

JOSE DIOLA[], MANUEL DIOLA, JUAN DIOLA, FILOMENO DIOLA, BERNARDINO DIOLA AND GERUNDIA DIOLA, PETITIONERS, VS. HON. COURT OF APPEALS, BEATRIZ FONTANOSA, REGINALDO FLORES, ANNABEL...

G.R. No. L-36455. April 30, 1976

Ponente: TEEHANKEE, J.

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TEEHANKEE, J.:

The Court reverses respondent court's dismissal of petitioners' appeal and remands it for prompt disposition on the merits. Where the original record on appeal shows on its face the timely perfection of the appeal with the filing of the notice of appeal, appeal bond and record on appeal within the reglementary period and this was expressly so declared by the trial court, the non-inclusion in the amended record on appeal of the trial court's order requiring the incorporation of a few amendments is not fatal. Aside from the undisputed fact that the amended record on appeal was filed within the ten-day period granted by the trial court, the amended record on appeal is deemed to have been filed on, and to relate back to, the presentation of the original, which was filed within the reglementary period.

On the 20th day from receipt on June 2, 1972 of the adverse decision of the Cebu Court of First Instance, dismissing their complaint for recovery of their ownership of a portion of the subject property by right of inheritance from their grandmother, petitioners (plaintiffs-appellants) filed on June 22, 1972 (without asking any extension) their notice of appeal, P120-cash appeal bond and voluminous 103-page record on appeal.

Respondents (defendants-appellees) objected to the approval of the record on appeal "on the ground that defendants Fontanosas were not served with a copy of the alleged appeal bond or were not served with notice of the alleged deposit of the cash appeal bond within the reglementary period, arguing that this failure makes the appeal unperfected, therefore, the decision has become final and executory",^[1] and on the ground that certain matters had been omitted therefrom.

The trial court in an extended Order dated August 7, 1972 (received by petitioners on August 11, 1972) found the opposition to the approval of the appeal to be without merit since "the notice of appeal, the record on appeal and the appeal bond (were filed) within the reglementary period and have served copies thereof on the opposing counsel, (petitioners) have complied with the Rules of Court with regard to the procedure to be followed incident to the perfection of their appeal, and the failure of the respondent judge to approve the appeal bond as required by section 5 of Rule 41, cannot work to their prejudice."

The trial court concluded that "(it) finds no compelling reason to concur with the arguments of the oppositors to the approval of the Record on Appeal" but required petitioners to include in the Record on Appeal two pre-trial orders, to insert two phrases and "to have the Table of Contents indicate the pages of the items" and gave them a period of ten (10) days from receipt thereof within which to resubmit the said Record on Appeal.

On the seventh day after receipt of the Order, petitioners-appellants filed on August 18, 1972 (again without asking any extension) a motion for approval of their amended Record on Appeal incorporating the required amendments and containing a total of 105 pages. (The few amendments ordered by the trial court signified an increase of only two more pages than the original record on appeal.)

On August 24, 1972, no opposition having been filed, the trial court issued its order approving "the record on appeal as corrected by order of the court" and directed the clerk of court to send the record on appeal and all the evidence to the Court of Appeals.

Under date of November 25, 1972, at respondents' (defendants appellees') motion and over petitioners' opposition, respondent Court of Appeals[2] issued its Resolution dismissing the appeal for failure to incorporate the Order to Amend the Record on Appeal in the Amended Record on Appeal, as follows:

**** * * * * * CONSIDERING that from receipt of decision on June 2, 1972 to filing of notice, cash appeal bond and original Record on Appeal on June 22, 1972, twenty (20) days elapsed, leaving ten (10) days of period to perfect appeal, that when the Amended Record on Appeal was submitted on August 18, 1972, 57 days had further elapsed and that since the order to amend the Record on Appeal was not incorporated in the amended Record on Appeal, there is no showing that the said amended Record on Appeal was filed on time, the Court RESOLVED to DISMISS the appeal."

Reconsideration having been denied as per respondent court's resolution of February 1, 1973, the present petition was filed and treated as a special civil action per the Court's Resolution of July 10, 1973.

The petition is meritorious.

