

**GERRY A. MAMANSAG AND RESTITUTO GUTIERREZ, PETITIONERS,
NATIONAL LABOR RELATIONS COMMISSION, BERNABE
CONSTRUCTION & INDUSTRIAL CORP. (OF ASIA), TITO
AVARICIO, ANGELITO ORTEGA, R...**

Ponente: GARCIA-FERNANDEZ, J.

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GARCIA-FERNANDEZ, J.:

This is a petition for certiorari under Rule 65 of the Revised Rules of Civil Procedure, as amended, seeking to annul and set aside the decision dated December 7, 2010[1] and resolution dated February 7, 2010[2] both issued by the National Labor Relations Commission (NLRC) (6[th] Division) in NLRC NCR LAC No. 08-001906-10.

The facts are as follows:

Petitioners filed on January 11, 2010 a complaint[3] for constructive illegal dismissal and non-payment of 13[th] month pay against private respondents Bernabe Construction & Industrial Corp. (of Asia)/Tito Avaricio, Angelito Ortega, and Rodolfo Galicia (BCIC for brevity) which was docketed as NCR Case No. NCR-01-00503-10. Mediation failed, thus the labor arbiter instructed the parties to file their respective position papers.

Petitioners' Position Paper[4]

Petitioner Gerry A. Mamansag alleged that he was a mechanical supervisor of private respondent company from 2001 until 2008; that sometime in April 2007 he was assigned to private respondent BCIC's project involving the First Farmer Sugar Central in Bacolod, where he reported for work until sometime in November 2008 when he sought and was given permission to take a week-long leave to attend to his father; that around November 21, 2008, petitioner, along with other employees, were told that management will take over the project; that petitioner returned on November 23, 2008 to the project site but was prevented entry and was informed that the order came from the main office; and that upon his return to Manila, he was informed by BCIC that he was terminated because he was allegedly encouraging his co-workers to stop working in the site.

On his part, petitioner Restituto Gutierrez alleged that he has been working with BCIC as a fitter/construction worker since August 2005; that sometime on or before April 12, 2007, he was included in the project involving the First Farmer Sugar Central in Bacolod; that sometime on or before December 10, 2008, he was informed by private respondent Ortega that he is being ordered to report back to the main office in Manila because he is going to be transferred to a different project; and that when he reported back to the main office, he was told to fill up another bio-data form and was surprised to learn later that BCIC will just call him when there is a job opening.

Petitioners claim that they were illegally dismissed by the private respondent BCIC because: 1) they were not informed of the reason for their termination and was only told not to report for work anymore; and 2) BCIC did not comply with the procedural requirements in terminating them. Petitioners claim that they be reinstated to their former positions, plus backwages, moral damages, exemplary damages, and attorney's fees.

BCIC's Position Paper[5]

BCIC claimed that there is no employer-employee relationship between the BCIC and the petitioners, the latter being employees of subcontractor Neri Mamansag; that in 2007, BCIC and Neri Mamansag entered into a subcontracting agreement[6] for the following: 1) equipment site installation; 2) equipment site installation (with site fabrication); 3) structural framing installation; 4) pipes and fittings fabrication and installation; and 5) G.I. Sheet roofing and sidings installation. Pursuant to the agreement, Neri Mamansag hired several workers, including petitioner Gerry Mamansag, and paid their salaries. Since petitioners are not its employees, BCIC contended that it cannot be held liable for illegal dismissal, much less for the payment of petitioners' 13[th] month pay.

On April 30, 2010, BCIC filed a motion to implead Neri Mamansag[7] as respondent. On June 15, 2010, Neri Mamansag filed his affidavit/position paper[8] alleging that he had been operating a construction business under the name and style "N.Q. Mamansag Steel Works and Fabrication Services[9]" and petitioner Gerry Mamansag was one of his employees; that he has sufficient capital, tools and equipment to carry out his business; that sometime in 2007 he entered into subcontracting agreement with BCIC which later expired when the project was completed in November 2008; that he had full control and supervision over his employees during the project; and that petitioners are not employees of BCIC and had no claims of whatever nature against BCIC.

