

ARTURO F.W. TANTOCO, PETITIONER, VS. THE HONORABLE COURT OF APPEALS, JUDGE HILARION JARENCIO, BR. XXIII, CFI, MANILA, THE GENERAL MILK (PHIL.), INC., AND THE SHERIFF, MALOLOS, B...*G.R. No. L-29345. May 31, 1977*

Ponente: MAKASIAR, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/e3494a774923/>**MAKASIAR, J.:**

Appeal by certiorari taken by Arturo F.W. Tantoco -- hereinafter referred to as petitioner -- from the resolution of the Court of Appeals in CA-G.R. No. 41488, denying his petition for leave to file an amended petition after the original petition for mandamus, dated June 26, 1968, had been dismissed for not being sufficient in form and substance and after the motion for reconsideration of the dismissal had been denied, on the following grounds:

"1. The petition for relief from the judgment of April 18, 1966, was filed after the lapse of 60 days from the time the defendant in Civil Case 63494 of the Court of First Instance of Manila, Branch XXIII, now petitioner, learned of said judgment sometime in September, 1966 (See pp. 37 and 41, rollo). The said petition for relief was filed on January 29, 1967, or more than one hundred and twenty (120) days thereafter.

"2. The record on appeal shows that although the notice of appeal was filed within the 30-day reglamentary period and the time for filing the record on appeal was extended beyond the said period, the appeal bond was not filed simultaneously with the notice of appeal but eleven (11) days later, or on April 15, 1968, which was the 35th day after notice by the petitioner of the order denying the petition for relief. The notice of appeal from said order of denial was filed on April 4, 1968, or on the 24th day after receipt of notice of said order, while the appeal bond was filed on April 15, 1968. As the last day for filing the appeal bond was April 10, 1968, the said bond was filed five (5) days late. The appeal was not, therefore, perfected in due time and the disapproval thereof by the trial court was perfectly legal" (pp. 178-179, rec.).

The record shows that in Civil Case No. 63494 of the Court of First Instance of Manila, entitled "General Milk Co. (Phil.), Inc., plaintiff, versus Arturo Tantoco, doing business under the name of 'Maria Belen Store', defendant", plaintiff therein - hereinafter referred to as private respondent - filed on December 3, 1965 a complaint against petitioner to recover the sum of P80,933.00, representing the value of milk products obtained on credit by the latter from the former on various dates, plus 25% of the said amount, which is equivalent to P20,233.25, as attorney's fees.

As petitioner failed to file his answer within the period prescribed by the Rules of Court, on March 10, 1966, the trial court, at private respondent's behest, declared the petitioner in default and directed the private respondent to present its evidence ex parte. On March 15, 1966.

On April 18, 1966, on private respondent's evidence, the trial court rendered judgment for the said respondent "ordering the defendant Arturo Tantoco, doing business under the name of 'Maria Belen Store', to pay the respondent the amount of P80,933.00, with interest at 12% per annum from October 14, 1965, the date of the letter of demand, until fully paid, plus P1,500.00 for attorney's fees and the costs."

On February 3, 1967, petitioner filed a petition to vacate the order of default, the ex-parte judgment and the order of execution, claiming:

1. That he learned for the first time of the default judgment on September 19, 1966, when said judgment was being executed by the respondent Sheriff of Malolos, Bulacan;
2. That the trial court did not acquire jurisdiction over his person since he was not properly served with summons and processes of the court;
3. That the proceedings which gave rise to the default order and the default judgment, as well as the order of execution issued thereafter, were all taken and entered against him thru excusable negligence; and
4. That he had a good and meritorious defense, consisting of an exemption from liability for loss caused by fortuitous event - fire.

On April 25, 1967, petitioner filed his answer to the complaint.

On May 19, 1967, the trial court ordered the parties to submit evidence on the question of whether the summons and the judgment which were issued and rendered in the case were properly served upon the petitioner. For this purpose, the trial court appointed a commissioner to receive the evidence of the parties.

