MARIO B. DIMAGAN, PETITIONER, VS. DACWORKS UNITED, INCORPORATED AND/OR DEAN A. CANCINO, RESPONDENTS.

G.R. No. 191053. November 28, 2011

Ponente: PERLAS-BERNABE, J.

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PERLAS-BERNABE, J.:

This is a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure assailing the Decision[1] dated July 10, 2009 and the Resolution[2] dated January 22, 2010 rendered by the Court of Appeals (CA) in CA-G.R. SP No. 105771. The CA reversed and set aside the Resolutions[3] of the National Labor Relations Commission (NLRC) dated May 29, 2007 and July 15, 2008 in NLRC NCR CA No. 047312-06/NLRC NCR-00-07-07590-03 finding petitioner Mario B. Dimagan to have been illegally dismissed.

Petitioner Mario B. Dimagan is a stockholder of respondent DACWORKS UNITED, INC., which is engaged in the business of installing, maintaining and repairing airconditioning systems. In July 1997, he started working for respondent company as Officer-in-Charge (OIC) for mechanical installation with a monthly salary of P8,000.00.

Sometime in 2002, petitioner was downgraded from his post as OIC to supervisor. Then, in March of the following year, he was made to work as a mere technician. When he vocally expressed his concerns regarding his assignments, one Loida Aquino, who was in charge of servicing/personnel under the direct supervision of respondent Dean A. Cancino, told him not to report for work anymore. Thereafter, a certain Carlito Diaz, Operations Manager of respondent company, castigated petitioner for not following Aquino's instruction to work as a technician. This prompted petitioner to file a complaint for illegal dismissal, non-payment of overtime pay, holiday pay, service incentive leave and separation pay against respondents.

Respondents denied that petitioner was illegally dismissed arguing that, since April 4, 2003 up to the time of the filing of the complaint, petitioner never reported for work and continuously violated the company policy on absence without official leave (AWOL). They allegedly sent a total of four (4) memoranda for the period August 2002 to March 2003 informing petitioner of his offenses, including being AWOL, but he nonetheless unjustifiably refused to return to work.

In reply, petitioner denied ever receiving any one of the four memoranda allegedly sent by respondents.

On October 28, 2005, the Labor Arbiter rendered a decision4 in favor of petitioner disposing as follows:

> "WHEREFORE, respondents are hereby ordered to reinstate complainant to his former position with full backwages which as of this date has amounted to P240,800.00.
>
> All the other claims are hereby DISMISSED.
>
> SO ORDERED."[5]

In holding that petitioner was illegally dismissed, the Labor Arbiter pointed out that there was no denial by respondents that they relegated petitioner from the position of OIC to supervisor and then to ordinary technician.

The last assignment was meant to humiliate him and deprive him of his dignity as stockholder of the company. Moreover, the immediate filing by petitioner of the complaint for dismissal negated the defense of abandonment interposed by respondents.

On appeal, the NLRC rendered a Resolution[6] dated May 29, 2007 affirming the Labor Arbiter's Decision in toto. It took note of the dearth of evidence to show that petitioner duly received the memoranda allegedly sent by respondents informing him of his suspension from work. In affirming petitioner's constructive dismissal, the NLRC ratiocinated that he was not given overtime pay despite the fact that he frequently worked late nights because he was supposedly a managerial employee. But when respondents started treating him as a rank-and-file employee by making him work as a mere technician, such act of "clear discrimination, insensibility or disdain" became unbearable to petitioner.

Further, the NLRC clarified that the phrase "as of this date" in the decretal portion of the Decision of the Labor Arbiter signified that the computation of petitioner's backwages starts from the date when his compensation was withheld from him until the date of his actual reinstatement, as provided in Article 279 of the Labor Code.

