

**SEGUNDO ABANDO, PETITIONER, VS. COURT OF APPEALS,[]
APOLONIO S. ROBLES, AND ISAAC TISBE, RESPONDENTS.***G.R. No. L-37697. May 31, 1978*

Ponente: TEEHANKEE, J.

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The Court dismisses the petition and sustains respondent court's denial of petitioner-appellee's motion to dismiss the appeal of respondents-appellants on the strength of controlling jurisprudence that have liberalized the previous rigid application of the material data rule and sanction proper reliance on the trial court's order of approval and determination of timeliness of the appeal, particularly when the fact of timeliness and perfection of the appeal has not been placed in question nor impugned by petitioner-appellee who had filed no opposition to the approval of the record on appeal in the trial court.

Respondent court properly denied the motion to dismiss appeal, which was based solely on the lack of mention in the record on appeal of the fact and date of filing of the appeal bond, on the valid ground that "it appear(ed) from the letter of transmittal of records of the clerk of the lower court that defendants-appellants (timely) filed surety appeal bond of one hundred twenty (P120.00) pesos on December 3, 1969."

The appealed judgment of the trial court had sentenced respondents-appellants jointly and severally to pay petitioner-appellee the sums of P238.00 for medical expenses, P70,000.00-compensatory damages, P20,000.00-moral damages, P5,000.00-attorney's fees and costs of suit.

Respondents-appellants' record on appeal filed on December 4, 1969 as approved by the trial court without opposition from petitioner-appellee per its Order of December 22, 1969 (and particularly, the very notice of appeal filed on November 20, 1969) properly states all the material "data as will show that the appeal was perfected on time"[1] within the reglementary 30-day period (deducting the period of pendency of the motion for new trial) and without any extension having been asked or needed by the appellant, as follows:

"1. That the defendants, thru counsel, received on August 25, 1969, the copy of the decision in the above-entitled case dated August 4, 1969;

"2. That on September 4, 1969, defendants, thru counsel, filed a Motion for New Trial which was denied by this Honorable Court in its Order dated November 4, 1969, copy of which was received by the defendants, thru counsel, on November 14, 1969; x x x."[2]

The trial court in its Order of December 22, 1969 approving the record on appeal, expressly stated that "there (is) no opposition to defendant's 'Record on Appeal' filed on December 4, 1969". The record on appeal per se shows that motion for new trial was filed on September 4, 1969, the 10th day after service of the adverse decision on August 25, 1969, notice of denial of the motion was received on November 14, 1969 (from which date, the counting of the period for appeal again resumed) and on the 16th day (November 20, 1969) notice of appeal was filed, and on the 30th day (December 4, 1969) the record on appeal was duly filed.

None of these dates is disputed by petitioner-appellee. Neither does he dispute the actual fact that a P120. -appeal bond was filed on the 29th day, on December 3, 1969, although no mention thereof was made in the record on appeal. No opposition to the approval of the record on appeal was filed by petitioner-appellee, and hence eighteen days later, the trial court which apparently noted that all requirements were complied with, duly approved the same and ordered the transmittal on appeal of the records and evidence to respondent court. The clerk of the trial court in the letter of transmittal of records to respondent court, as already stated hereinabove, duly noted thereon the fact that respondents-appellants timely filed the P120. -appeal bond on December 3, 1969.

After receipt of the records in respondent court, petitioner-appellee filed his motion to dismiss appeal of August 1, 1973 invoking solely the lack of any mention in the record on appeal of the date and fact of filing of the appeal bond and relying on the theretofore rigid application of the material data rule. Respondent court correctly denied dismissal of the appeal since the letter of transmittal of the clerk of court (of which it could take judicial notice in the same way that it takes judicial notice of the date of filing of the record on appeal as stamped on the original record on appeal as filed with the trial court and certified by the clerk of court in the letter of transmittal) duly certified the correctness of the fact and date of filing of the appeal bond, as required by the provisions of Rule 41, sections 10 and 11.[3]

In the similar case of *Alfonso vs. Court of Appeals*[4] where all material dates were shown in the original record on appeal except for the fact of filing of the appeal bond which was not incorporated therein, the Court held that there was substantial compliance with the rule and set aside the appellate court's dismissal of the appeal since verification by the said court as required by this Court showed that at the bottom of the original record on appeal there had been written the numbers of the official receipt and money order and dates thereof in the amount of P120.60 which said court reported "must be the appeal bond" as averred by therein petitioners-appellants.

The Court cited in *Alfonso* the previous cases of *Ever Ice Drop Factory vs. Court of Appeals*[5] "where the printed joint record on appeal did not include petitioner's notice of appeal to show the timeliness thereof and the official payment of the appeal bond (which were duly shown in their original notice of appeal which was, however, inadvertently not incorporated in the printing of the joint record on appeal contrary to the agreement of the parties)," and *Design Masters vs. Court of Appeals*[6] where the Court held that the appellate court must examine the original record on appeal as filed with the trial court and forwarded to it to determine the date of filing thereof as stamped on the original record on appeal, in both of which cases the Court had upheld the doctrine of substantial if not literal compliance with the cited Rule, in setting aside the appellate court's dismissal of the appeals therein.

