

**MANUEL BERNABE, PETITIONER, VS. HON. COURT OF APPEALS (3RD DIVISION), HON. NICASIO YATCO, PRES. JUDGE OF BRANCH V OF THE COURT OF FIRST INSTANCE OF RIZAL (QUEZON CITY) AND RESUR...***G.R. No. L-18278. March 30, 1967*

Ponente: CONCEPCION, C.J.

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Appeal by certiorari, taken by Manuel Bernabe, from an order of the Court of Appeals dismissing his petition for mandamus to compel the Court of First Instance of Rizal (Quezon City, Branch No. V) to give due course to his appeal in Civil Case No. 5161 thereof, entitled "Resurreccion S. Reyes et al. vs. Manuel Bernabe".

On May 18, 1960, Resurreccion S. Reyes (hereinafter referred to as Miss Reyes) filed, on her behalf and as guardian-ad-litem of her minor child Nacito Reyes, with said court of first instance, a complaint - which was docketed as Civil Case No. 5161 of said court - against Manuel Bernabe, for the acknowledgment of said minor, as his alleged natural child, as well as for support and dam-ages. On June 4, 1960, Bernabe filed a motion to dismiss, which was denied in an order dated August 30, 1960. Upon the filing of Bernabe's answer, dated September 12, 1960, the case was set for hearing on October 13, 1960, notice of which was served on counsel for Bernabe on September 26, 1960. This notwithstanding, neither Bernabe nor his counsel appeared at said hearing, he having received on October 10, 1960, copy of a motion of Miss Reyes - dated October 3, 1960, and set for hearing on October 8, 1960 - for postponement, which was denied; but, notice of the order denying the motion was not received by him until October 17, 1960. What is more, the court of first in-stance proceeded with the hearing of the case, received the evidence introduced by Miss Reyes and, on October 28, 1960, rendered a decision ordering Bernabe to acknowledge Nacito Reyes as his natural child and sentencing Bernabe to pay Miss Reyes and Nacito Reyes a monthly alimony of P100, plus P3,000 as moral damages, P1,000 as exemplary damages, P500 by way of attorney's fees, and the costs.

Bernabe received copy of this decision on November 7, 1960. Five (5) days later, or on November 12, 1960, he filed a "motion to set aside decision and/or for new trial", predicated upon the allegation that his failure to appear at the hearing of the case had been due to the mistaken belief that the motion for postponement would be granted. On November 26, 1960, Bernabe received notice of an order, dated November 25, 1960, denying his motion. On December 5, 1960, Bernabe filed a motion for reconsi-deration of this order, but, on December 24, 1960, he re-ceived copy of an order, dated December 10, 1960, denying it. On January 3, 1961, Bernabe filed his notice of ap-peat from said orders of August 30, November 25 and Decem-ber 10, 1960, to the Court of Appeals, as well as his ap-peat bond and record on appeal, but on January 7, 1961, the lower court disapproved said record on appeal, upon the ground that the appeal had not been perfected within the reglementary period. A reconsideration of the order to this effect having been denied, on February 6, 1961, Bernabe filed, with the Court of Appeals, the petition for mandamus in this case, to compel the lower court to give due course to his aforementioned appeal. On Feb-ruary 11, 1961, said appellate court issued the order, from which the present appeal has been taken,

dismissing the petition herein, for the reason that the decision of October 28, 1960 was already final and executory, and that, being interlocutory, no appeal could be taken from the orders of August 30, November 25 and December 10, 1960.

In holding that said decision had become final and executory, the Court of Appeals expressed itself as follows:

"From November 7, 1960, date of receipt of notice of decision, to November 12, date of the filing of the motion for new trial, five (5) days elapsed; and from November 26, 1960, date of receipt of the order denying the motion for new trial, to December 5, date of the filing of the motion for reconsideration, nine (9) days elapsed or a total of fourteen (14) days, which is to be deducted from the 30-day statutory period, leaving a balance of sixteen days. The filing of the motion for reconsideration on December 5, alleging the same grounds stated in the motion for new trial, did not suspend the running of the balance of the 30-day period, so that when the notice of appeal, appeal bond and Record on Appeal were filed on January 3, 1961, a total of forty-three (43) days had elapsed, which is far in excess of the 30-day period for perfecting an appeal."

Bernabe assails this process of reasoning as premised upon a false predicate - that an appeal has been taken from the decision of October 28, 1960. He had merely appealed, he stresses, from the orders of November 25 and December 10, 1960, which, he maintains, are not interlocutory, but, final, because they put an end to the issue disposed of thereby. He concludes, accordingly, that the period to perfect his appeal should be reckoned from notice of said orders.

