sorsogon and published in the Mamera Press, that said land would be sold at public auction on December 12, 1933. On December 16, 1933, the appellants executed a mortgage in favor of the appellee, wherein it was stipulated that their obligation under the judgment in civil case No. 42125 was reduced to P1,200 which was made payable in four installments of P300 during the period commencing on February 8, 1934, and ending on August 8, 1935; that to secure the payment of the said P1,200, a camarin belonging to the appellants

and built on the above-mentioned land, was mortgaged to the appellee; that in case the appellants defaulted in the payment of any of the installments, they would pay ten per cent of the unpaid balance as attorney's fees, plus the costs of the action to be brought by the appellee by reason of such default, and the further amount of P338, representing the discount conceded to the appellants. As a result of the agreement thus reached by the parties, the sale of the land advertised by the provincial sheriff did not take place. However, pursuant to an alias writ of execution issued by the Court of First Instance of Manila in civil case No. 42125 on March 31, 1934, the provincial sheriff, without publishing a new notice, sold said land at a public auction held on May 28, 1934, to the appellee for P1,923.32. On June 13, 1935, the provincial sheriff executed a final deed in favor of the appellee. On August 29, 1939, the appellee instituted the present action in the Court of First Instance of Sorsogon against the appellants in view of their refusal to recognize appellee's title and to vacate the land. The appellants relied on the legal defenses that their obligation under the judgment in civil case No. 42125 was novated by the mortgage executed by them in favor of the appellee and that the sheriff's sale was void for lack of necessary publication. These contentions were overruled by the lower court which rendered judgment declaring the appellee to be the owner of the land and ordering the appellants to deliver the same to him, without special pronouncement as to costs. The appellants seek the reversal of this judgment.

We concur in the theory that appellants' liability under the judgment in civil case No. 42125 had been extinguished by the settlement evidenced by the mortgage executed by them in favor of the appellee on December 16, 1933. Although said mortgage did not expressly cancel the old obligation, this was impliedly novated by reason of incompatibility resulting from the fact that, whereas the judgment was for P1,538.04 payable at one time, did not provide for attorney's fees, and was not secured, the new obligation is for P1,200 payable in installments, stipulates for attorney's fees, and is secured by a mortgage. The appellee, however, argues that the later agreement merely extended the time of payment and did not take away his concurrent right to have the judgment executed. This could not have been the purpose for executing the mortgage, because it was therein recited that the appellants promised to pay P1,200 to the appellee as a

settlement of the judgment in civil case No. 42125 (en forma de transaccion de la decision en el asunto civil No. 42125). Said judgment cannot be said to have been settled, unless it was extinguished.

Moreover, the sheriff's sale in favor of the appellee is void because no notice thereof was published other than that which appeared in the Mamera Press regarding the sale to be held on December 12, 1933. Lack of new publication is shown by appellee's own evidence and the issue, though not raised in the pleadings, was thereby tried by implied consent of the parties, emphasized by the appellants in the memorandum filed by them in the lower court, and squarely threshed out in this Court by both the appellants and the appellee. The latter had, besides, admitted that there was no new publication, and so much so that in his brief he merely resorted to the argument that "section 460 of Act 190 authorized the sheriff to adjourn any sale upon execution to any date agreed upon in writing by the parties . . . and does not require the sheriff to publish anew the public sale which was adjourned." The appellee has correctly stated the law but has failed to show that it supports his side, for it is not pretended that there was any written agreement between the parties to adjourn the sale advertised for December 12, 1933, to May 28, 1934. Neither may it be pretended that the sale in favor of the appellee was by virtue of a mere adjournment, it appearing that it was made pursuant to an alias writ of execution. Appellee's admission has thus destroyed the legal presumption that official duty was regularly performed.

The appealed judgment is; therefore, reversed and the defendants-appellants, who are hereby declared to be the owners of the land in question, are absolved from the complaint, with costs against the appellee. So ordered.

Yulo, *C.J.*, Ozaeta and Bocobo, *JJ.*, concur.

SEPARATE OPINIONS

MORAN, J., dissenting:

I dissent.

By virtue of a judgment for P1,538.04 which appellee obtained against appellants, a writ of execution was issued in pursuance of which a parcel of land belonging to appellants was levied upon and its sale at public auction duly advertised. The sale was, however, suspended as a result of an agreement between the parties, by the terms of which the obligation under the judgment was reduced to P1,200 payable in four installments, and to secure the payment of this amount, the land levied upon with its improvement was mortgaged to appellee with the condition that in the event of appellants' default in the payment of any installment, they would pay 10 per cent of any unpaid balance as attorney's fees as well as the difference between the full judgment credit and the reduced amount thus agreed. Appellants failed to comply with the terms of the settlement, whereupon, appellee sought the execution of the judgment, and by virtue of an alias writ of execution, the land was sold at public auction to appellee and a final deed was executed in his favor. Appellants refused, however, to vacate the land and to recognize appellee's title thereto; hence, the latter instituted the present action for recovery.

