

**JESUS R. AZNAR AND AURORA TIMBER INDUSTRIES CORPORATION,
PETITIONERS, VS. THE HON. COURT OF APPEALS AND ONG
BROTHERS LUMBER CO., INC., RESPONDENTS.**

G.R. No. L-38134. September 30, 1978

Ponente: CONCEPCION JR., J.

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CONCEPCION JR., J.:

Petition for writs of certiorari and mandamus, with preliminary injunction, to annul and set aside the order of the respondent appellate court, dismissing the petitioners' appeal upon the ground that the record on appeal does not contain such data as will show that the appeal was perfected on time, and to enjoin said respondent court to give due course to the said appeal.

Petitioners, Jesus R. Aznar and the Aurora Timber Industries Corporation, and private respondent Ong Brothers Lumber Co., Inc., are logging operators who have abutting timber concessions in the municipality of Maria Aurora, Aurora Subprovince, Quezon. On October 13, 1969, the private respondent, claiming that the herein petitioners have encroached upon its timber concession and had removed wood or timber products therefrom, filed a suit before the Court of First Instance of Aurora Sub-province to restrain the petitioners from entering its timber concession, and to order the said petitioners to pay herein private respondent the value of the wood and timber products removed by the petitioners, plus damages and costs.[1] A temporary restraining order was issued,[2] and after trial, or on May 30, 1970, judgment was rendered, making the temporary restraining order permanent, and ordering herein petitioners to pay to the private respondent, the amounts of P128,384.51 as actual or compensatory damages, P8,000.00 as attorney's fees, and P2,900.00, as expenses of litigation, with costs against the said petitioner.[3]

A copy of the aforementioned decision was received by petitioners on June 9, 1970,[4] and on July 2, 1970, they filed their notice of appeal and appeal bond.[5] The record on appeal, also dated July 2, 1970,[6] was filed in court on July 6, 1970.[7]

On January 21, 1971, the trial court approved "the amended record on appeal"[8] and the records of the case were consequently elevated to the respondent appellate court, where the case was docketed as case CA-G.R. No. 48160-R.

While the appeal was pending in the appellate court, and soon after the filing of the printed Record on Appeal, herein private respondent filed a motion to dismiss the appeal upon the ground that the record on appeal does not contain such data as will show that the appeal was perfected on time, more particularly, (1) the order of July 23, 1970, directing the amendment of the record on appeal; (2) the period given the herein petitioners in said order of July 23, 1970 within which to submit their amended record on appeal; and (3) the date when herein petitioners received copy of the order of July 23, 1970.[9] The respondent appellate court denied the motion to dismiss the appeal on November 22, 1972.[10]

However, upon motion for reconsideration filed by the private respondent,[11] to which the petitioners had filed

their comment,[12] the respondent Court of Appeals, on May 7, 1973, reconsidered its resolution of November 22, 1972, and dismissed the appeal.[13]

Hence, the present recourse.

It is not disputed that the petitioners had seasonably filed their notice of appeal and appeal bond, as well as the record on appeal, within the reglementary period. Nor does the private respondent contest the approval of the record on appeal. What is disputed here is the effect of the non-inclusion in the record on appeal, of the order of the trial court requiring the herein petitioners to amend their record on appeal, and of the date when the said petitioners received a copy of the said order.

The "material data rule" in Section 6, Rule 41 of the Revised Rules of Court is to the effect that where the trial court finds and declares in its order of approval of a record on appeal that it was filed on time or within the reglementary period and the correctness, accuracy and veracity of such finding are not impugned, questioned or disputed by the adverse party, the non-inclusion of a motion or order 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 appeal. Thus, in the case of *Berkenkotter vs. Court of Appeals, et al.*,^[14] the Court said: "The mere absence of a formal order granting the motion for extension of time to file the record on appeal should not be fatal to the petitioner if the record on appeal filed within the requested extension period was approved by the Court a quo. As previously stated, the approval thereof carries with it the approval of the motion for extension and the mere failure of the record on appeal to show such approval should not defeat the right to appeal. 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."

This pronouncement was reiterated in *Pimentel vs. Court of Appeals, et al.*,^[15] wherein were omitted from the record on appeal the motion for a 30-day extension within which to perfect the record on appeal, the order of the court granting the 30-day extension, and the order giving the petitioners therein five days to finalize the amended record on appeal, as well as in the cases of *Republic vs. Court of Appeals*,^[16] *Luna vs. Court of Appeals*,^[17] *Tambunting vs. Court of Appeals*,^[18] and *Diola vs. Court of Appeals*,^[19] where similar motions and resolutions have not been included in the record on appeal. In the *Diola* case, the Court said:

"The only ground for respondents' motion to dismiss the appeal as filed in respondent court was the non-incorporation in the amended record on appeal of the trial court's order of August 7, 1972 requiring the inclusion of certain amendments.

"Such omission is not fatal. As recently reiterated in *Rodriguez vs. Court of Appeals*, (L-37522, Nov. 28, 1975) 'As early as the case of *Vda. de Oyzon v. Vinzon* (L-19360, July 26, 1963, 8 SCRA 455), We ruled that: 'The fact that the amended record on appeal was submitted after the reglementary 30-day period, did not render the perfection thereof untimely, because the amended record on appeal is deemed to have been filed on the presentation of the original, which was done within the reglementary period. As We explained in *Philippine Independent Church v. Juana Mateo, et al.*, (L-14793, April 22, 1961, 111 Phil. 752), 'amendment presupposes the existence of something to be amended, and, therefore, the tolling of the period should relate back to the filing of the pleading sought to be amended x x x.'

"The cited principle that since the appeal had unquestionably been timely perfected as shown by the very record on appeal, the admission of the amended record on appeal presented no longer a jurisdictional question

of timeliness of the perfection of the appeal but a question of compliance with the trial court's order requiring certain amendments which rested on the said court's sound discretion, controls in the case at bar. Furthermore, the undisputed fact is that the amended record on appeal was indeed filed well within the ten-day period granted by the trial court."

Accordingly, the respondent Court of Appeals abused its discretion when it dismissed the herein petitioners' appeal.

WHEREFORE, the petition is granted and the resolution of the Court of Appeals, dated May 7, 1973, in case CA-G.R. No. 48169-R is hereby annulled and set aside, and the said respondent appellate court is hereby enjoined to give due course to the appeal. Costs against the private respondent Ong Brothers Lumber Co., Inc.

SO ORDERED.

Fernando, (Chairman), Barredo, Antonio, Aquino, and Santos, JJ., concur.

[1] p. 4, printed Record on Appeal.

[2] p. 72, Ibid.

[3] pp. 95-112, Ibid.

[4] p. 113, Ibid.

[5] p. 113, printed Record on Appeal.

[6] p. 3, Ibid.

[7] p. 114, Ibid.

[8] p. 113, Ibid.

[9] p. 13, rollo.

[10] p. 29, rollo.

[11] p. 30, rollo.

[12] p. 46, rollo.

[13] p. 51, rollo.

[14] G.R. No. L-36629, Sept. 28, 1973; 53 SCRA 228.

[15] G.R. Nos. L-38423 and L-39684, June 27, 1975; 64 SCRA 475.

[16] L-40995-96, Oct. 30, 1975, 67 SCRA 322.

[17] L-37123, Oct. 30, 1975, 67 SCRA 503.

[18] L-40768, Feb. 27, 1976, 69 SCRA 551.

[19] L-36455, April 30, 1976, 70 SCRA 511.

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