FIRST DIVISION

[G.R. No. 140364. August 15, 2000]

ACE NAVIGATION CO., INC. and/or CONNING SHIPPING LTD., *petitioners, vs.* COURT OF APPEALS (THIRTEENTH DIVISION), NATIONAL LABOR RELATIONS COMMISSION (FIRST DIVISION) and ORLANDO ALONSAGAY, *respondents*.

D E C I S I O N

PUNO, *J.*:

This is a petition for review of the resolutions[1] of the Court of Appeals[2] that dismissed the petition for *certiorari* filed by petitioners and which denied their motion for reconsideration, respectively.

First, the facts.

In June 1994, Ace Navigation Co., Inc. (Ace Nav) recruited private respondent Orlando Alonsagay to work as a bartender on board the vessel M/V "Orient Express" owned by its principal, Conning Shipping Ltd. (Conning). Under their POEA approved contract of employment, Orlando shall receive a monthly basic salary of four hundred fifty U.S. dollars (U.S. $450.00), flat rate, including overtime pay for 12 hours of work daily plus tips of two U.S. dollars (U.S. $2.00) per passenger per day. He, was also entitled to 2.5 days of vacation leave with pay each month. The contract was to last for one (1) year.

Petitioners alleged that on June 13, 1994, Orlando was deployed and boarded M/V "Orient Express" at the seaport of Hong Kong. After the expiration of the contract on June 13, 1995, Orlando returned to the Philippines and demanded from Ace Nav his vacation leave pay. Ace Nav did not pay him immediately. It told him that he should have been paid prior to his disembarkation and repatriation to the Philippines. Moreover, Conning did not remit any amount for his vacation leave pay. Ace Nav, however, promised to verify the matter and asked Orlando to return after a few days. Orlando never returned.

On November 25, 1995, Orlando filed a complaint[3] before the labor arbiter for vacation leave pay of four hundred fifty U.S. dollars (U.S. $450.00) and unpaid tips amounting to thirty six, thousand U.S. dollars (U.S.

$36,000.00).[4] On November 15, 1996, Labor Arbiter Felipe P. Pati ordered Ace Nav and Conning to pay jointly and severally Orlando his vacation leave pay of US$450.00. The claim for tips of Orlando was dismissed for lack of merit.[5]

Orlando appealed[6] to the National Labor Relations Commission (NLRC) on February 3, 1997. In a decision[7] promulgated on November 26, 1997, the NLRC ordered Ace Nav and Conning to pay the unpaid tips of Orlando which amounted to US$36,000.00 in addition to his vacation leave pay. Ace Nav and Conning filed a motion for reconsideration on February 2, 1998 which was denied on May 20, 1999.[8]

On July 2, 1999, Ace Nav and Conning filed a petition for *certiorari* before the Court of Appeals to annul the decision of the NLRC. On July 28, 1999, the Court of Appeals promulgated a three-page resolution[9] dismissing the petition. Their motion for reconsideration filed on September 8, 1999 was denied on October 8, 1999. Hence this appeal.

In assailing the dismissal of their petition on technical grounds, petitioners argued that the Court of Appeals erred in rigidly and technically applying Section 13, Rule 13[10] and Section 1, Rule 65[11] of the 1997 Rules of Civil Procedure.[12] They also contend that the respondent court erred in ruling that they are the ones liable to pay tips to Orlando. They point out that if tips will be considered as part of the salary of Orlando, it will make him the highest paid employee on M/V "Orient Express." The ship captain, the highest ranking officer, receives U.S.$3,000.00 per month without tips. Orlando, who is a bartender, will receive U.S.$3,450.00 per month. Allegedly, this will compel foreign ship owners to desist from hiring Filipino bartenders**.** It will create an unfavorable precedent detrimental to the future recruitment, hiring and deployment of Filipino overseas workers specially in service oriented businesses. It will also be a case of double compensation that will unjustly enrich Orlando at the expense of petitioners. They also stress that Orlando never complained that they should pay him the said tips.

Respondent filed a two-page comment to the petition adopting the resolution of the Court of Appeals dated July 28, 1999.

We find merit in the petition.

