

**APOLINARIO VALERIO, PETITIONER, VS. BIENVENIDO A, TAN,
JUDGE, COURT OF FIRST INSTANCE OF MANILA, SECRETARY OF
AGRICULTURE AND NATURAL RESOURCES, DIRECTOR OF LANDS
AND LUCERO DE ...**

G.R. No. L-8446. September 19, 1955

Ponente: LABRADOR, J.

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LABRADOR, J.:

Petitioner seeks to compel respondent Judge of the Court of First Instance of Manila to certify the appeal of petitioner from an order of dismissal for failure of plaintiff, petitioner herein, to appear at the trial. The trial was set for August 3, 1954, at 1 o'clock p.m., but petitioner received notice of the hearing only on August 2, at 3:40 p.m. At 5:55 o'clock that same afternoon of August 2, he tiled a motion for postponement, alleging that he had another trial on August 3 at Norzagaray, Bulacan and that he received notice of the hearing only at 3:40 o'clock p.m. on August 2. The order of dismissal is dated August 3, and makes no mention of petitioner's motion for postponement.

Petitioner was served a copy of the order of dismissal on August 14, 1954, and on August 17 he filed a motion for reconsideration, which he set for hearing on August 21, 1954. This motion was. denied on that same day. Notice of this denial was given petitioner on August 31, 1954. On September 23, 1954 he filed a notice of appeal and on the following day he also filed an appeal bond and his record on appeal. The following objections were registered against the appeal, namely, that the motion for reconsideration is pro-forma and did not stay the running of the period of appeal, and that the notice of appeal did not mention the name of the court to which the appeal was being made. These objections were sustained, so the appeal was denied. A motion to reconsider this denial was also denied before this petition was tiled in this Court

There is no question that if the motion for reconsideration is not a pro-forma motion, the appeal was perfected in time. Was the motion for reconsideration to set aside the order of dismissal pro-forma and did not suspend the running of the period of appeal? We have examined the motion and find it to be replete with a statement of the facts and circumstances which made it impossible for plaintiff to appear at the trial, the further fact that he was denied his day in court, and decisions sustaining his petition for postponement and his right to have the dismissal reconsidered. We hold that it is not a pro-forma motion, and it therefore suspended the running of the period for perfecting the appeal. The appeal was, therefore, perfected within the time provided by the rules.

Neither is the failure of petitioner to mention in his notice of appeal the court to which the appeal was being made fatal to the appeal. The rule requiring a party to specify the court to which the appeal is being made is directory merely. This is to be inferred from section 31 of Republic Act No. 296 (otherwise known as the Judiciary Act of 1948), which provides that the Supreme Court or the Court of Appeals to which a case has been appealed, may certify said case to the other court if it finds that the jurisdiction thereof pertains to the latter. In other words, an error in the court to which an appeal is made is not fatal to the appeal. So should failure to designate the court in

the notice of appeal.

One other point needs consideration, and this is the argument of respondents that petitioner's motion for reconsideration of the order of dismissal contains no affidavit of merit attached thereto and that petitioner's complaint is not sufficient to serve the purpose of an affidavit of merit. The affidavit of merit is a requirement for a new trial under Rule 37 or for vacating a judgment under Rule 38. The judgment or order sought to be set aside under the above rules is regular and valid insofar as the proceedings preparatory or prior to the condition thereof are concerned. As the judgment or order is regular and valid, it may only be set aside in the discretion of the court under two circumstances, namely, that the judgment or order against the movant has been secured by reason of fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against, and that he has been probably impaired in his rights. This is the philosophy underlying the requirement of an affidavit of merit.

Where, however, the movant has been deprived of his day in court through no fault or negligence on his part and because no notice of hearing was furnished him in advance so as to enable him to prepare for trial, the judgment or order is absolutely null and void for denying him his day in court, a constitutional right. In such case, the judgment or order suffers from an inherent procedural defect and is absolutely null and void. Under such circumstances, no showing of merits is necessary to support an application to have the order vacated (I Freeman on Judgments, p. 559). This is the situation under which the case at bar falls. There was no need of an affidavit of merit because the order of dismissal was an apparent nullity.

The writ prayed for is hereby granted and the court a quo is ordered to give course to the appeal. Costs against respondent Lucero de Guzman. So ordered.

Bengzon, Acting C. J., Padilla, Montemayor, Reyes, A., Jugo, Bautista Angelo, Concepcion and Reyes, J.B.L., JJ., concur.

Writ prayed for granted.

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