Respondents sought reconsideration[7] of the NLRC's Resolution. However, in his Comment/Opposition8 thereto, petitioner alleged that respondents "rigged, tampered, distorted and perverted" the mailing of their motion for reconsideration to make it appear that it was mailed on the last day for filing thereof, or on June 25, 2007, at the Mayamot Post Office. To prove the same, petitioner submitted a Certification[9] from the postmaster of the Mayamot Post Office, Antipolo City, stating that there was no record of registered mails posted on June 25, 2007 by Atty. Gerardo B. Collado, counsel for the respondents, and addressed to the NLRC and to petitioner's counsel, Atty. Jonathan Polines.

On July 15, 2008, the NLRC issued a Resolution[10] denying respondents' motion for reconsideration for lack of merit without, however, passing judgment on the allegation that respondents manipulated the filing of their motion for reconsideration. The NLRC merely directed respondents to file a comment and/or explanation within five (5) days from receipt of the aforesaid Resolution, to which the latter complied.[11]

Subsequently, respondents filed a petition for certiorari[12] under Rule 65 of the same Rules before the CA. In its challenged Decision[13] dated July 10, 2009, the CA reversed and set aside the Resolutions of the NLRC upon a finding that there was no dismissal of petitioner to speak of, whether actual or constructive, considering the absence of substantial evidence to prove that his services were, in fact, terminated by respondents; or that there was a demotion in rank or a diminution of his salaries, benefits and privileges

With regard to the procedural aspect, the CA held that, since the NLRC did not categorically address the issue on the alleged manipulation in the mailing of respondents' motion for reconsideration even after the required explanation was submitted by the latter, then said motion was considered as timely filed.

Aggrieved, petitioner moved[14] for reconsideration of the CA Decision, but it was denied in the Resolution[15] dated January 22, 2010 for lack of merit. Hence, the instant recourse on the following grounds, to wit:

> "(A)
>
> THE COURT OF APPEALS HAS FAILED IN ITS DUTY TO DETERMINE THAT RESPONDENTS HAVE FAILED TO COMPLY WITH THE REQUIREMENTS ON THE APPROPRIATE SWORN CERTIFICATION ON FORUM-SHOPPING TO BE SUBMITTED TOGETHER WITH THE PETITION FOR CERTIORARI, THAT WOULD CALL FOR THE EXERCISE BY THIS HONORABLE SUPREME COURT OF ITS POWER OF SUPERVISION.
>
> (B)

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THE COURT OF APPEALS HAS FAILED IN ITS DUTY TO DETERMINE THAT RESPONDENTS HAVE VIOLATED THE CERTIFICATION ON NON-FORUM SHOPPING, BY REFUSING AND FAILING TO DISCLOSE THE PENDING INVESTIGATION BEING CONDUCTED BY THE NLRC ON THE RESPONDENTS' MANIPULATION OF THE MAILING OF THEIR MOTION FOR RECONSIDERATION BELOW, THAT WOULD CALL FOR THE EXERCISE BY THIS HONORABLE SUPREME COURT OF ITS POWER OF SUPERVISION.

(C)

THE COURT OF APPEALS GRAVELY ERRED IN DECLARING THAT PETITIONER WAS NOT ILLEGALLY DISMISSED, DESPITE THE EXISTENCE OF EVIDENCE INDICATING THE CONSTRUCTIVE DISMISSAL BY REASON OF CLEAR DISCRIMINATION, INSENSIBILITY OR DISDAIN COMMITTED BY THE EMPLOYER AGAINST THE PETITIONER."[16]

Before delving into the merits of the instant case, the Court shall first resolve petitioner's claim that respondents are guilty of forum shopping having failed to comply with the required form of the certification, as prescribed17 by the Rules of Court, and to disclose the pendency of an investigation being conducted by the NLRC with regard to the allegation of manipulation and/or tampering in the mailing of respondents' motion for reconsideration.

The Court is not convinced.