Rules of procedure are used to help secure and not override substantial justice.[13] Even the Rules of Court mandates a liberal construction in order to promote their objective of securing **a just**, speedy and inexpensive disposition of every action and proceeding.[14] Since rules of procedure are mere tools designed to facilitate the attainment of justice, their strict and rigid application which would result in technicalities that tend to frustrate rather than promote substantial justice must always be avoided.[15] Thus, the dismissal of an appeal on purely technical ground is frowned upon especially if it will result to unfairness.

We apply these sound rules in the case at bar. Petitioners' petition for *certiorari* before the Court of Appeals contained the certified true copy of the

NLRC's decision dated November 26, 1997,[16] its order dated May 2, 1999[17] and the sworn certification of non-forum shopping.[18] Petitioners also explained that their counsel executed an affidavit of proof of service and explanation in the afternoon of July 1, 1999. However, he forgot to attach it when he filed their petition the following day because of the volume and pressure of work and lack of office personnel. However, the Registry Receipt,[19] which is the proof of mailing to Orlando's counsel, issued by the Central Post Office was attached on the original petition they filed with the respondent court. It was also stamped[20] by the NLRC which is proof of receipt of the petition by the latter. The affidavit of service, which was originally omitted, was attached on their motion for reconsideration.[21] Significantly, it was dated July 1, 1999. In view of the surrounding circumstances, the subsequent filing of the affidavit of service may be considered as substantial compliance with the rules.

We now come to the merits of the case. The issue is whether petitioners are liable to pay the tips to Orlando.

The word [tip] has several meanings, with origins more or less obscure, connected with "tap" and with "top." In the sense of a sum of money given for good service, other languages are more specific, e.g., Fr. pourboire, for drink. It is suggested that [the word] is formed from the practice, in early 18th c. London coffeehouses, of having a box in which persons in a hurry would drop a small coin, to gain immediate attention. The box was labelled To Insure Promptness; then just with the initials T.I.P.[22]

It is more frequently used to indicate additional compensation, and in this sense "tip" is defined as meaning a gratuity; a gift; a present; a fee; money given, as to a servant to secure better or more prompt service. A tip may range from pure gift out of benevolence or friendship, to a compensation for a service measured by its supposed value but not fixed by an agreement, although usually the word is applied to what is paid to a servant in addition to the regular compensation for his service in order to secure better service or in recognition of it. It has been said that a tip denotes a voluntary act, but it also has been said that from the very beginning of the practice of tipping it was evident that, whether considered from the standpoint of the giver or the recipient, a tip lacked the essential element of a gift, namely, the free bestowing of a gratuity without a consideration, and that, despite its apparent voluntariness, there is an element of compulsion in tipping.[23]

Tipping is done to get the attention and secure the immediate services of a waiter, porter or others for their services. Since a tip is considered a pure gift out of benevolence or friendship, it can not be demanded from the customer. Whether or not tips will be given is dependent on the will and generosity of the giver. Although a customer may give a tip as a consideration for services rendered, its value still depends on the giver. They are given in addition to the compensation by the employer. A gratuity given by an employer in order to inspire the employee to exert more effort in his work is more appropriately called a bonus.

The NLRC and the Court of Appeals held that petitioners were liable to pay tips to Orlando because of the contract of employment. Thus:

"The contract of employment entered into by and between the complainant and Ace Navigation Co., Inc. (p. 82, Record) clearly provides xxx:

'That the employee shall be employed on board under the following terms and conditions:

1.1 Duration of Contract: (12 months) 10 months remaining duration of contract

1.2 Position: Bartender

1.3 Basic Monthly Salary: U.S.$450.00 Flat rate including overtime pay for

1.4 Hours of Work: 12 hrs. work daily.

1.5 Overtime: Plus tips of U.S.$2.00 per passenger per day.

1.6 Vacation Leave with Pay: 2.5 days/mo.' (record, p. 82)

"The record of this case shows that the respondent, in the Contract of Employment xxx undertook to pay to complainant 'tips of U.S.$2.00 per passenger per day.' Yet, there is no showing that the said undertaking was complied with by the respondents.

"It was thus a serious error on the part of the Labor Arbiter to rule that the tips were already paid, much less to rule that said tips were directly paid to the crew of M/V "ORIENT PRINCESS." With Article 4 of the Labor Code reminding us that doubts should be resolved in favor of labor, we all the more find it compelling to rule that the complainant is still entitled to the contractually covenanted sum of US$36,000.00. xxx."