On February 27, 1968, the trial court denied the petition for relief, and also rejected the answer filed on April 25, 1967. The pertinent portion of the order of denial follows:

"x x x x

"Francisco G. Santos, Deputy Provincial Sheriff of Bulacan, testified that he served the summons in this case upon defendant Arturo Tantoco personally on January 28, 1966 at defendant's store in Malolos, Bulacan.

"On the other hand, defendant Arturo Tantoco testified that he did not receive the summons in this case. He said that on January 28, 1966, when the summons was allegedly served upon him, he was in his fishpond. He further testified that the person upon whom the summons was served was his 22-year old son, Abelardo Tantoco, who signed his name on the original of the summons and that said Abelardo Tantoco was a mentally retarded person and not a person qualified to receive summons for him.

"Dr. Carlos Vicente testified that he had examined Abelardo Tantoco sometime in August, 1967 and after applying upon him the Wachsler Belavue Intelligence Test he found out that the patient was 'in social remission and has inadequacies on his emotions; that the behavior of Abelardo is that of an individual who does not associate much and his intelligence quotient belongs to the borderline mentality of a person between 7 and 10 years old'.

"Assuming that the summons in this case was received by Abelardo Tantoco, son of the defendant Arturo Tantoco, the question to be determined is whether said Abelardo Tantoco is a person of sufficient intelligence and discretion to receive summons for his father, the defendant Arturo Tantoco.

"Defendant Arturo Tantoco admitted that his son was 22 years old and has reached the sixth grade; that his son helped in the store by placing goods inside the showcases and do(ing) some errands such as buying things; that once in a while his son signed his name to checks exchanged the cash with agents who were delivering goods to his store and spends the proceeds that on one occasion his son got P2,000.00 a pair of shoes and gave money and suiting to his classmates and friends.

"Taking into account this testimony of the, defendant himself, the Court believes that his son Abelardo Tantoco is not mentally incompetent. The fact that his son could imitate defendant's signature with creditable similarity and be exchange it for cash with agents dealing in defendant's store and spending the proceeds

thereof shows a sufficient degree of intelligence and discretion.

"Dr. Carlos Vicente saw Abelardo only three (3) times and had not treated him as a patient. This doctor observed Abelardo Tantoco at the behest of the defendant while the petition for relief was already pending in this Court. Drs. Bernabe Mendoza and Juliana Flaviano who treated Abelardo Tantoco prior to May, 1967, and the certificate which they issued, were not presented in Court.

"Abelardo Tantoco was living with his father, the defendant, and helping him in the store. Apparently, on January 28, 1966, when the Sheriff served the summons at defendant's atore, Abelardo Tantoco appeared to be the most responsible person in the store otherwise the Sheriff would not have served the summons upon him. The Sheriff had been a sheriff since 1960 and it can be assumed that he can determine whether the person receiving the summons is of sufficient intelligence and discretion to receive it.

"The Court notes that Abelardo Tantoco was not presented by the defendant as a witness thus depriving the plaintiff of an opportunity to cross-examine him and test his intelligence. As a matter of fact, on May 19, 1967 the Court verbally directed the attorney for the defendant to bring Abelardo Tantoco to the Court for cross-examination by plaintiff's counsel.

"The Court further notes that in the verified petition for relief defendant Arturo Tantoco stated under oath that the initial 'OJ' appearing in the summons was neither his nor that of his wife. It was only during the presentation of the evidence that the said defendant tried to establish that the signature appearing in the summons was that of his son, Abelardo Tantoco, and not xxxxx. Whether the Court accepts the testimony of Deputy Provincial Sheriff. Francisco G. Santos that he served summons upon the defendant Arturo Tantoco, or the Court accepts the claim of the defendant that the summons was received by his son Abelardo Tantoco, the Court holds that the defendant was properly served with summons was, therefore, correctly declared in default after said defendant failed to file his answer within the reglamentary period.

