

REMEDIOS CUENCO VDA. DE BORRROMEO, PETITIONER VS. THE COURT OF APPEALS AND TOMAS L. BORRROMEO, RESPONDENTS.

G.R. No. L-14382. November 29, 1960

Ponente: PADILLA, J.

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PADILLA, J.:

Appeal by certiorari under Rule 46 from a judgment of the Court of Appeals (C. A.—G. R. No. 22136-R).

Remedios Cuenco Borrromeo, as administratrix of the estate of the late Teofilo Borrromeo, brought an action against Tomas L. Borrromeo in the Court of First Instance of Cebu praying for accounting, liquidation and payment of her late husband's share in the proceeds of the war damage claim paid to and received by the defendant as his attorney-in-fact and of the sum of P17,100 as moral and actual damages and attorney's fees (Civil No. R-5031, Annex A, C.A.-G.R. No. 22136-R). The defendant answered the complaint denying the plaintiff's claim and averring that such share has been fully paid to Teofilo Borrromeo (Annex B, C.A.—G. R. No. 22136-R). Aside from this case, there were pending in the same Court Civil No. R-3808, entitled "Estate of Vito Borrromeo vs. Tomas Borrromeo." and special proceedings No. R-916, entitled "Testate Estate of Vito Borrromeo." For the convenience of Attorney Crispin D. Baizas, counsel for Tomas L. Borrromeo in Civil No. R. 5031 and special proceedings No. R-916 who resided and had his law office in Manila, by agreement of the parties the hearing of the case and special proceedings was set by the Court to enable Attorney Baizas to be in Cebu City on consecutive days. The hearing of Civil No. R-5031 was set for 9 July 1957 and of special proceedings No. R—916 for 10, 11 and 12 July 1957. On 8 July 1957 Attorney Baizas received by mail a copy of an urgent motion dated 5 July 1957 of the Solicitor General, who represented the Government in the special proceedings, praying for postponement of the hearing set for 10, 11 and 12 July 1957 (Annex C, C.A.-G.R, No. 22136-R). Attorney Baizas, who had previously made reservation with the Philippine Air Lines to fly to Cebu City, cancelled his reservation and wired Attorney Filiberto Leonardo (who was collaborating with him in handling the cases) in Cebu City, requesting him to ask for postponement of the hearing of Civil No. R-5031, which he referred to in the telegram as the "Cuenco Case," or, should the Court deny his request, to appear in his behalf at the trial of the case. On 9 July, Attorney Leonardo, believing that the "Cuenco Case" referred to by Attorney Baizas in his telegram was Civil No. R-8808, proceeded to the Court presided over by Hon. Edmundo Piccio but after reading the court calendar found that Civil No. R-3808 was not set for hearing on that day. So he went home. For that reason, when Civil No. R-5031 was called for hearing at the Court presided over by Hon. Jose S. Rodriguez, neither the defendant Tomas L. Borrromeo nor his counsel appeared, and the plaintiff Remedios Cuenco Borrromeo was allowed to present her evidence. On 11 July 1957 the Court rendered judgment for the plaintiff and against the defendant, copy of which was received by counsel for the defendant on 2 August 1957 (Annex B, C.A.-G.R. No. 22136). On 29 August 1957 the defendant filed a verified motion for new trial, dated 26 August 1957, on the ground of mistake or excusable neglect, supported by affidavits of merit attached thereto (Annexes B, E-1 and E-2, C.A.-G.R. No. 22136). On 13 September 1957, the Court denied the defendant's motion for new trial (Annex F, C.A.-G.R. No. 22136), copy of which was received by counsel for the defendant on 23 September 1957. On 17 October 1957, or 24 days after-receipt of a copy of the order denying his motion for new trial, the defendant perfected his appeal

from the last mentioned order. In a motion dated 21 October 1957, copy of which counsel for the defendant received on 26 October 1957, the plaintiff prayed for the dismissal of the appeal on the ground that it was filed beyond the regle-mentary period (Annex H, C.A.-G.R. No. 22136). On 29 October 1957 the defendant filed an objection thereto stating that he was appealing from the order dated 13 September 1957 denying his motion for new trial, and not from the judgment dated 11 July 1957 (Annex I, C.A.-G.R. No. 22136). The Court set the hearing of the plaintiff's motion to dismiss on 26 October 1957 and thereafter on the same day entered an order as follows:

