

**HON. MARTINIANO VIVO, IN HIS CAPACITY AS ACTING
COMMISSIONER OF IMMIGRATION, PETITIONER, VS. HON.
FRANCISCO ARCA, IN HIS CAPACITY AS JUDGE OF THE COURT OF
FIRST INSTANCE OF MANI...**

G.R. No. L-21589. April 30, 1965

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

The Commissioner of Immigration, represented by the Solicitor General, seeks a writ of mandamus to compel the Court of First Instance of Manila to give due course to his appeal, in Civil Case No. 51433 of said court, annulling the orders setting aside the approval of the appeal, and for a writ of injunction to restrain execution of the appealed decision.

The pertinent facts of record are that on March 30, 1963 respondent Judge Francisco Area, of Branch I of the Court of First Instance of Manila, rendered a decision, in Civil Case No. 51433, ordering the issuance of a writ of prohibition enjoining the Commissioner of Immigration from arresting, confining, and deporting a Chinese woman, Lee O Koo alias Dee O Koo, and her son, Lim Chen Pen alias Chen Pen; to refund the immigration bond for their temporary stay; and declaring both to be Filipino citizens. Copy of this decision was served on the Solicitor General on April 2, 1963.

On April 17 of that year, the Solicitor General moved for a reconsideration, but this motion was denied on May 18, 1963 by the vacation Judge, Hon. Tito V. Tizon. Copy of the denial was received by counsel for the Commissioner on May 22, 1963.

On May 24, 1963, the Solicitor General filed a notice of appeal to the Supreme Court; and in view thereof, vacation Judge Tizon, by order of May 28, 1963, ordered that the records be elevated to this Court in accord with Section 17 of Rule 41.

On June 4, 1963, counsel for the Chinese asked for the reconsideration of the preceding order; and on June 23 respondent Judge Area reconsidered and set aside the order of transmittal of the case record on the ground that his decision of March 30, 1963 had already become final and executory, since, after discounting the period during which the motion for reconsideration was pending, more than fifteen days had elapsed from the notice of said decision to the filing of the Commissioner's Notice of Appeal. His motion for reconsideration having been denied, the Immigration Commissioner resorted to this Court. We issued a writ of preliminary injunction to hold the execution in abeyance until the case could be decided on its merits.

The sole issue in this case is whether the decision of the court below, dated March 30, 1963, and served on the Solicitor General on April 2, 1963, had been appealed on time or had become final and executory.

Section 17 of Rule 41 of the Rules of Court in force in 1963 requires that appeals in prohibition cases be perfected within 15 days. Petitioning Commissioner does not deny that, discounting the period during which Judge Tizon

held his motion for reconsideration under advisement, his notice of appeal was filed on the sixteenth (16th) day after notice of the questioned judgment, the operative period for appeal being from April 2 to April 17, 1963 (14 days) and from May 22 to May 21 1963 (2 days). Petitioner contends, however, that Judge Tizon, by his order of May 28, 1963, directing the Clerk to forward the records of the case to this Court, impliedly extended the period for the appeal.

We think this position is not tenable, since no extension of the appeal period was ever asked by the Solicitor General of Judge Tizon. No objection was made at the time that the appeal was belated, and it is clear on the face of the record that Judge Tizon merely took for granted that the appeal notice was timely. It is true that the Solicitor General filed an affidavit of his clerk, dated June 11, 1963, purporting to show that the delay in filing the notice was due to excusable negligence (Annex A to Annex 1); but the affidavit was executed on June 11, almost 20 days after the expiration of the appeal period (on May 23), and was in fact submitted to Judge Area, who correctly refused to consider it since the judgment had become final, and he no longer had any discretion in the matter (*Tiongko vs. Area*, 102 Phil. 173, and cases therein cited; *Rodriguez vs. Fernandez*, 51 Off. Gaz. 1802-1801; *Sarabia vs. Sec. of Agriculture*, 104 Phil. 151). It is well-established that extensions of time must be asked before expiration of the original period sought to be extended (*Alejandro vs. Endencia*, 64 Phil. 321, 325; *Singbengco vs. Arellano*, 99 Phil. 952; 52 Off. Gaz. 6167; *Buena vs. Surtida*, 54 Off. Gaz., 2184).

It is also argued that there having been already an order to forward the records to the appellate court, the Court of First Instance no longer had jurisdiction to dismiss the appeal. This is not correct, since section 11 of Rule 11 expressly authorizes a motion to dismiss an appeal in the trial court prior to the transmittal of the record to the appellate court; and the best evidence that the records in this case have not yet been so transmitted, despite the lapse of the ten days fixed by section 11, Rule 41, is that the petitioner is now still asking this Court to compel respondent Judge to elevate the records.

WHEREFORE, the writs of certiorari and mandamus prayed for are hereby denied; and the preliminary injunction heretofore issued is dissolved. No costs.

Bengzon, C.J., Bautista Angelo, Concepcion, Barrera, Paredes, Dizon, Regala, Makalintal, Bengzon, J.P. and Zaldivar, JJ., concur. Writs denied.

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