

**PASTOR B. CONSTANTINO AND PASTOR CONSTANTINO, JR.,
PETITIONERS, VS. HON. ANDRES REYES, AS JUDGE OF THE COURT
OF FIRST INSTANCE OF RIZAL, AND HERMINIA ESPIRITU,
RESPONDENTS.**

G.R. No. L-16853. June 29, 1963

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

Petition for mandamus to compel respondent Judge of the Court of First Instance of Rizal to approve the record on appeal which, petitioners filed in Civil Case No. 5924 of that court.

Pastor B. Constantino, petitioner herein, initiated said case by filing a complaint against respondent Herminia Espiritu, alleging that he had, by a fictitious deed of sale, conveyed to her the house and lot described in the complaint on the agreement that she would hold it in trust for their illegitimate son, Pastor Constantino, Jr.—still unborn at the time of the conveyance—but that thereafter defendant mortgaged the property to guarantee a personal loan contracted by her; and praying that the defendant be enjoined from further alienating or otherwise disposing of the property and ordered to execute an absolute deed : of conveyance thereof in favor of Pastor Constantino, Jr. The defendant moved to dismiss the complaint on the i grounds (1) that it stated no cause of action because Pastor Constantino, Jr., the beneficiary of the alleged trust, was not included as party-plaintiff, arid (2) that the plaintiff's cause of action was unenforceable under the Statute of Frauds. Respondent Judge dismissed the complaint by order dated January 8, 1960, notice of which the plaintiff received on January 11. On January 12, 1960 the plaintiff filed a motion to amend the complaint, attaching the amended complaint itself wherein Pastor Constantino, Jr. was included as party-plaintiff. The defendant opposed the motion, and after the plaintiff's reply to the opposition and the defendant's rejoinder to said reply were filed, respondent Judge, on February 1, 1960, issued an order denying the plaintiff's motion to admit the amended complaint. The plaintiff was notified thereof on February 9, 1960. On February 27, 1960 he filed with the court a notice of appeal from the order of February 1, an appeal bond and a record on appeal. At the hearing for the approval of the record on appeal on March 5, 1960, the defendant was given five days therefrom to file her objection and the plaintiff, five days from receipt of a copy thereof to file his answer. On March 8, 1960' the defendant filed her objection to the approval of the record on appeal, claiming that when the plaintiff filed the notice of appeal, appeal bond and record on appeal the order of January 8, dismissing the complaint, was already final. The plaintiff answered the objection on March 11, but two days before that, or on March 9, 1960, respondent Judge disapproved the record on appeal on the ground that the appeal had been filed out of time. On March 18, the plaintiff moved to reconsider; the motion was denied on March 23; and on April 8, 1960 the instant petition for mandamus was docketed here, with both Pastor Constantino and the minor Pastor Constantino, Jr., named as petitioners.

In his order of March 23, 1960, denying the motion for reconsideration, respondent Judge said:

"The plaintiffs submitted a motion for reconsideration from the order of March 9, 1960. It is alleged that the

appeal taken by plaintiffs is from the order of February 1, 1960 and not from the order of January 8, 1960, and that as regards the first order, the same has not yet become final when they perfected their appeal therefrom. While it may be true that the order appealed from is the order of February 1 which denied the motion to admit the amended complaint, it is no less true that at the time said appeal was perfected the order of January 8, 1960, dismissing the complaint, had already become final. There was therefore no legal basis on which the amendment was to be made, and consequently, even if an amendment were now allowed, the same would serve no useful purpose for there is nothing to amend due to the fact that the original complaint had been dismissed and such dismissal became final on February 11, 1960. For the same reason, the appeal had been dismissed. It results that the motion for reconsideration should be, as it hereby is, denied."

Under the Rules a party may amend his pleading once as a matter of course at any time before a responsive pleading is served,[1] but the court may, upon motion at any stage of an action, and upon such terms as may be just, order or give leave to a party to amend his pleading, to the end that the real matter indispute and all matters in the action in dispute between the parties may, as far as possible, be completely determined in a single proceeding.[2] Even after an order dismissing his complaint is issued, an amendment may still be allowed.[3] The motion to amend should be filed before the order of dismissal becomes final and unappealable, because thereafter there would be nothing to amend. If the amendment is denied, the order of denial is appealable and the time within which to appeal is counted from the order of denial—not from the order dismissing the original complaint. Otherwise, the right to take such appeal would be at the mercy of the court, which could frustrate it by the simple expedient of delaying the resolution of the motion to amend the complaint until after the expiration of thirty days from notice to the plaintiff of the order of dismissal. If the appeal is taken from the order of dismissal, the plaintiff stands on the sufficiency of his complaint. But if he decides to amend his pleading and his motion for leave to do is denied, an appeal from the order of denial puts in issue the propriety of the amendment.

Respondent Judge denied the motion for leave to file an amended complaint on February 1, 1960. Notice thereof was received by petitioner on February 9. The notice of appeal, appeal bond and record on appeal were filed only eighteen days thereafter. Consequently, it was the duty of respondent Judge to approve them so that this Court may review the legal question of whether or not the amended complaint should have been admitted.

The parties, in their respective written arguments before this Court, have raised and discussed certain legal questions that go into the merits of the case, such as the right of Pastor B. Constantino to file the action for and in behalf of his minor illegitimate son, Pastor Constantino, Jr., and the admissibility of parol evidence to prove the trust alleged in the complaint. These questions, however, should be threshed out in the appeal itself and are irrelevant to the issues in the instant petition for mandamus, namely, whether or not the order denying the amendment of the complaint is appealable and whether or not the appeal was perfected on time, on both of which issues we find in favor of petitioner.

Wherefore the writ prayed for is granted and respondent Judge is ordered to approve and certify to this Court the appeal taken by petitioner. Costs against the other respondents.

Padilla, Bautista Angelo, Labrador, Reyes, J. B. L., Barrera, Paredes, and Dizon, JJ., concur.

[1] Sec. 1, Rule 17, Rules of Court In this respect, a motion to dismiss is not considered a responsive pleading. *Ong Peng vs. Custodio*, L-14911, Mar. 25, 1961; *Rep. vs. Ilao*, L-16667, Jan. 30,

[2] Sec. 2, Rule 17, Rules of Court.

[3] *Arranz vs. Manila Surety & Fidelity Co., Inc.*, 108 Phil., 747.

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