

MAMERTO S. BESA, DOING BUSINESS UNDER THE NAME AND STYLE OF BESA'S CUSTOMBUILT SHOES, PETITIONER, VS. THE HONORABLE CRESENCIANO B. TRAJANO, DIRECTOR OF THE BUREAU OF LABOR RELAT...

G.R. No. 72409. December 29, 1986

Ponente: PARAS J.

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PARAS J.:

This petition questions the decision of the Director of the Bureau of Labor Relations in BLR Case No. A-8-165-85, which affirmed the appealed order of the Med-Arbiter, Labor Relations Division, NCR in NCR--LRD-M-1-044-85, a certification election case. More specifically, petitioner seeks the resolution of the question as to whether or not an employer-employee relationship exists between herein petitioner and the seventeen (17) shoeshiners-members of the respondent union, who, if the relationship does exist, should be entitled to the rights, privileges and benefits of an employee as provided in the Labor Code.

Sometime in January, 1985, private respondent Kaisahan ng Manggagawang Pilipino (KAMPIL, for short) a legitimate labor union duly registered with the Ministry of Labor and Employment (MOLE, for short), filed a Petition for Certification Election, docketed as NCR-LRD-M-1-044-85 in the National Labor Relations Division of the National Capital Region. Petitioner opposed it alleging that -

- "1. There is no employer-employee relationship between Besa's and the petitioners-signatories to the petition;
- "2. The subject of the present petition had previously been decided by the defunct Court of Industrial Relations, and is therefore barred under the principle of res judicata;
- "3. The petition fails to comply with the mandatory formal requirements under Sec. 2, Rule V, Book V, of the Omnibus Rules Implementing the Labor Code; and
- "4. This Hon. Commission has no jurisdiction over the subject matter and parties to the petition."

Acting on the Petition, the Opposition thereto, and the Reply to the Opposition, the Med-Arbiter on June 27, 1985, issued an order declaring that there was an employer-employee relationship between the parties and directed that an election be conducted.

Petitioner appealed the order to the Director of BLR, citing among others the following reasons -

- "1. That the subject of the present petition has previously been decided by the defunct Court of Industrial Relations, and is therefore barred under the principle of res judicata (CIR Case Nos. 2783, 2751 and 2949 ULP, December 21, 1965);
- "2. That on May 28, 1985, Director Severo Pucan of the Ministry of Labor and Employment, in dismissing the case for underpayment of commissions and non-payment of ECOLA, filed by the shoeshiners against Besa's Custombuilt Shoes, for lack of jurisdiction, declared that there was no employer-employee relationship

between the shoeshiners and petitioner Besa's (Order in NCR-LSED-1-020-85);

"Director Pucan's findings were based on a letter-opinion of the Director of the Bureau of Working Conditions of the MOLE (Annex "B-2", Petition for Certiorari). The legal ground therein cited was *res judicata*.

xxx xxx xxx"

Appeal was dismissed by the Director of BLR as contained in his decision dated Sept. 27, 1985 upholding the finding of the Med-Arbiter that supervisors were appointed to oversee the bootblacks' performance. It declared that such is a finding of fact that is entitled to respect and that *res judicata* does not lie as the parties and the causes of action in the certification election case are different from the parties and causes of action in CIR Cases Nos. 2783-ULP 2751-ULP and 2949 ULP.

Thus the Petition of the Union (KAMPIL) before the Med-Arbiter for the holding of the certification election was granted. While the pre-election conference was in progress, petitioner herein (BESA'S) filed with Us this petition for certiorari with Prohibition and simultaneously filed with the Med-Arbiter a motion to suspend the pre-election conference. The petition filed before Us was dismissed for lack of merit but was reconsidered upon Motion of petitioner. In its Motion for Reconsideration, petitioner raised the following grounds:

I

THE INSTANT PETITION PRESENTS QUESTIONS OF LAW AND SUBSTANCE TO MERIT THE CONSIDERATION OF THIS HONORABLE COURT.

II

THE QUESTIONED DECISION OF THE RESPONDENT DIRECTOR WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE SAME IS PURELY BASED ON SPECULATIONS, SURMISES AND CONJECTURES.

III

THE QUESTIONED DECISION OF THE RESPONDENT DIRECTOR IS CONTRARY TO LAW AND APPLICABLE DECISIONS OF THE SUPREME COURT ON THE MATTER.

IV

THE PETITION FOR CERTIFICATION ELECTION FILED BY RESPONDENT UNION WITH THE MINISTRY OF LABOR AND EMPLOYMENT FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS UNDER ARTICLE 258 OF THE LABOR CODE, AS AMENDED, AND ITS IMPLEMENTING RULES.

V

THE RESPONDENT DIRECTOR ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION IN DECIDING THAT THERE EXISTS AN EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN THE PETITIONER AND THE SHOESHINER-MEMBERS OF THE RESPONDENT UNION.

VI

THE RESPONDENT DIRECTOR ACTED WITHOUT JURISDICTION IN TAKING COGNIZANCE OF THE BASIC PETITION CONSIDERING THAT THE SUBJECT MATTER AND THE PARTIES THEREOF HAVE BEEN DECIDED BY THE DEFUNCT COURT OF INDUSTRIAL RELATIONS AND IS

THEREFORE BARRED BY THE PRINCIPLE OF RES ADJUDICATA.

