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SECOND DIVISION

[G.R. No. L-46009. May 14, 1979]

RICARDO T. SALAS and MARIA SALAS, *petitioners, vs.* **HON. MIDPANTAO L. ADIL, as Judge of Branch II, Court of First Instance of Iloilo, ROSITA BEDRO and BENITA YU,** *respondents.*

SYLLABUS

1. **REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; REQUISITES.** — In *certiorari* proceedings, the cardinal rule is that the court must be given the opportunity to correct itself. Thus, for the special civil action of *certiorari* to prosper, there must be no appeal nor any plain, speedy and adequate remedy in the ordinary course of law. Petitioners, therefore, must exhaust all available remedies before filing a petition for *certiorari*, otherwise the petition shall be held to be premature.

2. **ID.; ID.; ID.; PREMATURE WHEN A PARTY FAILED TO AVAIL OF THE REMEDY PROVIDED UNDER THE RULE.** — Where an order of attachment is improperly or irregularly issued, the party whose property has been attached could file an application with the court *a quo* for the discharge of the attachment under Section 13, Rule 57 of the Rules of Court. The failure of such party to avail of the remedy provided under the Rules renders his petition for *certiorari* premature.

3. **ID.; PROVISIONAL REMEDIES; ATTACHMENT; DUTY OF COURT TO INSURE COMPLIANCE WITH REQUISITES OF LAW.** — A preliminary attachment is a rigorous remedy which exposes the debtor to humiliation and annoyance. It should not be abused as to cause unnecessary prejudice. It is, therefore, the duty of the court, before issuing the writ, to ensure that all the requisites of the law have been complied with, otherwise the judge acts in excess of his jurisdiction and the writ so issued shall be null and avoid. When the affidavit in support of the preliminary attachment on the ground that defendants are disposing their properties in fraud of creditors merely states such ground in general terms, without specific allegations of circumstances to show the reason why plaintiffs believe that

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defendants are disposing of their properties in fraud of creditors, it is incumbent upon the judge to give notice to defendants and to allow them to present their position at a hearing wherein evidence is to be received.

4. ID.; ID.; ID.; NOT AVAILABLE IN SUIT FOR DAMAGES WHERE AMOUNT IS CONTINGENT. — The writ of attachment is not available in a suit for damages where the amount claimed is contingent or unliquidated.

APPEARANCES OF COUNSEL

Castro Law Office for petitioners.

Tirso Espelete and *Fortunato A. Padilla* for private respondents.

D E C I S I O N

ANTONIO, *J.*:

Certiorari to nullify the Order of Attachment of May 13, 1977, as well as the Writ of Attachment dated May 16, 1977, issued by respondent Judge in Civil Case No. 10770 of the Court of First Instance of Iloilo, entitled "R*osita Bedro and Benita Yu v. Spouses Ricardo T. Salas and Maria Salas, et al.*"

On September 10, 1976, respondents Rosita Bedro and Benita Yu filed the afore-mentioned civil action with the Court of First Instance of Iloilo against herein petitioners Ricardo T. Salas and Maria Salas, the Philippine Commercial & Industrial Bank, in its capacity as Administrator of the Testate Estate of the deceased Charles Newton Hodges, and Avelina A. Magno, in her capacity as Administratrix of the Testate Estate of the deceased Linnie Jane Hodges, to annul the deed of sale of Lot No. 5 executed by administrators of the Hodges Estate in favor of the Spouses Ricardo T. Salas and Maria Salas and for damages. The action for annulment was predicated upon the averment that Lot No. 5, being a subdivision road, is intended for public use and cannot be sold or disposed of by the Hodges Estate. The claim for damages was based on the assertion that after

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defendant spouses purchased Lots Nos. 2 and 3, they also purchased Lot No. 5 and thereafter "erected wooden posts, laid and plastered at the door of the house on Lot No. 3, with braces of hardwood, lumber and plywood nailed to the post," thereby preventing Rosita Bedro and Benita Yu from using the road on the afore-mentioned lot, Lot No. 5, and that as a result of such obstruction, private respondents Rosita Bedro and Benita Yu sustained actual damages in the amount of ₱114,000.00, plus the sum of ₱1,000.00 as damages daily from June 30, 1976 due to the stoppage in the construction of their commercial buildings on Lot No. 3, and moral damages in the amount of ₱200,000.00.