Finding the motion of counsel for the plaintiff dated October 21, 1957, well founded, it appearing that the appeal filed by the defendant was presented outside of the 30 day period for appeal, it was filed after 44th day as shown by the records, as prayed for, the appeal filed by the defendant is hereby Dismissed (Annex J, C. A.—G.R. No. 22136).

On 6 November 1957 the defendant moved for reconsideration of the foregoing order, reiterating that his appeal was from the order dated 13 September 1957 denying his motion for new trial and not from the judgment dated 11 July 1957 (Annex K, C.A.-G.R. No. 22136) ; the plaintiff, an objection thereto (Annex L, C.A.-G.R. No. 22136). On 2 December 1957 the defendant received a copy of an order dated 25 November 1957 denying his motion for reconsideration (Annex M, C.A.-G.R. No. 22136); on 23 December 1959 the defendant filed a petition for a writ of certiorari in the Court of Appeals praying that after hearing the order dated 26 October 1957 dismissing his appeal from the denial of his motion for new trial be set aside. (C.A.-G.R. No. 22136). He also prayed that after filing the requisite bond, a writ of preliminary injunction be issued enjoining the respondent court from issuing a writ of execution of the judgment rendered in Civil No. R-5031. After he had posted a bond in the sum of P1,000, the Court of Appeals issued the writ of preliminary injunction prayed for. On 28 February 1958 the Court of Appeals rendered judgment, the dispositive part of which is:

In VIEW OF THE FOREGOING, the judgment rendered in Civil Case No. 5031, is set aside, and the respondent judge should be, as he is hereby ordered, to grant the new trial prayed for and permit the petitioner to present such evidence as may be lawfully warranted and relevant in the premises. The injunction issued heretofore, is made permanent, without special pronouncement as to costs.

The herein respondent, petitioner in the Court of Appeals, insists that he is appealing from the order dated 13 September 1957, denying his motion for new trial and not from the judgment dated 11 July 1957.

Taking into consideration the facts set forth in the motion for new trial supported by affidavits attached thereto and the answer filed by the herein respondent Tomas L. Borromeo in the Court of First Instance of Cebu where he denies the claim of the herein petitioner, plaintiff in the said Court, and avers that the claim for war damage of the late Teofilo Borromeo, husband of the herein petitioner, has been fully paid to him, said motion may be deemed one filed under Rule 38, of the Rules of Court. A denial thereof is final and appealable. The period for taking an appeal from a denial of a motion praying for the setting aside of a judgment or order rendered or entered against a party through fraud, accident, mistake, or excusable negligence is thirty days from the receipt of a copy of such judgment or order. Indeed, it would be futile to appeal from the judgment sought to be set aside by a motion for relief under Rule 38, because the aggrieved party would have no evidence upon which to rely to secure a reversal of the judgment sought to be set aside by a motion for relief under Rule 38, unless he would rely for its reversal on insufficiency or perhaps inherent improbability of the evidence presented by the winning party. The appeal by the herein respondent Tomas L. Borromeo from the order denying his motion for relief had been taken within the reglementary period and should have been allowed.

The judgment rendered by the Court of Appeals under review granting the writ prayed for by the herein respondent Tomas L. Borromeo should be, as it is hereby, affirmed, with costs against the herein petitioner

Remedios Cuenco Vda, de Borromeo.

Paras, C.J., Bengzon, Bautista Angelo, Labrador, Concepcion, Reyes, J.B.L., Barrera, Gutierrez David, Paredes, and Dizon, JJ., concur.

Decision affirmed.

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