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THIRD DIVISION

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

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

D E C I S I O N

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)

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