

FRANCISCO ARCEGA, PLAINTIFF AND APPELLANT, VS. DOROTEO DIZON, DEFENDANT AND APPELLANT.

G.R. No. L-195. February 20, 1946

Ponente: PERFECTO, J.

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PERFECTO, J.:

Plaintiff and appellee filed a motion for execution of judgment and dismissal of appeal alleging: that defendant failed to serve upon appellee, within thirty days from notice of the judgment, his notice of appeal and of appeal (service having been made one day after expiration of the thirty-day reglementary period); that defendant has not filed an appeal bond; that he failed to deposit on time the rentals for August and September, 1945; that on November 9 the lower court issued an order for the execution of its judgment, it appearing that defendant failed to deposit the rentals for August and September, 1945, within the extension of five days granted him in the order of October 15; that on November 14 defendant filed a motion to stay the execution of the judgment on the ground that he had on that date deposited the rentals for August, September, and October, and that he is entitled to said suspension by virtue of Commonwealth Act No. 689; that the lower court issued on December 11 an order setting aside and vacating its previous order of execution, on the ground that it was issued after the record on appeal has been approved.

Copy of the motion was served on defendant's attorney on January 24, 1946, but no answer has been filed as yet.

In his motion to stay execution of judgment filed in the lower court on November 14, defendant alleged that he was unable to deposit the rents in view of the fact that he is a pauper and had to borrow money from somewhere.

Regarding let 689, plaintiff replied correctly that said act is not applicable because the premises in question is used by defendant, not solely for dwelling, but to keep a shoe repair shop and a drug store, a fact not denied by defendant. (*Tiangco vs. Liboro*, and Court of First Instance of Manila, 75 Phil., 559.)

Defendant's failure to post an appeal bond cannot be entertained as a ground to dismiss the appeal, it appearing that the lower court, in an order issued on October 3, allowed him to appeal as a pauper.

Defendant's failure to serve plaintiff copies of his notice of appeal and record on appeal within thirty days after notice of the judgment cannot be considered enough ground to dismiss the appeal, there being no showing that it had affected adversely any substantial right of plaintiff.

It is true that section 3 of Rule 41 requires appellant to serve upon the adverse party his notice of appeal, an appeal bond, and a record on appeal within the same thirty-day period for filing in court. While there is no reason why the requirement should not be enforced, when noncompliance thereof would not impair any substantial right of the adverse party, it should be considered as merely directory and shall not impair the right of appeal. This stand is strengthened by the fact that failure to serve the adverse party with copies of the above mentioned papers is not specifically stated in section 1 of Rule 52 as one of the grounds to dismiss an appeal.

The application of the doctrine in the present case appears emphasized by the fact that counsel for appellee was

served personally on October 6, one day after the expiration of the thirty-day reglementary period, and that, according to the lower court's order of October 15, approving the record on appeal and directing its transmission to the Supreme Court, no objection has been filed against said record on appeal, although plaintiff had opportunity of objecting to it.

The petition for dismissal of the appeal must, therefore, be and is denied.

One of the questions raised by appellee's motion is that where it attacks the lower court's authority to grant, as it did grant, in the order of October 15, defendant five days' extension to deposit the rentals for August and September, 1945, which defendant failed to deposit within the reglementary period. Under the facts in this case, we are of opinion that the lower court erred in granting said extension. (2 Moran on Rules, 138; Lapuz vs. Court of First Instance of Pampanga, 46 Phil., 77, 79.) As a general rule, the lower court lacks the authority to extend said reglementary period. We do not see any reason why the lower court should, in the case at bar, be allowed to deviate from said rule, there being no showing that the interest of justice so requires.

Defendant's failure to deposit the rents for August and September, not only within the time fixed by the rules, but even within the extension granted by the lower court in its order of October 15, entitles plaintiff to the execution of the judgment as the lower court itself opines, although it set aside Its order for execution because it was issued after the recor[^] on appeal has been approved.

We cannot but sympathize with defendant's allegation that he was unable to deposit the rents in question because of his poverty, but his penurious situation does not justify impairing plaintiff's legal rights nor depriving him of the use of his property without due compensation.

Therefore, the lower court is ordered to proceed with the execution of the appealed decision by issuing the necessary orders to said effect.

CONCURRING

HILADO, J.:

I concur in the result, tiowever, I am not prepared to say that, if the point is properly and opportunely raised, I would not vote to declare an appeal from a Court of First Instance to the Court of Appeals or the Supreme Court not to have been legally and duly perfected mi ere service of the notice of appeal is not made within thirty days from notice of the order or judgment appealed from, as provided by Rule 41, section 3; without prejudice, of course, to the provisions of Rule 38, section 1, when properly applicable.

Order set aside; case remanded with instructions.

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