

BASILIO GARCIA, PETITIONER, VS. AMADO BUENAVENTURA, RESPONDENT.

G.R. No. 49062. March 24, 1944

Ponente: OZAETA, J.

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OZAETA, J.:

Certiorari to the Court of Appeals to reverse an order entered by the latter in C. A.-G. R. No. 373, Basilio Garcia, plaintiff-appellant, vs. Amado Buenaventura, defendant-appellee, dismissing the appeal of the herein petitioner for having been presented out of time, upon the following facts:

In the civil case above mentioned (No. 7848 of the Court of First Instance of Rizal) the decision of the trial court was rendered on November 21, 1941, and notified to the attorney for the plaintiff on the following day, November 22, 1941. Twenty-seven days thereafter, i. e., on December 19, 1941, counsel for the plaintiff mailed a motion for reconsideration, which was denied on July 15, 1942, and notice of the order of denial was received by counsel for the plaintiff on July 30, 1942, on which date he filed a notice of appeal together with a motion for an extension of fifteen days within which to perfect the appeal. Said motion was granted by the court. In other words, the three days remaining out of the original reglementary period of thirty days, added to the fifteen days' extension granted by the court, gave the plaintiff eighteen days within which to perfect the appeal, which, counted from July 30, 1942, would expire on August 17, 1942. Two days before the last-mentioned date counsel for the plaintiff filed an ex-parte petition for a second extension of ten days within which to perfect the appeal, which petition was also granted by the court on August 18, 1942, and notice of the granting order was received by counsel for the plaintiff on August 24, 1942. The plaintiff filed the record on appeal and the appeal bond on September 4, 1942.

The appeal was at first disallowed by the trial court for having been filed out of time, but upon motion for reconsideration based on alleged accident and excusable neglect, the trial court allowed it on the theory that, counting the last extension of ten days plus the three days remaining out of the original period, or thirteen days, from August 24, 1942, when counsel for the plaintiff received notice of the order granting the second extension of ten days, it resulted that the plaintiff had until September 6 to perfect the appeal and that, therefore, the filing of the record on appeal and of the appeal bond on September 4, 1942, was within time.

On the other hand, the theory of the parties and of the Court of Appeals is that, counting the last extension of ten days from August 24, 1942, the time to appeal expired on September 3, 1942.

Upon that theory counsel for the petitioner contends that the filing of the record on appeal and of the appeal bond on September 4, 1942, was only one day late, and he attempts to justify the delay by alleging that on September 3, 1942, when he was ready to file the record on appeal and the appeal bond, he suffered with a nervous breakdown on account of the death of his son in Bataan. The Court of Appeals did not consider that allegation as sufficient justification for the delay because counsel had twice procured extensions of time, and granted respondent's motion for dismissal.

We think both the parties and the lower courts were in error in counting the last extension of ten days from

August 24, 1942, the date when counsel for the petitioner was notified of the order granting his petition for a second extension. It will be recalled that the first extension of fifteen days, together with the remaining three days out of the original period, was to expire on August 17, 1942. There is no rime or reason why a hiatus should have been permitted or supposed to arise between August 17 and August 24. The pendency of a motion for extension of time to perfect an appeal or to file a brief does not suspend the running of the period sought to be extended. If it did, the mere filing of a petition for extension at the eleventh hour would ipso facto extend the time—which is a glaring absurdity. As we have said in the case of *Alejandro vs. Endencia*, 64 Phil. 321, 326, if the order granting an extension of time fails to determine when it should commence to run, the extension "must be joined to the original period or that fixed by law, and must be computed from the date following the expiration thereof." It is true that we also said in that case "that when the order granting extension of time is issued and notice thereof served after the expiration of the period fixed by law, said extension of time must be counted from the date notice of the order granting it is received." But that pronouncement must be read and interpreted in relation to the facts of that case. It has no application to the facts of this case, which show that counsel for petitioner received notice of the order granting the second extension of ten days on August 24, or three days before the expiration of said extension, which must be joined to the first extension of fifteen days. The reason is obvious: Knowing that the petition for extension of time does not interrupt the running of the period, the petitioner has no right to wait with folded arms until he receives notice from the court; he has even no right to assume that his petition will be granted; all that he can assume is that, if granted, the extension will commence to run from the expiration of the original or preceding period.

Hence the last extension of ten days granted by the trial court in this case commenced to run from and after August 17, 1942, and expired on August 27, 1942. Therefore, the filing of the record on appeal and of the appeal bond on September 4, 1942, was eight days late, and the alleged nervous collapse of the attorney for the petitioner on September 3—seven days after the lapse of the period—was completely irrelevant.

Petitioner contends that in accordance with our decision in *Bustamante vs. Tirona*, 1 Off. Gaz., 875, it was discretionary in the trial court to approve or disapprove an appeal filed out of time, in the interest of justice. It is evident that counsel has failed to read our decision in that case aright. The statement relied upon was made, and must be read, in connection with the claim therein advanced by *Bustamante* that his failure to perfect the appeal on time was due to an unforeseen event of the war. It is only in such a situation—occasioned by fraud, accident, mistake, or excusable negligence—as contemplated in section 2 of Rule 38, that the court is vested with discretion to allow an appeal filed out of time. We have had occasion to make this observation in the subsequent case of *Reyes vs. The Court of Appeals*, G. R. No. 48960. Yet counsel seems to believe that the latter case revokes or changes the doctrine laid down in the former. That, again, is plain error. We repeat that when, as in this case, there is no legal justification for the failure to perfect an appeal within the reglementary period, or within such extension of time as may have been previously granted by the trial court, the judgment is already final and executory, and the trial court has no discretion to allow an appeal therefrom.

The order is affirmed, with costs.

Yulo, C. J., Moran, Horrilleno, Paras, and Bocobo, JJ., concur.

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