664 Phil. 614

SECOND DIVISION

[G.R. No. 179532, May 30, 2011]

CLAUDIO S. YAP, PETITIONER, VS. THENAMARIS SHIP'S MANAGEMENT AND INTERMARE MARITIME AGENCIES, INC., RESPONDENTS.

DECISION

NACHURA, J.:

Before this Court is a Petition for Review on *Certiorari*[1] under Rule 45 of the Rules of Civil Procedure, seeking the reversal of the Court of Appeals (CA) Decision[2] dated February 28, 2007, which affirmed with modification the National Labor Relations Commission (NLRC) resolution[3] dated April 20, 2005.

The undisputed facts, as found by the CA, are as follows:

> [Petitioner] Claudio S. Yap was employed as electrician of the vessel, M/T SEASCOUT on 14 August 2001 by Intermare Maritime Agencies, Inc. in behalf of its principal, Vulture Shipping Limited. The contract of employment entered into by Yap and Capt. Francisco B. Adviento, the General Manager of Intermare, was for a duration of 12 months. On 23 August 2001, Yap boarded M/T SEASCOUT and commenced his job as electrician. However, on or about 08 November 2001, the vessel was sold. The Philippine Overseas Employment Administration (POEA) was informed about the sale on 06 December 2001 in a letter signed by Capt. Adviento. Yap, along with the other crewmembers, was informed by the Master of their vessel that the same was sold and will be scrapped. They were also informed about the *Advisory* sent by Capt. Constatinou, which states, among others:
>
> " ...PLEASE ASK YR OFFICERS AND RATINGS IF THEY WISH TO BE TRANSFERRED TO OTHER VESSELS AFTER VESSEL S DELIVERY (GREEK VIA ATHENS-PHILIPINOS VIA MANILA...
>
> ...FOR CREW NOT WISH TRANSFER TO DECLARE THEIR PROSPECTED TIME FOR REEMBARKATION IN ORDER TO SCHEDULE THEM ACCLY..."
>
> Yap received his seniority bonus, vacation bonus, extra bonus along with the scrapping bonus. However, with respect to the payment of his wage, he refused to accept the payment of one-month basic wage. He insisted that he was entitled to the payment of the unexpired portion of his contract since he was illegally dismissed from employment. He alleged that he opted for

immediate transfer but none was made.

> [Respondents], for their part, contended that Yap was not illegally dismissed. They alleged that following the sale of the M/T SEASCOUT, Yap signed off from the vessel on 10 November 2001 and was paid his wages corresponding to the months he worked or until 10 November 2001 plus his seniority bonus, vacation bonus and extra bonus. They further alleged that Yap's employment contract was validly terminated due to the sale of the vessel and no arrangement was made for Yap's transfer to Thenamaris' other vessels.[4]

Thus, Claudio S. Yap (petitioner) filed a complaint for Illegal Dismissal with Damages and Attorney's Fees before the Labor Arbiter (LA). Petitioner claimed that he was entitled to the salaries corresponding to the unexpired portion of his contract. Subsequently, he filed an amended complaint, impleading Captain Francisco Adviento of respondents Intermare Maritime Agencies, Inc. (Intermare) and Thenamaris Ship's Management (respondents), together with C.J. Martionos, Interseas Trading and Financing Corporation, and Vulture Shipping Limited/Stejo Shipping Limited.

On July 26, 2004, the LA rendered a decision[5] in favor of petitioner, finding the latter to have been constructively and illegally dismissed by respondents. Moreover, the LA found that respondents acted in bad faith when they assured petitioner of re-embarkation and required him to produce an electrician certificate during the period of his contract, but actually he was not able to board one despite of respondents' numerous vessels. Petitioner made several follow-ups for his re-embarkation but respondents failed to heed his plea; thus, petitioner was forced to litigate in order to vindicate his rights. Lastly, the LA opined that since the unexpired portion of petitioner's contract was less than one year, petitioner was entitled to his salaries for the unexpired portion of his contract for a period of nine months. The LA disposed, as follows:

> **WHEREFORE**, in view of the foregoing, a decision is hereby rendered declaring complainant to have been constructively dismissed. Accordingly, respondents Intermare Maritime Agency Incorporated, Thenamaris Ship's Mgt., and Vulture Shipping Limited are ordered to pay jointly and severally complainant Claudio S. Yap the sum of $12,870.00 or its peso equivalent at the time of payment. In addition, moral damages of **ONE HUNDRED THOUSAND PESOS (P100,000.00) and exemplary damages of FIFTY THOUSAND PESOS (P50,000.00)** are awarded plus ten percent (10%) of the total award as attorney's fees.
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> Other money claims are **DISMISSED** for lack of merit.
>
> **SO ORDERED**.[6]

Aggrieved, respondents sought recourse from the NLRC.

