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her physical condition and history and/or concealed with whoever assisted her in relaying false information to the medical examiner ***."

Certainly, petitioner cannot assume inconsistent positions by attempting to enforce the contract of insurance for the purpose of collecting the proceeds of the policy and at the same time nullify the contract by claiming that he executed the same thru fraud or mistake.

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**SECOND DIVISION**

[G.R. No. L-48820. May 25, 1979]

**MALAYAN INSURANCE CO., INC.,** *petitioner, vs.* **HON. EMILIO V. SALAS, as Presiding Judge, Court of First Instance of Rizal, Branch I, Pasig, Metro Manila, ROSENDO FERNANDO and JOHN DOE,** *respondents.*

**SYLLABUS**

**1. REMEDIAL LAW; PROVISIONAL REMEDIES; REPLEVIN; RECOVERY OF DAMAGES ON REPLEVIN BOND; REQUISITES.** — Under Section 20, Rule 57, in order to recover damages on a replevin bond (or on a bond for preliminary attachment, injunction or receivership) it is necessary (1) that the defendant has secured a favorable judgment in the main action, meaning that the plaintiff has no cause of action and was not, therefore, entitled to the provisional remedy of replevin; (2) that the application for damages, showing claimant's rights thereto and the amount thereof, be filed in the same action before trial or before appeal is perfected or before the judgment becomes executory; (3) that due notice be given the other party and his surety or sureties, notice to the principal not being sufficient and (4) that there should be a proper hearing and the award for damages should be included in the final judgment.

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**2. ID.; ID.; WHEN MAY BE FILED.** — The application for damages against the surety must be filed (with notice to the surety) in the Court of First Instance before the trial or before appeal is perfected or before the judgment of the court becomes executory. If an appeal is taken, the application must be filed in the appellate court but always before the judgment of that court becomes executory so that the award may be included in its judgment.

**3. ID.; ID.; ID.; ID.; APPELLATE COURT SHOULD INCLUDE AWARD OF DAMAGES AGAINST SURETY.** — Where the application for damages against the surety is seasonably made in the appellate court, the latter must either proceed to decide and hear the application or refer it to the trial court and allow it to hear and decide the same.

**4. ID.; ID.; ID.; ID.; ID.; EXCEPTION.** — Where a claim for damages on the replevin bond was timely made with the Court of Appeals, and the surety was notified thereof, but the Court of Appeals did not resolve the claim immediately and instead directed the trial court to hear that claim, it was held that this peculiar factual situation makes it an exception to the settled rule that the surety's liability for damages should be included in the final judgment to prevent duplicity of suits or proceedings. Obviously, the lower court has no choice but to implement the directive which is the law of the case.

**5. ID.; ID.; ID.; ID.; REQUIRES NOTICE TO SURETY.** — If the surety was not given notice when the claim for damages against the principal in the replevin bond was heard, then as a matter of procedural due process the surety is entitled to be heard when the judgment for damages against the principal is sought to be enforced against the surety's replevin bond. The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove. The oral proof of damages already adduced by the claimant may be reproduced without the necessity of retaking the testimony, but the surety should be given an opportunity to cross-examine the witness or witnesses if it so desires. That procedure would forestall the perpetration of fraud or collusion against the surety.

**6. ID.; ID.; ID.; ID.; EFFECT OF FAILURE TO GIVE SUMMARY HEARING.** — Where the surety company was not given the summary hearing during which it could contest the reality or

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reasonableness of the claim for damages on the replevin bond, the trial court's order awarding damages against it will be set aside and, in the interest of justice, it should be given an opportunity to be heard on the merits of the prevailing party's claim for damages.

7. **ID.; ID.; ID.; ID.; COUNTERCLAIM; WHEN AVAILABLE.** — The defendant in a replevin case cannot file a separate action for damages due to the wrongful issuance of the writ. He should claim the damages as a counterclaim in the original replevin suit.