The very Record on Appeal itself as well as respondent court's resolution dismissing the appeal show per se that the material data rule[3] requiring the inclusion of "such data as will show that the appeal was perfected on time" was duly complied with in that the Record on Appeal itself shows that it was filed well within the original thirty-day reglementary period for perfecting an appeal and complete with the corresponding cash appeal bond and notice of appeal.

Thus, the trial court in dismissing the untenable grounds of opposition which defendants argued "made the appeal unperfected", expressly ruled to the contrary in its August 7, 1972 Order that the appeal was timely and duly perfected since petitioners had "filed the notice of appeal, the record on appeal and the appeal bond within the reglementary period".

These material dates showing the timely perfection of the appeal are undisputed. After their initial opposition had failed, respondents did not question nor oppose the approval of the amended record on appeal incorporating the amendments required by the trial court.

The timeliness of the filing of such amended record on appeal within the ten-day period granted by the trial court in its August 7, 1972 Order has not been questioned, impugned or disputed by respondents in this Court nor in respondent court. Neither did they oppose petitioners' motion for approval of the amended record on appeal nor did they question or dispute in the trial court its Order of August 24, 1972 approving the said amended record on appeal.

The only ground for respondents' motion to dismiss the appeal as filed in respondent court was the non-incorporation in the amended record on appeal of the trial court's order of August 7, 1972 requiring the inclusion of certain amendments.

Such omission is not fatal. As recently reiterated by the Court in *Rodriguez vs. Court of Appeals*[4] "As early as

the case of *Vda. de Oyzon v. Vinzon*,^[5] We ruled that: The fact that the amended record on appeal was submitted after the reglementary 30-day period, did not render the perfection thereof untimely, because the amended record on appeal is deemed to have been filed on the presentation of the original, which was done within the reglementary period.' As We explained in *Philippine Independent Church v. Juana Mateo, et al.*,^[6] 'amendment presupposes the existence of something to be amended, and, therefore, the tolling of the period should relate back to the filing of the pleading sought to be amended *** *** ***.'

The cited principle that since the appeal had unquestionably been timely perfected as shown by the very record on appeal, the admission of the amended record on appeal presented no longer a jurisdictional question of timeliness of the perfection of the appeal but a question of compliance with the trial court's order requiring certain amendments which rested on the said court's sound discretion, controls in the case at bar. Furthermore, the undisputed fact is that the amended record on appeal was indeed filed well within the ten-day period granted by the trial court.

The teaching of *Berkenkotter vs. Court of Appeals*,^[7] that "the mere absence of a formal order granting the motion for extension of time to file the record on appeal (or requiring the addition of two pages of amendments to the original record on appeal as in this case) should not be fatal to the petitioner if the record on appeal filed within the requested extension period was approved by the Court a quo. *** *** *** No trial Judge in his right mind and who is aware of the serious responsibilities of his office, would approve a record on appeal that was not timely filed," *mutatis mutandis*, is consequently fully applicable. Suffice it to state finally that respondents make no pretense in their answers that the appeal is frivolous or purely dilatory.

ACCORDINGLY, respondent court's resolution dismissing petitioners' appeal is hereby set aside and the case is remanded to respondent court for prompt disposition of the appeal on its merits. Without costs.

Makasiar, Esguerra, Muñoz Palma, and Martin, JJ., concur.

[*] Died on September 23, 1974 and substituted by his widow Victorina Y. Diola and nine children upon their motion of October 15, 1974 granted in the Court's Resolution of Nov. 6, 1974.

[1] Rollo, p. 15, CFI Order of August 7, 1972.

[2] Special Seventh Division then composed of Edilberto Soriano, J. chairman, Juan O. Reyes and Emilio A. Gancayco, JJ., members.

[3] Rule 41, section 6.

[4] L-37522, Nov. 28, 1975, Second Division per Felix Q. Antonio, J.; emphasis supplied.

[5] L-19360, July 26, 1963, 8 SCRA 455.

[6] L-14793, April 22, 1961, 111 Phil. 752.

[7] 53 SCRA 228, 236; note in parenthesis supplied. See *Tambunting vs. Court of Appeals*, L-40768, Feb. 27, 1976 and cases cited.

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