In its decision[7] dated January 14, 2005, the NLRC affirmed the LA's findings that petitioner was indeed constructively and illegally dismissed; that respondents' bad faith was evident on their wilful failure to transfer petitioner to another vessel; and that the award of attorney's fees was warranted. However, the NLRC held that instead of an award of salaries corresponding to nine months, petitioner was only entitled to salaries for three months as provided under Section 10[8] of Republic Act (R.A.) No. 8042,[9] as enunciated in our ruling in *Marsaman Manning Agency, Inc. v. National Labor Relations Commission*.[10] Hence, the NLRC ruled in this wise:

> WHEREFORE, premises considered, the decision of the Labor Arbiter finding the termination of complainant illegal is hereby AFFIRMED with a MODIFICATION. Complainant['s] salary for the unexpired portion of his contract should only be limited to three (3) months basic salary.
>
> Respondents Intermare Maritime Agency, Inc.[,] Vulture Shipping Limited and Thenamaris Ship Management are hereby ordered to jointly and severally pay complainant, the following:
>
> 1. Three (3) months basic salary - US$4,290.00 or its peso equivalent at the time of actual payment.
>
> 2. Moral damages - P100,000.00
>
> 3. Exemplary damages - P50,000.00
>
> 4. Attorney's fees equivalent to 10% of the total monetary award.
>
> SO ORDERED.[11]

Respondents filed a Motion for Partial Reconsideration,[12] praying for the reversal and setting aside of the NLRC decision, and that a new one be rendered dismissing the complaint. Petitioner, on the other hand, filed his own Motion for Partial Reconsideration,[13] praying that he be paid the nine (9)-month basic salary, as awarded by the LA.

On April 20, 2005, a resolution[14] was rendered by the NLRC, affirming the findings of Illegal Dismissal and respondents' failure to transfer petitioner to another vessel. However, finding merit in petitioner's arguments, the NLRC reversed its earlier Decision, holding that "*there can be no choice to grant only three (3) months salary for every year of the unexpired term because there is no full year of unexpired term which this can be applied*." Hence -

> **WHEREFORE**, premises considered, complainant's Motion for Partial Reconsideration is hereby granted. The award of three (3) months basic

> salary in the sum of US$4,290.00 is hereby modified in that complainant is entitled to his salary for the unexpired portion of employment contract in the sum of US$12,870.00 or its peso equivalent at the time of actual payment.
>
> All aspect of our January 14, 2005 Decision **STANDS**.
>
> **SO ORDERED**.[15]

Respondents filed a Motion for Reconsideration, which the NLRC denied.

Undaunted, respondents filed a petition for *certiorari*[16] under Rule 65 of the Rules of Civil Procedure before the CA. On February 28, 2007, the CA affirmed the findings and ruling of the LA and the NLRC that petitioner was constructively and illegally dismissed. The CA held that respondents failed to show that the NLRC acted without statutory authority and that its findings were not supported by law, jurisprudence, and evidence on record. Likewise, the CA affirmed the lower agencies' findings that the advisory of Captain Constantinou, taken together with the other documents and additional requirements imposed on petitioner, only meant that the latter should have been re-embarked. In the same token, the CA upheld the lower agencies' unanimous finding of bad faith, warranting the imposition of moral and exemplary damages and attorney's fees. However, the CA ruled that the NLRC erred in sustaining the LA's interpretation of Section 10 of R.A. No. 8042. In this regard, the CA relied on the clause "*or for three months for every year of the unexpired term, whichever is less*" provided in the 5th paragraph of Section 10 of R.A. No. 8042 and held:

> In the present case, the employment contract concerned has a term of one year or 12 months which commenced on August 14, 2001. However, it was preterminated without a valid cause. [Petitioner] was paid his wages for the corresponding months he worked until the 10th of November. Pursuant to the provisions of Sec. 10, [R.A. No.] 8042, therefore, the option of "three months for every year of the unexpired term" is applicable.[17]

