

BONIFICIA LOPEZ, PLAINTIFF AND APPELLEE, VS. PABLO LOPEZ ET AL., DEFENDANTS AND APPELLANTS. RESOLUTION ON MOTION TO DISMISS APPEAL

G.R No. L-786. August 30, 1946

Ponente: FERIA, J.

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FERIA, J.:

From the record on appeal filed with, and approved by, the Court of First Instance of Cebu, it appears that said court rendered judgment on November 4, 1941. It does not appear when was the appellant notified of the judgment. A motion for reconsideration was filed by the appellant, and denied by the court on May 2, 1945. The record on appeal was filed by the defendants-appellants on May 24, 1946, and approved by the lower court in its order dated June 1, 1946, which reads as follows:

"Habiendo manifestado el Or. Filiberto Leonardo, abogado de la parte demand ante, en corte abierta que ya esta debidamente corregido el expediente de apelacion de los demandados, el mismo queda aprobado, y se ordena al Escribano que lo certifique y elevo a la Honorable Corte Suprema, juntamente con todas las pruebas orales o documentales presentadas en la vista de esta causa. A si se ordena."

A motion dated June 11, 1946, to dismiss the appeal on the ground that no notice of appeal was filed by the appellant and therefore the appeal has not been perfected, was filed with the court of first instance. It was denied. by the latter on June 15 of the same year for lack of merits, and a motion for reconsideration of the order denying his motion to dismiss was also denied.

The record on appeal having been elevated to this Court and the docketing, fees paid, the appellee has filed a motion to dismiss the appeal, which is now pending before us, based on two grounds: (1) first, that no notice of appeal has been filed by the appellant on time¹, and (2) secondly, that the appeal boric has not been approved by the lower court.

(1) As to the first ground, it is true that it has been the practice to include in the bill of exceptions or the record on appeal the filing of the notice of appeal, and that such practice is advisable in order that, should a question as the one under consideration arise, it may be readily decided without necessity of requiring evidence or examining the record of the Court of First Instance; as Sec. 6, Rule 41, of the Rules of Court, does not require such inclusion, the fact that the record on appeal in this case does not state the filing of the notice of appeal is no evidence that said notice has not been filed. Though there is no direct available evidence to show that the notice of appeal has been filed on time, from the fact that the record on appeal, after it had been corrected pursuant to appellee's objection, was approved by the lower court with the express consent of the attorney for the plaintiff-appellee (see the stove quoted order of the court approving the record on appeal), It may be presumed that the notice of appeal lies been filed on time.

Besides, the filing or presentation and approval of the record on appeal on time implies or involves, necessarily, the filing of notice of appeal. This conclusion is supported, by analogy, by the decision of this Court in the case of

Luengo & Martinez vs. Herrero, (17 Phil., 29, 34) in which it was held that "the presentation of a bill of exceptions for approval in due time is equivalent to or involves the announcement of an intention to appeal."

(2) As to the second ground, from, the approval of the record on appeal it is to be inferred that the appeal bond has also been approved. It is to be presumed that the official duty has been regularly performed, and therefore the court would not have approved the record on appeal, and the latter would have been transmitted to this Court, if no appeal bond had been previously filed and approved. According to the above quoted order of the court below approving the record on appeal, the very attorney for appellee had invited the attention of that court that the said record was already corrected and might therefore be approved.

Furthermore, the only ground advanced by the appellee, in his motion to dismiss the appellant's appeal and for reconsideration of the order denying said motion filed with the court of First Instance, is that no notice of appeal has been filed. Had not the appeal bond been approved by the lower court the appellee should have known it before filing said motion to dismiss the appeal. And according to section 8, Rule 26, of the Rules of Court, "a motion attacking a pleading or a proceeding shall include all objections then available, and all objections not so included shall be deemed waived."

Appellee's motion to dismiss, is denied.

Moran, C.J., Bengzon, Briones, and Tuason, JJ., concur.

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