Labor Arbiter Fatima Jambaro-Franco issued the decision dated July 26, 2010[10], the dispositive portion of which reads:

"WHEREFORE, premises considered, judgment is hereby rendered, ordering the respondents Bernabe Construction and Industrial Corporation (of Asia)/Tito Avaricio/Angelito Ortega and Rodolfo Garcia to pay complainants the amount indicated opposite their respective names, representing their backwages, separation pay and 13[th] month pay, to wit:

GERRY A. MAMANSAG -----

P629,200.00

RESTITUTO R. GUTIERREZ -----

P254,701.85

T O T A L -

P883,901.85

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Respondents are further ordered to pay complainants the amount of EIGHTY EIGHT THOUSAND THREE HUNDRED NINETY PESOS & 18/100 (P88,390.18) as and for attorney's fees.

Neri Mamansag is hereby DROPPED/EXCLUDED as party respondent since he is not the employer of the complainants.

All other claims are DISMISSED for lack of merit.

SO ORDERED."

The labor arbiter found that Neri Mamansag is not a legitimate subcontractor for lack of basis since he failed to submit proof of his financial standing and information of his operations, tools and equipment that would support his claim. The labor arbiter ruled that petitioners are employees of BCIC since: 1) petitioners' identification cards[11] are issued by BCIC and Neri Mamansag's company was not indicated in their identification cards; 2) petitioners Gerry Mamansag and Luisito Gutierrez started working for BCIC in 2001 and 2005, respectively, while Neri Mamansag only entered into the subcontracting agreement with private respondent company in March 16, 2007; and 3) the Department of Trade and Industry shows that private respondent Neri Mamansag's company was registered only on November 18, 2009[12].

BCIC appealed[13] the decision of the labor arbiter before the respondent NLRC claiming that Neri Mamansag is a legitimate independent contractor who should be held liable for the dismissal of the petitioners.

Respondent NLRC granted the appeal and reversed the decision of the labor arbiter in its decision promulgated December 7, 2010[14]. Stating that save for their identification cards, petitioners failed to present any relevant evidence which indicated that they are employees of BCIC, and the subcontracting agreement between BCIC and Neri Mamansag shows that petitioners are employees of Neri Mamansag, who is an independent contractor. Respondent NLRC also took note of the following documents BCIC presented showing that Neri Mamansag is an independent contractor: 1) certificate of business name and registration of Neri Mamansag for 1994, 2003, and 2009; and 2) proof of payment by BCIC to Neri Mamansag and the corresponding payroll of the latter for the periods January 25, 2008, February 1-7, 2008, March 14-20, 2008, November 21-27, 2008, and November 28-December 4, 2008[15].

Finding that petitioners were employees of Neri Mamansag, the NLRC dismissed petitioners' claim for illegal dismissal and other monetary claims after finding that Neri Mamansag dismissed the petitioners for fraudulently including themselves in the payroll when in fact they did not report for work and that petitioners sued BCIC since Neri Mamansag is the father of petitioner Gerry A. Mamansag.

Petitioners' motion for reconsideration[16] was denied by respondent NLRC in the resolution promulgated February 7, 2011[17] for lack of merit.

Petitioners allege the following in the instant petition:

“1. HEREIN PUBLIC RESPONDENT COMMITTED GRAVE ABUSE OF DISCRETION WHEN IT RULED THAT PETITIONERS AND RESPONDENT BCIC HAVE NO EMPLOYER-EMPLOYEE RELATIONSHIP AMIDST THE VALID ARGUMENTS AND PIECES OF EVIDENCE RAISED AND PRESENTED BY PETITIONERS TO THE CONTRARY.

2. HEREIN PUBLIC RESPONDENT COMMITTED GRAVE ABUSE OF DISCRETION WHEN IT RULED THAT PETITIONERS WERE NOT ILLEGALLY DISMISSED IN UTTER DISREGARD OF THE PERTINENT PRINCIPLES LAID DOWN IN TERMINATION CASES.

3. PUBLIC RESPONDENT COMMITTED GRAVE ABUSE OF DISCRETION IN GIVING DUE COURSE TO THE APPEAL WITHOUT THE SAME HAVING BEEN PERFECTED.”

Petitioners' claim that BCIC and other private respondents failed to perfect their appeal for failure to post a bond within the period provided by law is without merit as shown by the supersedeas bond dated August 18, 2010 issued by the Philippine Charter Insurance Corporation and supporting documents[18] that private respondents filed with the public respondent on August 20, 2010.

Hence, this Court shall resolve the first and second grounds only.

