

MARIA TRINIDAD DE GUZMAN AND HER HUSBAND PRIMITIVO MERCADO, PLAINTIFFS AND APPELLANTS, VS. RAMON FERNANDEZ Y LOPEZ, DEFENDANT AND APPELLEE.

G.R. No. 16453. July 29, 1920

Ponente: CARSON, J.

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CARSON, J.:

The record of the proceedings in this case which has been brought here on appeal, is defective, in that it does not contain a transcript of the testimony taken at the trial in the court below.

The official stenographer who took the stenographic notes of the testimony, has gone to the United States on a long vacation, without extending his notes and attaching a duly certified transcript of the testimony to the record. It is believed that it is not the intention of the stenographer to return to duty in the Philippines. The stenographic notes appear to have been left in the hands of the clerk of the trial court.

Counsel for the appellant now moves the court to extend the period prescribed by our rules for the filing of his brief; and, further, to return the record to the trial court for a new trial on the ground that the manifest defect in the record renders it impossible for this court to review the evidence submitted in the court below.

Under the circumstances just recited, the appellant is clearly entitled to a suspension of the running of the period during which he is required, under our rules, to file his brief. Clearly, also, this court cannot review the evidence and render judgment on the merits, until and unless the omission is corrected. It follows, that if it is made to appear that the defect in the record was due to no fault on the part of the appellant, and that despite due diligence on his part in an effort to supply the omission of the testimony from the record, it is impossible or impracticable to cure the defect, he will be entitled to have the judgment appealed from set aside, and a new trial ordered in the court below.

Section 501 of the Code of Civil Procedure provides that "If at any time when a case is called for trial, or during the trial, or afterwards, while the Supreme Court may have the same under consideration, it is discovered that the record is so incomplete that justice requires the case to be postponed until the record can be made complete, the court shall postpone the further consideration of the same and make such order as may be proper and necessary to complete the record, in the interests of justice."

Under this provision of the Code we may properly require, and we uniformly have required the exercise of due diligence on the part of the interested parties looking to the completion of the record or the correction of defects which tend to impede the final adjudication of cases pending on appeal.

In cases of this kind it sometimes appears to be to the interest of the appellant, sometimes to the interest of the appellee, to have the defect in the record delay or impede the final adjudication of the case. Frequently, one party or the other imagines that it might be to his interest to prevent the completion of the record. The appellant, in the hope that the defect may result in the return of the record to the court below for a new trial; and the appellee, in

the hope that he may secure thereby either the dismissal of the appeal or its adjudication on the pleadings and judgment, without a review by this court of the evidence and the findings of fact by the trial judge. Not infrequently, also, it happens that the heat of the trial and the passions aroused by a hotly contested proceeding in the court below, tend to keep the parties to the litigation at "arms length," so that they are unable to enter into stipulations and understandings which might effectively cure the defect in the record without prejudicing the real rights of either party.

Under the above cited provision of the Code of Civil Procedure, the court is required to "make such order as may be proper to complete the record, in the interests of justice;" and under such conditions, it becomes a purely practical question what measures the court should adopt to prevent a failure of justice, due to the strained relations of the parties or the failure of one party or the other to exercise due diligence, or to cooperate in good faith with the court in its efforts to expedite the final adjudication of the case on appeal.

Mapa vs. Chaves (20 Phil., 147), deals with a somewhat similar situation to that now confronting us, and in our decision in that case we set out at some length the principles which should control the court in the preparation of orders of this kind.

