436 Phil. 190

SECOND DIVISION

[G.R. No. 151228, August 15, 2002]

ROLANDO Y. TAN, PETITIONER, VS. LEOVIGILDO LAGRAMA AND THE HONORABLE COURT OF APPEALS, RESPONDENTS.

D E C I S I O N

MENDOZA, J.:

This is a petition for review on certiorari of the decision,[1] dated May 31, 2001, and the resolution,[2] dated November 27, 2001, of the Court of Appeals in C.A.-G.R. SP. No. 63160, annulling the resolutions of the National Labor Relations Commission (NLRC) and reinstating the ruling of the Labor Arbiter which found petitioner Rolando Tan guilty of illegally dismissing private respondent Leovigildo Lagrama and ordering him to pay the latter the amount of P136,849.99 by way of separation pay, backwages, and damages.

The following are the facts.

Petitioner Rolando Tan is the president of Supreme Theater Corporation and the general manager of Crown and Empire Theaters in Butuan City. Private respondent Leovigildo Lagrama is a painter, making ad billboards and murals for the motion pictures shown at the Empress, Supreme, and Crown Theaters for more than 10 years, from September 1, 1988 to October 17, 1998.

On October 17, 1998, private respondent Lagrama was summoned by Tan and upbraided: "*Nangihi na naman ka sulod sa imong drawinganan.*" ("You again urinated inside your work area.") When Lagrama asked what Tan was saying, Tan told him, "*Ayaw daghang estorya. Dili ko gusto nga mo-drawing ka pa. Guikan karon, wala nay drawing. Gawas*." ("Don't say anything further. I don't want you to draw anymore. From now on, no more drawing. Get out.")

Lagrama denied the charge against him. He claimed that he was not the only one who entered the drawing area and that, even if the charge was true, it was a minor infraction to warrant his dismissal. However, everytime he spoke, Tan shouted "*Gawas*" ("Get out"), leaving him with no other choice but to leave the premises.

Lagrama filed a complaint with the Sub-Regional Arbitration Branch No. X of the National Labor Relations Commission (NLRC) in Butuan City. He alleged that he had been illegally dismissed and sought reinvestigation and payment of 13th month pay, service incentive leave pay, salary differential, and damages.

Petitioner Tan denied that Lagrama was his employee. He asserted that Lagrama was an independent contractor who did his work according to his methods, while he (petitioner) was only interested in the result thereof. He cited the admission of Lagrama during the conferences before the Labor Arbiter that he was paid on a fixed piece-work basis, i.e., that he was paid for every painting turned out as ad billboard or mural for the pictures shown in the three theaters, on the basis of a "no

mural/billboard drawn, no pay" policy. He submitted the affidavits of other cinema owners, an amusement park owner, and those supervising the construction of a church to prove that the services of Lagrama were contracted by them. He denied having dismissed Lagrama and alleged that it was the latter who refused to paint for him after he was scolded for his habits.

As no amicable settlement had been reached, Labor Arbiter Rogelio P. Legaspi directed the parties to file their position papers. On June 17, 1999, he rendered a decision, the dispositive portion of which reads:

> WHEREFORE, premises considered judgment is hereby ordered:
>
> 1. Declaring complainant's [Lagrama's] dismissal illegal and
> 2. Ordering respondents [Tan] to pay complainant the following:
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> | | | |
> |---|---|---|
> | A. Separation Pay | - | P 59,000.00 |
> | B. Backwages (from 17 October 1998 to 17 June 1999) | - | 47,200.00 |
> | C. 13th month pay (3 years) | - | 17,700.00 |
> | D. Service Incentive Leave Pay (3 years) | - | 2, 949.99 |
> | E. Damages | - | 10,000.00 |
> | TOTAL | | [P136,849.99] |
>
> Complainant's other claims are dismissed for lack of merit.[3]

Petitioner Rolando Tan appealed to the NLRC Fifth Division, Cagayan de Oro City, which, on June 30, 2000, rendered a decision[4] finding Lagrama to be an independent contractor, and for this reason reversing the decision of the Labor Arbiter.

Respondent Lagrama filed a motion for reconsideration, but it was denied for lack of merit by the NLRC in a resolution of September 29, 2000. He then filed a petition for certiorari under Rule 65 before the Court of Appeals.

The Court of Appeals found that petitioner exercised control over Lagrama's work by dictating the time when Lagrama should submit his billboards and murals and setting rules on the use of the work area and rest room. Although it found that Lagrama did work for other cinema owners, the appeals court held it to be a mere sideline insufficient to prove that he was not an employee of Tan. The appeals court also found no evidence of any intention on the part of Lagrama to leave his job or sever his employment relationship with Tan. Accordingly, on May 31, 2001, the Court of Appeals rendered a decision, the dispositive portion of which reads:

> IN THE LIGHT OF ALL THE FOREGOING, the Petition is hereby GRANTED. The Resolutions of the Public Respondent issued on June 30, 2000 and September 29, 2000 are ANNULLED. The Decision of the Honorable Labor Arbiter Rogelio P. Legaspi on June 17, 1999 is hereby REINSTATED.