"WHEREFORE, the defendant's petition for relief is hereby DENIED. The answer submitted to the Court on April 25, 1967 is rejected. The restraining order against the Sheriff of Bulacan dated March 7, 1967 is hereby set aside" (pp. 50-53, rec.; underscoring supplied).

On March 9, 1968, petitioner filed a motion for reconsideration of the order of February 27, 1968, which motion, together with two others - motion to dismiss dated March 6, 1968 and motion dated March 16, 1968 re appearance of Abelardo Tantoco - was denied for lack of merit by the trial court in its omnibus order dated March 18, 1968.

On April 4, 1968, petitioner filed his Notice of Appeal, and on the following day, April 5, 1968, he filed a motion for extension of time and clarification of the 10-day period to appeal (p. 96, rec.).

On April 8, 1968, the trial court gave petitioner up to April 30, 1968 to file his record on appeal (p. 98, rec.).

On April 15, 1968, petitioner filed a motion, dated March 8, 1968, for the approval of the record on appeal and appeal bond, setting the same for hearing on April 23, 1968.

On April 30, 1968, petitioner filed his appeal bond through the Towers Assurance Corporation (p. 236, rec.).

On May 24, 1968, the petitioner received a copy of the order of the trial court dated May 20, 1968, disapproving his record on appeal dated April 15, 1968, on the following grounds:

"An examination of the Record on Appeal filed by the defendant on April 15, 1968 and submitted for the approval of this Court on April 23, 1968 shows the following defects:

“(a) It does not contain a copy of the Notice of Appeal;

“(b) It does not show the date when the defendant received a copy of the decision of this Court sought to be appealed from;

- “(c) It does not show the date when defendant filed his motion for reconsideration;
- “(d) It does not show the date when the defendant received the order of the Court denying his motion for reconsideration;
- “(e) It does not include the plaintiff's motion to declare defendant in default filed on February 14, 1966;
- ”(f) It does not include the order of this Court declaring defendant in default;
- “(g) It does not show plaintiff's action for a writ of execution; and
- “(h) It does not include the order of the Court granting the writ of execution" (pp. 123-124, rec.).

On May 29, 1968, the petitioner filed a motion for reconsideration based on compliance re objections, as per order of May 20, 1968 received on May 24, 1968; and submission of amended record on appeal.

On June 10, 1968, the petitioner received a copy of the order of the trial court dated June 4, 1968, disapproving petitioner's amended record on appeal, for the following reasons:

- "(a) Most of its contents are carbon copies and not originals. Considering that the approved record on appeal itself is transmitted to the appellate court and in effect is the expediente itself insofar as the appeal is concerned, it is not proper to transmit the amended Record on Appeal submitted to the Court for approval by the defendant in its present form. The entire record on appeal must be typed anew and the original filed with the court for approval within the reglamentary period.
- "(b) The date when attorney for the defendant received a copy of the order of this Court dated February 27, 1968 (which is the order sought to be appealed from) is March 1, 1968 (see page 272 of the expediente) and not March 5, 1968 as typed on page 55 of the amended Record on Appeal" (p. 131, rec.).

Petitioner went to the Court of Appeals. There he filed mandamus proceedings to compel respondent Manila CFI Judge Hilarion Jarencio to give due course to his appeal (pp. 136-155, rec.). Respondent Court of Appeals, in its resolution of July 13, 1968, dismissed the petition for not being sufficient in form and substance, and for petitioner's failure to show in his petition as well as in his amended record on appeal the date when he received the order of the trial court dated February 27, 1968.

Resolving petitioner's motion for reconsideration of its resolution dated July 13, 1968, respondent Court of Appeals said:

"Upon consideration of the motion dated July 18, 1968, filed by petitioner praying that the resolution of July 13, 1968 (which dismissed the petition) be reconsidered; the Court RESOLVED TO DENY the motion for reconsideration. If appellant received a copy of the order of February 27, 1968, on March 1, 1968 (as he alleges in his motion for reconsideration), and filed his notice of appeal on April 4, 1968, then his appeal was not perfected on time for the 30-day period had elapsed when he filed the notice of appeal. The period when the petition for certiorari was pending before the Supreme Court cannot be deducted from the 30-day period. Certiorari is an independent action; it does not interrupt the period to appeal in the main action x x x (p. 157, rec.).

