

INSULAR BANK OF ASIA AND AMERICA, PETITIONER, VS. COURT OF APPEALS, E.T. HENRY & CO., INC., SPOUSES ENRIQUE AND LILIA TAN, AND HI-CEMENT CORPORATION, RESPONDENTS.

G.R. No. 103733. December 14, 1993

Ponente: BELLOSILLO, J.

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BELLOSILLO, J.:

This is a special civil action of certiorari under Rule 65 of the Rules of Court filed by Insular Bank of Asia and America seeking to annul and set aside two resolutions of the Court of Appeals, the first, dated 22 May 1991, which denied the motion filed by petitioner bank to dismiss the appeal of respondents E.T. Henry & Co., Inc. (HENRY & CO., for brevity), spouses Enrique and Lilia Tan (SPOUSES TAN, for brevity), and Hi-Cement Corporation (HI-CEMENT, for brevity) from the decision of the trial court, and the second, dated 21 November 1991, which denied the motion for reconsideration of the resolution of 22 May 1991.

Petitioner bank filed with the trial court an action to recover a sum of money against private respondents herein and against Riverside Mills Corporation, Kanebo Cosmetics Philippines, Inc., Phelips Tanchi, Edward Lee, Antonio de las Alas and Lourdes de Leon.

On 30 June 1989, the trial court rendered a decision in favor of petitioner and against the defendants, including private respondents herein.

On 17 July 1989, respondent HI-CEMENT filed a notice of appeal with the trial court while respondents HENRY & CO. and SPOUSES TAN filed their notice of appeal on 21 July 1989.

On 21 July 1989, petitioner filed a motion for execution pending appeal against respondent HI-CEMENT, and in view thereof submitted on 1 August 1989 a motion to defer elevation of records.

In an order dated 25 September 1989, the trial court denied petitioner's motion for execution pending appeal.

On 26 March 1991, petitioner filed with the Court of Appeals a Motion to Dismiss Appeal on the ground of gross inaction on the part of respondents for having failed to cause the elevation of the records to the Court of Appeals despite the lapse of more than one (1) year and six (6) months since they received the 25 September 1989 order of the trial court. Respondents HI-CEMENT, HENRY & CO., and SPOUSES TAN filed their respective oppositions to the motion to dismiss appeal, to which petitioner filed a consolidated reply.

On 22 May 1991, the Court of Appeals denied petitioner's motion to dismiss appeal thereby upholding respondents' contention that several follow-ups were made with the trial court but the records could not be elevated as the transcripts of stenographic notes were incomplete and the stenographers who took down the notes were no longer with the branch of the court which heard the case.[1]

On 17 June 1991, through a "Submission and Motion," respondent HI-CEMENT submitted to the trial court photocopies of transcripts of stenographic notes in its possession to assist the trial court in completing the records

of the case for elevation to the Court of Appeals. The transcripts pertained to six (6) hearing dates. In the motion, respondent HI-CEMENT prayed that petitioner be directed by the trial court to submit photocopies of the transcripts of stenographic notes pertaining to two (2) hearing dates.[2]

On 21 June 1991, petitioner filed a motion for reconsideration of the order of the Court of Appeals of 22 May 1991 denying its motion to dismiss appeal. The trial court also ordered the parties to furnish the court with original duplicate copies of the transcripts of stenographic notes previously found to be missing from the files of the trial court.

On 1 July 1991, in its compliance and submission, respondent HI-CEMENT submitted to the trial court the original duplicate copies of the transcripts of stenographic notes in its possession pertaining to ten (10) hearing dates in 1985. However, HI-CEMENT informed the trial court that it did not have in its possession a copy of the transcripts for the hearing of 29 April 1986.[3]

On 13 August 1991, all parties filed with the trial court a joint manifestation submitting a photocopy of the remaining "missing" transcript of stenographic notes of the hearing on 29 April 1986.

On 16 August 1991, the trial court issued an order directing the elevation of the records to the Court of Appeals.

On 21 November 1991, petitioner's motion for reconsideration of the order of the Court of Appeals denying the motion to dismiss appeal was denied; hence, this petition.

The issue before this Court is whether the Court of Appeals committed grave abuse of discretion in denying the motion of petitioner to dismiss the appeal of private respondents and in denying the motion to reconsider the order of denial.

Petitioner contends that the failure of private respondents for one-and-a-half years to take appropriate and timely steps to ensure the completion of the records in the trial court so that they may be immediately elevated to the Court of Appeals, constitutes gross inaction which is a ground to dismiss appeal.