8. **ID.; ID.; ID.; REPLEVIN BOND; DISTINGUISHED FROM COUNTERBOND AND FROM SURETY'S OBLIGATION ON AN ADMINISTRATOR'S BOND.** — The procedure in Section 20 of the Rule 57 should not be confounded with the procedure in Section 17 of the same rule regarding the surety's liability on the counterbond for the lifting of the preliminary attachment. Under Section 17, the surety may be held liable after notice and summary hearing conducted after the judgment had become executory and the execution was returned unsatisfied. The case contemplated in Section 17 of Rule 57 is different from the case envisaged in Section 20 of that rule. Nor does Section 20 of Rule 57 apply to cases where the surety bound himself to abide by the judgment against his principal and hereby renounced his right to be sued or cited, or where the surety guaranteed the return of certain goods and he did not raise the issue of lack of notice, or where the sureties bound themselves to pay the plaintiff a definite amount. Note that a different rule also obtains with respect to the surety in the bond of an administrator or executor. The nature of the surety's obligation on an administrator's bond, which makes him privy to the proceeding against his principal, is such that he is bound and concluded, in the absence of fraud or collusion, surety was not a party to the proceedings.

**APPEARANCES OF COUNSEL**

*Angara Abello Concepcion Regala & Cruz* for petitioner.
*Lazaro Abinoja & Associates* for private respondents.

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## DECISION

**AQUINO, *J.*:**

This case is about the surety company's liability on its replevin bond which was not included in the final judgment against the principal in the bond. It is undisputed that in 1970 Makati Motor Sales, Inc., as vendor mortgagee, sued Rosendo Fernando for the recovery of four diesel trucks and the collection of the balance of his obligation plus damages (Civil Case No. 13874, Court of First Instance of Rizal, Pasig Branch I).

To obtain immediate possession of the trucks pending trial, Makati Motors Sales, Inc. posted a replevin bond executed by the Malayan Insurance Co., Inc. In that bond the surety bound itself to pay ₱362,775.92 "for the return of the property to the defendant, if the return thereof be adjudged, and for the payment of such sum as may in the cause be recovered against the plaintiff." Pursuant to the order of the court, the sheriff seized the four trucks. Later, two of the trucks were returned to Fernando.

After trial, or on March 2, 1973, the lower court rendered judgment ordering Makati Motor Sales, Inc. to return to Fernando the other two trucks and to pay him, for the seizure of each of them, damages in the sum of three hundred pesos daily from September 25 and 26, 1970 (or six hundred pesos for the two trucks from the latter date) until their return to Fernando plus ₱26,000 as actual and moral damages.

In turn, Fernando was ordered to pay Makati Motor Sales, Inc. the sum of ₱66,998.34, as the balance of the price of the two trucks, with twelve percent interest from February 28, 1969 until fully paid and the further sum of ₱15,730.20 as the cost of the repair with six percent interest from September 11, 1970 until fully paid.

Makati Motor Sales, Inc. appealed to the Court of Appeals. It affirmed the lower court's judgment in its decision of March 1, 1977 in CA-G. R. No. 54196-R.

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Meanwhile, on May 11, 1973, or before the elevation of the record to the Court of Appeals, Fernando filed in the trial court an application for damages against the replevin bond. It was opposed by the surety on the ground that the trial court had lost jurisdiction over the case because of the perfection of the appeal. The trial court denied the application on June 28, 1973.

On May 27, 1974 Fernando filed in the Court of Appeals his claim for damages against the replevin bond. He prayed that the same be included in the judgment. The surety, which was furnished with a copy of the claim, filed an opposition to it.

The Court of Appeals did not act immediately on that claim but in its 1977 decision it observed that Fernando's motion or claim "was correct" and it ordered that his claim against Malayan Insurance Co., Inc. "be heard before the trial court." That decision affirming the lower court's judgment became final and executory on March 18, 1977.

On April 6, 1977, or after the remand of the record to the trial court, Fernando filed a motion to set for hearing his application for damages against the surety on its replevin bond. The application was heard with notice to Makati Motor Sales, Inc. and Malayan Insurance Co., Inc. Fernando submitted documentary evidence. On December 15, 1977 Malayan Insurance Co., Inc. moved to quash the proceeding regarding the claim for damages. It contended that the trial court has no jurisdiction to alter or modify the final judgment of the Court of Appeals.

The trial court in its order of July 14, 1978 denied the motion to quash. It directed Malayan Insurance Co., Inc. to pay Fernando the damages which it had adjudged against Makati Motor Sales, Inc. The surety company appealed from that order to this Court pursuant to Republic Act No. 5440.

Section 10, Rule 60 of the Rules of Court provides that in replevin cases, as in receivership and injunction cases, the damages "to be awarded to either party upon any bond filed by the other" "shall be claimed, ascertained, and granted" in accordance with Section 20 of Rule 57 which reads:

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"SEC. 20. *Claim for damages on account of illegal attachment.* — If the judgment on the action be in favor of the party against whom attachment was issued, he may recover, upon the bond given or deposit made by the attaching creditor, any damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching creditor and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof.

