SUPREME COURT
SECOND DIVISION

SEVILLA TRADING COMPANY,
***Petitioner*,**

-versus-

G.R. No. 152456
April 28, 2004

A.V.A. TOMAS E. SEMANA, SEVILLA TRADING WORKERS UNION–SUPER,
***Respondents*.**
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D E C I S I O N

PUNO, *J.*:

On appeal is the Decision[1] of the Court of Appeals in CA-G.R. SP No. 63086 dated 27 November 2001 sustaining the Decision[2] of Accredited Voluntary Arbitrator Tomas E. Semana dated 13 November 2000, as well as its subsequent Resolution[3] dated 06 March 2002 denying petitioner's Motion for Reconsideration.

The facts of the case are as follows:

For two to three years prior to 1999, petitioner Sevilla Trading Company (Sevilla Trading, for short), a domestic corporation engaged in trading business, organized and existing under Philippine laws, added to the base figure, in its computation of the 13th-month pay of

its employees, the amount of other benefits received by the employees which are beyond the basic pay. These benefits included:

(a) Overtime premium for regular overtime, legal and special holidays;

(b) Legal holiday pay, premium pay for special holidays;

(c) Night premium;

(d) Bereavement leave pay;

(e) Union leave pay;

(f) Maternity leave pay;

(g) Paternity leave pay;

(h) Company vacation and sick leave pay; and

(i) Cash conversion of unused company vacation and sick leave.

Petitioner claimed that it entrusted the preparation of the payroll to its office staff, including the computation and payment of the 13th month pay and other benefits. When it changed its person in charge of the payroll in the process of computerizing its payroll, and after audit was conducted, it allegedly discovered the error of including non-basic pay or other benefits in the base figure used in the computation of the 13th-month pay of its employees. It cited the Rules and Regulations Implementing P.D. No. 851 (13th-Month Pay Law), effective December 22, 1975, Sec. 2(b) which stated that:

> "Basic salary" shall include all remunerations or earnings paid by an employer to an employee for services rendered but may not include cost-of-living allowances granted pursuant to P.D. No. 525 or Letter of Instruction No. 174, profit-sharing payments, and all allowances and monetary benefits which are not considered or integrated as part of the regular or basic

salary of the employee at the time of the promulgation of the Decree on December 16, 1975.

Petitioner then effected a change in the computation of the thirteenth month pay, as follows:

$$13^{th}\text{-month pay} = \frac{\text{net basic pay}}{12 \text{ months}}$$

where:

net basic pay = gross pay – (non-basic pay or other benefits)

Now excluded from the base figure used in the computation of the thirteenth month pay are the following:

a) Overtime premium for regular overtime, legal and special holidays;

b) Legal holiday pay, premium pay for special holidays;

c) Night premium;

d) Bereavement leave pay;

e) Union leave pay;

f) Maternity leave pay;

g) Paternity leave pay;

h) Company vacation and sick leave pay; and

i) Cash conversion of unused vacation/sick leave.

Hence, the new computation reduced the employees' thirteenth month pay. The daily piece-rate workers represented by private

> respondent Sevilla Trading Workers Union – SUPER (Union, for short), a duly organized and registered union, through the Grievance Machinery in their Collective Bargaining Agreement, contested the new computation and reduction of their thirteenth month pay. The parties failed to resolve the issue.

On March 24, 2000, the parties submitted the issue of "whether or not the exclusion of leaves and other related benefits in the computation of 13th-month pay is valid" to respondent Accredited Voluntary Arbitrator Tomas E. Semana (A.V.A. Semana, for short) of the National Conciliation and Mediation Board, for consideration and resolution.

The Union alleged that petitioner violated the rule prohibiting the elimination or diminution of employees' benefits as provided for in Art. 100 of the Labor Code, as amended. They claimed that paid leaves, like sick leave, vacation leave, paternity leave, union leave, bereavement leave, holiday pay and other leaves with pay in the CBA should be included in the base figure in the computation of their 13th month pay.

On the other hand, petitioner insisted that the computation of the 13th-month pay is based on basic salary, excluding benefits such as leaves with pay, as per P.D. No. 851, as amended. It maintained that, in adjusting its computation of the 13th-month pay, it merely rectified the mistake its personnel committed in the previous years.

A.V.A. Semana decided in favor of the Union. The dispositive portion of his Decision reads as follows:

> WHEREFORE, premises considered, this Voluntary Arbitrator hereby declared that:
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> 1. The company is hereby ordered to include sick leave and vacation leave, paternity leave, union leave, bereavement leave and other leave with pay in the CBA, premium for work done on rest days and special holidays, and pay for regular holidays in the computation of the 13th-month pay to all covered and entitled employees; and

2. The company is hereby ordered to pay corresponding backwages to all covered and entitled employees arising from the exclusion of said benefits in the computation of 13th-month pay for the year 1999.