Thus, the CA provided, to wit:

> **WHEREFORE,** premises considered, this Petition for Certiorari is **DENIED**. The *Decision* dated January 14, 2005, and ***Resolutions,*** dated April 20, 2005 and July 29, 2005, respectively, of public respondent National Labor Relations Commission-Fourth Division, Cebu City, in NLRC No. V-000038-04 (RAB VIII (OFW)-04-01-0006) are hereby **AFFIRMED with the MODIFICATION** that private respondent is entitled to three (3) months of basic salary computed at US$4,290.00 or its peso equivalent at the time of actual payment.
>
> Costs against Petitioners.[18]

Both parties filed their respective motions for reconsideration, which the CA, however, denied in its Resolution[19] dated August 30, 2007.

Unyielding, petitioner filed this petition, raising the following issues:

> 1) Whether or not Section 10 of R.A. [No.] 8042, to the extent that it affords an **illegally** dismissed migrant worker the lesser benefit of - "salaries for [the] unexpired portion of his employment contract **or** for **three (3) months** for every **year** of the unexpired term, **whichever is less**" - is constitutional; and
>
> 2) Assuming that it is, whether or not the Court of Appeals gravely erred in granting petitioner only three (3) months backwages when his unexpired term of 9 months is **far short** of the "**every year** of the unexpired term" threshold.[20]

In the meantime, while this case was pending before this Court, we declared as unconstitutional the clause "*or for three months for every year of the unexpired term, whichever is less*" provided in the 5th paragraph of Section 10 of R.A. No. 8042 in the case of *Serrano v. Gallant Maritime Services, Inc.*[21] on March 24, 2009.

Apparently, unaware of our ruling in *Serrano*, petitioner claims that the 5th paragraph of Section 10, R.A. No. 8042, is violative of Section 1,[22] Article III and Section 3,[23] Article XIII of the Constitution to the extent that it gives an erring employer the option to pay an illegally dismissed migrant worker only three months for every year of the unexpired term of his contract; that said provision of law has long been a source of abuse by callous employers against migrant workers; and that said provision violates the equal protection clause under the Constitution because, while illegally dismissed local workers are guaranteed under the Labor Code of reinstatement with full backwages computed from the time compensation was withheld from them up to their actual reinstatement, migrant workers, by virtue of Section 10 of R.A. No. 8042, have to waive nine months of their collectible backwages every time they have a year of unexpired term of contract to reckon with. Finally, petitioner posits that, assuming said provision of law is constitutional, the CA gravely abused its discretion when it reduced petitioner's backwages from nine months to three months as his nine-month unexpired term cannot accommodate the lesser relief of three months for every year of the unexpired term.[24]

On the other hand, respondents, aware of our ruling in *Serrano*, aver that our pronouncement of unconstitutionality of the clause "*or for three months for every year of the unexpired term, whichever is less*" provided in the 5th paragraph of Section 10 of R.A. No. 8042 in *Serrano* should not apply in this case because Section 10 of R.A. No. 8042 is a substantive law that deals with the rights and obligations of the parties in case of Illegal Dismissal of a migrant worker and is not merely procedural in character.

Thus, pursuant to the Civil Code, there should be no retroactive application of the law in this case. Moreover, respondents asseverate that petitioner's tanker allowance of US$130.00 should not be included in the computation of the award as petitioner's basic salary, as provided under his contract, was only US$1,300.00. Respondents submit that the CA erred in its computation since it included the said tanker allowance. Respondents opine that petitioner should be entitled only to US$3,900.00 and not to US$4,290.00, as granted by the CA. Invoking *Serrano*, respondents claim that the tanker allowance should be excluded from the definition of the term "salary." Also, respondents manifest that the full sum of P878,914.47 in Intermare's bank account was garnished and subsequently withdrawn and deposited with the NLRC Cashier of Tacloban City on February 14, 2007. On February 16, 2007, while this case was pending before the CA, the LA issued an Order releasing the amount of P781,870.03 to petitioner as his award, together with the sum of P86,744.44 to petitioner's former lawyer as attorney's fees, and the amount of P3,570.00 as execution and deposit fees. Thus, respondents pray that the instant petition be denied and that petitioner be directed to return to Intermare the sum of US$8,970.00 or its peso equivalent.[25]

On this note, petitioner counters that this new issue as to the inclusion of the tanker allowance in the computation of the award was not raised by respondents before the LA, the NLRC and the CA, nor was it raised in respondents' pleadings other than in their Memorandum before this Court, which should not be allowed under the circumstances. [26]

The petition is impressed with merit.

