

**LILIA AGUIRRE, GENATO AGUIRRE AND BENITO AGRAVA,
PETITIONERS, VS. THE HONORABLE COURT OF FIRST INSTANCE OF
LEYTE, BRANCH III, EDUARDO TAMPIL AND LETICIA A. TAMPIL,
RESPONDENTS.**

G.R. No. 53556. December 20, 1990

Ponente: MEDIALDEA, J.

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MEDIALDEA, J.:

This petition for certiorari assails the order (p. 27, Rollo) of respondent Court of First Instance (now Regional Trial Court) of Leyte, Branch III, dismissing petitioners appeal for failure to prosecute and the order (p. 41, Rollo) denying the motion for reconsideration.

The undisputed facts are as follows:

This petition stemmed from Civil Case No. 5153 filed by private respondents. The complaint was for damages sustained when the auto-calesa (AC) jeep owned by petitioners figured in an accident on September 18, 1974, resulting in the death of private respondents' daughter and injury to private respondent Leticia Tampil requiring hospitalization for nine (9) days.

The petitioners denied liability to the private respondents. After trial, judgment was rendered on February 28, 1978 holding petitioners liable to the private respondents.

The petitioners filed a timely notice of appeal to the Court of Appeals from the decision of the trial court. On August 15, 1978, respondent trial court issued an order approving petitioners' record on appeal and appeal bond (p. 6, Rollo).

On August 21, 1979, private respondents filed with the trial court a motion to dismiss the appeal for failure of petitioners to prosecute their appeal pursuant to Section 3, Rule 46 of the Rules of Court. The motion alleged that for over a year after the approval of petitioners' record on appeal, the same had not been forwarded to the appellate court and still lay dormant in the files of the trial court (pp. 22-23, Rollo).

Petitioners filed an opposition (pp. 24-26, Rollo) to the motion to dismiss on the following arguments: 1) that the trial court had no more jurisdiction over the case in view of the perfection of the appeal and the approval of the record on appeal by the trial court; 2) that the motion is misdirected having been filed with the trial court instead of filing it with the appellate court; and 3) that petitioners exerted efforts to have the record of the case transmitted to the appellate court but the Deputy Clerk of Court explained that the stenographic notes of the proceedings have not yet been attached to the record.

On October 12, 1979, the trial court issued an order granting the motion to dismiss (p. 27, Rollo). Petitioners' motion for reconsideration was denied on February 22, 1980.

On April 10, 1980, this petition for certiorari was filed with Us.

There is no question that an appeal from the decision of the Court of First Instance (now Regional Trial Court) to the Court of Appeals may be dismissed for failure of the appellant to prosecute his appeal. We have ruled in the case of *Fagtanac v. CA*, L-26922-23, March 21, 1968 and reiterated in *Loyola v. CA*, L--27465, August 31, 1971, and in *Arcega v. C.A.*, G.R. No. 79043, October 28, 1988 that:

"A rule long familiar to practitioners in this jurisdiction is that it is the duty of the appellant to prosecute his appeal with reasonable diligence. He cannot simply fold his arms and say that it is the duty of the Clerk of Court of First Instance under the provisions of Section 11, Rule 41 of the Rules of Court to transmit the record on appeal to the appellate court. It is appellants' duty to make the Clerk act and, if necessary, procure a court order to compel him to act. He cannot idly sit by and wait till this is done. He cannot afterwards wash his hands and say that delay in the transmittal of the record on appeal was not his fault. For indeed, this duty imposed upon him was precisely to spur on the slothful."

The petitioners contend that respondent trial court acted without jurisdiction when it dismissed the appeal of petitioners. The act of respondent trial court in dismissing their appeal after it had been perfected violates Section 9, Rule 41 of the Rules of Court.

The contention is tenable. Rule 41, Section 9 of the Rules of Court provides that once an appeal has been perfected, the trial court loses its jurisdiction over the case. But, notwithstanding the perfection of an appeal, the trial court does not lose its jurisdiction "x x x to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal." Private respondents contend that the dismissal of the appeal by the trial court is an "order for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal. We disagree. The order granting private respondents' motion to dismiss appeal for failure of petitioners to prosecute their appeal is not merely an order for the protection of the rights of the parties but is an order which disposes of the case.

Rule 41, Section 14, in connection with Section 13 of the Rules of Court provides for the only instance when the Court of First Instance may dismiss an appeal i.e., when the notice of appeal, or the appeal bond or the record on appeal was not filed on time. In all these cases, the appeal had not yet been perfected. In the instant case, the notice of appeal, the record on appeal and the appeal bond were filed on time and the appeal had already been perfected.

Under Section 22, Rule 41, "(A)n appeal in any case may be withdrawn in the Court of First Instance before the record on appeal is transmitted to the appellate court." The dismissal in this case is initiated by the appellant himself who withdraws his appeal.

The basis of private respondents' filing of a motion to dismiss is Section 1, Rule 50 in connection with Section 3, Rule 46 of the Rules of Court which provides:

Rule 46:

"Section 3. Order of Transmittal of record.- If the record on appeal is not received by the Court of Appeals within thirty (30) days after the approval thereof, the appellee may, upon notice to the appellant, move the court to grant an order directing the clerk of the lower court forthwith to transmit such record on appeal or to declare the same abandoned for failure to prosecute.

Rule 50:

"Section 1. Grounds for dismissal of appeal. - An appeal may be dismissed by the Court of Appeals, on its own motion or on that of the appellee, on the following grounds:

‘(a) x x x

‘(b) x x x

‘(c) Failure of the appellant to prosecute his appeal under Section 3 of Rule 46.’

"x x x."

The proper court therefore, which must dismiss an appeal for failure to prosecute upon motion of the appellant himself or upon the court's own motion is the Court of Appeals and not the Court of First Instance. Respondent trial court acted without jurisdiction when it ordered the dismissal of the appeal for failure to prosecute, the proper court to order the dismissal of the appeal for failure to prosecute, after the perfection of said appeal, being the Court of Appeals, before which the appeal is taken.

ACCORDINGLY, the petition is GRANTED. The assailed orders of respondent trial court are set aside and the appeal of petitioners is reinstated.

SO ORDERED.

Narvasa, (Chairman), Cruz, Gancayco, and Grino-Aquino, JJ., concur.

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