

ARMS TAXI AND/OR DOROTHEA TANONGON, PETITIONER, VS. NATIONAL LABOR RELATIONS COM-MISSION AND LUDIVICO C. CULLA, RESPONDENTS.

G.R. No. 104523. March 08, 1993

Ponente: GRINO-AQUINO, J.

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GRINO-AQUINO, J.:

In this petition for certiorari^[1] the petitioner, Ludivico C. Culla, seeks the annulment of the decision dated March 5, 1992 of the National Labor Relations Commission (NLRC) ordering the Spouses Norberto and Dorothea Tanongon and/or Arms Taxi and Aida dela Cruz jointly and severally to pay him (Culla) the total sum of one hundred ninety-five thousand pesos (P195,000.00) as backwages for three (3) years and separation pay computed at one-half month for every year of service (NLRC NCR Case No. 7-2572-86).

The spouses Tanongon own and operate taxicabs under the names of "Arms Taxi" and "Lin-lin Taxi." However, the taxicabs are registered under the "kabit" system in the name of Aida dela Cruz who holds a certificate of public convenience to operate a taxicab service.

In the early part of 1980, Culla was hired by the Tanongon spouses to work as mechanic, shop manager, garage caretaker, dispatcher, and liaison man in their taxi business, at a monthly salary of P5,000.00 plus commission on the daily or monthly gross income of the business in addition to the payment of his Social Security System (SSS) premiums.

On June 11, 1986, without Culla's consent, the Tanongon spouses asked one of their taxi drivers to force open his quarters in the Tanongon compound at the St. Francis Subdivision in Cainta, Rizal. They removed his personal belongings and brought them to his residence in Sta. Ana, Manila (p. 2. Affidavit of Complainant, p.24, Rollo)

Culla filed with the Arbitration Branch of the then Ministry of Labor and Employment, a complaint alleging that his ejectment from his living quarters and dismissal from employment were illegal because there was no prior investigation or written notice of the charges against him. His dismissal was allegedly due to his demands "for the payment of the benefits, percentage and privileges and premiums to the SSS" (p. 3, Amended Complaint; p. 115, Rollo). He prayed for reinstatement with backwages, plus his commission of fifteen percent (15%) of the gross income of the taxi business, in the amount of P480,000.00 with legal interest, plus moral, nominal and exemplary damages in the total sum of P300,000.00 and actual or compensatory damages and litigation expenses.

In their position paper, the Tanongon spouses denied that they were the operators of the Arms Taxi and Lin-lin Taxi. They denied the existence of an employer-employee relationship between them and Culla. They averred that Arms Taxi is owned and operated by Aida dela Cruz; that on April 25, 1986, they bought Lin-lin Taxi from one Jose Lim, but its ownership has not yet been transferred to them as their application with the Land Transportation Office is still pending.

For her part, Aida dela Cruz admitted ownership and operation of a fleet of taxicabs under the name Arms Taxi

and that she had entered into an agreement with Dorothea Tanongon for the latter to manage for a fee the operation of several of her taxi units. Denying that she hired Culla, Dela Cruz averred that at most, Culla could be considered as an independent contractor paid on a piece-work basis and therefore, he was not entitled to regular benefits, much less to the alleged 15% commission.

In a decision dated February 14, 1990, Labor Arbiter Ricardo C. Nora found for Culla. He declared that Culla was an employee of the Tanongon spouses who operate some units of the Arms Taxi and Lin-lin Taxi under the "kabit" system: that Culla was illegally dismissed from employment and that Aida dela Cruz should be considered an indirect employer of Culla pursuant to Arts. 106, 107 and 109 of the Labor Code. However, he denied Culla's claim for 15% commission on the gross earnings of the taxi business as Culla failed "to sub-stantially prove the same by some precise, concrete and convincing evidence" (p. 185. Rollo). The agreement on the commission "should have been in writing, note or memorandum, and subscribed by the parties, to be en-forceable" (Ibid.). Further holding that Culla was not entitled to the 13th month pay under P.D. No. 851 and to overtime pay, for time was not of the essence in his kind of employment, the Labor Arbiter disposed of the case thus:

