

SECOND DIVISION

[G.R. No. 121494, June 08, 2000]

SPOUSES VICTOR ONG AND GRACE TIU ONG, PETITIONERS, VS. COURT OF APPEALS, HON. RODOLFO R. BONIFACIO IN HIS CAPACITY AS PRESIDING JUDGE, RTC, PASIG CITY, BRANCH 159; PROVINCIAL SHERIFF OF RIZAL GRACE S. BELVIS; DEPUTY SHERIFF VICTOR S. STA. ANA; AND PREMIERE DEVELOPMENT BANK, RESPONDENTS.

RESOLUTION

QUISUMBING, J.:

Subject of the present petition for review on *certiorari* is the decision of the Court of Appeals in CA-G.R. SP. No. 34636 dismissing petitioner's special civil action for prohibition with preliminary injunction which sought to enjoin public respondents from implementing a writ of possession issued in favor of private respondent. The Court of Appeals likewise denied petitioners' Motion for Reconsideration.

Petitioners are the mortgagors of an 857 square meter lot and residential house in San Juan, Metro Manila, evidenced by Transfer Certificate Title (TCT) No. (53788) 030-R. The real estate mortgage was used to secure a promissory note (No. 275-Z and later 285-W) issued by Kenlene Laboratories, Inc. (debtor company), a domestic corporation, in favor of private respondent Premiere Development Bank (mortgagee-bank).

Upon failure of the debtor company to pay its amortizations, the mortgagee-bank extrajudicially foreclosed the real estate mortgage under the provisions of Act 3135, as amended by Act 4118. The mortgagee-bank was the highest bidder. During the one-year redemption period, the mortgagee filed a petition with the Regional Trial Court of Pasig City, Branch 159 for the issuance of a writ of possession, which was docketed as LRC Case No. R-4874.

Upon the filing of a bond, the trial court issued the writ of possession. Petitioners filed a Motion for Reconsideration and to Recall Writ of Possession, which was denied by the trial court.

Petitioners-mortgagors filed with the Court of Appeals a petition for prohibition with an application for a writ of preliminary mandatory injunction^[1] to enjoin the implementation of the writ of possession. Petitioners alleged that there is a pending case for annulment of extrajudicial foreclosure of real estate mortgage with an application for preliminary injunction and temporary restraining order (TRO), docketed as Civil Case No. 64604, with the Regional Trial Court of Pasig, Branch 157. Petitioners argued that the implementation of the writ of possession would render nugatory the judgment of the trial court in Civil Case No. 64604.

Initially, the Court of Appeals granted the TRO, but later dismissed the petition for prohibition for lack of merit based on:^[2] (1) failure to allege that there was no appeal or any plain, speedy and adequate remedy in the ordinary course of law, (2) forum-shopping (though it did not explain why), and (3) *Veloso v. IAC*, 205 SCRA 22 (1992) which held that the pendency of a civil case for annulment of sale or reformation of contract is not sufficient ground to deny the issuance of a writ of possession or for the suspension of the resolution thereof. The Court of Appeals likewise denied petitioner's Motion for Reconsideration.^[3]

Hence, the present petition for review on *certiorari*.^[4]

In their Memorandum,^[5] petitioners argue that the Court of Appeals should have enjoined the *implementation* of the writ of possession (LRC Case No. R-4874) pending resolution of their separate case for annulment of extrajudicial foreclosure of real estate mortgage (Civil Case No. 64604). Petitioners contend that if Civil Case No. 64604 is resolved in their favor, the RTC-Pasig, Branch 157 cannot enforce it as against a co-equal court which issued the writ of possession, hence the necessary recourse to the Court of Appeals and this Court.

Petitioners further invoke the case of *Allied Bank v. Court of Appeals*, G.R. No. 109253, February 7, 1994,^[6] wherein both the SC and CA upheld the trial court's orders setting aside the certificate of sale and nullifying the extrajudicial foreclosure proceedings on the ground of prematurity. The mortgagee bank therein foreclosed the real estate mortgage prior to the maturity of the restructured loan. Worse, there was no publication of the foreclosure sale. No writ of possession was issued in that case. Hence, *Allied* is not at fours with this case, and petitioners not similarly situated.

