

MAXIMA GROSPE, TOMASA GROSPE, AND HON. AGUSTIN P. MONTESA, JUDGE OF THE COURT OF FIRST INSTANCE OF NUEVA ECIJA, PETITIONERS VS. COURT OF APPEALS AND AUGUSTO UERA, RESPONDENTS.

G. R. No. L-11443. September 30, 1959

Ponente: BENGZON, J.

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BENGZON, J.:

Review of a decision of the Court of Appeals setting aside the judgment of the Nueva Ecija court of first instance in a certain civil case and ordering a new trial.

It appears that Maxima and Tomasa Grospe filed in said provincial court, a complaint to recover from Augusto Uera, damages in the total sum of P4,500.00 plus attorney's fees, due to malicious prosecution. At the trial, neither defendant nor his counsel appeared. Whereupon, plaintiffs presented their evidence, in view of which judgment was rendered ordering defendant to pay P3,000.00 to each of them in addition to costs. Copy of the judgment was received by Uera's counsel on October 20, 1955; and on November 11, 1955, he submitted a petition "for relief from judgment" (which was in effect a motion for new trial under Rule 37, inasmuch as the decision had not yet become final), wherein he explained his/absence on the day of trial was due to accident or excusable neglect, because he had been attending to a criminal case before the Court of Appeals in Manila. The petition was supported by several documents allegedly showing a good defense.

Such petition was denied by order of November 16, 1955, copy of which was sent to Uera's counsel by registered mail. The latter received from the postmaster the first notice of such mail on November 28, 1955,' however, he only claimed and received it on December 20, 1955. (These two dates are important since this decision centers around them.) On December 20, 1955, he filed a motion for reconsideration, which was denied, copy of the denial being served him on January 16, 1956. On this last date, he tendered a notice of appeal, appeal bond and record on appeal; however, upon objection by the adverse party, the appeal was rejected on the ground that it was late.

Wherefore, Uera started in the Court of Appeals a special civil action praying either for mandamus to compel the judge to approve the record on appeal or for certiorari to set aside, on the ground of abuse of discretion, the order denying his petition for new trial.

After hearing both sides, the appellate court held: (1) mandamus may riot be granted because the appeal had not been perfected within the reglementary period; (2) however, the respondent court gravely abused its discretion in denying the motion for new trial. Consequently, it set aside the judgment with directions for new trial.

At the proper time and in due form, the Grospees submitted to this Supreme Court a petition for review, which was given due course because they raised the legal issue of whether certiorari may be resorted to as a substitute for an appeal which could be, but was not, taken in time.

Uera defends the use of certiorari, and for good measure, he maintains the timeliness of his appeal.

Therefore, two questions call for determination: timeliness of the appeal and availability of certiorari.

On the first, we note at the outset that Uera has not appealed from the Court of Appeals' finding of tardiness of his appeal. Admittedly, the appellee may differ with the appealed judgment and submit arguments disputing its grounds of decision; but he may do so only for the purpose of supporting the dispositive part of the judgment.[1] In this case, however, if Uera's position be upheld, the appellate court's decision will have to be overturned, and instead of a new trial, approval of the record on -appeal would have to be directed.

Nevertheless, overlooking this technical aspect, we have decided to look into the disputed matter to set a definite ruling.

The Grosapes, the court of first instance and the Court of Appeals, made this computation: from October 20 (notice of decision received by counsel) up to November 11 (petition for relief or motion for new trial) 21 days elapsed; from December 3, 1955 (notice of denial of motion) to December 20 (motion to reconsider denial) 17 days. Therefore, the notice of appeal filed on January 16 was out of time (38 days at least). The herein respondent Uera claims, however, that the computation was erroneous, because the 17 days from December 3 to December 20 should not be included.

According to the statement of facts, notice of denial of the motion for new trial was sent to Uera's counsel by registered mail. He received the first notice, from the postmaster on November 28, 1955. The Grosapes and the courts hold that Uera's counsel must be deemed to have been notified on the fifth day after November 28, 1955, i.e. on December 3, 1955, according to Rule 27, sec. 8. On the other hand, Uera argues that he should be deemed to have been notified only on December 20, 1955, the date when he actually received the mail.

Sec. 8, Rule 27 reads as follows:

"* * * Service by registered mail is complete upon actual receipt by the addressee; but if he fails to claim his mail from the post office within five days from the date of first notice of the postmaster, the service shall take effect at the expiration of such time."

