

FRANCISCO ROSKA, ET AL., PETITIONERS, VS. HON. MODESTO R. RAMOLETE, ETC., ET AL., RESPONDENTS.

G. R. No. 18266. June 30, 1962

Ponente: REGALA, J.

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REGALA, J.:

This is a petition for mandamus under Section 15, Rule 41, Rules of Court, to compel respondent Judge to approve petitioners' appeal.

The record discloses that on October 16, 1959, in relation to the payment of the fire damage claims of Fulgencio Banico Kho which have been attached, levied for third party claims, and garnished by different creditors, the Cebu Fire Damage Commission filed with the Court of First Instance of Cebu, an action for interpleader or a petition for apportionment and/or declaratory relief, praying that it be directed as to who among the creditors should the money be paid, and in what proportion it should be made; that on December 10, 1960, the trial court issued an order based on a compromise agreement of the parties apportioning the respective allotments of the creditors, including petitioners Roska and his wife, and respondent Gabrmtina; that on December 15, 1960 Gabrintina thru counsel filed an Urgent Motion praying that the respondent Judge amend the apportionment previously made on the basis of the compromise agreement of the parties so as to give her P350.00 instead of only P100.00; that on December 17, 1960, respondent Judge acting upon this urgent motion, issued an order amending the original apportionment without the knowledge of petitioners, reducing the latter's allotment to P3,050.00 and increasing Gabrintina's share to P350.00, and which order was received by petitioners on December 24, 1960; that on same date petitioners filed a motion for reconsideration of said order on the ground that the compromise agreement being not a trial on the merits, the respondent Judge has no authority to amend it without the consent of all the parties, including themselves; but said motion was denied in an order dated January 9, 1961 which they received on January 11, 1961; that petitioners filed their notice of appeal, appeal bond, and record on appeal on January 12, 1961, February 7, 1961, and February 10, 1961, respectively; that on February 16, 1961, respondent Gabrintina filed a motion to dismiss the appeal, and notwithstanding opposition thereto, respondent Judge dismissed petitioners' appeal in an order dated March 9, 1961.

The main issue is whether or not the appeal of petitioners dismissed by respondent Judge was filed within the statutory period.

There is no dispute that the appealed order of respondent Judge dated December 17, 1960 was received by petitioners on December 24, 1960, and that on same date they filed their motion for reconsideration; that on January 9, 1961 said motion for reconsideration was denied and that this order of denial was received by them on January 11, 1961; that on February 7, 1961 they filed their cash appeal bond; and that on February 10, 1961, they filed their record on appeal.

After a careful study of the case, we are inclined to agree with petitioners that their appeal was in point of law and fact filed on time and should have been given due course.

It will be noted, as already stated above, that the order of denial having been received only on January 11, 1961, the 30-day period to appeal commenced to run on January 12, 1961 (Sec. 1, Rule 28, Rules of Court). Counting the statutory period of 30 days from January 12, 1961, the same would expire only on February 10, 1961, the very date when the petitioners' record on appeal was filed.

With respect to the contention of respondent Gabrintina and upheld by the lower court to the effect that petitioners' act in withdrawing the amount of P3,280.85 is tantamount to the abandonment and waiver of their right to appeal, the same is absolutely devoid of merit. In the first place, the money withdrawn by petitioners is not the amount as reduced in the amendatory order of apportionment which is being appealed from, but the amount originally allotted to them. In the second place, they made known in an oral manifestation to the lower court and this is not denied, that "they would return the money they received as deposit as soon as the other creditors and respondent Banico would return also the money they have received from the Clerk of Court on the case pending appeal," thereby clearly showing that their act of withdrawing said amount was just to protect their rights and interest and not to comply or abide with the subsequent order of apportionment appealed from so as to interpret their said act of withdrawing as an abandonment or waiver of their right to appeal said order.

As to the insinuation of respondent Gabrintina that although petitioners filed their record on appeal on time on February 10, 1961, their appeal is not, however, deemed perfected as of that date because of their failure to furnish her a copy of said pleading on that same day, the same is also not well taken. In the case of *Arcega vs. Dizon*, (76 Phil., 164; 42 Off. Gaz. 2138) We have already ruled that—

"Defendant's failure to serve plaintiff copies of his notice of appeal and record on appeal within thirty days after notice of the judgment cannot be considered enough ground to dismiss the appeal, there being no showing that it had affected adversely any substantial right of plaintiff.

"It is true that Section 3 of Rule 41 requires appellant to serve upon the adverse party his notice of appeal, and appeal bond, and a record on appeal within the same thirty-day period for filing in court. While there is no reason why the requirement should not be enforced, when non-compliance thereof would not impair any substantial right of the adverse party, it should be considered as merely directory and shall not impair the right of appeal. This stand is strengthened by the fact that failure to serve the adverse party with copies of the above mentioned papers is not specifically stated in Section 1 of Rule 52 as one of the grounds to dismiss an appeal' (Italics supplied)

In the quite recent case of *Philippine Resources Development Corporation vs. Narvasa, et. al.*, G. R. No. L-12803, February 27, 1962, we again there ruled that where non-compliance with service of the notice of appeal, appeal bond and record on appeal upon the adverse party does not cause an impairment of his right, it will not be considered a ground for dismissal and in such an event the court's discretion in giving due course to the appeal would be guided with the interest of justice.

In view of all the foregoing the petition is granted, and respondent Judge is hereby ordered to give due course to petitioners' appeal, with cost against respondent Gabrintina.

Bengzon, C. J., Padilla, Bautista Angelo, Concepcion, Barrera, Dizon, and Makalinal, JJ., concur.

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