Petitioner received a copy of the Decision of the Arbitrator on December 20, 2000. It filed before the Court of Appeals, a "Manifestation and Motion for Time to File Petition for Certiorari" on January 19, 2001. A month later, on February 19, 2001, it filed its Petition for Certiorari under Rule 65 of the 1997 Rules of Civil Procedure for the nullification of the Decision of the Arbitrator. In addition to its earlier allegations, petitioner claimed that assuming the old computation will be upheld, the reversal to the old computation can only be made to the extent of including non-basic benefits actually included by petitioner in the base figure in the computation of their 13th-month pay in the prior years. It must exclude those non-basic benefits which, in the first place, were not included in the original computation. The appellate court denied due course to, and dismissed the petition.

Hence, this appeal. Petitioner Sevilla Trading enumerates the grounds of its appeal, as follows:

1. THE DECISION OF THE RESPONDENT COURT TO REVERT TO THE OLD COMPUTATION OF THE 13TH-MONTH PAY ON THE BASIS THAT THE OLD COMPUTATION HAD RIPENED INTO PRACTICE IS WITHOUT LEGAL BASIS.

2. IF SUCH BE THE CASE, COMPANIES HAVE NO MEANS TO CORRECT ERRORS IN COMPUTATION WHICH WILL CAUSE GRAVE AND IRREPARABLE DAMAGE TO EMPLOYERS.[4]

First, we uphold the Court of Appeals in ruling that the proper remedy from the adverse decision of the arbitrator is a petition for review under Rule 43 of the 1997 Rules of Civil Procedure, not a petition for certiorari under Rule 65. Section 1 of Rule 43 states:

RULE 43
Appeals from the Court of Tax Appeals and Quasi-Judicial Agencies to the Court of Appeals

> SECTION 1. Scope. — This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi-judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, Energy Regulatory Board, National Telecommunications Commission, Department of Agrarian Reform under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Inventions Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction Industry Arbitration Commission, and voluntary arbitrators authorized by law. [Emphasis supplied]

It is elementary that the special civil action of certiorari under Rule 65 is not, and cannot be a substitute for an appeal, where the latter remedy is available, as it was in this case. Petitioner Sevilla Trading failed to file an appeal within the fifteen-day reglementary period from its notice of the adverse decision of A.V.A. Semana. It received a copy of the decision of A.V.A. Semana on December 20, 2000, and should have filed its appeal under Rule 43 of the 1997 Rules of Civil Procedure on or before January 4, 2001. Instead, petitioner filed on January 19, 2001 a "Manifestation and Motion for Time to File Petition for Certiorari," and on February 19, 2001, it filed a petition for certiorari under Rule 65 of the 1997 Rules of Civil Procedure. Clearly, petitioner Sevilla Trading had a remedy of appeal but failed to use it.

A special civil action under Rule 65 of the Rules of Court will not be a cure for failure to timely file a petition for review on certiorari under Rule 45 (Rule 43, in the case at bar) of the Rules of Court. Rule 65 is

an independent action that cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that under Rule 45 (Rule 43, in the case at bar), especially if such loss or lapse was occasioned by one's own neglect or error in the choice of remedies.[5]

Thus, the decision of A.V.A. Semana had become final and executory when petitioner Sevilla Trading filed its petition for certiorari on February 19, 2001. More particularly, the decision of A.V.A. Semana became final and executory upon the lapse of the fifteen-day reglementary period to appeal, or on January 5, 2001. Hence, the Court of Appeals is correct in holding that it no longer had appellate jurisdiction to alter, or much less, nullify the decision of A.V.A. Semana.

Even assuming that the present petition for certiorari under Rule 65 of the 1997 Rules of Civil Procedure is a proper action, we still find no grave abuse of discretion amounting to lack or excess of jurisdiction committed by A.V.A. Semana. "Grave abuse of discretion" has been interpreted to mean "such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, in other words where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[6] We find nothing of that sort in the case at bar.

On the contrary, we find the decision of A.V.A. Semana to be sound, valid, and in accord with law and jurisprudence. A.V.A. Semana is correct in holding that petitioner's stance of mistake or error in the computation of the thirteenth month pay is unmeritorious. Petitioner's submission of financial statements every year requires the services of a certified public accountant to audit its finances. It is quite impossible to suggest that they have discovered the alleged error in the payroll only in 1999. This implies that in previous years it does not know its cost of labor and operations. This is merely basic cost accounting. Also, petitioner failed to adduce any other relevant evidence to support its contention. Aside from its bare claim of mistake or error in the computation of the thirteenth month pay, petitioner merely appended to its petition a copy of the 1997-2002 Collective Bargaining Agreement and an alleged "corrected"

computation of the thirteenth month pay. There was no explanation whatsoever why its inclusion of non-basic benefits in the base figure in the computation of their 13th-month pay in the prior years was made by mistake, despite the clarity of statute and jurisprudence at that time.