"If the judgment of the appellate court be favorable to the party against whom the attachment was issued, he must claim damages sustained during the pendency of the appeal by filing an application with notice to the party in whose favor the attachment was issued or his surety or sureties, before the judgment of the appellate court becomes executory. The appellate court may allow the application to be heard and decided by the trial court."

Under Section 20, in order to recover damages on a replevin bond (or on a bond for preliminary attachment, injunction or receivership) it is necessary (1) that the defendant-claimant has secured a favorable judgment in the main action, meaning that the plaintiff has no cause of action and was not, therefore, entitled to the provisional remedy of replevin; (2) that the application for damages, showing claimant's right thereto and the amount thereof, be filed in the same action before trial or before appeal is perfected or before the judgment becomes executory; (3) that due notice be given to the other party and his surety or sureties, notice to the principal not being sufficient and (4) that there should be a proper hearing and the award for damages should be included in the final judgment (*Luneta Motor Co. vs. Menendez,* 117 Phil. 970, 974; 3 Moran's Comments on the Rules of Court, 1970 Ed., pp. 54-56. See *Cruz vs. Manila Surety & Fidelity Co., Inc.,* 92 Phil. 699).

In this appeal, Malayan Insurance Co., Inc. contends that the trial court's judgment against it is not warranted under Section 20 of Rule 57. It assails the trial court's competence to render judgment against the surety after the decision of the Court of

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Appeals against the surety's principal had become final and executory.

We hold that the trial court has jurisdiction to pass upon Fernando's application for the recovery of damages on the surety's replevin bond. The reason is that Fernando *seasonably filed his application for damages in the Court of Appeals.* It was not his fault that the damages claimed by him against the surety were not included in the judgment of the Court of Appeals affirming the trial court's award of damages to Fernando payable by the principal in the replevin bond. The peculiar factual situation of this case makes it an exception to the settled rule that the surety's liability for damages should be included in the final judgment to prevent duplicity of suits or proceedings.

As may be gathered from Section 20 of Rule 57, the application for damages against the surety must be filed (with notice to the surety) in the Court of First Instance before the trial or before appeal is perfected or before the judgment becomes executory.

If an appeal is taken, the application must be filed in the appellate court but always before the judgment of that court becomes executory so that the award may be included in its judgment (*Luneta Motor Co. vs. Menendez*, 117 Phil. 970, 976).

But it is not always mandatory that the *appellate court* should include in its judgment the award of damages against the surety. Thus, it was held that where the application for damages against the surety is seasonably made in the appellate court, "the latter must either proceed to hear and decide the application or *refer "it" to the trial court and allow it to hear and decide the same*" (*Rivera vs. Talavera,* 112 Phil. 209, 219).

We have stated earlier that in the instant case Fernando in 1974 made a timely claim in the Court of Appeals for an award of damages against Malayan Insurance Co., Inc. enforceable against its replevin bond. The surety was notified of that application. It registered an opposition to the claim. The Court of Appeals did not resolve the claim immediately but in its 1977 decision it directed the trial court to hear that claim.

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Obviously, the lower court has no choice but to implement that directive which is the law of the case (See *Compagnie Franco-Indochinoise vs. Deutsch, etc.*, 39 Phil. 474, 476).

However, the trial court's implementation of that directive was incorrect. It set the claim for hearing but the surety assailed its jurisdiction and did not consider itself bound by the mandate of the appellate court. The merits of the claim for damages were not threshed out at the hearing because the surety stood pat on its contention that the trial court has no jurisdiction to allow the claim in view of the finality of the decision of the Court of Appeals.

This Court has held that, if the *surety* was not given notice when the claim for damages against the *principal* in the replevin bond was heard, then as a matter of procedural due process the surety is entitled to be heard when the judgment for damages against the principal is sought to be enforced against the surety's replevin bond.

"The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove. The oral proof of damages already adduced by the claimant may be reproduced without the necessity of retaking the testimony, but the surety should be given an opportunity to cross-examine the witness or witnesses if it so desires." That procedure would forestall the perpetration of fraud or collusion against the surety (*Visayan Surety and Insurance Corporation vs. Pascual,* 85 Phil. 779, 785-786).