Herein lies the issue: which part of the above provision controls?

The second part, in our opinion. Uera failed to claim his mail within five days from first notice (November 28, 1955); therefore, he is deemed to have received it on December 3, 1955, no matter whether he never claimed it or received it afterwards (as in this case, on December 20, 1955). As we have held in several cases, "if the addressee is so negligent that he fails to claim his mail from the post office within five days after the first notice by the postmaster, then the service is deemed complete and effective at the expiration of such time."

It is contended that this second part of the sentence applies only where the addressee never claims and never receives the mail. But the words are clear: "If he fails to claim within five days." They do not say "if he never claims." The best proof that applies even if the addressee receives his mail many days after notice is that we expressly invoked it in *Enriquez vs. Bautista*, 79 Phil., 220 wherein the addressee actually received his registered mail on January 6, 1947, but we held he is deemed to have received it on November 3, 1946, five days after he received the first notice of the postmaster on October 28, 1946. Therein, we deemed the service completed on the fifth day after the first notice, even if he actually received the mail months later. And in *Roullo vs. Lumayno*[3] we tacitly approved identical application of section 8.

Indeed, the structure of the sentence permits no other inference. The second part is separated by a semicolon, and begins with "but" which indicates that the following is an exception to the rule enunciated in the first that service is completed upon actual receipt.

To make our thoughts specific, we may give examples: First notice of registered mail is received by addressee on December 1, and he gets his mail on December 3, service is complete on December 3, date of actual receipt (first part of the section). But if he does not get it until December 15, service is deemed complete on December 6, (five days after December 1) (second part). If he never gets the mail, service is also deemed complete on December 6 (second part). If he receives the mail two months after it is registered, but there is no proof of the first notice, actual receipt is the date of service (first part).

During our discussion, the possibility of injustice was explored where the mail contains a copy of the decision and the addressee gets it only on the thirtieth day after first notice. In the situation, and according to this view, the addressee would have only five days within which to perfect his appeal. However, we find no injustice, because anyway such party might ask the court for extension of the time to perfect his record on appeal.[4] And at any rate, if he is inconvenienced it is his fault that he did not claim his mail earlier, as directed by the Rules.

Furthermore, granting for the sake of argument that notice of denial of his motion for new trial was effective on December 20, as claimed by Uera, still his appeal was out of time. It will be recalled that when he filed the motion for new trial, twenty-one days had already elapsed of his 30-day-period to appeal. Supposing he received notice of denial only on December 20, yet he appealed only on January 16, i. e. 26 days later so 21 days plus 26 days equal 47 days; late. We know, on December 20 he filed a "motion for reconsideration", but being a mere motion to reconsider, reiterating the motion to set aside, and on new ground, it did not suspend the period.[5] Useless to urge, in avoidance of this computation, that the appeal was taken from the denial of the motion for new trial—and not from the original judgment; because in the first place, such is not Uera's theory, whose computation (p. 9 brief) begins from October 20, 1955, date when the original decision was received. In the second place, it is not permissible for one party whose appeal from the original decision has elapsed, to argue in an effort to circumvent its finality that he merely appealed from the order denying his motion for new trial.[6]

Therefore, looked from every angle, the appeal of Uera was out of time, and the decision of the court of first instance of Nueva Ecija became executory.

Now then, may compliance with such decision be prevented by means of certiorari? If the court had no jurisdiction, undoubtedly. But no: abuse of discretion is Uera's line of remedial action. Too bad, certiorari is not available where such abuse could have been the object of an appeal but the time to appeal has elapsed.[7] This is the situation confronting us. Uera could have appealed, and in such appeal, discuss or insist that he should have been allowed to present his side, because accident or excusable neglect prevented him from attending the trial. Therein his papers supposedly establishing meritorious defenses could have been compared with the evidence submitted by the plaintiffs and as a result of the comparison, the appellate courts could have taken adequate measures. Nonetheless he did not appeal, and chose, designedly perhaps, to submit those papers in this certiorari proceeding, where the record does not disclose the plaintiffs' evidence and it's impossible to check his claim to a tenable stand.[8] Never was the rule more fitting which denies a separate revision through certiorari, to a party who neglected to appeal, considering especially that such neglect to appeal constituted the third of a series, the others being neglect to appear and neglect to claim registered mail.