Petitioners insist that appeal under Act 496 is not an available remedy because it merely refers to orders and decisions of the trial court in "registration proceedings." Further, appeal, even if available, would not be an adequate and speedy remedy because it would not stop the sheriff from implementing the writ of possession.

Lastly, petitioners maintain that the order issuing the writ of possession has not yet attained finality because of the present petition for prohibition. Inasmuch as the extrajudicial foreclosure proceedings are a nullity, the issuance of the writ of possession was in excess of jurisdiction, hence correctible by *certiorari* or prohibition.

On the other hand, in its Memorandum,^[7] private respondent (mortgagee-bank) contends, in gist, that prohibition does not lie since petitioners in fact has two remedies available - (1) appeal of the order issuing the writ of possession under Sec. 8 of Act 3135, as amended by Act 4118, and (2) their separate action for annulment of foreclosure of mortgage. For failure to avail of the first remedy, the issue of possession already attained finality. Private respondent concedes, nevertheless, that its possession of the mortgaged property would still be subject to the outcome of Civil Case No. 64604. Further, private respondent claims that the pendency of both the petition for prohibition and Civil Case No. 64604, both aimed at preventing the implementation of the writ of possession, constitutes forum shopping.

Simply put, the issues are: (1) Whether or not prohibition lies to enjoin the issuance of a writ of possession? (2) Whether or not petitioners are guilty of forum shopping?

A writ of possession is "a writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment."^[8]

A writ of possession may be issued under the following instances:^[9] (1) land registration proceedings under Sec. 17 of Act 496;^[10] (2) judicial foreclosure, provided the debtor is in possession of the mortgaged realty and no third person, not a party to the foreclosure suit, had intervened;^[11] and (3) extrajudicial foreclosure of a real estate mortgage under Sec. 7 of Act 3135 as amended by Act 4118.

The present case falls under the third instance. Under Sec. 7 of Act 3135 as amended by Act 4118, a writ of possession may be issued either (1) within the one year redemption period, upon the filing of a bond, or (2) after the lapse of the redemption period, without need of a bond.^[12] Sec. 7 of Act 3135, as amended by Act 4118, provides -

"Sec. 7. In any sale made under the provisions of this Act, the purchaser may petition the Court of First Instance of the province or place where the property or any part thereof is situated, to give him possession thereof during the redemption period, furnishing bond in an amount equivalent to the use of the property for a period of twelve months, to indemnify the debtor in case it be shown that the sale was made without violating the mortgage or without complying with the requirements of this Act. Such petition shall be made under oath and filed in form of an *ex parte* motion in the registration or cadastral proceedings if the property is registered, or in special proceedings in the case of property registered under the Mortgage Law or under sec. 194 of the Administrative Code, or of any other real property encumbered with a mortgage duly registered in the office of any register of deeds in accordance with any existing law, and in each case the clerk of court shall, upon the filing of such petition, collect the fees specified in par. 11 of sec 114 of Act No. 496, and the court shall, upon approval of the bond, order that a writ of possession issue, addressed to the sheriff of the province in which the property is situated, who shall execute said order immediately."

In case it is disputed that there was violation of the mortgage or that the procedural requirements for the foreclosure sale were not followed, Sec. 8 of Act 3135 as amended by Act 4118, provides that the mortgagor may file a petition with the trial court which issued the writ to set aside the sale and for cancellation of the writ of possession within 30 days *after* the purchaser-mortgagee was given possession. Sec. 8 of Act 3135 as amended by Act 4118, provides -

"Sec. 8. The debtor may, in the proceedings in which possession was requested, but not later than thirty days after the purchaser was given possession, petition that the sale be set aside and the writ of possession cancelled, specifying the damages suffered by him, because the