"WHEREFORE, respondents Doro-thea and Norberto Tanongon and Aida dela Cruz are hereby ordered to pay jointly and severally complainant the aggregate sum of ONE HUNDRED NINETY-FIVE THOUSAND (P195,000.00) PESOS representing complainant's backwages for three (3) year: (P5,000.00/mo. x 36 mos. plus P2,500.00/mo. (1/2 mo/yr. of service x 6 years) and separation pay com-puted at one-half (1/2) for every year of service within ten (10) days from receipt of this decision.

"All other issues are hereby DISMISSED for lack of merit". (pp. 111-112. Rollo)

The parties appealed to the NLRC. Culla was dissatisfied with the monetary awards, because he was not given full backwages nor the 15% commission, incentive leave pay, damages, and attorney's fees.

On the other hand, the Tanongon spouses assailed the Labor Arbiter's finding that Culla was their employ-ee. They alleged that Culla was an independent contrac-tor doing mainly the work of a mechanic who was paid on a piece-work basis: that he was free to accept repair jobs from other customers, that he had no regular hours of work and they had no control over his work except to indicate what part of a taxicab needed to be repaired.

As earlier mentioned, the First Division[2] of the NLRC affirmed on March 5, 1991 the decision of the Labor Arbiter. It dismissed the appeal of the Tanongon spouses for having been filed late and for lack of the required supersedeas bond. It denied Culla's claim for the 15% commission on the ground that:

" There is nothing on record to substantiate this claim. If, as complainant claims, he is entitled to a commission as part of his wage and/or in addition to his basic pay, we cannot understand why he never made any claims therefor during his six years of service." (Underscoring supplied; p. 23. Rollo).

Separate petitions for certiorari were filed by Culla (G.R. No. 104526) and Tanongon or Arms Taxi (G.R. No. 104523) which were later consolidated.

Culla argues in his petition that the payment to him of P5,000.00 a month for his services was in partial fulfillment of Tanongon's promise to pay him a 15% commission removing said agreement from coverage of the Statute of Frauds.

Culla's reference to the Statute of Frauds under Art. 1403, par. 2 of the Civil Code is misplaced. An agreement for compensation of services rendered is not one of the contracts mentioned in Art. 1403 which must be in writing to be enforceable by action.[3]

The payment of a P5,000.00 monthly salary to the petitioner for his services may not be considered as partial compliance by his employers with the alleged agreement[4] to pay him a commission or percentage of the daily

earnings of their taxi business because, as correctly pointed out by the Solicitor General a salary is different from a commission (Ibid., p. 222). While a salary is a fixed compensation for regular work or for continuous service rendered over a period of time (Moreno's Philippine Law Dictionary, 3rd Ed., p. 852 citing *Lee Tee vs. Ching Chiong*, 17518-R, January 13, 1959), a commission is a percentage or allowance made to a factor or agent for transacting business for another (Supra, p.171 citing *People vs. Sua Bok*, 1 O.G. 689). Thus, before invoking the exception to the Statute of Frauds, petitioner should have proven that he had re-ceived a commission, or part of it, in the past.

Furthermore, as aptly noted by the NLRC, if it were true that there had been an agreement regarding the payment of a 15% commission to him, the petitioner would not have waited almost six (6) years to claim it. Considerable delay in asserting one's right is strongly persuasive of the lack of merit of one's claim (*Quinsay vs. Intermediate Appellate Court*, 195 SCRA 268).

Regarding the Tanongon spouses' allegation in G.R. No. 104523, that the petitioner was never their employee. hence, the NLRC gravely abused its discretion in granting his monetary claims, that allegation raises a factual issue. The finding thereon of the NLRC, in the absence of abuse of discretion, is not only invested with respect, but even with finality, since it is supported by substantial evidence (*Great Pacific Life Assurance Corporation vs. National Labor Relations Commission*, 187 SCRA 694).