Thereafter, on July 18, 1968, petitioner filed with respondent Court of Appeals a petition for leave to file amended petition (pp. 158-161, rec.), attaching thereto his amended petition bearing the same date. Respondent Court of Appeals denied his said petition as well as his amended petition in its resolution dated July 26, 1968, on two grounds, namely: (1) that the petition for relief was filed out of time; and that the appeal of defendant from the order of the trial court was not perfected on time and, hence, the disapproval thereof by the trial court was perfectly legal.

Petitioner's motion for reconsideration of the foregoing resolution having been denied by the Court of Appeals in its resolution dated August 6, 1968, he now comes to this Court, assailing the actuations not only of the Court of Appeals but also those of the court a quo, as hereinabove pointed out.

1. The first - and pivotal - issue to be resolved in this appeal is: Whether or not the petitioner was properly served with summons, thereby vesting the court, a quo with, jurisdiction to declare him in default. If that issue is answered in the affirmative, then the order of default, together with the default judgment and the order of execution issued by the court a quo must all be affirmed. Upon the other hand, if said issue is answered in the negative, then the order of default, as well as the default judgment and the order of execution must all be set aside and the case remanded to the court a quo for further proceedings upon its merits.

WE dispose of this issue adversely to petitioner in a three-step analysis.

First - The record shows that the petitioner filed his answer to the complaint on April 25, 1967. In said answer he did not expressly object to the jurisdiction of the court a quo over his person. As such, he is deemed to have voluntarily appeared, and he thereby gave the trial court jurisdiction over his person, and an objection thereafter made upon the ground that he was not properly served with summons will not avail him. It is then made too late (Sec. 23, Rule 14, Revised Rules of Court; *Flores vs. Zurbito*, 37 Phil. 746, 750-751).

This Court notes also that petitioner filed a motion to dismiss on March 11, 1968, ten (10) days after he received a copy of the order of the court a quo denying his petition for relief. Clearly, such motion to dismiss was filed out of time, and may therefore be denied outright. Hence, the court a quo acted correctly in not granting the same for lack of merit.

Second - It is elementary that venue is waivable, since it is a procedural, not a jurisdictional, matter. The record shows that the parties agreed that the courts of Manila shall have jurisdiction to try this case. The agreement is evidenced by sales contracts duly presented at the ex-parte hearing of March 25, 1966, whereby the parties submitted themselves to the jurisdiction of the courts of Manila for any legal action arising out of their transaction. In short, the parties agreed to add the courts of Manila as tribunals to which they may resort in the event of suit, and not only to the courts either of Rizal, of which private respondent is a resident, or of Bulacan, where petitioner resides, pursuant to Section 2(b) of Rule 4 of the Revised Rules of Court.

Third - The Court of First Instance of Manila is a court of general jurisdiction. As such, it is to be presumed that, before it issued its order declaring petitioner in default, it took care to see that the summons and complaint had been delivered to and received by petitioner in accordance with law. And this is precisely what the trial court did by issuing the order of May 19, 1967, wherein it stated:

"It is necessary to receive evidence on whether the summons and judgment had been properly served upon defendant Arturo Tantoco. x x x" (p. 39, rec.).

The question of whether or not summons and complaint were actually received by petitioner is one of fact and was actually ventilated in the trial court, which correctly found that petitioner was properly served with the summons and copy of the complaint through his 22-year old and competent son, as embodied in its order of February 27, 1968.

2. The second issue posed by petitioner is his claim that he filed his petition for relief from the default judgment dated April 18, 1966, within the period set forth in Section 3 of Rule 38 of the Revised Rules of Court.

