

LUCITA Q. GARCES, PETITIONER, VS. THE HONORABLE COURT OF APPEALS, SALVADOR EMPEYNADO AND CLAUDIO CONCEPCION, RESPONDENTS.

G.R. No. 114795. July 17, 1996

Ponente: FRANCISCO, J.

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FRANCISCO, J.:

Questioned in this petition for review is the decision[1] of the Court of Appeals[2] (CA), as well as its resolution, which affirmed the decision of the Regional Trial Court[3] (RTC) of Zamboanga del Norte in dismissing a petition for mandamus against a Provincial Election Supervisor and an incumbent Election Registrar.

The undisputed facts are as follows:

Petitioner Lucita Garces was appointed Election Registrar of Gutalac, Zamboanga del Norte on July 27, 1986. She was to replace respondent Election Registrar Claudio Concepcion, who, in turn, was transferred to Liloy, Zamboanga del Norte.[4] Correspondingly approved by the Civil Service Commission,[5] both appointments were to take effect upon assumption of office. Concepcion, however, refused to transfer post as he did not request for it.[6] Garces, on the other hand, was directed by the Office of Assistant Director for Operations to assume the Gutalac post.[7] But she was not able to do so because of a Memorandum issued by respondent Provincial Election Supervisor Salvador Empeynado that prohibited her from assuming office in Gutalac as the same is not vacant.[8]

On February 24, 1987, Garces was directed by the same Office of Assistant Director to defer her assumption of the Gutalac post. On April 15, 1987, she received a letter from the Acting Manager, Finance Service Department, with an enclosed check to cover for the expenses on construction of polling booths. It was addressed "Mrs. Lucita Garces E.R. Gutalac, Zamboanga del Norte" which Garces interpreted to mean as superseding the deferment order.[9] Meanwhile, since respondent Concepcion continued occupying the Gutalac office, the COMELEC en banc cancelled his appointment to Liloy.[10]

On February 26, 1988, Garces filed before the RTC a petition for mandamus with preliminary prohibitory and mandatory injunction and damages against Empeynado[11] and Concepcion, among others. Meantime, the COMELEC en banc through a Resolution dated June 3, 1988, resolved to recognize respondent Concepcion as the Election Registrar of Gutalac,[12] and ordered that the appointments of Garces to Gutalac and of Concepcion to Liloy be cancelled.[13] In view thereof, respondent Empeynado moved to dismiss the petition for mandamus alleging that the same was rendered moot and academic by the said COMELEC Resolution, and that the case is cognizable only by the COMELEC under Sec. 7 Art. IX-A of the 1987 Constitution. The RTC, thereafter, dismissed the petition for mandamus on two grounds, viz., (1) that quo warranto is the proper remedy,[14] and (2) that the "cases" or "matters" referred under the constitution pertain only to those involving the conduct of elections. On appeal, respondent CA affirmed the RTC's dismissal of the case. Hence, this petition.

The issues raised are purely legal. First, is petitioner's action for mandamus proper? And, second, is this case

cognizable by the RTC or by the Supreme Court?

On the first issue, Garces claims that she has a clear legal right to the Gotalac post which was deemed vacated at the time of her appointment and qualification. Garces insists that the vacancy was created by Section 2, Article III of the Provisional Constitution.[15] On the contrary, Concepcion posits that he did not vacate his Gotalac post as he did not accept the transfer to Liloy.

Article III Section 2 of the Provisional Constitution provides:

"All elective and appointive officials and employees under the 1973 Constitution shall continue in office until otherwise provided by proclamation or executive order or upon the designation or appointment and qualification of their successors, if such is made within a period of one year from February 25, 1986." (Italics supplied)

The above organic provision did not require any cause for removal of an appointive official under the 1973 Constitution.[16] The transition period from the old to the new Constitution envisioned an "automatic" vacancy;[17] hence the government is not hard put to prove anything plainly and simply because the Constitution allows it.[18] Mere appointment and qualification of the successor removes an incumbent from his post. Nevertheless, the government in an act of auto-limitation and to prevent indiscriminate dismissal of government personnel issued on May 28, 1986, Executive Order (E.O.) No. 17. This executive order, which applies in this case as it was passed prior to the issuance of Concepcion's transfer order, enumerates five grounds for separation or replacement of elective and appointive officials authorized under Article III, Section 2 of the Provisional Constitution, to wit:

- "1. Existence of a case for summary dismissal pursuant to Section 40 of the Civil Service Law;
2. Existence of the probable cause for violation of the Anti-Graft and Corrupt Practices Act as determined by the Ministry Head concerned;
3. Gross incompetence or inefficiency in the discharge of functions;
4. Misuse of public office for partisan political purposes;
5. Any other analogous ground showing that the incumbent is unfit to remain in the service or his separation/replacement is in the interest of the service."

Not one of these grounds was alleged to exist, much less proven by petitioner when respondent Concepcion was transferred from Gotalac to Liloy. More, Concepcion was transferred without his consent. A transfer requires a prior appointment.[19] If the transfer was made without the consent of the official concerned, it is tantamount to removal without valid cause[20] contrary to the fundamental guarantee on non-removal except for cause.[21] Concepcion's transfer thus becomes legally infirm and without effect for he was not validly terminated. His appointment to the Liloy post, in fact, was incomplete because he did not accept it. Acceptance, it must be emphasized, is indispensable to complete an appointment.[22] Corollarily, Concepcion's post in Gotalac never became vacant. It is a basic precept in the law of public officers that "no person, no matter how qualified and eligible he is for a certain position may be appointed to an office which is not vacant.[23] There can be no appointment to a non-vacant position. The incumbent must first be legally removed, or his appointment validly terminated before one could be validly installed to succeed him. Further, Garces' appointment was ordered to be deferred by the COMELEC. The deferment order, we note, was not unequivocally lifted. Worse, her appointment to Gotalac was even cancelled by the COMELEC en banc.

These factors negate Garces' claim for a well-defined, clear, certain legal right to the Gotalac post. On the contrary, her right to the said office is manifestly doubtful and highly questionable. As correctly ruled by

respondent court, mandamus, which petitioner filed below, will not lie as this remedy applies only where petitioner's right is founded clearly in law and not when it is doubtful.[24] It will not issue to give him something to which he is not clearly and conclusively entitled.[25] Considering that Concepcion continuously occupies the disputed position and exercises the corresponding functions therefore, the proper remedy should have been quo warranto and not mandamus.[26] Quo warranto tests the title to one's office claimed by another and has as its object the ouster of the holder from its enjoyment, while mandamus avails to enforce clear legal duties and not to try disputed titles.[27]

Garces' heavy reliance with the 1964 Tulawie[28] case is misplaced for material and different factual considerations. Unlike in this case, the disputed office of "Assistant Provincial Agriculturist" in the case of Tulawie is clearly vacant and petitioner Tulawie's appointment was confirmed by the higher authorities making his claim to the disputed position clear and certain. Tulawie's petition for mandamus, moreover, was against the Provincial Agriculturist who never claimed title to the contested office. In this case, there was no vacancy in the Gutalac post and petitioner's appointment to which she could base her claim was revoked making her claim uncertain.

Coming now to the second issue.

The jurisdiction of the RTC was challenged by respondent Empeynado[29] contending that this is a "case" or "matter" cognizable by the COMELEC under Sec. 7 Art. IX-A of the 1987 Constitution. The COMELEC resolution cancelling the appointment of Garces as Election Registrar of Gutalac, he argues, should be raised only on certiorari before the Supreme Court and not before the RTC, else the latter court becomes a reviewer of an en banc COMELEC resolution contrary to Sec. 7, Art. IX-A.

The contention is without merit. Sec. 7, Art. IX-A of the Constitution provides:

"Each commission shall decide by a majority vote of all its members any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the commission or by the commission itself. Unless otherwise provided by this constitution or by law, any decision, order, or ruling of each commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof."