As an employee of the Tanongon spouses, was the petitioner entitled to security of tenure? He was Art. 280 of the Labor Code provides:

"Art. 280. Regular and Casual Employment. - The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

"An employment shall be deemed to be casual if it is not covered by the preceding paragraph: Provided, That, any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such actually exists." (Underscoring supplied.)

Petitioner was not a project employee. He was a garage supervisor, liaison man, dispatcher, mechanic and driver, a jack of all trades, doing work that was necessary and desirable in the taxi business of the Tanongon spouses. As such, he was a regular employee entitled to security of tenure (*Tucor Industries Inc. vs. National Labor Relations Commission*, 197 SCRA 296). His employment may be terminated only in accordance with law. Because he was summarily dismissed from his job, he is entitled to reinstatement without loss of seniority and other privileges and to receive three (3) years backwages. In view, however, of the strained relations between the petitioner and the Tanongon spouses (p. 11, Labor Arbiter's Decision. p. 184. Rollo), making his reinstatement no longer advisable nor feasible, petitioner should receive separation pay in addition to three years backwages (*Torillo vs. Leogardo, Jr.*, 197 SCRA 471).

The full backwages claimed by Culla and provided in Section 34 of Republic Act No. 6715, which took effect on March 21, 1989, cannot be granted to him for his summary dismissal occurred on June 11, 1986, three (3) years before R.A. No. 6715 took effect. The new law may not be applied retroactively (*Sealand Service, Inc., vs. NLRC*, 190 SCRA 347; *Lantion vs. NLRC*, 181 SCRA 513).

As petitioner's dismissal was effected without prior notice and investigation of the charges against him, in violation of his right to due process, his employers should indemnify him for damages in the sum of One Thousand Pesos (P1,000.00) pursuant to Rule XIV. Secs. 2, 5 and 6 of the rules implementing Batas Pamban-sa Blg. 130 and the rulings of this Court in *Great Pacific Life Assurance Corporation vs. NLRC*, 187 SCRA 694, 700, *Shoemart, Inc. vs. NLRC*, 176 SCRA 385, and *Wenphil vs. NLRC*, 170 SCRA 69.

WHEREFORE, the assailed decision of the National Labor Relations Commission is MODIFIED by ordering the private respondents, Norberto and Dorothea Tanongon, in G.R. No. 104526 to pay petitioner Ludivico C. Culla damages in the sum of One Thousand Pesos (P1,000.00), in addition to the monetary awards made by the NLRC in his favor, which are hereby AFFIRMED. The petition for certiorari of Arms Taxi and/or Dorothea Tanongon in G.R. No. 104523 is DISMISSED for lack of merit. Costs against Norberto and Dorothea Tanongon.

SO ORDERED.

Cruz, (Chairman), Bellosillo, and Quiason, JJ., concur.

[1] Atty. Alfonso A. Osias for the petitioner; The Solicitor General for public respondents, and Atty. Sisenando R. Villaluz, Jr. and Atty. Narciso Ramirez for private respondents.

[2] Bartolome S. Carale, Presiding Commissioner. He was concurred in by Commissioners Vicente S.E. Veloso III and Romeo B. Putong.

[3] Art. 1403. The following contracts are unenforceable unless they are ratified.

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(2) Those that do not comply with the Statute of Frauds as set forth in this number. In the following cases an agreement hereafter made shall be unenforceable, by action, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement cannot be received without the writing, or a secondary evidence of its contents:

(a) An agreement that by its terms is not to be performed within a year from the making thereof;

(b) A special promise to answer for the debt, default, or miscarriage of another;

(c) An agreement made in consideration of marriage, other than a mutual promise to marry;

(d) An agreement for the sale of goods, chattels or things in action, at a price not less than five hundred pesos unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money: but when a sale is made by auction and entry is made by the auctioneer in his sales book, at the time of the sale, of the amount and kind of property sold, terms of sale, price, names of the purchasers and person on whose account the sale is made, it is a sufficient memorandum;

(e) An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein;

(f) A representation to the credit of a third person.

[4] Denied by the Private Respondents.

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