The aforecited rule of court provides:

"SEC. 3. Time for filing petition; contents and verification. - A petition provided for in either of the preceding

sections of this rule must be verified, filed within sixty (60) days after the petitioner learns of the judgment, order, or other proceedings to be set aside, and not more than six (6) months after such judgment or order was entered, or such proceeding was taken; and must be accompanied with affidavits showing the fraud, accident, mistake, or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be."

The record shows that petitioner filed his petition for relief on February 3, 1967 (p. 285, rec.). He admitted having learned of the default judgment on September 19, 1966, when the same was being executed by respondent sheriff. Under the aforementioned rule, petitioner had sixty (60) days after September 19, 1966 within which to file his petition for relief. But he filed his petition for relief only on February 3, 1967, 136 days, or 4 months and 16 days after he knew on September 19, 1966 of said default judgment.

Then again, there is evidence in the record that the default judgment from which the petitioner seeks to be relieved was entered on June 2, 1966 (pp. 46, 49, Brief for Respondents, p. 432, rec.). Six (6) months, or 180 days, from June 2, 1966, would be November 29, 1966. Petitioner filed his petition for relief on February 3, 1967, or after the lapse of 245 days, or 8 months and 5 days from June 2, 1966.

Hence, petitioner's remedy is totally lost.

WE reiterate what WE said in the case of *Dirige vs. Biranya* (L-22033, July 30, 1966, 17 SCRA 840, 850):

"We therefore rule that a petition for relief must, amongst others, be filed within six months from the date judgment is entered. Rulings inconsistent herewith are hereby expressly overruled."

Petitioner invokes the doctrine laid down by this Court in the case of *People's Homesite & Housing Corporation vs. Tiongco* (12 SCRA 471, 475), where, despite the fact that the petition for relief was presented outside of the reglementary period of sixty (60) days from notice of the judgment, nevertheless, due to peculiar circumstances obtaining in the case, WE considered the rule to have been substantially complied with and the petition for relief from judgment was seasonably filed. In that case, the delay in the filing of the petition for relief consisted only of two (2) days from receipt of the judgment by defendant's former counsel. In the present case, as pointed out above, the delay consisted of seventy-seven (77) days, or two (2) months and seventeen (17) days after petitioner learned of the judgment, and sixty-six (66) days, or two (2) months and six (6) days, after entry of judgment.

Furthermore, relief from judgment or order, being an act of grace, is premised on equity. It should, therefore, be granted only in exceptional cases (*Dirige vs. Biranya*, *supra*). On top of this petitioner must prove excusable negligence and the existence of good and substantial defense.

Petitioner claims that he became sick after he consulted then Assistant Fiscal Magat (now City Court Judge Magat) of Manila. Nothing in the record suggests how long his sickness disabled him or prevented him from filing a timely petition for relief. Not even a medical certificate did he produce to prove his claim. In sum, he failed to make a clear case of excusable negligence. He has not discharged his burden to clear himself of the imputation of want of due diligence. His case must therefore fall.

Even the merits of his alleged good and substantial defense will not carry the day for him. He claims "the goods mentioned in plaintiff's ten causes of action and received in concept of consignment credit were all burned in the fire of July 31, 1966", through no fault of his but by force majeure (Joint Affidavit of Merit, p. 32, rec.). In effect, he wants this Court to believe that since July 6, 1964, when he began receiving milk products from private respondent up to and including September 4, 1965, when he received the last shipment of 200 cans of Liberty Milk, worth P5,230.00, he never made any sale, until ALL were burned in said fire of July 31, 1966.

Again, while it is true that petitioner stated in his affidavit of merit that a certificate was issued by the chief of

police of Malolos, Bulacan, the record does not bear any such certificate. WE therefore have no means of knowing just what that certificate was all about. Neither does the record show that the goods lost in said fire were precisely those consigned to him during the period from July 6, 1964 to September 4, 1965 (Complaint, pp. 63-66, *ibid.*), nor does it show any evidence of the extent of his actual loss, as reflected in his income tax return for the year 1966.