Inasmuch as in this case appellant Malayan Insurance Co., Inc. was not given the summary hearing during which it could contest the reality or reasonableness of Fernando's claim for damages, we have to set aside the trial court's order awarding damages against it and, in the interest of justice, give it another opportunity to be heard on the merits of Fernando's claim for damages.

Before closing, it may be useful to make a review and synthesis of the copious jurisprudence on the surety's liability in attachment, injunction, replevin and receivership bonds. It was observed in

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one case that once upon a time the rulings on that point were in a muddled state.

Section 20 of Rule 57 is a revised version of Section 20, Rule 59 of the 1940 Rules of Court which earlier Section 20 is a restatement of this Court's rulings under Sections 170, 177, 223, 272 and 439 of the Code of Civil Procedure regarding the damages recoverable in case of the wrongful issuance of the writs of preliminary injunction, attachment, *mandamus* and replevin and the appointment of a receiver.

Section 170 contains the provision that the damages suffered in connection with the issuance of a preliminary injunction shall be ascertained by the court trying the action (meaning the court where the action is pending) and shall be included in the final judgment "against the plaintiff and against the sureties." As to damages in case of wrongful attachment, see Section 439 of the Code of Civil Procedure and *Belzunce vs. Fernandez,* 10 Phil. 452.

So, as held under the Code of Civil Procedure, if the preliminary injunction was issued by this Court, the specification of damages should be filed in this Court. The petitioner and his bondsmen should be served with copies of the specification (*Somes vs. Crossfield,* 9 Phil. 13 and *Macatangay vs. Municipality of San Juan de Bocboc*, 9 Phil. 19).

On the other hand, under Section 439 of the Code of Civil Procedure, the damages caused by a wrongful attachment may be adjudicated in a summary hearing but the better practice would be to claim the damages in the answer and to offer evidence in support thereof during the trial (*Gasataya vs. Fallon,* 32 Phil. 245 and *Raymundo vs. Carpio,* 33 Phil. 395).

Note that under the second paragraph of Section 20, Rule 57 of the present Rules of Court, the damages suffered during the pendency of an appeal in a case where the writs of attachment, injunction and replevin or an order of receivership were issued should be claimed in the appellate court.

There is an old ruling that the sureties in an injunction bond are bound by a judgment for damages against their principal

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even if the sureties were not heard at the time the claim for damages was tried. The reason for that ruling is that the sureties in an injunction bond "assume such a connection with the suit that they are included by a judgment in it in a suit at law upon the bond, so far as the same issues are involved; and that, upon the entry of a judgment against the principal, their liability is absolute" (*Florentino vs. Domadag*, 45 O.G. 4937, 81 Phil. 882).

Also, it was held that if damages were awarded against the principal in a replevin bond without notice to the surety, that final judgment may be enforced against the surety after it has been given an opportunity to be heard as to the reality or reasonableness of the alleged damages. In such a case, the trial court must order the surety to show cause why the bond should not answer for the judgment for damages. The hearing is summary and the surety may cross-examine the witnesses presented by the defendant (*Visayan Surety & Insurance Corporation vs. Pascual*, 85 Phil. 779).

Insofar as those rulings in the *Florentino* and *Visayan Surety* cases allowed a claim for damages against the surety to be ventilated in a separate proceeding or after the finality of the judgment for damages against the principal in the bond, those rulings were *jettisoned and abandoned* in several subsequent cases because they are contrary to the explicit provision of Section 20 of Rule 59, now Rule 57, that the judgment for damages against the surety should be included in the final judgment to avoid additional proceedings (*Cruz vs. Manila Surety & Fidelity Co., Inc.*, 92 Phil. 699; *Japco vs. City of Manila*, 48 Phil. 851, 855).

The damages are recoverable on the theory that an actionable wrong was committed by the losing party. The recovery is limited to the amount of the bond (*Pacis vs. Commission on Elections*, L-29026, August 22, 1969, 29 SCRA 24, 29).

The usual procedure is to file an application for damages with due notice to the other party and his sureties. The other party may answer the application. Upon the issues thus being joined, the matter will be tried and determined. A court order

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declaring the bond confiscated without adhering to that procedure is void (*Fabella vs. Tancinco*, 86 Phil. 543; *Luzon Surety Co., Inc. vs. Guerrero*, L-20705, June 20, 1966, 17 SCRA 400).