Petitioner's action of certiorari assailing respondent court's resolution of September 27, 1973 denying his motion to dismiss appeal was then given due course by this Court, as it was only at about that time that the vanguard case of *Berkenkotter vs. Court of Appeals*[7] which relaxed the then prevailing literal adherence to the material data rule was handed down and it had not yet taken root. But the subsequent long line of cases adhering to *Berkenkotter* and its dictum that "No trial judge in his right mind and who is aware of the serious responsibilities of his office, would approve a record on appeal that was not timely filed" calls for no other determination but the dismissal of the present case. These cases uniformly enunciate the liberal rule that where the accuracy and veracity of the trial court's finding of due and timely perfection of the appeal as attested by its approval thereof are not impugned, questioned or disputed by the adverse party, the non-inclusion in the record on appeal of some pleadings or data "is not fatal and does not warrant dismissal of the appeal, since the appellate court may properly rely on the trial court's order of approval and determination of timeliness of the appeal." [8] The previous rigid application of the material data rule was thus declared in *Morales vs. Court of Appeals*[9] to have lost its "ephemeral vitality." Hence, petitioner's invoking of the mere technicality of a deficiency in the record on appeal

can no longer prevail against the uncontested and undisputed fact of timeliness of perfection of the appeal as shown by the trial court's approval of the record on appeal without opposition from him.

As Stated in *Araneta vs. Doronila*[10], (which is applicable here, *mutatis mutandis*), "surely, matters of judicial notice constitute part of whatever data is required under Section 1 of Rule 50 and Section 6 of Rule 41. And taking the circumstances of judicial notice already referred to together with the absence of any further objection on the part of Araneta to the amended record on appeal in question as well as the failure of Araneta to allege categorically that the original record on appeal of the Doronilas was filed out of time or to deny that it was filed within the reglementary period, We are persuaded that the amended record on appeal here in dispute sufficiently complies with the requirements of the rules," and the Court therein cited the additional consideration of waiver of the objection of non-timeliness in that "when Araneta objected to the original record on appeal, it was only on the ground of omission of certain papers therein, not for its being out of time. Under the omnibus motion rule, the objection of untimeliness was waived by Araneta, x x x." In the case at bar, as already shown, petitioner had filed no opposition whatsoever to the approval of the record on appeal, which in fact was timely filed and perfected, and in the absence of any positive showing from the records that the appeal was in fact not timely perfected, he must be likewise deemed to have waived the objection of non-timeliness and can no longer be allowed to invoke it on mere technicality in the appellate court. It is to be noted that petitioner's insistence on such technicality (instead of awaiting respondent court's decision on the merits of respondents' appeal) has only served to unduly delay the determination of the appeal to the prejudice of all concerned.

ACCORDINGLY, the petition is dismissed and the case is remanded to respondent court for determination of the appeal on the merits. No costs.

Barredo,[**] Makasiar, Santos,[***] and Guerrero, JJ., concur.

[*] Second Division, composed of H. Concepcion Jr., A. Reyes and R. C. Fernandez, JJ.

[1] Rule 41, section 6.

[2] Notice of Appeal, at page 46, Rec. on Appeal; emphasis supplied.

[3] The cited sections read:

"SEC. 10. Duty of clerk of court after approval of the record. - Upon the approval of the record on appeal by trial judge, it shall be the duty of the clerk of trial court to verify the correctness of the copies of all petitions, motions, pleadings, orders and decisions included therein, as well as the dates of filing and receipt thereof by the parties, and to make a certificate of their correctness." (Rule 41; emphasis supplied.)

Cf. *Fagtanac vs. Court of Appeals*, 22 SCRA 1227 (1968).

"SEC. 11. Transmittal. - The clerk of the trial court shall transmit to the appellate court the record on appeal within ten (10) days after its approval, together with a certified copy of the minutes of the proceedings, the order of approval, the certificate of correctness, and the original documentary evidence referred to therein. A true copy of such documentary evidence shall be prepared by the clerk and shall remain in the lower court. x x x." (Rule 41; emphasis supplied.)

[4] 58 SCRA 43 (July 18, 1974).

[5] 47 SCRA 305, 308-309 (1972); per Barredo, J.

[6] 38 SCRA 297 (1971); per Concepcion, C.J. (retired).

[7] 53 SCRA 228 (Sept. 28, 1973).

[8] Luna vs. Court of Appeals, 67 SCRA 503 (Oct. 30, 1975); see Krueger vs. Court of Appeals, 69 SCRA 50 (Jan. 20, 1976) and cases cited.

[9] 67 SCRA 304, 310 (Oct. 21, 1975), per Martin, J. (retired).

[10] 72 SCRA 413 (August 24, 1976); per Barredo, J.

[**] Designated to sit in the First Division vice Justice Ramon C. Fernandez, disqualified.

[***] Designated to sit in the First Division vice Mme. Justice Cecilia Muñoz Palma, who is on official leave.

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