

**ARISTON BUSTAMANTE, PETITIONER, VS. EMILIANO T. TIRONA,
JUDGE OF COURT OF FIRST INSTANCE OF MANILA, AND PERFECTO
BUSTAMANTE, RESPONDENTS.***G.R. No. 48813. September 02, 1942*

Ponente: OZAETA, J.

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This is an original petition for mandamus, with preliminary injunction, to compel the respondent judge to approve the record on appeal tendered by the petitioner in special proceedings Nos. 51591, 52813, 54210, and 55888 of the Court of First Instance of Manila—the said respondent having disallowed it on the ground that it was filed out of time.

The petitioner, as administrator of the intestate estate of the deceased Bernabe Bustamante (case No. 51591) and special administrator of the testate estate of the deceased Rufina Arevalo de Bustamante (case No. 52813), intends to appeal to this Court from the orders of the lower court dated September 8 and November 8, 1941, authorizing the sale of certain property of the deceased spouses. He received notice of the last-mentioned order on November 12, 1941. Three days later, that is to say, on November 15, he filed a motion for reconsideration, which was denied on December 16, and notice of the denial was served on him on December 23. On December 27, he filed the notice of appeal, but did not file the record on appeal until March 16, 1942, nor did he actually serve copy of said record on appeal on opposing counsel until May 26, 1942.

Under Rule 41 (section 3) of the Rules of Court, the petitioner should have served upon the adverse party and filed with the court the notice of appeal, the appeal bond, and the record on appeal within thirty days from November 12, 1941, deducting the time during which the motion for reconsideration had been pending; in other words, he should have perfected the appeal on January 19, 1942. Section 13 of the same Rule 41 provides that where the record on appeal is filed out of time the appeal shall be dismissed.

The petitioner, however, tried to Justify his failure to perfect his appeal within the reglementary period by attributing it "to unforeseen event of the war then taking place." But the respondent judge in effect declared that the petitioner did not exercise reasonable diligence under the circumstances, pointing out "that the office of the Clerk of Court was reopened on January 23, 1942, and the Judges of the Court of First Instance of Manila were appointed under the actual administration on February 24, 1942, since which date all the Branches of this Court have resumed functioning." The respondent judge said that there was an unjustifiable delay in the filing of the record on appeal on March 16 and in the service of copy thereof on May 26, 1942.

The petitioner having admittedly tendered his record on appeal after the lapse of the thirty-day reglementary period, it was not mandatory but, if at all, purely discretionary in the respondent judge to approve or disapprove it in the interest of justice. In order that mandamus may lie in such a case, it must be shown that the respondent judge has manifestly and grossly abused his discretion in the premises. We find no such abuse of discretion in the instant case to warrant this Court's interposition and the exercise of its coercive power. On the contrary, we find

sufficient the reason given by the respondent judge for disallowing the petitioner's record on appeal. Who would justify noncompliance of a legal requirement on account of force majeure or unavoidable accident, should exercise due diligence to supply the omission as soon as possible after the justifying circumstance has ceased. The petitioner failed to do so.

Wherefore, the petition for mandamus is denied and the writ of preliminary injunction issued herein by this Court against the respondents is hereby dissolved, with costs. So ordered.

Yulo, C. J., Moron, Paras, and Bocobo, JJ., concur.

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