We disagree. The contract of employment between petitioners and Orlando is categorical that the monthly salary of Orlando is US$450.00 **flat rate.** This already included his overtime pay which is integrated in his 12 hours of work. The words "plus tips of US$2.00 per passenger per day" were written at the line for overtime. Since payment for overtime was included in the monthly salary of Orlando, the supposed tips mentioned in the contract should be deemed included thereat.

The actuations of Orlando during his employment also show that he was aware his monthly salary is only US$450.00, no more no less. He did not raise

any complaint about the non-payment of his tips during the entire duration of his employment. After the expiration of his contract, he demanded payment only of his vacation leave pay. He did not immediately seek the payment of tips. He only asked for the payment of tips when he filed this case before the labor arbiter. This shows that the alleged non-payment of tips was a mere afterthought to bloat up his claim. The records of the case do not show that Orlando was deprived of any monthly salary. It will now be unjust to impose a burden on the employer who performed the contract in good faith.

Furthermore, it is presumed that the parties were aware of the plain, ordinary and common meaning of the word "tip." As a bartender, Orlando can not feign ignorance on the practice of tipping and that tips are normally paid by customers and not by the employer.

It is also absurd that petitioners intended to give Orlando a salary higher than that of the ship captain. As petitioners point out, the captain of M/V "Orient Princess" receives US$3,000.00 per month while Orlando will receive US$3,450.00 per month if the tip of US$2.00 per passenger per day will be given in addition to his US$450.00 monthly salary. It will be against common sense for an employer to give a lower ranked employee a higher compensation than an employee who holds the highest position in an enterprise.

However, Orlando should be paid his vacation leave pay. Petitioners denied this liability by raising the defense that the usual practice is that vacation leave pay is given before repatriation. But as the labor arbiter correctly observed, petitioners did not present any evidence to prove that they already paid the amount. The burden of proving payment was not discharged by the petitioners.

IN VIEW WHEREOF, the resolutions of the Court of Appeals in CA G.R. SP No. 53508 are reversed and set aside. The decision of the labor arbiter ordering petitioners to pay jointly and severally the unpaid vacation leave pay of private respondent, Orlando Alonsagay, in the amount of US$450.00 and dismissing his other claim for lack of merit is reinstated.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Kapunan, Pardo, and *Ynares-Santiago, JJ.,* concur.

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[1] CA G.R. SP No. 53508 dated July 28 ,1999 and October 8, 1999.
[2] Thirteenth Division.
[3] NLRC Case No. NCR-00-11-00760-95.
[4] *Rollo*, pp. 163-164.
[5] *Ibid*., pp. 47-48.
[6] NLRC NCR CA No. 012362-9.
[7] First Division. Penned by Commissioner Vicente S.E. Veloso and concurred in by Commissioner Alberto R. Quimpo.
[8] *Rollo*, pp. 69-70.

[9] Penned by then Associate Justice Artemio G. Tuquero (now Secretary of Justice) and concurred in by Associate Justices Eubulo G. Verzola and Elvi John S. Asuncion.
[10] *Proof of service.*- Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing or facts showing compliance with section 7 of this Rule. If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt, or in lieu thereof of the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee.

> [11] Section 1.-- When any tribunal, board or officer exercising judicial or quasi judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board, officer, and granting such incidental reliefs as law and justice may require.

The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of Section 3, Rule 46.
[12] *Rollo*, p. 25.
[13] Heirs of Francisco Guballa Sr. *vs*. Court of Appeals, 168 SCRA 518 (1988)
[14] RULES OF COURT, Rule 2, Section 6.
[15] Casa Filipina Realty Corporation *vs*. Office of the President, 241 SCRA 165 (1995)
[16] CA *Rollo*, pp. 26-32.
[17] *Ibid*., pp. 34-36.
[18] *Ibid*., pp. 12-13.
[19] *Ibid*., p. 27.
[20] *Ibid.,* p. 13.
[21] *Ibid.,* ANNEX "I", p. 98.
[22] Roberts *vs*. CIR, 176 F.2d 221 (9th Cir. 1949)
[23] 86 C.J.S. 906.