True, certiorari has been granted on occasions where appeal could have been, but was not, perfected on time. But they were instances wherein the petitioner failed to appeal through accident or excusable neglect. And this is not one of them. The accident or excusable neglect described here consists in Uera's failure to appear at the trial; not his failure to perfect the appeal.[9]

Consequently, it was improper to grant certiorari. On that score the decision under review must be, and is hereby revoked, with costs.

Padilla, Bautista Angela, Labrador, Concepcion, and Gutierrez David, JJ., concur.

[1] See Moran, Rules of Courts, Comments under Rule 48, sec. 18, Saenz vs. Mitchell, 60 Phil., 69; Villovert vs. Lim, 62 Phil., 178.

[2] Pielagio vs. Generosa, 73 Phil., 654.

[3] 103 Phil., 1044.

[4] Moya vs. Barton, 76 Phil., 831.

[5] Federal Films Inc. vs. Judge of First Instance of Manila 78 Phil., 472; Medran vs. Court of Appeals, 83 Phil., 164; Mallare vs. Panahon, 52 Off. Gaz., 219.

[6] Alano vs. Paglinawan, L-12962, Feb. 26, 1959.

[7] Prof eta vs. Gutierrez David, 71 Phil., 582; Cruz vs. Judge, 66 Phil., 102; Equio vs. Court of First Instance, L-6047, April 27, 1953; Francisco, Rules of Court, Rev. Ed. Vol. III, p. 96.

[8] For that reason they are not detailed here.

[9] Neglect to claim the mail not excusable; Pielagio vs. Generosa, 73 Phil., 654.

CONCURRING

BARRERA, J.,

I concur and wish merely to add that if the Rule is interpreted otherwise than as indicated in the majority opinion, it would favor attorneys who, through negligence or by design, fail to claim their mail and would work unfavorably against diligent lawyers or litigants. The result would be to unwittingly encourage delay.

DISSENTING

PARAS, C. J.,

In this case the appeal being sought by herein respondent Uera in the Court of Appeals, wherein he was petitioner, from the decision of the trial court, wherein he was defendant, appears to be meritorious. In disposing of the alternative original petition for mandamus or certiorari the Court of Appeals said:

"We note from the record that petitioner has a substantial defense in the action for damages filed by respondents against him a defense that ought at least to be received and passed upon if justice is to be subserved. Petitioner alleges that he was the vendee of a parcel of land and had therefor become its owner. The land was subsequently mortgaged without his consent by the vendor, Agustin Grospe. Petitioner appealed to the authorities of his town and the Chief of Police, as the prosecuting officer, filed a complaint for swindling against the said vendor (evidently having in view Article 316 of the Revised Penal Code), including respondents Maxima and Tomasa Grospe as co-defendants. The issue in the civil action for damages subsequently filed by those two against petitioner is: Was he guilty of malicious prosecution so as to be liable for damages. In his motion for new trial, referred to by him as a petition for relief from judgment, he submitted the documents already mentioned earlier in this decision tending to show that respondents Tomasa and

Maxima Grospe knew of and authorized the mortgage of the land executed by their brother Agustin Grospe; that such authority was necessary for he mortgage because the land was owned by them in common; and that they knew likewise that the share of Agustin Grospe therein had been previously sold to petitioner. These circumstances, if allowed to be proven at the trial, certainly would have a material bearing on the question of malice imputed to petitioner. Material also is petitioner's allegation that all he did, being a man of very limited education, was to consult the Chief of Police as to what should be done to protect his rights to the property bought by him, and it was that official who decided to prosecute respondents for swindling."

While the appeal could have been bounded upon a meritorious defense, it was not allowed by the trial court, because it was held to have been filed out of time. On this point, the Court of Appeals said:

"Petitioner's motion for new trial denominated by him as a petition for relief from judgment, was denied by respondent Court on November 15, 1955. Copy of the order of denial was sent to petitioner's counsel by registered mail, of which the first notice was served upon him on November 28, 1955. However, it was not until December 20, 1955, that he claimed his mail and actually received said copy of the order; and on the same day he filed a motion for reconsideration thereof, which was likewise denied on January 3, 1956, copy of the order of denial being received by him on January 16, 1956. On the said day counsel for petitioner filed his notice of appeal, appeal bond and record on appeal, which was thereafter disapproved on the ground that they were filed beyond the reglementary period."

