

**SALVADOR DE LUNA, OSCAR DE LUNA, NATIVIDAD DE LUNA,
ANTONIA DE LUNA, DOMINGO DE LUNA AND JOSE DE LUNA,
PETITIONERS, VS. THE HON. PERFECTO R. PALACIO, JUDGE OF THE
COURT OF FIRST...**

G.R. No. L-26927. December 27, 1969

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Petition for a writ of certiorari to review and set aside an order of respondent judge approving the appeal bond of respondent Damaso Ferrer.

On 26 May 1966, Judge Palacio of the Court of First Instance of Camarines Sur rendered his decision in Civil Case No. 5151, wherein petitioners were plaintiffs and Damaso Ferrer the defendant. Both parties announced in due time their intention to appeal from the decision to the Court of Appeals. While respondent Ferrer had filed his record of appeal within the period prescribed by the rules, he admittedly failed to file his appeal bond within the reglementary term. Whereupon, the plaintiffs, now petitioners, moved that Ferrer's appeal be dismissed. The latter objected on the ground that the appeal bond had been notarized and readied, and the bond premium duly paid to the bonding company, even prior to the expiration of the appeal period, but that said bond was not timely filed in court due to oversight on the part of Luis Valencia, secretary to the attorneys for Ferrer, Messrs. General & General of Naga City. Attached to the objection was the secretary's affidavit that while he received the bond on 30 June 1966, with instructions to file it, it was not filed because -

"I forgot to make the simple copy of the bond in Civil Case No. 5151 and to serve and file it, specially when on that weekend, I returned for a short visit to my hometown (Caramoan) to take advantage of the holiday on 4 July (a Monday).

"I only remembered the said appeal bond when Atty. General found its two copies, including the original, in the files of the record of said case on 21 July 1966.

"In my more than two years of service in the law office of Atty. General, this was the first instance where I overlook to file any pleading." (Annex "A", Answer, Rec., page 11)

The trial court held that the belated filing of the appeal bond was due to excusable negligence, and denied the motion to dismiss defendant's appeal. The plaintiffs then recoured to this Court, claiming that the refusal to dismiss Ferrer's appeal was in grave abuse of discretion.

It is indisputable and elementary that to perfect an appeal the notice and record of appeal, as well as the appeal bond, must be filed within the period prescribed by the Rules; and that the failure to do so renders the decision final and unappealable because the period for appeal is fatal (See, inter alia, *Alvero vs. De la Rosa*, 76 Phil. 433; *Salva vs. Palacio* (1952), 90 Phil. 731; *Reyes vs. Court of Appeals* (1943), 74 Phil. 235; *Mallare vs. Panahon* (1955), 98 Phil. 154). But the would be appellant is not thereby precluded from seeking relief under Revised Rule

38, section 2, whenever the entering of a judgment or order against said party was made through fraud, accident, mistake or excusable neglect. This Court so indicated in *Salve vs. Palacio* and *Reyes vs. Court of Appeals*, supra. In *Medran vs. Court of Appeals* (1949), 83 Phil. 167, we said:

"The order of the Court of First Instance of February 19, 1946, dismissing the appeal was undoubtedly valid, because the defeated parties had failed to submit an appeal bond in due time. The would be appellant could obtain a revocation of that order, upon a motion for relief from accident, mistake or excusable negligence, pursuant to Rule 38. However, if their petition for relief is denied, they should appeal." (Emphasis supplied)

And, conformably to the foregoing ruling, in *Salva vs. Palacio* (1952), 90 Phil. 732, this Court, after holding that a dismissal of the appeal was proper because the appeal bond had been filed two days after the expiry of the extension granted for the purpose, added however:

"What the herein petitioner or his counsel should have done in the Court below was to file a motion for relief under Rule 38, and not to appeal from the judgment of the Court below" (Cas. cit., page 734; emphasis supplied)

Now, if a party may seek relief under Rule 38, and within the period prescribed therein, after an order for dismissal of the appeal has been entered, there is no reason for denying him that right before the order of dismissal is entered. Respondent Ferrer's objection to the motion to dismiss his appeal in this case was virtually a motion for relief under Rule 38; it was predicated on accident or excusable neglect, and was accompanied by an apposite affidavit of merit. Hence, it was proper for the trial court to grant him relief, provided of course the ground for doing so appeared indubitable.

The issues are thus narrowed down to the question whether in the granting of relief to the appellant Ferrer there was such "grave abuse of discretion" to warrant intervention of this Court under section 1 of Revised Rule 65.

In *Abad Santos vs. Province of Tarlac*, 67 Phil. 480, it was ruled that "grave abuse of discretion" implies such capricious and whimsical exercise of judgment as to be equivalent to lack of jurisdiction; and again, in *Luna vs. Nable*, 67 Phil. 340 and *Alafriz vs. Nable*, 72 Phil. 278, this Court posited that to warrant certiorari the abuse of discretion must be so patent and gross as to amount to an evasion of positive duty, or to a virtual refusal to perform a duty enjoined. Concomitantly, *Villa Rey Transit vs. Bello* (1963) 7 SCRA, 735 (citing *Government vs. Judge of First Instance*, 34 Phil. 157), reiterated that not every erroneous conclusion of law or of fact is abuse of discretion, for certiorari can not take the place of an appeal. The court below in the case at bar predicated its grant of relief on the diligence displayed by appellant Ferrer in procuring an appeal bond, paying the requisite premium to the bonding company and readying the documents well ahead of the expiration of the appeal period, so that the non-filing thereof in time was due to accidental and unforeseeable, oversight of an employee who had hitherto proved exact in the discharge of his duties. The undisputed existence of the basic facts readily distinguishes the present case from that of *Philippine Air Lines vs. Arca*, 19 SCRA 300, relied upon by the petitioners. Hence, we are not prepared to say that the action complained of in granting relief to appellant and denying the motion to dismiss his appeal was totally devoid of foundation. The court below undoubtedly maintained a liberal attitude; but its action did not intrude into the realm of arbitrary or capricious action.

WHEREFORE, the writ prayed for is denied, with costs against herein petitioners De Luna.

Concepcion, C.J., Dizon, Makalintal, Zaldivar, Sanchez, Ruiz Castro, Fernando, Teehankee, and Barredo, JJ., concur.

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