Petitioner further submits that although some of the transcripts of stenographic notes taken in the court below are missing hence unavailable, respondent HI-CEMENT has in its possession duplicate copies of the missing transcripts which could have been submitted immediately to assist the trial court in completing the records; consequently, its failure to do so is a deliberate attempt to delay the proceedings or gross negligence to prosecute its appeal. As basis for its contentions, petitioner cites the cases of *Fagtanac v. Court of Appeals*,[4] *Loyola v. Court of Appeals*,[5] and *Estella v. Court of Appeals*,[6] where this Court upheld the dismissal of the appeal for failure of the appellants to prosecute their appeal with reasonable diligence.

In their respective comments, private respondents contend that the factual considerations in the cases cited by petitioner are not in *pari causa* with those obtaining in the case at bar. They argue that they had not been grossly negligent in prosecuting their appeal; that the reason for the non-elevation of the records is that they are incomplete, and as of 22 April 1991, transcripts of stenographic notes pertaining to eleven (11) hearing dates were not available or were missing because they were not submitted to the lower court by stenographer Amor S. Damian who took down those notes. Respondent HI-CEMENT further alleges that from time to time it made several inquiries with the staff of the trial court on the elevation of the records. HI-CEMENT also advances the argument that the non-feasance of a stenographer consisting in the loss or non-transcription of stenographic notes should not prejudice a litigant's right to appeal, citing *Advincula v. Intermediate Appellate Court*. [7] Further, respondents HENRY & CO. and SPOUSES TAN contend that the appeal should not be dismissed purely on a technical ground because the right to appeal is an essential part of due process and the judicial system.

We do not find compelling reasons to set aside the assailed resolutions of the Court of Appeals. Petitioner has not shown sufficient and convincing evidence that the appellate court gravely abused its discretion in allowing the appeal.

The decisions cited by petitioner in support of its allegations are not applicable in the case at bar. In *Fagtanac v. Court of Appeals*[8], the Court found that there was failure to prosecute because appellants, before transmittal of the record on appeal, failed to require the inclusion therein (which was then required under Sec. 9, Rule 41, of the Rules of Court before the effectivity of B.P. Blg. 129, Sec. 39) the approval thereof and the certification on its correctness; that they were remiss in their duty to comply with the trial court's order requiring them to include in their record on appeal the matters therein set forth, so that the records were not accordingly elevated until the lapse of a considerable length of time.

In *Loyola v. Court of Appeals*,[9] the Court upheld the decision of the Court of Appeals dismissing the appeal on the ground that for a period of one (1) year and seven (7) months from the date of approval by the trial court of the record on appeal, the appellants did not do anything to facilitate the elevation of the records, e.g., filing a motion to compel the clerk of the trial court concerned to transmit to the appellate court the original record on appeal. The petitioners' excuse that the long delay was caused by the lack of copies of numerous documentary exhibits required to be retained by the trial court upon transmittal of the record on appeal was not justified because there was no showing that petitioners exerted efforts to urge the clerk of the trial court to expedite the preparation of such copies.

In *Estella v. Court of Appeals*,[10] the records show that the trial court had ordered the records forwarded to the appellate court as early as 11 April 1985 and since that date up to the filing of respondents' motion to dismiss appeal, or for a period of more than one (1) year, nothing appeared to have been done on the appeal. In that case, we did not subscribe to petitioners' gratuitous statement that "as the rule now exists, the appellant is justified if he merely folds his hands after the trial judge has ordered that the records of the case be transmitted to the appellate court." We ruled therein that the appellant has the duty to prosecute his appeal with reasonable diligence. Thus, in an effort to do away with the litigant's complacency and to spur him into taking the initiative, the Court of Appeals has placed on the appellant and his counsel the prime responsibility of seeing to it that the appealed case shall be ready for decision as soon as practicable, as provided under Art. VII-C, Court of Appeals Resolution No. 2 dated 6 August 1986.

In *Arcega v. Court of Appeals*,[11] the Court held that petitioners failed to prosecute their appeal when they did nothing to effect or facilitate the transmittal of the records of the case to the appellate court for almost two (2) years from the issuance of the order to elevate said records to the appellate court.

Likewise, in *Mateo v. Court of Appeals*,[12] the Court affirmed the factual findings of the Court of Appeals showing that when the records of the case were transmitted to the appellate court, the latter refused acceptance because some transcripts of stenographic notes were missing. When this fact was brought to the attention of petitioner, the latter through counsel undertook to assist in the completion of the records so that the same would be accepted by the Court of Appeals and her appeal duly prosecuted. However, petitioner failed to live up to her undertaking.

Clearly, on the basis of the foregoing, gross inaction of a party-appellant to prosecute his appeal is simply failing to take the appropriate steps with reasonable diligence to ensure that the record of the case is complete and seasonably transmitted to the Court of Appeals.