This provision is inapplicable as there was no case or matter filed before the COMELEC. On the contrary, it was the COMELEC's resolution that triggered this Controversy. The "case" or "matter" referred to by the constitution must be something within the jurisdiction of the COMELEC, i.e., it must pertain to an election dispute. The settled rule is that "decision, rulings, order" of the COMELEC that may be brought to the Supreme Court on certiorari under Sec. 7 Art. IX-A are those that relate to the COMELEC's exercise of its adjudicatory or quasi-judicial powers[30] involving "elective regional, provincial and city officials." [31] In this case, what is being assailed is the COMELEC's choice of an appointee to occupy the Gutalac Post which is an administrative duty done for the operational set-up of an agency.[32] The controversy involves an appointive, not an elective, official. Hardly can this matter call for the certiorari jurisdiction of the Supreme Court. To rule otherwise would surely burden the Court with trivial administrative questions that are best ventilated before the RTC, a court which the law vests with the power to exercise original jurisdiction over "all cases not within the exclusive jurisdiction of any court, tribunal, person or body exercising judicial or quasi-judicial functions." [33]

WHEREFORE, premises considered, the petition for review is hereby DENIED without prejudice to the filing of the proper action with the appropriate body.

SO ORDERED.

Narvasa, C.J., (Chairman), Davide, Jr., Melo, and Panganiban, JJ., concur.

[1] Promulgated on December 29, 1993. The subsequent Motion for Reconsideration was denied on March 10, 1994.

[2] Thirteenth Division: Ynares-Santiago, J., ponente, Herrera, Ibay-Somera, JJ., concurring.

[3] Regional Trial Court, Sindangan, Zamboanga del Norte, Br. 11.

[4] Rollo, p. 17.

[5] Garces' appointment was approved on October 20, 1986, while that of Concepcion's was on January 23, 1987.

[6] Rollo, p. 18.

[7] Issued on February 4, 1987, Rollo, p. 18.

[8] Rollo, p. 18. The memorandum was dated August 18, 1987 (Petition, p. 5) but the CA said it was August 17, 1987 (CA Decision, p. 4).

[9] Rollo, p. 18.

[10] Rollo, p. 19.

[11] Empeynado retired from service and was succeeded by Atty. Muhamad Hashan.

[12] Comment, p. 2; Rollo, p. 25.

[13] CA Decision, pp. 2, 6; Rollo, pp. 16, 20.

[14] Rollo, p. 19.

[15] Proclamation No. 3, March 25, 1986, Pres. Aquino.

[16] *Radia v. Review Committee Under. E.O. 17*, 157 SCRA 749.

[17] *Ibid.*, pp. 120-121.

[18] *Dario v. Mison*, 176 SCRA 85, 120.

[19] *Palma-Fernandez v. dela Paz*, 160 SCRA 751.

[20] *Ibid.*

[21] Art. IX-B, Sec. 2(3), 1987 Constitution.

[22] *Javier v. Reyes*, 170 SCRA 560.

[23] *Costin v. Quimbo*, 205 Phil. 117.

[24] *University of San Agustin v. C.A.*, 230 SCRA 761; *Tamano v. Manglapus*, 214 SCRA 587; *Sanson v. Bamos*, 63 Phil. 198; *Marcelo v. Tantuico, Jr.*, 142 SCRA 439.

[25] *National Investment Department Authority v. Aquino*, 163 SCRA 153.

[26] *Pilar v. Secretary of Public Works*, 19 SCRA 360.

[27] *Lota v. Court of Appeals*, 112 Phil. 619; 2 SCRA 715.

[28] *Tulawie v. The Provincial Agriculturist of Sulu*, 120 Phil. 595.

[29] Garces claims this issue cannot be raised for the first time on appeal. The records, however, reveal that this was tackled in the court a quo (cited in the CA Decision, p. 3; Rollo, p. 17.)

[30] *Filipinas Engineering & Machine Shop v. Ferrer*, 135 SCRA 25.

[31] Sec. 2(2) Art. IX-C.

[32] *Gloria v. de Guzman*, 249 SCRA 126.

[33] Sec. 19(6) of BP 129 as amended by Sec. 1 of R.A. 7691, otherwise known as the Expanded Jurisdiction Law.

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