The cases he relies upon, in support of this theory,<sup>[1]</sup> are, however, not in point. They refer to appeals from orders denying motions for relief under Rule 38 of the Rules, of Court. Indeed, such orders are appealable, pursuant to the express provision of Section 2, of Rule 41 of the Revised Rules of Court.<sup>2</sup> It should be noted, however, that the aforesaid "relief", under Rule 38, may not be availed of except when the decision has become final and executory,<sup>3</sup> and only when a new trial is not available.<sup>4</sup> In the case at bar, said new trial was still available and the decision of October 28, 1960, was not as yet final and executory when Bernabe filed his "motion to set aside decision and/or for new trial" on November 12, 1960. As we ruled in *Samia vs. Medina*:<sup>5</sup>

"Between an order denying a motion for a new trial under section 145 of the Code of Civil Procedure (Rule 37 of the Rules of Court), which this court has held to be interlocutory and hence unappealable (*Co-Yengco vs. Reyes*, 4 Phil. 709; *Benedicto vs. De la Rama*, 3 Phil. 34; *Artadi & Co. vs. Chu Baco*, 8 Phil. 677), and an order denying a motion for new trial under section 113 of the Code (Rule 38 of the Rules of Court), which this Court held to be final and therefore, appealable (*Philippine Manufacturing Co. and Government of the Philippine Islands vs. Cabañgis*, 49 Phil. 107; *Philippine Manufacturing Co. vs. Imperial*, 47 Phil. 810; *Pecson vs. Coronel*, 43 Phil., 358; *Gustilo vs. Sian*, 53 Phil. 155) there is this fundamental difference: In the first case, since the judgment sought in the motion for new trial to be annulled is not final, the question of the denial of this motion may be raised on appeal from such judgment; in the second, since the judgment sought in the motion for a new trial to be annulled is already final, there is no other remedy than appeal from the order denying the motion, in order that the question as to its correctness can be raised." (Underscoring ours.)

Bernabe's aforementioned "motion to set aside decision and/or for new trial", suspended the running of his period to appeal.<sup>6</sup> Hence, when the motion was denied, his only remedy was to appeal from said decision, and, in connection therewith or as an incident of said appeal, he could have assailed the order denying the new trial.

"The second assignment of error concerns the denial of plaintiff's first motion for a new trial and attacks the court's findings, theretofore extracted, on the evidence. Denial or granting of that motion lay within the sound discretion of the court. The plaintiff's sole remedy if he disagreed with the court's appraisal of the proofs was to appeal the decision on the court's findings. The plaintiff's minute and extensive argument in this instance, designated to show that the court's conclusions are wrong, can not afford him any relief". (*Tañada vs. Aldaya*, G.R. No. L-3278, July 23, 1951; underscoring ours.)

It may not be amiss to note that, at any rate, Bernabe had no valid ground to complain against the order of November 25, 1960, denying his motion for new trial, for the same was addressed to the sound discretion of the court of first instance and the latter had not abused its discretion in denying it, because: (1) Bernabe had no reasonable ground to assume that the motion for postponement of the hearing would be granted;<sup>7</sup> and (2) more important still, no affidavit of merit had been attached to said motion, so that there was no possible reason to expect or assume that the result of the case would be otherwise, if the motion were granted.<sup>8</sup>

WHEREFORE, the order appealed from is hereby affirmed, with costs against petitioner Manuel Bernabe.

**IT IS SO ORDERED.**

Reyes, Dizon, Regala, Makalintal, Bengzon, Zaldivar, Sanchez, and Castro, JJ., concur.

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[1] *Gustilo vs. Sian*, 53 Phil. 155; *Philippine Manufacturing Co. et al. vs. Cabañgis*, 49 Phil. 107; *Philippine Manufacturing Co. vs. Imperial*, 47 Phil. 810; *Pecson vs. Coronel*, 43 Phil. 358; *Tecson et al. vs. Melendres*, G.R. No. L-3824, May 16, 1951; *Diaz et al. vs. Macalinao et al.*, G.R. No. L-10747, January 31, 1958.

2 x x x x

"A judgment denying relief under Rule 38 is subject to appeal, and in the course thereof, a party may also assail the judgment on the merits, upon the ground that it is not supported by the evidence or it is contrary to law." (Underscoring ours.)

x x x x

3 *Amurao vs. Aquino*, 38 Phil. 29; *Punzalan vs. Papica*, G.R. No. L-13804, February 29, 1960.

4 *Ongsiako vs. Natividad*, 79 Phil. 3.

5 56 Phil. 613.

6 *Diaz vs. Macalinao*, G.R. No. L-10747, May 28, 1958; *Ramirez de la Cavada vs. Butte*, 53 Off. Gaz. 1407.

7 *Lichauco vs. Lim*, 6 Phil. 271; *Camacho vs. Liqueste*, 6 Phil. 50; *U.S. vs. Ramirez*, 39 Phil. 788.

8 *Wack Wack Golf & Country Club Inc. vs. Court of Appeals*, G.R. No. L-11724-25, November 23, 1959.

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