The instant case needs to be distinguished from Globe Mackay Cable and Radio Corp. vs. NLRC,[7] which petitioner Sevilla Trading invokes. In that case, this Court decided on the proper computation of the cost-of-living allowance (COLA) for monthly-paid employees. Petitioner Corporation, pursuant to Wage Order No. 6 (effective 30 October 1984), increased the COLA of its monthly-paid employees by multiplying the P3.00 daily COLA by 22 days, which is the number of working days in the company. The Union disagreed with the computation, claiming that the daily COLA rate of P3.00 should be multiplied by 30 days, which has been the practice of the company for several years. We upheld the contention of the petitioner corporation. To answer the Union's contention of company practice, we ruled that:

> Payment in full by Petitioner Corporation of the COLA before the execution of the CBA in 1982 and in compliance with Wage Orders Nos. 1 (26 March 1981) to 5 (11 June 1984), should not be construed as constitutive of voluntary employer practice, which cannot now be unilaterally withdrawn by petitioner. To be considered as such, it should have been practiced over a long period of time, and must be shown to have been consistent and deliberate. The test of long practice has been enunciated thus:
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> > Respondent Company agreed to continue giving holiday pay knowing fully well that said employees are not covered by the law requiring payment of holiday pay." (Oceanic Pharmacal Employees Union [FFW] vs. Inciong, 94 SCRA 270 [1979])

Moreover, before Wage Order No. 4, there was lack of administrative guidelines for the implementation of the Wage Orders. It was only when the Rules Implementing Wage Order No. 4 were issued on 21 May 1984 that a formula for the conversion of the daily allowance to its monthly equivalent was laid down.

Absent clear administrative guidelines, Petitioner Corporation cannot be faulted for erroneous application of the law.

In the above quoted case, the grant by the employer of benefits through an erroneous application of the law due to absence of clear administrative guidelines is not considered a voluntary act which cannot be unilaterally discontinued. Such is not the case now. In the case at bar, the Court of Appeals is correct when it pointed out that as early as 1981, this Court has held in San Miguel Corporation vs. Inciong[8] that:

> Under Presidential Decree 851 and its implementing rules, the basic salary of an employee is used as the basis in the determination of his 13th-month pay. Any compensations or remunerations which are deemed not part of the basic pay is excluded as basis in the computation of the mandatory bonus.
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> Under the Rules and Regulations Implementing Presidential Decree 851, the following compensations are deemed not part of the basic salary:
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> a) Cost-of-living allowances granted pursuant to Presidential Decree 525 and Letter of Instruction No. 174;
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> b) Profit sharing payments;
>
> c) All allowances and monetary benefits which are not considered or integrated as part of the regular basic salary of the employee at the time of the promulgation of the Decree on December 16, 1975.
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> Under a later set of Supplementary Rules and Regulations Implementing Presidential Decree 851 issued by the then Labor Secretary Blas Ople, overtime pay, earnings and other remunerations are excluded as part of the basic salary and in the computation of the 13th-month pay.

The exclusion of cost-of-living allowances under Presidential Decree 525 and Letter of Instruction No. 174 and profit sharing payments indicate the intention to strip basic salary of other payments which are properly considered as "fringe" benefits. Likewise, the catch-all exclusionary phrase "all allowances and monetary benefits which are not considered or integrated as part of the basic salary" shows also the intention to strip basic salary of any and all additions which may be in the form of allowances or "fringe" benefits.

Moreover, the Supplementary Rules and Regulations Implementing Presidential Decree 851 is even more empathic in declaring that earnings and other remunerations which are not part of the basic salary shall not be included in the computation of the 13th-month pay.

While doubt may have been created by the prior Rules and Regulations Implementing Presidential Decree 851 which defines basic salary to include all remunerations or earnings paid by an employer to an employee, this cloud is dissipated in the later and more controlling Supplementary Rules and Regulations which categorically, exclude from the definition of basic salary earnings and other remunerations paid by employer to an employee. A cursory perusal of the two sets of Rules indicates that what has hitherto been the subject of a broad inclusion is now a subject of broad exclusion. The Supplementary Rules and Regulations cure the seeming tendency of the former rules to include all remunerations and earnings within the definition of basic salary.