"The question raised between the parties is whether or not the appeal was perfected on time. It is admitted that if petitioner should be considered as having been notified of the denial of his motion for new trial only on December 20, 1955, when he actually claimed the registered mail containing such notice, his appeal would be within the prescribed period. However, it is maintained by the respondents that notice to petitioner was complete and effective upon the expiration of five days after November 28, 1955, and thus computed, the period of appeal had already expired when the record on appeal was presented."

Section 8, Rule 27 of the Rules of Court says:

"* * * Service by registered mail is complete upon actual receipt by the addressee; but if he fails to claim his mail from the post office within five days from the date of first notice of the postmaster, the service shall take effect at the expiration of such time."

It needs no argument to show that notices are either actual or constructive: registered mail is either claimed or unclaimed.

In my opinion, the first part of the rule above quoted refers to actual notice arising from having claimed the registered mail; whereas, the second part, preceded by a semi-colon, concerns constructive notice only, for failure to claim the said mail. It is incongruous with reality and reason that a letter actually received, for instance, on the 10th day from notice should be construed to have been received on the 6th day. To my mind, it is only when a letter is returned unclaimed that there arises the necessity of fixing a date for purpose of record and computation. Hence, the need of the rule on constructive notice.

To adopt respondents' contention to the contrary is to be needlessly unreasonable. Experience has shown that not infrequently addressees of registered mail, when sent notices, are out of town attending to some legitimate business or occupation. It will be grossly unreasonable and unfair to visit upon them the rigid interpretation of the rule that service has to be deemed completed on the 6th day after first notice should they be able to claim said mail only thereafter. The first Rule of Court on the matter which took effect on January 1, 1919, follows:

"Rule 13. The period within which all notifications required by these rules shall take effect, unless otherwise expressly provided shall be as follows:

"Five days, if service is made in the city of Manila, or the Provinces of Rizal, Cavite, or Bulacan; seven days if

the service is made in any other province directly connected with Manila by any line of railroad; ten days if service is made in any province of Luzon not directly connected with Manila by any line of railroad, except the Provinces of Cagayan, Isabela, Albay, Ambos Camarines, and Sorsogon; twenty days if service is made in any province in the islands of Panay, Cebu, or Negros, or in the Provinces of Mindoro, Albay, Ambos Camarines or Sorsogon, except the Province of Antique; thirty days if service is made in any province of the Archipelago for which no shorter period is provided by this rule. Such periods shall be computed to begin with the day following that upon which the notice is served." (35 Phil. Reports)

and the second rule which took effect on April 1, 1933, provides:

"Rule 12. Whenever by these rules a notice is required to be given by the parties, and the period thereof is not elsewhere prescribed, the time of the notice shall be governed by Rule 13. All notices of motions shall be given in, writing by the moving party to the adverse party, shall state generally the nature and grounds of the motion, and shall be accompanied by copies of all affidavits or other papers presented to the court in support thereof. Proof of the service of such notice shall be filed, such proof to consist of a written acceptance of the service, or the affidavit of the person making the service that he has delivered a copy of the papers to the attorney for the adverse party, or has left it at his office or residence in the hands of some person, to be designated by name, employed or resident therein and of sufficient discretion to receive the same, or the certificates of a sheriff or other authorized process server that he has made such service. Service may also be made by sending a copy of the papers to the attorney for the adverse party by registered mail, and proof of such service shall be made by affidavit as to the mailing of the papers, and by the production of the registry return card or the letter unclaimed." (55 Phil. Reports)

In any event, the period to claim registered mail from the post office is relatively short, as three notices only are sent to the addressee at an interval of three days (See *Palisoc vs. Locsin*, 57 Phil., 332; *Enriquez vs. Bautista*, 79 Phil., 220).

Apart from the foregoing consideration, it will be observed that the return card accompanying the registered mail that has been claimed, when returned to the sender, does not show the date or dates when the first or subsequent notices have been sent to the addressee. The absence of any indication as to their respective dates will give rise to a cumbersome investigation of the records of the post offices concerned so as to verify the date when the five-day period expired. To adopt respondents' interpretation will certainly create situations that will promote or induce protracted litigations as has happened in the case of *Rouullo vs. Lumayno*, 103 Phil., 1044.

I agree with the majority that certiorari could not be availed of by respondent Uera where he had the remedy of appeal. But he should have been granted the writ of mandamus because his appeal was filed on time: the motion for reconsideration of the order denying his petition for relief suspended the running of the period within which to appeal,

Wherefore, the decision appealed from should have been set aside and a writ of mandamus issued.

Endencia, J., concurs,

Decision revoked.

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