Anent the first ground, petitioners claim that there is an employer-employee relationship between them and BCIC

since the latter had the power of control, being the most important determinant in the existence of an employer-employee relationship, over petitioners, as shown by its exercise of power to dismiss the petitioners as well as other provisions under the subcontracting agreement.[19] Further, petitioners claim that respondent NLRC erroneously ruled that they are the employees of Neri Mamansag based on the provisions of the subcontracting agreement in the absence of proof that these stipulations have been implemented and practiced by BCIC. Petitioners give emphasis to the dissenting opinion of NLRC Commissioner Isabel G. Panganiban-Ortiguerra, who found that the subcontracting agreement cannot be relied upon as it is clear from the records of the case that while said agreement was entered into only on March 16, 2007, petitioners claim that they have been BCIC's employees since 2001 (for petitioner Gerry A. Mamansag) and 2005 (for petitioner Luisito Gutierrez)[20].

With regard to the second ground, petitioners claim that they were illegally terminated by BCIC since they were not informed of the reason for their termination and they were not given a chance to be heard.

In their Comment, BCIC and other private respondents claim that Neri Mamansag is a legitimate job contractor, supported by the fact that his business is duly registered by the Department of Trade and Industry as early as 1994 up to the present and petitioners' salaries at the project in Bacolod were all paid by Neri Mamansag; and that any claim of illegal termination and monetary claims should be pursued against private respondent Neri Mamansag and not BCIC.

The petition has merit.

The Supreme Court held in *Protacio vs. Laya Mananghaya & Co. and/or Mario T. Mananghaya*[21] that certiorari proceedings do not render this Court completely powerless to reexamine the factual findings of the NLRC, saying:

“As a general rule, in certiorari proceedings under Rule 65 of the Rules of Court, the appellate court does not assess and weigh the sufficiency of evidence upon which the Labor Arbiter and the NLRC based their conclusion. The query in this proceeding is limited to the determination of whether or not the NLRC acted without or in excess of its jurisdiction or with grave abuse of discretion in rendering its decision. However, as an exception, the appellate court may examine and measure the factual findings of the NLRC if the same are not supported by substantial evidence. The Court has not hesitated to affirm the appellate court’s reversals of the decisions of labor tribunals if they are not supported by substantial evidence.” [Citations omitted, emphasis supplied.]

The Supreme Court discussed the determination of independent contractorship in *Polyfoam-RGC International Corporation and Precilla A. Gramaje vs. Edgardo Concepcion*[22], saying:

“Article 106 of the Labor Code explains the relations which may arise between an employer, a contractor, and the contractor’s employees, thus:

ART. 106. Contractor or subcontracting. - Whenever an employer enters into a contract with another person for the performance of the former’s work, the employees of the contractor and of the latter’s subcontractor, if any, shall be paid in accordance with the provisions of this Code.

In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him.

The Secretary of Labor and Employment may, by appropriate regulations, restrict or prohibit the contracting out of labor to protect the rights of workers established under the Code. In so prohibiting or restricting, he may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations

within these types of contracting and determine who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provision of this Code.

There is labor-only contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.

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The test of independent contractorship is “whether one claiming to be an independent contractor has contracted to do the work according to his own methods and without being subject to the control of the employer, except only as to the results of the work.” In *San Miguel Corporation v. Semillano*, the Court laid down the criteria in determining the existence of an independent and permissible contractor relationship, to wit:

x x x [W]hether or not the contractor is carrying on an independent business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of a specified piece of work; the control and supervision of the work to another; the employer’s power with respect to the hiring, firing and payment of the contractor’s workers; the control of the premises; the duty to supply the premises, tools, appliances, materials, and labor; and the mode, manner and terms of payment.” [Citations omitted, emphasis supplied.]

The Supreme Court held in *De Los Santos, et.al. vs. NLRC, et.al.*[23] that job contracting is permissible only if the following conditions are met: 1) the contractor carries on an independent business and undertakes the contract work on his own account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof; and 2) the contractor has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of the business.

Further, Section 5 of Department Order 18-02 (Series of 2002), also known as the Rules Implementing Articles 106-109 of the Labor Code[24], as amended, provides the guidelines in determining whether labor-only contracting exists:

“Section 5. Prohibition against labor-only contracting. - Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and any of the following elements are present:

- (i) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or
- (ii) the contractor does not exercise the right to control over the performance of the work of the contractual employee.

The foregoing provisions shall be without prejudice to the application of Article 248 (C) of the Labor Code, as amended.