In their answer to the complaint, the Salas spouses, after specifically denying the material allegations in the complaint, stated that Lot No. 5 had been registered in the name of the C. N. Hodges as their exclusive private property and was never subjected to any servitude or easement of right of way in favor of any person; that any occupants of Lots Nos. 2 and 3 have direct access to Bonifacio Drive, a National Highway, hence, Lot No. 5 is neither needed nor required for the egress or ingress of the occupants thereof; and that private respondents, as a matter of fact, since 1964 had excluded and separated completely their property (Lots Nos. 2 and 3) from Lot No. 5 by building a concrete wall on the boundary thereon without providing any gate as entrance or exit towards Lot No. 5; and that private respondents have no personality to question the validity of the deed of sale over Lot No. 5 since they were not parties to the same and the sale was duly approved by the probate court.

In a motion dated May 12, 1977, private respondents filed a Motion for Attachment, alleging, among others, that the case was "for annulment of a deed of sale and recovery of damages" and that the defendants have removed or disposed of their properties or are about to do so with intent to defraud their creditors especially the plaintiffs in this case.

On May 13, 1977, respondent Judge issued *ex-parte* a Writ of Attachment "against the properties of the defendants particularly Lots Nos. 1 and 4 of Psc-2157 less the buildings

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standing thereon upon the plaintiffs filing a bond in the amount of ₱200,000.00 subject to the approval of this Court." After a surety bond in the amount of ₱200,000.00, executed on May 11, 1977 by the Central Surety and Insurance Company as surety was filed, the writ itself was issued by respondent Judge on May 16, 1977, directing the Sheriff to attach the properties above-mentioned. On May 17, 1977, the Deputy Sheriff of Iloilo levied upon the aforesaid properties of petitioners.

Contending that respondent Judge gravely abused his discretion in issuing the said Writ of Attachment, petitioners filed the present petition.

In *certiorari* proceedings, the cardinal rule is that the court must be given the opportunity to correct itself. Thus, for the special civil action of *certiorari* to prosper, there must be no appeal nor any plain, speedy and adequate remedy in the ordinary course of law. Petitioners, therefore, must exhaust all available remedies in the lower court before filing a petition for *certiorari*, otherwise the petition shall be held to be premature.

In the instant case, it appears that petitioners have adequate remedy under the law. They could have filed an application with the court *a quo* for the discharge of the attachment for improper or irregular issuance under Section 13, Rule 57, of the Revised Rules of Court, which provides the following:

"SEC. 13. *Discharge of attachment for improper or irregular issuance.* — The party whose property has been attached may also, at any time either before or after the release of the attached property, or before any attachment shall have been actually levied, upon reasonable notice to the attaching creditor, apply to the judge who granted the order, or to the judge of the court in which the action is pending, for an order to discharge the attachment on the ground that the same was improperly or irregularly issued. If the motion be made on affidavits on the part of the party whose property has been attached, but not otherwise, the attaching creditor may oppose the same by counter-affidavits or other evidence in addition to that on which the attachment was made. After hearing, the judge shall order the discharge of the attachment if it appears that it was improperly or irregularly issued and the defect is not cured forthwith."

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Considering that petitioners have not availed of this remedy, the instant petition is premature.

We deem it necessary, however, for the guidance of respondent Court and of the parties, to stress herein the nature of attachment as an extraordinary provisional remedy.

A preliminary attachment is a rigorous remedy, which exposes the debtor to humiliation and annoyance, such it should not be abused as to cause unnecessary prejudice. It is, therefore, the duty of the court, before issuing the writ, to ensure that all the requisites of the law have been complied with; otherwise the judge acts in excess of his jurisdiction and the writ so issued shall be null and void.[1]

In *Carpio v. Macadaeg,*[2] this Court said:

"Respondent Judge should not have issued the two writs of preliminary attachment (Annexes C and C-1) on Abaya's simple allegation that the petitioner was about to dispose of his property, thereby leaving no security for the satisfaction of any judgment. Mere removal or disposal of property, by itself, is not ground for issuance of preliminary attachment, notwithstanding absence of any security for the satisfaction of any judgment against the defendant. The removal or disposal, to justify preliminary attachment, must have been made with intent to defraud defendant's creditors.