Prefatorily, it bears emphasis that the unanimous finding of the LA, the NLRC and the CA that the dismissal of petitioner was illegal is not disputed. Likewise not disputed is the tribunals' unanimous finding of bad faith on the part of respondents, thus, warranting the award of moral and exemplary damages and attorney's fees. What remains in issue, therefore, is the constitutionality of the 5th paragraph of Section 10 of R.A. No. 8042 and, necessarily, the proper computation of the lump-sum salary to be awarded to petitioner by reason of his illegal dismissal.

Verily, we have already declared in *Serrano* that the clause "*or for three months for every year of the unexpired term, whichever is less*" provided in the 5th paragraph of Section 10 of R.A. No. 8042 is unconstitutional for being violative of the rights of Overseas Filipino Workers (OFWs) to equal protection of the laws. In an exhaustive discussion of the intricacies and ramifications of the said clause, this Court, in *Serrano*, pertinently held:

> ***The Court concludes that the subject clause contains a suspect classification in that, in the computation of the monetary benefits of fixed-term employees who are illegally discharged, it imposes a 3-month cap on the claim of OFWs with an unexpired portion of one year or more in their contracts, but none on the claims of other OFWs or local workers with fixed-term employment. The subject***

clause singles out one classification of OFWs and burdens it with a peculiar disadvantage.[27]

Moreover, this Court held therein that the subject clause does not state or imply any definitive governmental purpose; hence, the same violates not just therein petitioner's right to equal protection, but also his right to substantive due process under Section 1, Article III of the Constitution.[28] Consequently, petitioner therein was accorded his salaries for the entire unexpired period of nine months and 23 days of his employment contract, pursuant to law and jurisprudence prior to the enactment of R.A. No. 8042.

We have already spoken. Thus, this case should not be different from *Serrano*.

As a general rule, an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is inoperative as if it has not been passed at all. The general rule is supported by Article 7 of the Civil Code, which provides:

> Art. 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse or custom or practice to the contrary.

The doctrine of operative fact serves as an exception to the aforementioned general rule. In *Planters Products, Inc. v. Fertiphil Corporation*,[29] we held:

> The doctrine of operative fact, as an exception to the general rule, only applies as a matter of equity and fair play. It nullifies the effects of an unconstitutional law by recognizing that the existence of a statute prior to a determination of unconstitutionality is an operative fact and may have consequences which cannot always be ignored. The past cannot always be erased by a new judicial declaration.
>
> The doctrine is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied on the invalid law. Thus, it was applied to a criminal case when a declaration of unconstitutionality would put the accused in double jeopardy or would put in limbo the acts done by a municipality in reliance upon a law creating it.[30]

Following *Serrano*, we hold that this case should not be included in the aforementioned exception. After all, it was not the fault of petitioner that he lost his job due to an act of illegal dismissal committed by respondents. To rule otherwise would be iniquitous to petitioner and other OFWs, and would, in effect, send a wrong signal that principals/employers and recruitment/manning agencies may violate an OFW's security of tenure which an employment contract embodies and actually profit from such violation based on an unconstitutional provision of law.

In the same vein, we cannot subscribe to respondents' postulation that the tanker allowance of US$130.00 should not be included in the computation of the lump-sum salary to be awarded to petitioner.

First. It is only at this late stage, more particularly in their Memorandum, that respondents are raising this issue. It was not raised before the LA, the NLRC, and the CA. They did not even assail the award accorded by the CA, which computed the lump-sum salary of petitioner at the basic salary of US$1,430.00, and which clearly included the US$130.00 tanker allowance. Hence, fair play, justice, and due process dictate that this Court cannot now, for the first time on appeal, pass upon this question. Matters not taken up below cannot be raised for the first time on appeal. They must be raised seasonably in the proceedings before the lower tribunals. Questions raised on appeal must be within the issues framed by the parties; consequently, issues not raised before the lower tribunals cannot be raised for the first time on appeal.[31]