The majority sustained appellants' theory upon two grounds: (1) that their liability under the judgment has been extinguished by the agreement and that accordingly there was legally no judgment to execute; and (2) that the auction sale was void not only because the judgment sought to be executed has been extinguished but also because there was no publication thereof as required by law.

The first ground is contrary to a doctrine laid down by this Court in a previous case. In Zapanta vs. De Rotaeche (21 Phil., 154), plaintiff obtained judgment against defendant for a sum of money. Thereafter, the parties entered into an agreement by virtue of which the obligation under the judgment was to be paid in installments and that, upon default of defendant to comply with the terms of the agreement, plaintiff shall be at liberty to enter suit against him. Defendant defaulted and plaintiff sued out a writ of execution to recover the balance due upon the judgment credit and by virtue thereof defendant's property was levied upon and sold at public auction. Upon the issue of whether the agreement extinguished the

judgment and plaintiff's right to an execution thereunder, this Court held:

> "A final judgment is one of the most solemn obligations incurred by parties known to law. The Civil Code, in article 1156, provides the method by which all civil obligations may be extinguished. One of the methods recognized by said code for the extinguishment of obligations is that by novation. (Civil Code, arts. 1156, 1203, 1213.) In order, however, that an obligation shall be extinguished by another obligation (novation) which substitutes it, the law requires that the novation or extinguishment shall be expressly declared or that the old and the new obligations shall be absolutely incompatible. (Civil Code, art. 1204.) In the present case, the contract referred to does not expressly extinguish the obligations existing in said judgment. Upon the contrary, it expressly recognizes the obligation existing between the parties in said judgment and expressly provides a method by which the same shall be extinguished which method is, as is expressly indicated in said contract, by monthly payments. The contract, instead of containing provisions 'absolutely incompatible' with the obligations of the judgment, expressly ratifies such obligations and contains provisions for satisfying them. The said agreement simply gave the plaintiff a method and more time for the satisfaction of said judgment. It did not extinguish the obligations contained in the judgment, until the terms of said contract had been fully complied with. Had the plaintiff continued to comply with the conditions of said contract, he might have successfully invoked its provisions against the issuance of an execution upon said judgment. The contract and the punctual compliance with its terms only delayed the right of the defendant to an execution upon the judgment. The judgment was not satisfied and the obligations existing thereunder still subsisted until the terms of the agreement had been fully complied with. The plaintiff was bound to perform the conditions mentioned in said contract punctually and fully, in default of which the defendant was remitted to the original rights under his judgment." (pp. 159-160.)

I see no reason why this decision cannot be made to control in the instant case. Here, as in the Zapanta case, there was an agreement providing for the manner of payment of the obligation under the judgment. In both cases, plaintiff has, by express stipulation, the option to enter an independent suit against defendant should the latter fail to comply with the terms of the settlement. If, in the Zapanta case, plaintiff's alternative right to execute the judgment has been upheld, I perceive no cogent reason why plaintiff in the instant case would be denied a like option to merely execute the judgment and be compelled, instead, to enter an independent suit on the terms of the settlement. The spirit of the new Rules which frowns upon multiplicity of suits lends additional argument against the majority view.

The majority maintains that here there is an implied novation by "reason of incompatibility resulting from the fact that, whereas the judgment was for P1,538.04 payable at one time, did not provide for attorney's fees, and was not secured, the new obligation is for P1,200 payable in installments, stipulates for attorney's fees, and is secured by a mortgage." With respect to the amount, it should be noted that, while the obligation under the judgment was reduced to P1,200, there was, however, a stipulation to the effect that the discount would be recoverable in the event of appellants' default to comply with the terms of the agreement. And as to attorney's fees and the security by way of mortgage, the stipulation therefor contained in the agreement is of no moment, for it is merely incidental to, and anticipatory of, a suit which appellee may choose to take against appellants. Far, therefore, from extinguishing the obligation under the judgment, the agreement ratifies it and provides merely a new method and more time for the judgment debtor to satisfy it. If the judgment debtor fail to comply with the terms of the agreement, the judgment creditor shall be deemed remitted to his original rights under the judgment which he may choose to execute or enter, instead, a separate suit on the terms of the settlement. This is the ratio decidendi in the Zapanta case; this is the ratio decidendi here.

Upon the question of the nullity of the auction sale, the majority appears to have deduced the lack of publication of the necessary notice from isolated parts of the records and from the fact that the published notice regarding the first sale which was suspended, was

merely appended to the second sheriff's sale. It should be noted, however, that appellants have never raised this issue in their pleadings and that the nullity of the sale by them pleaded is made to rest only upon the ground of "fraud and deceit" or "without or with false consideration." There having been no issue as to the publication of notice, no evidence thereon has been adduced by both parties whose attention has never been directed to the question of whether the notice appended to the second sale is or is not the true notice published in connection therewith. Under such circumstance, we have only to rely on the presumption of law in favor of the regularity of official action. We cannot safely disregard this presumption of law for the temptation that isolated pieces of the records on appeal may offer in support of one conjecture or another on matters not expressly litigated by the parties.

I, therefore, vote for the affirmance of the judgment of the trial court.