Petitioner moved for a reconsideration, but the Court of Appeals found no reason to reverse its decision and so denied his motion for lack of merit.[5] Hence, this petition for review on certiorari based on the following assignments of errors:

> I. With all due respect, the decision of respondent Court of Appeals in CA-G.R. SP NO. 63160 is bereft of any finding that Public Respondent NLRC, 5th Division, had no jurisdiction or exceeded it or otherwise gravely abused its discretion in its Resolution of 30 June 2000 in NLRC CA-NO. M-004950-99.
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> II. With all due respect, respondent Court of Appeals, absent any positive finding on its part that the Resolution of 30 June 2000 of the NLRC is not supported by substantial evidence, is without authority to substitute its conclusion for that of said NLRC.
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> III. With all due respect, respondent Court of Appeals' discourse on "freelance artists and painters" in the decision in question is misplaced or has no factual or legal basis in the record.
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> IV. With all due respect, respondent Court of Appeals' opening statement in its decision as to "employment," "monthly salary of P1,475.00" and "work schedule from Monday to Saturday, from 8:00 o'clock in the morning up to 5:00 o'clock in the afternoon" as "facts" is not supported by the evidence on record.
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> V. With all due respect, the case of *Lambo, et al., v. NLRC, et al.,* 317 SCRA 420 [G.R. No. 111042 October 26, 1999] relied upon by respondent Court of Appeals is not applicable to the peculiar circumstances of this case.[6]

The issues raised boil down to whether or not an employer-employee relationship existed between petitioner and private respondent, and whether petitioner is guilty of illegally dismissing private respondent. We find the answers to these issues to be in the affirmative.

I.

In determining whether there is an employer-employee relationship, we have applied a "four-fold test," to wit: (1) whether the alleged employer has the power of selection and engagement of employees; (2) whether he has control of the employee with respect to the means and methods by which work is to be accomplished; (3) whether he has the power to dismiss; and (4) whether the employee was paid wages.[7] These elements of the employer-employee relationship are present in this case.

First. The existence in this case of the first element is undisputed. It was petitioner who engaged the services of Lagrama without the intervention of a third party. It is the existence of the second element, the power of control, that requires discussion here.

Of the four elements of the employer-employee relationship, the "control test" is the most important. Compared to an employee, an independent contractor is one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under its own responsibility according to its own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof.[8] Hence, while an independent contractor enjoys independence and freedom from the control and supervision of his principal, an employee is subject to the employer's power to control the means and methods by which the employee's work is to be performed and accomplished.

In the case at bar, albeit petitioner Tan claims that private respondent Lagrama was an independent contractor and never his employee, the evidence shows that the latter performed his work as painter under the supervision and control of petitioner. Lagrama worked in a designated work area inside the Crown Theater of petitioner, for the use of which petitioner prescribed rules. The rules included the observance of cleanliness and hygiene and a prohibition against urinating in the work area and any place other than the toilet or the rest rooms.[9] Petitioner's control over Lagrama's work extended not only to the use of the work area, but also to the result of Lagrama's work, and the manner and means by which the work was to be accomplished.

Moreover, it would appear that petitioner not only provided the workplace, but supplied as well the materials used for the paintings, because he admitted that he paid Lagrama only for the latter's services.[10]

Private respondent Lagrama claimed that he worked daily, from 8 o'clock in the morning to 5 o'clock in the afternoon. Petitioner disputed this allegation and maintained that he paid Lagrama P1,475.00 per week for the murals for the three theaters which the latter usually finished in 3 to 4 days in one week.[11] Even assuming this to be true, the fact that Lagrama worked for at least 3 to 4 days a week proves regularity in his employment by petitioner.

Second. That petitioner had the right to hire and fire was admitted by him in his position paper submitted to the NLRC, the pertinent portions of which stated:

> Complainant did not know how to use the available comfort rooms or toilets in and about his work premises. He was urinating right at the place where he was working when it was so easy for him, as everybody else did and had he only wanted to, to go to the comfort rooms. But no, the complainant had to make a virtual urinal out of his work place! The place then stunk to high heavens, naturally, to the consternation of respondents and everyone who could smell the malodor.
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> . . .
>
> Given such circumstances, the respondents had every right, nay all the compelling reason, to fire him from his painting job upon discovery and his admission of such acts. Nonetheless, though thoroughly scolded, he was not fired. It was he who stopped to paint for respondents.[12]

By stating that he had the right to fire Lagrama, petitioner in effect acknowledged Lagrama to be his employee. For the right to hire and fire is another important