

DOMINGO FOJAS, PETITIONER, VS. EULALIO GARCIA, JUDGE OF FIRST INSTANCE OF CAVITE, AND LEONARDO BURGOS ET AL., RESPONDENTS.

G.R. No. 49112. February 23, 1944

Ponente: OZAETA, J.

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OZAETA, J.:

Mandamus to compel the respondent judge to certify petitioner's record on appeal in civil case No. 38 of the Court of First Instance of Cavite.

Said case was instituted by the herein petitioner nominally against Leonardo Burgos and principally against his two minor children Bonifacio and Isidro Burgos, of whom he is alleged to be the natural guardian and administrator of their property, to recover from said minors the sum of P1,000 which their deceased mother Ambrosia Fojas is alleged to have obligated herself to pay to the plaintiff in lieu of one half of lot 1729 of the Hacienda Santa Cruz, de Malabon, which since her demise had passed to the defendants. On May 10, 1943, the respondent judge, upon motion of the defendants, dismissed the complaint on the ground that the action had prescribed. Three days after receiving notice of the judgment of dismissal, counsel for the plaintiff filed a motion for reconsideration, which was denied by the court in its order of June 10, 1943, in which it reiterated that the action had prescribed and added that if it had not yet prescribed, it should be presented in special proceedings for the distribution or partition of the estate left by the deceased mother of the minor defendants. Upon receipt of notice of the order denying his motion for reconsideration, counsel for the plaintiff filed a second motion for reconsideration, which was denied by the trial court on July 31, 1943, notice of which was received by counsel for the plaintiff on August 6, 1943. On September 6, 1943, counsel for the plaintiff filed notice of appeal from the judgment of May 10, 1943, and from the orders of June 10, and July 31, 1943, denying his motions for reconsideration. On the same date, September 6, 1943, he filed his record on appeal and the corresponding appeal bond. Upon opposition by counsel for the defendants, the respondent judge dismissed the appeal on the ground that it had been filed out of time.

Petitioner's theory is that he is appealing only from the last order of the court dated July 31, 1943, notice of which was received by him only on August 6 of the same year, and that since September 5, the thirtieth day thereafter, was a Sunday, the filing of the record on appeal on September 6 was within the reglementary period of thirty days counted from August 6. Petitioner admits that if the time to appeal be counted from the date he received notice of the original judgment of dismissal, even deducting the time during which his two successive motions for reconsideration were pending, his appeal would be out of time.

Petitioner's theory is untenable. His notice of appeal itself states that he was appealing from the judgment of May 10, 1943, as well as from the orders of June 10 and July 31, 1943; and it cannot be otherwise. He cannot appeal solely from the last order denying his second motion for reconsideration, leaving the judgment itself undisturbed. The fact that in denying the motions for reconsideration the respondent judge maintained the original judgment

and at the same time incidentally adduced other reasons to fortify it, shows that the original judgment was not set aside and substituted by the subsequent orders. Therefore, counting as we must the time to appeal from May 28, 1943, the date petitioner received notice of the judgment of dismissal, and deducting the time during which the motions for reconsideration were pending resolution, it results that the record on appeal was presented four days late. In the case of *Reyes vs. Court of Appeals*, G. R. No. 48960, promulgated June 29, 1943, we declared an appeal out of time in which the appeal bond (but not the record on appeal) was presented one day late.

The petition is denied, with costs against the petitioner.

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

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