Second. Respondents' invocation of *Serrano* is unavailing. Indeed, we made the following pronouncements in *Serrano*, to wit:

> **The word *salaries* in Section 10(5) does not include overtime and leave pay**. For seafarers like petitioner, DOLE Department Order No. 33, series 1996, provides a Standard Employment Contract of Seafarers, in which **salary is understood as the basic wage, exclusive of overtime, leave pay and other bonuses**; whereas overtime pay is compensation for all work "performed" in excess of the regular eight hours, and holiday pay is compensation for any work "performed" on designated rest days and holidays.[32]

A close perusal of the contract reveals that the tanker allowance of US$130.00 was not categorized as a bonus but was rather encapsulated in the basic salary clause, hence, forming part of the basic salary of petitioner. Respondents themselves in their petition for *certiorari* before the CA averred that petitioner's basic salary, pursuant to the contract, was "US$1,300.00 **+** US$130.00 tanker allowance."[33] If respondents intended it differently, the contract *per se* should have indicated that said allowance does not form part of the basic salary or, simply, the contract should have separated it from the basic salary clause.

A final note.

We ought to be reminded of the plight and sacrifices of our OFWs. In *Olarte v. Nayona*, [34] this Court held that:

> Our overseas workers belong to a disadvantaged class. Most of them come from the poorest sector of our society. Their profile shows they live in suffocating slums, trapped in an environment of crimes. Hardly literate and in ill health, their only hope lies in jobs they find with difficulty in our

> country. Their unfortunate circumstance makes them easy prey to avaricious employers. They will climb mountains, cross the seas, endure slave treatment in foreign lands just to survive. Out of despondence, they will work under sub-human conditions and accept salaries below the minimum. The least we can do is to protect them with our laws.

WHEREFORE, the Petition is **GRANTED**. The Court of Appeals Decision dated February 28, 2007 and Resolution dated August 30, 2007 are hereby **MODIFIED** to the effect that petitioner is **AWARDED** his salaries for the entire unexpired portion of his employment contract consisting of nine months computed at the rate of US$1,430.00 per month. All other awards are hereby **AFFIRMED**. No costs.

SO ORDERED.

Carpio, J., Chairperson, Peralta, Abad, and *Mendoza, JJ.,* concur.

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[1] *Rollo*, pp. 33-56.

[2] Penned by Associate Justice Antonio L. Villamor, with Associate Justices Pampio A. Abarintos and Stephen C. Cruz, concurring; id. at 60-73.

[3] Id. at 166-170.

[4] Supra note 2, at 63-65.

[5] *Rollo*, pp. 121-129.

[6] Id. at 129.

[7] Id. at 130-149.

[8] The last clause in the 5th paragraph of Section 10, R.A. No. 8042, provides to wit:

Sec. 10. MONEY CLAIMS. -- x x x.

In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, the workers shall be entitled to the full reimbursement of his placement fee with interest of twelve percent (12%) per annum, plus his salaries **for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less**. (Emphasis and underscoring supplied.)

[9] The Migrant Workers and Overseas Filipinos Act of 1995, effective July 15, 1995.

[10] 371 Phil. 827 (1999).

[11] Supra note 7, at 148-149.

[12] *Rollo*, pp. 157-163.

[13] Id. at 150-156.

[14] Id. at 166-170.

[15] Id. at 170.

[16] Id. at 171-196.

[17] Supra note 2, at 70.

[18] Id. at 72-73.

[19] *Rollo*, pp. 96-99.

[20] Supra note 1, at 44-45.

[21] G.R. No. 167614, March 24, 2009, 582 SCRA 254.

[22] Section 1, Article III of the Constitution provides:

Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

[23] Section 3, Article XIII of the Constitution pertinently provides:

Sec. 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

[24] *Rollo*, pp. 312-331.

[25] Id. at 290-303.

[26] Supra note 24.

[27] Supra note 21, at 295.

[28] Id. at 303.

[29] G.R. No. 166006, March 14, 2008, 548 SCRA 485.

[30] Id. at 516-517. (Citations omitted.)

[31] *Ayson v. Vda. De Carpio*, 476 Phil. 525, 535 (2004).

[32] Supra note 21, at 303. (Emphasis supplied.)

[33] Supra note 16, at 173.

[34] 461 Phil. 429, 431 (2003).

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