In the present case, the Court of Appeals found that private respondents could not be faulted for the delay in the transmission of the records to the appellate court; that despite several follow-ups made by private respondents

with the trial court, the records could not be elevated as the transcripts of stenographic notes were not complete as the stenographers who took down the notes were no longer with the branch of the court that heard the case. The Court of Appeals also found that substantial justice would be served if the appeal of private respondents were allowed.[13]

In imputing grave abuse of discretion to the Court of Appeals in arriving at its conclusion, petitioner contends that only one stenographer is involved in the missing transcripts; that the transcripts for eleven (11) hearings reported missing had already been transcribed by the stenographer prior to the decision of the trial court on 30 June 1989, and that respondent HI-CEMENT has in its possession duplicate copies of the missing transcripts and so it could have submitted them immediately to the trial court to complete the records.

The rule is settled that in certiorari proceedings under Rule 65 of the Rules of Court, questions of fact are not generally permitted, the inquiry being limited essentially to whether public respondent acted without or in excess of its jurisdiction or with grave abuse of discretion. In the case before us, this Court will not engage in a review of facts found by the Court of Appeals unless the errors of law and fact are so serious and prejudicial as to amount to grave abuse of discretion. Mere error of judgment cannot be a proper subject of the special civil action of certiorari. The only question involved in certiorari is jurisdiction, either want of jurisdiction or excess thereof.

As determined by the Court of Appeals, the records of Civil Case No. 42791 were not elevated immediately to the Court of Appeals because they were not yet complete. The reason therefor is found in the certification of the branch clerk of court dated 22 April 1991 to the effect that the transcripts of the stenographic notes of the proceedings held on the eleven (11) hearing dates from 19 March 1985 to 29 April 1986 had not been submitted by stenographer Amor S. Damian who took down those notes, and the trial court had no available transcripts of those notes. Notwithstanding this problem, which apparently was not known to private respondents as the reason for the non-completion of the records until 22 April 1991 when the hearing dates covered by the missing transcripts were specified by the clerk of court, the Court of Appeals found that private respondents exerted reasonable efforts in pursuing the elevation of records by persistent follow-ups with the trial court. Since this factual finding is binding upon this Court, there is no basis to conclude that there was gross inaction on the part of private respondents.

Quite interestingly, when petitioner filed its motion to dismiss appeal, there was yet no order issued by the trial court to the clerk of court to elevate the records of the case, unlike in the cases cited by petitioner[14] where the appellants did nothing at all to facilitate the elevation of the records despite the issuance by the trial court of an order directing the forwarding of the records to the Court of Appeals.

Under the facts of this case, it is evident that the trial court tried to complete its records initially without the assistance of the parties. However, when it realized that the missing transcripts could no longer be found, it issued an order on 21 June 1991 directing the parties to furnish the court with duplicate original copies of the transcripts previously found to be missing from the files of the trial court.

The records also show that when private respondents were informed of the missing transcripts of stenographic notes, private respondents submitted duplicate copies pertaining to ten (10) hearing dates. On 13 August 1991, private respondents even entered into a joint manifestation with petitioner stating that the latter was submitting the photocopy of the remaining missing transcript of the hearing of 29 April 1986. Petitioner then was aware that the records could not be immediately completed without the assistance not only of private respondents but also of itself.

In the recent case of *Goulds Pumps (Phils.), Inc. v. Court of Appeals*,[15] this Court sustained the Court of Appeals when the latter refused the outright dismissal of the appeal due to appellant's failure to cause the

elevation of the records to it as we upheld as final and conclusive its factual finding that the appellant was not to blame for the delay. Similarly, in the case before us, since we find that the factual findings of the appellate court are supported by substantial evidence, they may no longer be reviewed by this Court. Further, this Court ruled that the dismissal of an appeal purely on a technical ground is frowned upon, its policy being to encourage hearings of appeals on their merits.

WHEREFORE, the petition is DISMISSED and the assailed resolutions of the Court of Appeals of 22 May 1991 and 21 November 1991 are AFFIRMED. Costs against petitioner.

SO ORDERED.

Cruz, (Chairman), and Davide, Jr., JJ., concur.
Quiason, J., no part.

- [1] Rollo, p. 38.
- [2] Rollo, p. 110.
- [3] Rollo, pp. 131-132.
- [4] Nos. L-26922-23, 21 March 1968, 22 SCRA 1227.
- [5] No. L-27465, 31 August 1971, 40 SCRA 562.
- [6] G.R. No. 76884, 28 May 1990, 185 SCRA 732.
- [7] G.R. No. 75310, 16 January 1987, 147 SCRA 262.
- [8] See Note 4.
- [9] See Note 5.
- [10] See Note 6.
- [11] G.R. No. 79043, 28 October 1988, 166 SCRA 773.
- [12] G.R. No. 97839, 22 April 1993.
- [13] Rollo, p. 38.
- [14] See Notes 4, 5 and 6.
- [15] G.R. No. 102748, 30 June 1993.

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