"Forum shopping exists when a party repetitively avails himself of several judicial remedies in different courts, simultaneously or successively, all substantially founded on the same transactions and the same essential facts and circumstances, and all raising substantially the same issues either pending in, or already resolved adversely by, some other court."[18]

The elements of forum shopping are: (1) identity of parties, or at least such parties as represent the same interests in both actions; (2) identity of rights asserted and reliefs prayed for, the relief being founded on the same set of facts; and (3) the identity of the two preceding particulars, such that any judgment rendered in the other action will, regardless of which party is successful, amount to res judicata in the action under consideration.[19]

There was no confluence of the foregoing elements in the instant case. Records show that when respondents filed their petition for certiorari before the CA, their motion for reconsideration before the NLRC had already been resolved on the merits, and the only incident left for the NLRC to adjudicate was the alleged mail tampering of respondents. The pendency of such investigation, however, is merely incidental, such that its resolution will not amount to res judicata in the petition for certiorari before the CA. Be that as it may, the Court examined the certification on forum shopping[20] attached to respondents' petition for certiorari before the CA, and found the same to have substantially complied with the requirements under the rules.

On the merits, the Court finds petitioner's arguments meritorious.

At the outset, it must be pointed out that the main issue in this case involves a question of fact. It is an established rule that the jurisdiction of the Supreme Court in cases brought before it from the CA via Rule 45 of the 1997 Rules of Civil Procedure is generally limited to reviewing errors of law. This Court is not a trier of facts. In the exercise of its power of review, the findings of fact of the CA are conclusive and binding and consequently, it is not our function to analyze or weigh evidence all over again.[21]

This rule, however, is not ironclad. One of the recognized exceptions is when there is a divergence between the findings of facts of the NLRC and that of the CA,[22] as in this case. There is, therefore, a need to review the records to determine which of them should be preferred as more conformable to evidentiary facts.[23]

After a judicious scrutiny of the records, the allegations of petitioner and the defenses raised by respondents, the

Court cannot sustain the finding of the CA that petitioner was not illegally or constructively dismissed.

Constructive dismissal is defined as a quitting because continued employment is rendered impossible, unreasonable or unlikely; when there is a demotion in rank or a diminution of pay.[24] The test of constructive dismissal is whether a reasonable person in the employee's position would have felt compelled to give up his position under the circumstances. It is an act amounting to dismissal but is made to appear as if it were not. Constructive dismissal is therefore a dismissal in disguise. The law recognizes and resolves this situation in favor of employees in order to protect their rights and interests from the coercive acts of the employer.[25]

As held in the case of Coca-Cola Bottlers Philippines, Inc. vs. Del Villar,[26] the burden falls upon the company to prove that the employee's assignment from one position to another was not tantamount to constructive dismissal. In the case at bar, respondents failed to discharge said burden. In fact, respondents never even disputed that petitioner was relegated from the position of OIC to supervisor and, subsequently, to an ordinary technician. Clearly, the reduction in petitioner's responsibilities and duties, particularly from supervisor to ordinary technician, constituted a demotion in rank tantamount to constructive dismissal.

Thus, contrary to the position of the CA, it is of no consequence that petitioner failed to substantiate his allegation that Loida Aquino, an employee of respondent company, informed him that he will be working as an ordinary technician, and that when he openly voiced out his concern regarding the transfer, he was told not to report for work anymore. As with all the other allegations made by petitioner, respondents never disputed or rebutted this fact.

Similarly, We cannot concur with the finding of the CA that it was petitioner who abandoned his employment by failing to report for work or having gone AWOL.

“Abandonment is the deliberate and unjustified refusal of an employee to resume his employment.”[27] To constitute abandonment of work, two elements must concur: “(1) the employee must have failed to report for work or must have been absent without valid or justifiable reason; and (2) there must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.”[28] The employer bears the burden of proof to show the deliberate and unjustified refusal of the employee to resume his employment without any intention of returning.[29]

In the case of Hodieng Concrete Products, Inc. v. Emilia[30], citing Samarca v. Arc-Men Industries, Inc.[31], the Court has ruled thus:

> “x x x. Absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore. And the burden of proof to show that there was unjustified refusal to go back to work rests on the employer.
>
> x x x
>
> Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts. To constitute abandonment, there must be clear proof of deliberate and unjustified intent to sever the employer-employee relationship. Clearly, the operative act is still the employee’s ultimate act of putting an end to his employment.
>
> Settled is the rule that mere absence or failure to report for work is not tantamount to abandonment of work. x x x.” (Emphasis supplied)

In this case, petitioner's failure to report for work was caused by the unwarranted demotion in rank that was imposed upon him by respondents, not by any intention to sever employment ties with them. And his filing of the instant complaint for illegal dismissal indubitably negates the allegation of abandonment. Had petitioner intended

to forsake his job, then he would not have found it necessary to institute this case against respondents.