The claim for damages against the surety should be made with notice to the surety and before the judgment against the principal becomes executory. The liability of the surety should be included in the final judgment. That remedy is exclusive. If not availed of, the surety is released (*Curilan vs. Court of Appeals*, 105 Phil. 1160 and *De la Rama vs. Villarosa*, 118 Phil. 424, 430; *Jesswani vs. Dialdas*, 91 Phil. 915; *Estioco vs. Hamada*, 103 Phil. 1145).

Therefore, the prevailing settled rule is that a court has no jurisdiction to entertain any proceeding seeking to hold a surety liable upon its bond if such surety has not been given notice of the claim for damages against the principal and the judgment holding the latter liable has already become executory (*People's Surety & Insurance Co., Inc. vs. Court of Appeals*, L-21627, June 29, 1967, 20 SCRA 481).

If the judgment awarding damages against the principal in a bond for the lifting of a preliminary injunction had already become executory, that claim cannot be pressed against the surety by setting it for hearing with notice to the surety. The failure to notify the surety of the claim for damages against the principal relieves the surety from any liability on his bond (*Sy vs. Ceniza*, 115 Phil. 396; *Pacis vs. Commission on Elections*, L-29026, August 22, 1969, 29 SCRA 24; *Dee vs. Masloff*, 116 Phil. 412).

To entertain the belated claim against the surety after the judgment for damages against the principal has become executory would result in the alteration of that judgment. That should not be done (*De Guia vs. Alto Surety & Insurance Co., Inc.*, 117 Phil. 434; *Visayan Surety & Insurance Co., Inc. vs. De Aquino*, 96 Phil. 900; *Port Motors, Inc. vs. Raposas and Alto Surety & Insurance Co., Inc.*, 100 Phil. 732; *Gerardo vs. Plaridel Surety & Insurance Co., Inc.*, 100 Phil. 178; *Luneta Motor Co. vs. Lopez*, 105 Phil. 327; *Curilan vs. Court of Appeals*, 105 Phil. 1160; *Riel vs. Lacson*, 104 Phil. 1055).

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Moreover, the damages claimed by the defendant should be pleaded as a compulsory counterclaim in his answer. Hence, a separate action to claim those damages is unwarranted (*Ty Tion and Yu vs. Marsman & Co. and Alpha Insurance & Surety Co., Inc.,* 115 Phil. 746, 749; *Medina vs. Maderera del Norte de Catanduanes, Inc.,* 51 Phil. 240; *Nueva-España vs. Montelibano,* 58 Phil. 807; *Tan-Suyco vs. Javier*, 21 Phil. 82).

It may be noted that in the *Visayan Surety* case, 85 Phil. 779, Visayan Surety & Insurance Corporation filed a replevin bond for one Yu Sip who sued Victoria Pascual for the recovery of a truck. The trial court found that the writ of replevin was wrongfully procured, that Victoria Pascual was the lawful owner of the truck and that she suffered damages on account of its wrongful seizure by the sheriff at the instance of plaintiff Yu Sip.

The trial court ordered Yu Sip to return the truck to Victoria Pascual or to pay its value of ₱2,300 in case of his inability to return it and, in either case, to pay thirty pesos daily from January 6, 1947 up to the date of the return of the truck or until its value was fully paid. The Court of Appeals affirmed that judgment.

After the return of the record to the trial court, Victoria Pascual filed a "petition for execution of the surety bond" wherein she prayed for a writ of execution against the surety to satisfy the judgment out of its replevin bond. The surety opposed that petition. It contended that it was never notified by Victoria Pascual regarding her presentation of evidence covering the damages which she had suffered. The trial court granted the petition and ordered the issuance of a writ of execution against the surety. That order was assailed in a *certiorari* proceeding in this Court.

It was held that the writ of execution should be set aside and that the surety should be given a chance to be heard in a summary proceeding. That proceeding was conducted after the judgment against Yu Sip, the principal in the replevin bond, had become final and executory.

What was done in the *Visayan Surety* case, as recounted above, was not allowed in subsequent cases. Thus, in *Manila*

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*Underwriters Insurance Co., Inc. vs. Tan,* 107 Phil. 911, the trial court rendered in 1954 a judgment dissolving the preliminary attachment and ordering the plaintiff to pay the defendant the damages which the latter suffered by reason of the wrongful attachment. The surety in the attachment bond was not notified of the hearing but it was furnished with a copy of the decision.

In 1957 the Court of Appeals affirmed that judgment. After it became final, the defendant filed in the trial court against the surety a motion for execution which the latter opposed. At the hearing of the motion, the defendant offered to reproduce the evidence which he had presented at the trial. The offer was accepted by the trial court. It issued the writ of execution against the surety.