"Respondent Judge in fact corrected himself. Acting on petitioner's motion to discharge attachment and apparently believing the correctness of the grounds alleged therein, he set aside the orders of attachment (Order of March 11, 1960, Annex F).

"But reversing himself again, he set aside his order of March 11, 1960 (Annex K, dated March 29, 1960). This he did apparently on Abaya's contention that petitioner was about to remove or dispose of his property in order to defraud his creditors, as examples of which disposals he pointed to the alleged sale of the horses and of petitioner's office furniture ***. These averments of fraudulent disposals were controverted by petitioner who *** reiterated the

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[1] *Guzman v. Catolico,* No. 45720, December 29, 1937, 65 Phil. 257, 261.

[2] L-17797, November 29, 1963, 9 SCRA 552, 554-556.

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defenses against preliminary attachment which he had previously enumerated in his petition to discharge the two orders of attachment. Thus the question of fraudulent disposal was put in issue; and respondent Judge, before issuing the preliminary attachment anew, should have given the parties opportunity to prove their respective claims or, at the very least, should have provided petitioner with the chance to show that he had not been disposing of his property in fraud of creditors." (citing *National Coconut Corporation v. Pecson*, L-4296, Feb. 25, 1952, *Villongco v. Panlilio*, L-6214, Nov. 20, 1953).

And in *Garcia v. Reyes*,[3] considering the allegation that the debtors were removing or disposing of some of their properties with intent to defraud their creditors, this Court said that "(a)ll in all due process would seem to require that both parties further ventilate their respective contentions in a hearing that could indeed reveal the truth. Fairness would be served thereby, the demand of reason satisfied."

Considering the gravity of the allegation that herein petitioners have removed or disposed of their properties or are about to do so with intent to defraud their creditors, and further considering that the affidavit in support of the preliminary attachment merely states such ground in general terms, without specific allegations of circumstances to show the reason why plaintiffs believe that defendants are disposing of their properties in fraud of creditors, it was incumbent upon respondent Judge to give notice to petitioners and to allow them to present their position at a hearing wherein evidence is to be received.

Moreover, it appears from the records that private respondents are claiming unliquidated damages, including moral damages, from petitioners. The authorities agree that the writ of attachment is not available in a suit for damages where the amount claimed is contingent or unliquidated.

"We think, however, that a rule sufficient for the determination of this case has been suggested and acted upon, and that the remedy

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[3] L-27419, October 31, 1969, 30 SCRA 162, 171.

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does not exist where unliquidated damages were demanded. ***. In *Warwick v. Chase*, 23 Md. 161, it is said: 'It is necessary that the standard for ascertaining the amount of damages claimed should not only appear, but that it should be fixed and certain, and in no degree dependent on facts either speculative or uncertain. ***. The general rule is, that unliquidated damages, *** cannot be recovered by attachment, unless the contract affords a certain measure or standard for ascertaining the amount of the damages ***.'"[4]

Further:

"The statute authorizing the issuance of the writ of garnishment and that relating to the issuance of the writ of attachment *** have not been construed as authorizing the writs to be issued when the plaintiff's suit is technically an action for debt. Neither of the writs may be issued when the suit is for damages for tort, but they may be issued when the plaintiff's claim arises out of contract either express or implied, and the demand is liquidated, that is, the amount of the claim is not contingent, is capable of being definitely ascertained by the usual means of evidence, and does not rest in the discretion of the jury."[5]

WHEREFORE, the instant petition is hereby DENIED, in order to enable petitioners to move before respondent Court for the discharge of the attachment on the ground of its improper and irregular issuance, pursuant to Section 13, Rule 57, of the Revised Rules of Court, and for the aforesaid Court to act thereon in accordance with the foregoing.

Fernando (Actg. C.J.), Aquino, Concepcion Jr., and *Santos JJ.,* concur.

Abad Santos J., took no part.

Barredo, J., on leave.

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[4] *Hochstadder, et al. v. Sam,* 11 SW 408-409.

[5] *Cleveland v. San Antonio Building and Loan Association,* 223 SW 2d 226, 228.