"Substantial capital or investment" refers to capital stocks and subscribed capitalization in the case of corporations, tools, equipment, implements, machineries and work premises, actually and directly used by the contractor or subcontractor in the performance or completion of the job, work or service contracted out.

The "right to control" shall refer to the right reserved to the person for whom the services of the contractual workers are performed, to determine not only the end to be achieved, but also the manner and means to be used in reaching that end."

After careful scrutiny of the evidence presented, this Court finds that Neri Mamansag is not an independent contractor but only a "labor-only" contractor since he failed to prove that he had substantial capital or investment to conduct his business. As held by the High Court, "[t]he presumption is that a contractor is a labor-only contractor unless such contractor overcomes the burden of proving that it has substantial capital, investment, tools and the like. The employees, in this case, private respondents, should not be expected to prove the negative fact that the contractor does not have substantial capital, investment and tools to engage in job-contracting." [25] Neri Mamansag's various certificates of registration and payroll are insufficient to prove that he had substantial capital to conduct his own business, in the absence of evidence showing that he had substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of the business. Save for bare allegations, private respondents failed to prove that Neri Mamansag qualifies as an independent job contractor under established jurisprudence and laws.

Since Neri Mamansag is only a labor-only contractor, he is considered merely an agent of BCIC and the latter is responsible to the employees of the labor-only contractor as if such employees had been directly employed by BCIC. [26] As such, the employees, including petitioners whom Neri Mamansag supplied to BCIC should be considered as employees of the latter. [27]

Considering the foregoing, this Court finds that petitioners have been illegally dismissed by BCIC when they were disallowed entry into the construction site in the First Farmer Sugar Central project in Bacolod. BCIC failed to show any valid or authorized cause under the Labor Code for the termination of the services of petitioners. Petitioners were also not afforded due process since there is nothing on record which shows that the latter were given ample opportunity to contest the legality of their dismissal and that a valid notice of termination was given to them. Clearly, the dismissal of petitioners from their employment is illegal.

WHEREFORE, the petition is GRANTED. The decision dated December 7, 2010 and resolution dated February 7, 2010 issued by the National Labor Relations Commission (6th Division) in NLRC NCR LAC No. 08-001906-10 are Annulled and Set Aside. The decision dated July 26, 2010 issued by Labor Arbiter Fatima Jambaro-Franco is Reinstated.

SO ORDERED.

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

Pizzarro, N.B., Acting Chairperson[*] and Garcia-Fernandez, M.V., JJ., concur.

[*] Per raffle dated May 20, 2014.

[1] Rollo, pp. 139-150.

[2] Rollo, pp. 170-172.

[3] Rollo, pp. 35-36.

- [4] Rollo, pp. 37-48.
- [5] Rollo, pp. 54-59.
- [6] Rollo, pp. 69-72.
- [7] Rollo, pp. 60-61.
- [8] Rollo, pp. 64-66.
- [9] Rollo, p. 67.
- [10] Rollo, pp. 97-106.
- [11] Rollo, p. 49.
- [12] Rollo, p. 67.
- [13] Rollo, pp. 110-138.
- [14] Supra note 1.
- [15] Rollo, pp. 278-292.
- [16] Rollo, pp. 151-169.
- [17] Supra note 2.
- [18] Rollo, pp. 316-324.
- [19] Rollo, pp. 69-72. See Articles II and V.
- [20] Rollo, p. 150.
- [21] G.R. No. 168654, March 25, 2009.
- [22] G.R. No. 172349, June 13, 2012.
- [23] G.R. No. 121327, December 20, 2001.
- [24] Replaced by Department Order No. 18-A, Series of 2011, also known as the Rules Implementing Articles 106-109 of the Labor Code, as amended.
- [25] 7K Corporation vs. National Labor Relations Commission, G.R. No. 148490, November 22, 2006, 507 SCRA 509, 523. See also Coca-Cola Bottlers, Phils. Inc. vs. Hingpit, G.R. No. 127238. August 25, 1998, and Guarin vs. National Labor Relations Commission, G.R. No. 86010, October 3, 1989,
- [26] San Miguel Corporation vs. MAERC Integrated Services. Inc., G.R. No. 144672, 10 July 2003.
- [27] Manila Water Company, Inc. vs. Pena, et.al., G.R. No. 158255, July 8, 2004.

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