It was held that, because the surety was not notified of the hearing on the damages suffered by the defendant in the manner prescribed in Section 20 of Rule 59, now Rule 57, it was not liable for damages under its attachment bond.

The surety is notified so that he may cross-examine the witnesses testifying as to the damages and question the evidence presented by the claimant and interpose any appropriate defense (*Riel vs. Lacson*, 104 Phil. 1055; *Liberty Construction Supply Co. vs. Pecson*, 89 Phil. 50).

So, if plaintiff's claim for damages resulting from the wrongful lifting of the writ of preliminary injunction was awarded in the main decision without notice to the surety and the decision had become executory, the failure to notify the surety on time relieves him from his liability under the bond (*Alliance Insurance & Surety Co., Inc. vs. Piccio,* 105 Phil. 1192).

The surety may be held liable only if before the judgment for damages against the principal becomes executory, an order is entered against him after a hearing with notice to him. After the judgment becomes executory, it is too late to file such claim for damages with notice to the surety (*Abelow vs. Riva,* 105 Phil. 159; *Visayan Surety & Insurance Corp. vs. Lacson*, 96 Phil. 878).

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Where the Court of Appeals dismissed a *mandamus* action originally filed in that court and dissolved the preliminary injunction which it had issued and after entry of judgment was made the record was remanded to the trial court, it was error for the Court of Appeals to allow the respondent in that case to file a claim for damages against the principal and surety in the injunction bond. The claim should have been filed before the judgment of dismissal became final (*Luzon Surety Co., Inc. vs. Court of Appeals,* 108 Phil. 157).

Section 20 of Rule 57 contemplates one judgment for damages against the principal and the surety in the injunction, replevin, attachment and receivership bonds. Since the judicial bondsman has no right to demand the exhaustion of the property of the principal debtor, there is no justification for entering separate judgments against them. The claim for damages against the surety should be made before entry of judgment (*Del Rosario vs. Nava,* 95 Phil. 637).

In the *Del Rosario* case, a judgment for damages was rendered against the principal in an attachment bond but there was no notice to the surety of the claim for damages. That judgment became final. After the execution against the principal was returned unsatisfied, the claimant filed a motion praying that the surety company be required to show cause why it should not answer for the judgment against the principal.

It was held that, while the prevailing party may apply for an award of damages against the surety even after the award has already been obtained against the principal, nevertheless, in order that all awards for damages may be included in the final judgment, the application and notice to the surety must be made before the judgment against the principal becomes final and executory.

In another case, it was held that as the winning party sought to hold the surety liable on its replevin bond almost a year after the judgment of the Court of Appeals became final, the trial court erred in enforcing its judgment against the surety. "The surety may only be held liable if, before judgment becomes final an order against the surety is entered after a hearing with

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notice to the surety." The claim against the surety should be included in the final judgment. It is not sufficient that the surety be afforded an opportunity to oppose the writ of execution. (*Plaridel Surety & Insurance Company vs. De los Angeles,* L-25550, July 31, 1968, 24 SCRA 487).

After this Court's judgment dissolving a preliminary injunction had become final and executory, it would be too late to entertain in the trial court the defendant's application for damages allegedly caused by the injunction (*Santos vs. Moir,* 36 Phil. 350).

The defendant in a replevin case cannot file a *separate action for damages* due to the wrongful issuance of the writ. He should have claimed the damages as a counterclaim in the original replevin suit (*Pascua vs. Sideco*, 24 Phil. 26; *Ty Tion and Yu vs. Marsman & Co. and Alpha Ins. & Surety Co. Inc.*, 115 Phil. 746).

A final judgment for damages against the principal in a replevin bond cannot be enforced against the surety company which was not notified of the claim for damages and was not afforded a chance to be heard (*People's Surety and Ins. Co., Inc. vs. Aragon*, 117 Phil. 257).

Where an injunction was dissolved and only attorney's fees and costs were adjudged against the principal, and the procedure for claiming damages against the surety was not followed, no recourse could be had against the injunction bond in case the writ of execution against the principal was not satisfied. Moreover, the attorney's fees and costs could be recovered from the principal even without the filing of the bond (*People's Surety & Insurance Co., Inc. vs. Bayona,* 103 Phil. 1109).