By statutory requirement, an appeal from the Court of First Instance to the Court of Appeals may be taken by serving upon the adverse party and the filing with the trial court within thirty (30) days from notice of order or judgment, a notice of appeal, an appeal bond, and a record on appeal (Sec. 3, Rule 41, Revised Rules of Court).

The filing of a notice of appeal within the thirty-day period prescribed in the *aforecited* rule is necessary for perfecting an appeal and conferring appellate jurisdiction upon the appellate court. In other words, if the notice of appeal, or the appeal bond, or the record on appeal is not filed within the *aforementioned* period, the appeal shall be dismissed (Sec. 13, Rule 41, Revised Rules of Court). This is mandatory.

Here, the record shows that on March 1, 1968 (p. 53, *rec.*), petitioner received a copy of the order of the trial court. Under the Rules, he should have filed his notice of appeal, an appeal bond, and a record on appeal within thirty (30) days from and after March 1, 1968. Thirty (30) days from March 1, 1968 would be March 31, 1968. Petitioner filed only a notice of appeal on April 4, 1968 (see upper right-hand corner of Annex "N", p. 94, *rec.*; p. 8, Supplemental Brief for Petitioner), but did not file any motion for extension of time to file the appeal bond and record on appeal before the lapse of the reglementary period. Then and there, the trial court could have validly ordered the striking out of the notice of appeal and simultaneously dismissed the appeal. Instead, the trial court allowed the petitioner to file his record on appeal, which he did on. April 15, 1968, but which was 15 days too late, and his appeal bond, which the trial court received on April 30, 1968 (p. 236, *rec.*), 30 days too late. In doing so, the trial court obviously exercised its sound discretion in the matter. But WE note with displeasure that petitioner abused the liberality of the court *a quo* by filing the appeal bond way beyond the reglementary period and by deliberately refusing to obey its order of May 20, 1968, which in effect required him to show in his amended record on appeal the date when he received a copy of the order of the court sought to be appealed from, by making it appear in the corresponding amended record on appeal that he received the copy of the order on March 5, 1968 when he knew fully well that he did not receive it on that day but on March 1, 1968 (see order, p. 131, *rec.*).

This appeal is patently frivolous and designed to impede justice.

Counsel for petitioner knowingly made untruthful statements. He insists that he filed an appeal bond on April 15, 1968, when the incontrovertible evidence of its filing with the trial court appears clearly on the face of the appeal bond itself that the same was received by the trial court on April 30, 1968. He further aggravated his lack of candor and honesty in his dealing with the court by making it appear at the left-hand bottom corner of his motion for approval of the record on appeal, appeal bond dated March 8, 1968, that he attached therewith an appeal bond and notice of appeal, when he knew very well that on April 15, 1968 - the day he filed his *aforesaid* motion - he had already filed the notice of appeal on April 4, 1968, and that he had not as yet filed an appeal bond (p. 99, in relation to pp. 94 & 236, *rec.*).

Censurable is the kind of language used by counsel for petitioner in many of his pleadings of record in referring to the trial court, the adverse counsel and the court commissioner, for which he is hereby admonished not to employ offensive language henceforth.

The language vehicle does not run short of expressions, emphatic but respectful, convincing but not derogatory, illuminating but not offensive (*Rheem of the Phil. vs. Ferrer*, G.R. No. L-22979, June 26, 1967, 20 SCRA 441,

445).

WHEREFORE, THE DECISION APPEALED FROM IS HEREBY AFFIRMED, WITH TREBLE COSTS AGAINST ATTY. JOSE BELTRAN SOTTO, ORIGINAL COUNSEL OF PETITIONER-APPELLANT ARTURO F.W TANTOCO. LET A COPY OF THIS DECISION BE MADE A PART OF THE PERSONAL FILE OF ATTY. JOSE BELTRAN SOTTO IN THE BAR DIVISION OF THIS COURT.

Teehankee, (Chairman), Antonio, Muñoz Palma, and Martin, JJ., concur.

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