

**JOSE C. GONZALES, ET AL., PLAINTIFFS AND APPELLANTS, VS.
AURELIA DATU, ET AL., DEFENDANTS AND APPELLEES.***G.R. No. L-8771. September 28, 1956*

Ponente: PARAS, C.J.

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The plaintiffs commenced In the justice of the peace court of Hermosa, Bataan, an action of forcible entry and detainer against the defendants, covering a parcel of land situated in the barrio of Saba, Municipality of Hermosa, Province of Bataan. After trial, the justice of the peace court rendered a decision dated May 11, 1940, in favor of the plaintiffs, from which the defendants appealed to the Court of First Instance of Bataan which after the trial, rendered a decision dated October 8, 1941, sentencing the defendants to vacate the land in question and deliver the same to the plaintiffs and to pay jointly and severally to the latter the sum of P455, plus the costs. On December 2, 1941, the defendants filed a record on appeal with notice of appeal, stating that, being poor litigants, they might not file the appeal bond in pursuance of section 22 of Rule 3 of the Rules of Court whereupon the clerk of court served a notice upon the parties that said record on appeal would be heard for approval on December 10, 1941. On December 5, 1941 the court, acting upon the motion filed by the plaintiffs on November 19, 1941, ordered the issuance of a writ of execution Nothing appears to have subsequently been done in the case until April 23, 1947 when the plaintiffs filed a petition for the reconstitution of the records, which was granted by the court in its order of June 16, 1947, allowing said reconstitution by copies filed by the plaintiffs and attached to the record. On July 5, 1952, the plaintiffs filed a petition praying that the appeal interposed by the defendants be dismissed for lack of prosecution and that the judgment be ordered executed. On August 4, 1952, the court issued an order requiring attorney for the plaintiffs to notify the defendants of the hearing of said motion. On September 30, 1952, the court issued an order dismissing the appeal taken by the defendants and ordering the execution of the judgment dated October 8, 1941. On January 30, 1953, Atty. Eliseo M. Tensa, in representation of the defendants, filed a petition praying that the order of September 30, 1952, be reconsidered and the writ of execution immediately lifted and that the defendants, through their new counsel, be heard in connection with their appeal. Notwithstanding the opposition filed by the plaintiffs on March 2, 1953, the court issued an order dated March 4, 1953, setting aside the order of September 30, 1952, and allowing the defendants to perfect their appeal within the reglementary period. On March 30, 1953, the defendants filed a motion for new trial under Act No. 3110, alleging that the appeal could not be prosecuted because the transcript was not available. On October 30, 1953, the court issued an order denying the motion for reconsideration of March 30, 1953 filed by the plaintiffs, and granting motion for new trial filed by the defendants. From this order the present appeal was taken by the plaintiffs.

The appellants contend that the lower court should have *motu proprio* dismissed the appeal taken by the defendants for having failed to take any steps to perfect it during more than 11 years; that the petition filed on January 30, 1953, by Atty. Tensa was not accompanied by affidavits of merits; that the appeal interposed by the defendants should at any rate have been dismissed for their failure to file an appeal bond; and that the lower court should not have ordered a new trial especially because the defendants failed to institute reconstitution proceedings within the period of one year fixed in Republic Act No. 441.

These contentions are untenable. The lower court could not of course dismiss the appeal taken by the defendants from the decision of October 8, 1941, without in the first place the records having been duly reconstituted. After the reconstitution of the records in pursuance of the order of June 16, 1947, it was not at all clear that the defendants had not taken the necessary steps to perfect their appeal. Upon the other hand, it appears that the hearing for the approval of the record on appeal was set for December 10, 1941, and this was not held due to the outbreak of the last war. The alleged failure of the defendants to file an appeal bond cannot be invoked against them since the record does not show that the court had ruled on the notice of appeal, stating that they could not file an appeal bond for being paupers; and much less is there any indication in the reconstituted records that the defendants in fact failed to file an appeal bond.

That the petition filed by the new counsel for the defendants on January 30, 1953, was not accompanied by affidavits of merits is of no moment, since it was granted on the premise that the plaintiffs had failed to comply with the order requiring them to send notice of their ex parte motion of July 5, 1952 to the defendants, and this was a matter that could be seen from the records under the control of the court.

In view of the loss or destruction of the transcript, it necessarily follows that the defendants could not have prosecuted their appeal in the Court of Appeals, even if duly perfected.

That no reconstitution proceedings were initiated by the defendants is not a ground for the dismissal of their appeal, since the remedy of reconstitution was also available to the plaintiffs who, in view of the judgment in their favor, were more called upon to reconstitute, as they did, the records. The one year period fixed in Republic Act No. 441 cannot be invoked against the defendants, since the latter were not the ones who sought the reconstitution of this case.

Wherefore, the appealed order is affirmed with costs against the appellants.

Padilla, Montemayor, Bautista Angelo, Labrador, Concepcion, Reyes, J. B. L., Endencia, and Felix, JJ., concur.

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