Where after the dismissal of a petition for relief from the judgment of a municipal court, the Court of First Instance ordered *ex parte* the issuance of a writ of execution against the petitioner's injunction bond, that order is void because there was no formal claim for damages and there was no hearing with notice to the petitioner and his surety. The court should hold a hearing. *(Luzon Surety Co., Inc. vs. Guerrero,* L-20705, June 20, 1966, 17 SCRA 400).

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Where on June 11, 1959 an action to stop the foreclosure of a chattel mortgage was dismissed, without prejudice, for failure to prosecute and, before that dismissal became final, the defendant did not prove any damages resulting from the issuance of the preliminary injunction, defendant's motion of September 7, 1959 praying that judgment be rendered against the surety's bond could no longer be entertained. The claim for damages should have been made before entry of final judgment. It must be duly substantiated at the proper hearing with notice to the surety (*Jao and Sia vs. Royal Financing Corporation*, 114 Phil. 1152; *Visayan Surety & Insurance Corp. vs. Lacson,* 96 Phil. 878).

If the case wherein the injunction was issued was dismissed for failure to prosecute and no damages were awarded to the defendant by reason of the issuance of the injunction, it was error for the trial court to issue a writ of execution against the surety since there was no claim nor evidence of damages suffered by the defendant. The order of dismissal did not include any award of damages. (*Vet Bros. and Co., Inc. vs. Movido,* 114 Phil. 211).

The case of *Vadil vs. De Venecia*, 118 Phil. 1217, involves a queer situation. Plaintiff corporation in that case filed an action to recover a sum of money. It asked for a writ of attachment. Before any attachment could be issued, the defendant filed a counterbond. But this bond provided that the *defendant* and his sureties would pay "all damages that the *defendant* (*sic*) may suffer by reason of" the attachment. In other words, the defendant executed a bond in favor of himself.

Judgment was rendered for the plaintiff. As the execution was returned unsatisfied, the trial court on plaintiff's motion ordered execution against defendant's bond. It was held that the execution was wrongfully issued.

However, where an injunction was issued in a forcible entry case but on *certiorari* to the Court of First Instance, the justice of the peace court was held to be without jurisdiction to entertain the ejectment case, that ejectment suit is not considered dismissed and it may still be regarded as pending in the justice of the peace court for the purpose of allowing the defendant's claim

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for damages on the injunction bond (*Cruz vs. Manila Surety & Fidelity Co.*, 92 Phil. 699).

Section 10 of Rule 60 makes Section 20 of Rule 57 applicable not only to the replevin bond but also to the *redelivery bond* posted by the defendant for the lifting of the order of seizure. The requisites for holding the surety liable on the *replevin bond* are also the requisites for holding the surety liable on the *redelivery bond.* So, if the surety on the redelivery bond was not notified of the plaintiff's claim for damages, the surety cannot be held liable on its redelivery bond for the damages adjudged against the principal. It is necessary that the surety be notified and that its liability be included in the final judgment against the principal (*Luneta Motor Co. vs. Menendez*, 117 Phil. 970).

The writ of execution issued against the counterbond for the dissolution of an injunction is void if it was issued without notice to the surety and after the judgment on the merits had become executory. The surety's liability should have been included in the final judgment (*Cajefe vs. Fernandez*, 109 Phil. 743).

If the judgment awarding damages against the principals in the counterbonds filed for the lifting of the receivership was appealed to the Court of Appeals and the plaintiff-appellee filed in the trial court (not in the appellate court) his application for damages against the sureties in the counterbonds, the trial court cannot hear the said application after the record is remanded to it because, by then, the decision of the appellate court had become final and the damages to be awarded against the sureties could no longer be included in that judgment. The application for damages against the sureties should have been filed in the Court of Appeals (*Luneta Motor Co. vs. Menendez,* 117 Phil. 970, 976).

The procedure in *Section 20* of Rule 57 should not be confounded with the procedure in *Section 17* of the same rule regarding the surety's liability on the *counterbond for the lifting of the preliminary attachment.* Under Section 17, the surety may be held liable after notice and summary hearing conducted after the judgment had become executory and the

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execution was returned unsatisfied (*Towers Assurance Corporation vs. Ororama Supermart,* L-45848, November 9, 1977, 80 SCRA 262; *Vanguard Assurance Corporation vs. Court of Appeals*, L-25921, May 27, 1975, 64 SCRA 148).

The case contempated in Section 17 of Rule 57 is different from the case envisaged in Section 20 of that rule (*Dizon vs. Valdes*, L-23920, April 25, 1968, 23 SCRA 200; *Visayan Surety & Insurance Corp. vs. De Aquino,* 96 Phil. 900).