The provisions of Act No. 2383 of the Philippine Legislature enacted since that case was decided, in no wise affect the principles upon which orders of this kind may be formulated under the terms of the above-cited section of the Code of Civil Procedure. That act imposes the official duty upon the clerk of the court and the official stenographer to unite the transcript of the stenographic notes of the testimony with the record brought here in appealed cases. But it by no means follows that in cases wherein through negligence, accident or design one or both those officers of the court fail to perform that duty, the appellant may supinely fold his hands and without making any effort to correct the defect in the record, demand that the judgment appealed from be reversed and a new trial granted him. On the contrary, it becomes his manifest duty to exercise all due diligence to have the omission in the record cured as promptly as may be, when such omission, by whomsoever it may have been occasioned, and whether the result of negligence or design, is such as to impede or to render impracticable the review of the proceedings in the court below to secure which he ostensibly filed his appeal. Accordingly, as a condition precedent to a grant of a new trial for defects of this kind, it is our uniform practice to require the appellant to make an affirmative showing that he has done all in his power to cure the defect, by calling on the clerk of the court to perform his statutory duty in this regard, by seeking appropriate mandatory orders directed to any official whose negligence or failure to perform his official duty has resulted in the omissions from the record, or by taking each other means as may reasonably be expected to secure the desired end.

Section 501 of the Code of Civil Procedure makes it the duty of this court to take the necessary measures looking to the correction of defects in the record of this kind, when they have been brought to its attention. In the performance of that duty, the court may issue such orders as it deems most suitable to secure the end in view. To that end, the court may demand and require the cooperation of either, or both, parties; though, ordinarily, and in the absence of special circumstances, the burden of such orders rests primarily on the appellant, who brings the record here for review. It follows, as of course, that if either party negligently, or wilfully fails or refuses to exercise all due diligence in compliance with such orders, he must taste the consequences. Under our practice, the consequences of such conduct on the part of the appellant, in cases such as that now under consideration, are the assumption by the court that he has waived or abandoned his right to have the evidence reviewed on appeal. While culpable failure on the part of the appellee to comply with such orders results in the reversal of the judgment in his favor and the return of the record to the court below for a new trial.

In the case at bar, we have concluded to enter the subjoined order, which we hope will secure the desired result.

If, hereafter, it should appear that without fault on his part, and despite the exercise of due diligence, the appellant has found it impracticable to correct the defect in the record, he will, of course, be entitled to a reversal of the judgment appealed from and a new trial. On the other hand, if it appears that there has been any lack of diligence or fault on his part in proceeding along the lines indicated in the order, we will be justified in treating his conduct as an abandonment of his objection to proceed because of the defect in the record. It may be well to add that we assume that under the terms of the order appellant's efforts to supply the omission from the record will meet with the hearty cooperation of the appellee, since the appellant's failure to correct the defect in the record, if it be due to no fault of his own and results from a lack of cooperation on the part of the appellee, will inevitably result in the reversal of the judgment in favor of the latter and the remittitur of the record to the court below for a new trial.

Ten days after the filing of this opinion, the clerk will enter the following order disposing of appellants' motion:

Action on the appellants' motion to return the record for a new trial will be held in abeyance for the present, but his motion to suspend the running of the period prescribed by the rules of this court for the filing of his brief is granted, in order to give him an opportunity to submit proof that he has exhausted all reasonable efforts to correct the defect in the record of which he complains in one or other of the modes hereinafter indicated.

- (1) By submitting a stipulation as to the substance of the testimony taken at the trial, or of the facts proved at the trial, executed by himself and the opposing party.
- (2) By submitting an extended transcript of the stenographic notes prepared by any court stenographer in the government service or other stenographer whose competency has been duly certified by the judge of the trial court, accompanied by the stenographer's certificate that the notes are in such condition that he was enable to extend them without reasonable ground to believe that the transcript thus submitted is inaccurate in any material matter.
- (3) By submitting a transcript of the stenographic notes taken at the trial, prepared by the stenographer who took them: and, to this end, the clerk of the court wherein the notes were taken is authorized to mail the said notes to the said stenographer with request that he extend them and certify them in due form, at the request of either party, and upon proof satisfactory to him that all reasonable effort has been made by such party to correct the defect in the record under the foregoing subdivisions 1 and 2. So ordered.

Mapa, C. J., Araullo, Moir, and Villamor, JJ., concur.

Malcolm, J., concurs in the result.

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