In sum, the CA committed reversible error when it held that petitioner was not illegally or constructively dismissed. With respect to the investigation being conducted by the NLRC regarding the alleged tampering and/or manipulation of the mailing of respondents' motion for reconsideration filed before it, the Court no longer finds it necessary to pass upon the same.

WHEREFORE, the instant petition is GRANTED. The assailed Decision and Resolution of the CA are SET ASIDE. The Resolutions of the NLRC affirming the Decision of the Labor Arbiter are REINSTATED. Petitioner is entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits computed from the time his compensation was withheld from him or on April 4, 2003, up to the time of his actual reinstatement, in accordance with Article 27932 of the Labor Code.

SO ORDERED.

Velasco, Jr., (Chairperson), Peralta, Abad, and Mendoza, JJ., concur.

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[1] Rollo, pp. 35-47.

[2] Id., pp. 67-71.

[3] Id., pp. 145-149, 151-153.

[4] Id., Annex “E”, pp. 73-77.

[5] Id., pp. 76-77.

[6] Id., Annex “F”, pp. 79-83.

[7] Id., Annex “G”, pp. 84-104.

[8] Id., Annex “H”, pp. 107-113.

[9] Id., p. 117.

[10] Id., Annex “I”, pp. 121-123.

[11] Id., Exhibit “2”, pp. 208-215.

[12] Id., Annex “J”, pp. 124-139.

[13] Supra note 1.

[14] Rollo, Annex “B”, pp. 48-55.

[15] Supra note 2.

[16] Petition, rollo, p. 18.

[17] SEC. 5, Rule 7. Certification against forum shopping. - The plaintiff or principal party shall certify under oath in the complaint or initiatory pleading asserting a claim for relief, or in a sworn certification annexed thereto and simultaneously filed therewith: (a) that he has not theretofore commenced any action or filed any claim involving the same issues in any court, tribunal or quasi-judicial agency and, to the best of his knowledge, no such other action or claim is pending therein; (b) if there is such other pending action or claim, a complete statement of the present status thereof; and (c) if he should thereafter learn that the same or similar action or claim has been

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filed or is pending, he shall report that fact within five (5) days therefrom to the court wherein his aforesaid complaint or initiatory pleading has been filed.

x x x

[18] Feliciano v. Villasin, G.R. No. 174929, June 27, 2008, 556 SCRA 348.

[19] Id.

[20] Rollo, p. 139.

[21] Sugue, et. al. v. Triumph International (Phils.), Inc., G.R. No. 164804, January 30, 2009, 556 SCRA 323.

[22] Id.

[23] Philippine American Life Gen. Insurance Co. v. Gramaje, G.R. No. 156963, November 11, 2004, 442 SCRA 274.

[24] Norkis Trading Co. Inc. v. Gnilo, G.R. No. 159730, February 11, 2008, 544 SCRA 279.

[25] CRC Agricultural Trading v. NLRC, G.R. No. 177664, December 23, 2009, 609 SCRA 138.

[26] G.R. No. 163091, October 06, 2010, 632 SCRA 293.

[27] Exodus International Construction Corporation v. Biscocho, et. al., G.R. No. 166109, February 23, 2011.

[28] Id.

[29] Id.

[30] G.R. No. 149180, February 14, 2005, 451 SCRA 249.

[31] G.R. No. 146118, October 8, 2003, 413 SCRA 162.

[32] “ART. 279. Security of Tenure. – In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or other monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.”

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