Nor does Section 20 of Rule 57 apply to cases where the surety bound himself to abide by the judgment against his principal and thereby renounced his right to be sued or cited, or where the surety guaranteed the return of certain goods and he did not raise the issue of lack of notice, or where the sureties bound themselves to pay the plaintiff a definite amount (*Aguasin vs. Velasquez,* 88 Phil. 357; *Lawyers Cooperative Publishing Co. vs. Periquet,* 71 Phil. 204; *Mercado vs. Macapayag and Pineda*, 69 Phil. 403 cited in *Alliance Insurance* case, 105 Phil. 1201).

Note that a different rule also obtains with respect to the surety in the bond of an administrator or executor. The nature of a surety's obligation on an administrator's bond, which makes him privy to the proceeding against his principal, is such that he is bound and concluded, in the absence of fraud or collusion, by a judgment against his principal, even though the surety was not a party to the proceedings (*Laurente vs. Rizal Surety & Insurance Co., Inc.*, L-21250, March 31, 1966, 16 SCRA 551, citing *Philippine Trust Co. vs. Luzon Surety Co., Inc.*, 112 Phil. 44. See *Cosme de Mendoza vs. Pacheco and Cordero*, 64 Phil. 34).

It should be underscored that in the instant case, although the surety's liability was not included in the final judgment, which became executory, nevertheless, there was a timely application for damages in the Court of Appeals which in its decision ordered the trial court to hear defendant-appellee Fernando's claim for damages against the surety. That feature of the case removes it from the coverage of the rule that the

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surety should be heard before the judgment becomes executory and that his liability should be included in the final judgment.

**WHEREFORE,** we hold that the trial court has jurisdiction to comply with the directive of the Court of Appeals but we reverse and set aside its order of July 14, 1978, requiring petitioner-appellant Malayan Insurance Co., Inc. to pay the damages which it had adjudged against Makati Motor Sales, Inc.

*The trial court is required to hold a summary hearing wherein* appellant surety should be given a chance to contest the reality or reasonableness of respondent-appellee Rosendo Fernando's claim for damages. After such hearing, or if the surety should waive it, the trial court should render the proper judgment. No costs.

**SO ORDERED.**

*Concepcion Jr., Santos,* and *Abad Santos, JJ.*, concur.

*Antonio (Actg. Chairman), J.,* concurs in a separate opinion.

*Fernando, Actg. C.J.* and *Barredo, J.*, took no part.

**ANTONIO, *J., concurring:***

I concur.

1. Under Section 20 of Rule 57, application for damages against the surety resulting from wrongful attachment or wrongful *seizure of personal property must be filed in the Court of First* Instance in the same action in which the Writ of Attachment or the writ or replevin was issued, before trial, or even after trial but before the judgment becomes executory or before perfection of the appeal. In other words, the court must still have jurisdiction over the case. The attaching creditor and his surety or sureties must be notified of the application setting forth the facts showing the right of the applicant to and the amount of damages sustained by him. If the appeal is taken, then the application must be filed in the Appellate Court but always before the judgment of said court becomes final and executory.

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2. That where such application is seasonably made to the Appellate Court, the latter must either proceed to hear and decide the application or refer the application to the trial court and allow it to hear and decide the same. Application for damages sustained during the proceeding of the appeal may similarly be filed with the Appellate Court, which may hear the application or refer it to the trial court for the said court to hear and decide.

3. The hearing is summary and will be limited to such new defense not previously set up by the principal, as the surety may allege and offer to prove. While the previous testimony by the claimant on the damages may be reproduced, the surety should be given an opportunity to cross-examine the witness or witnesses, if it so desires.

In the case at bar, there was a timely application for damages in the Court of Appeals on May 27, 1974, where the case was then pending, and in its 1977 decision, the Appellate Court ordered that the claim against the surety be heard before the trial court. *This circumstance apparently brings it out of the ambit of the* rule that the application to recover damages cannot be the subject of separate action, in order to avoid multiplicity of suits, since the hearing before the trial court is just an implementation of the judgment of the Appellate Court.

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**SECOND DIVISION**

[A.M. No. 243-MJ. May 28, 1979]

**LT. ROBERTO LASTIMOSO,** *complainant, vs.* **MUNICIPAL JUDGE IGNACIO LAMBO OF MABINI, DAVAO DEL NORTE,** *respondent.*