The main thrust of the instant petition is the question of employer-employee relationship between petitioner BESA'S and 17 of the members of the herein respondent Union who are designated as shoeshiners. During the certification election held on Nov. 26, 1985 at BESA'S, of the 53 eligible voters, 49 cast their votes. 33 voted for the union while 16 voted for no union. Among the 33 voters who opted for a union 17 persons are shoeshiners while 16 persons are non-shoeshiners.

The question of employer-employee relationship became a primordial consideration in resolving whether or not the subject shoeshiners have the juridical personality and standing to present a petition for certification election as well as to vote therein. It is the position of petitioner that if the shoeshiners are not considered as employees of BESA'S the basic petition for certification election must necessarily be dismissed for failure to comply with the mandatory requirements of the Labor Code, as amended, that at least thirty (30%) percent of the employees must support the petition for certification election and that in order to be certified as the sole and exclusive bargaining agent, the union must have obtained a majority of the valid votes cast by eligible voters. In the instant case, if the 17 shoeshiners are declared ineligible and their votes are consequently nullified the result of the certification election would be 16 "Yes" votes (33 minus 17) and 16 "No" votes, which is a tie. Since the respondent union did not obtain a clear majority for the "Yes" votes as required under Rule IV Sec. 8(f), of the Omnibus Rules of the Labor Code, it necessarily follows that the respondent union cannot be certified as the sole and exclusive bargaining agent of the workers of BESA'S.

The present petition merits Our consideration. The records of the case reveal that an employer-employee relationship does not exist between the 17 shoeshiners and petitioner.

Be it noted that the defunct CIR in dismissing the cases for unfair labor practice filed by the shoeshiners against herein petitioner BESA declared in its Decision dated December 21, 1965 that:

"The shoe shiner is distinct from a piece worker because while the latter is paid for work accomplished, he does not, however, contribute anything to the capital of the employer other than his service. It is the employer of the piece worker who pays his wages, while the shoe shiner in this instance is paid directly by his customer. The piece worker is paid for work accomplished without regard or concern to the profit as derived by his employer, but in the case of the shoe shiners, the proceeds derived from the trade are always divided share and share alike with respondent BESA. The shoe shiner can take his share of the proceeds everyday if he wanted to or weekly as is the practice of BESA'S. The employer of the piece worker supervises and controls his work, but in the case of the shoe shiner, respondent BESA does not exercise any degree of control or supervision over their person and their work. All these are not obtaining in the case of a piece worker as he is in fact an employee in contemplation of law, distinct from the shoe shiner in this instance who, in relation to respondent Mamerto B. BESA, is a partner in the trade. Consequently, employer-employee relationship between members of the Petitioning union and respondent Mamerto B. BESA being absent, the latter could not be held guilty of the unfair labor practice acts imputed against him."

(p. 6, Annex "B-1", of said Decision).

Then too on Dec. 27, 1983, then Director Augusto Sanchez of the Bureau of Working Conditions, MOLE, in response to a letter of petitioner relative to the implementation of wage Order No. 2 which provided for an increase both in minimum wage and cost of living allowance, opined as follows:

"Entitlement of the minimum requirements of the law particularly on wages and allowances presupposes the existence of employer-employee relationship which is determined by the concurrence of the following conditions:

- right to hire

- payment of wages
- right to fire; and
- control and supervision

The most important condition to be considered is the exercise of control and supervision over the employees, per our conversation, the persons concerned under your query are the shoe shiners and based on the decision rendered by Associate Judge Emiliano Tabigne of the defunct Court of Industrial Relations, these shoe shiners are not employees of the company, but are partners instead. This is due to the fact that the owner/ manager does not exercise control and supervision over the shoe shiners. That the shiners have their own customers from whom they charge the fee and divide the proceeds equally with the owner, which make the owner categorized them as on purely commission basis. The attendant circumstances clearly show that there is no employer-employee relationship existing, and such, the owner/manager is not by law, under obligation to extend to those on purely commission basis the benefit of Wage Order No. 2. However, the law does not preclude the employer in giving such benefit to all its employees including those which may not be covered by the mandate of the law."

(Letter dated December 27, 1985 addressed to petitioner Annex "B-2", Petition)

The Office of the Solicitor General as counsel for public respondent agrees that in the present case, no employer-employee relationship exists.

The Supreme Court in the Rosario Brothers case ruled that;

"A basic factor underlying the exercise of rights under the Labor Code is the status of employment. It is important in the determination of who shall be included in a proposed bargaining unit because it is sine qua non. The fundamental and essential condition that a bargaining unit be composed of employees. Failure to establish this juridical relationship between the union members and the employer affects the legality of the union itself. It means the ineligibility of the union members to present a petition for certification election as well as to vote therein."

"Existence of employer-employee relationship is determined by the following elements, namely, a] selection and engagement of the employee b] payment of wages; c] powers of dismissal; and d] power to control the employee's conduct although the latter is the most important element (Rosario Brothers Inc. vs. Ople, 131 CRA 72, 1984)"

WHEREFORE, judgment is hereby rendered giving due course to the Petition and declaring VOID the decision of the Director of the Bureau of Labor Relations dated September 27, 1985. The Petition in BLR Case No. A-8-165-85) (NCR-LRD-M-1-044-85) is therefore hereby DISMISSED.

SO ORDERED.

Feria, (Chairman), Fernan, Alampay, and Gutierrez, Jr., concur.

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