The all-embracing phrase "earnings and other remunerations" which are deemed not part of the basic salary includes within its meaning payments for sick, vacation, or maternity leaves, premium for works performed on rest days and special holidays, pay for regular holidays and night differentials. As such they are deemed not part of the basic salary and shall not be considered in the computation of the 13th-month pay. If they were not so excluded, it is hard to find any "earnings and other remunerations" expressly excluded in the computation of the

> 13th-month pay. Then the exclusionary provision would prove to be idle and with no purpose.
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> In the light of the clear ruling of this Court, there is, thus no reason for any mistake in the construction or application of the law. When petitioner Sevilla Trading still included over the years non-basic benefits of its employees, such as maternity leave pay, cash equivalent of unused vacation and sick leave, among others in the computation of the 13th-month pay, this may only be construed as a voluntary act on its part. Putting the blame on the petitioner's payroll personnel is inexcusable.

In Davao Fruits Corporation vs. Associated Labor Unions, we likewise held that:[9]

> The "Supplementary Rules and Regulations Implementing P.D. No. 851" which put to rest all doubts in the computation of the thirteenth month pay, was issued by the Secretary of Labor as early as January 16, 1976, barely one month after the effectivity of P.D. No. 851 and its Implementing Rules. And yet, petitioner computed and paid the thirteenth month pay, without excluding the subject items therein until 1981. Petitioner continued its practice in December 1981, after promulgation of the aforequoted San Miguel decision on February 24, 1981, when petitioner purportedly "discovered" its mistake.
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> From 1975 to 1981, petitioner had freely, voluntarily and continuously included in the computation of its employees' thirteenth month pay, without the payments for sick, vacation and maternity leave, premium for work done on rest days and special holidays, and pay for regular holidays. The considerable length of time the questioned items had been included by petitioner indicates a unilateral and voluntary act on its part, sufficient in itself to negate any claim of mistake.
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> A company practice favorable to the employees had indeed been established and the payments made pursuant thereto, ripened into benefits enjoyed by them. And any benefit and supplement being enjoyed by the employees cannot be reduced, diminished, discontinued or eliminated by the employer, by virtue of Sec. 10

> of the Rules and Regulations Implementing P.D. No. 851, and Art. 100 of the Labor Code of the Philippines which prohibit the diminution or elimination by the employer of the employees' existing benefits. [Tiangco vs. Leogardo, Jr., 122 SCRA 267 (1983)]

With regard to the length of time the company practice should have been exercised to constitute voluntary employer practice which cannot be unilaterally withdrawn by the employer, we hold that jurisprudence has not laid down any rule requiring a specific minimum number of years. In the above quoted case of Davao Fruits Corporation vs. Associated Labor Unions,[10] the company practice lasted for six (6) years. In another case, Davao Integrated Port Stevedoring Services vs. Abarquez,[11] the employer, for three (3) years and nine (9) months, approved the commutation to cash of the unenjoyed portion of the sick leave with pay benefits of its intermittent workers. While in Tiangco vs. Leogardo, Jr.,[12] the employer carried on the practice of giving a fixed monthly emergency allowance from November 1976 to February 1980, or three (3) years and four (4) months. In all these cases, this Court held that the grant of these benefits has ripened into company practice or policy which cannot be peremptorily withdrawn. In the case at bar, petitioner Sevilla Trading kept the practice of including non-basic benefits such as paid leaves for unused sick leave and vacation leave in the computation of their 13th-month pay for at least two (2) years. This, we rule likewise constitutes voluntary employer practice which cannot be unilaterally withdrawn by the employer without violating Art. 100 of the Labor Code:

> Art. 100. Prohibition against elimination or diminution of benefits. – Nothing in this Book shall be construed to eliminate or in any way diminish supplements, or other employee benefits being enjoyed at the time of promulgation of this Code.

IN VIEW WHEREOF, the petition is **DENIED**. The Decision of the Court of Appeals in CA-G.R. SP No. 63086 dated 27 November 2001 and its Resolution dated 06 March 2002 are hereby **AFFIRMED**.

SO ORDERED.

Quisumbing, Austria-Martinez, and Tinga, *JJ.*, concur. Callejo, Sr., *J.*, no part.

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[1] CA Rollo, pp. 124-134.
[2] CA Rollo, pp. 31-43.
[3] Rollo, p. 141.
[4] Rollo, p. 22.
[5] National Irrigation Administration vs. Court of Appeals, 318 SCRA 255, 265 (1999).
[6] Concurring Opinion of Justice Angelina Sandoval-Gutierrez in the consolidated cases of Tecson vs. COMELEC, G.R. No. 161434, Velez vs. Poe, G.R. No. 161634, and Fornier vs. COMELEC, G.R. No. 161824, 03 March 2004, citing Benito vs. COMELEC, 349 SCRA 705 (2001).
[7] 163 SCRA 71 (1988).
[8] 103 SCRA 139 (1981).
[9] 225 SCRA 562 (1993).
[10] Ibid.
[11] 220 SCRA 197 (1993).
[12] 122 SCRA 267 (1983).
