

EN BANC

[G.R. No. 129742, September 16, 1998]

TERESITA G. FABIAN PETITIONER, VS. HON. ANIANO A. DESIERTO, IN HIS CAPACITY AS OMBUDSMAN; HON. JESUS F. GUERRERO, IN HIS CAPACITY AS DEPUTY OMBUDSMAN FOR LUZON; AND NESTOR V. AGUSTIN RESPONDENTS.

DECISION

REGALADO, J:

Petitioner has appealed to us by certiorari under Rule 45 of the Rules of Court from the "Joint Order" issued by public respondents on June 18, 1997 in OMB-Adm. Case No. 0-95-0411 which granted the motion for reconsideration of and absolved private respondents from administrative charges for *inter alia* grave misconduct committed by him as then Assistant Regional Director, Region IV-A, Department of Public Works and Highways (DPWH).

I

It appears from the statement and counter-statement of facts of the parties that petitioner Teresita G. Fabian was the major stockholder and president of PROMAT Construction Development Corporation (PROMAT) which was engaged in the construction business. Private respondents Nestor V. Agustin was the incumbent District Engineering District (FMED) when he allegedly committed the offenses for which he was administratively charged in the Office in the office of the Ombudsman.

Promat participated in the bidding for government construction project including those under the FMED, and private respondent, reportedly taking advantage of his official position, inveigled petitioner into an amorous relationship. Their affair lasted for some time, in the course of which private respondents gifted PROMAT with public works contracts and interceded for it in problems concerning the same in his office.

Later, misunderstanding and unpleasant incidents developed between the parties and when petitioner tried to terminate their relationship, private respondent refused and resisted her attempts to do so to the extent of employing acts of harassment, intimidation and threats. She eventually filed the aforementioned administrative case against him in a letter-complaint dated July 24, 1995.

The said complaint sought the dismissal of private respondent for violation of Section 19, Republic Act No. 6770 (Ombudsman Act of 1989) and Section 36 of Presidential Decree No. 807 (Civil Service Decree), with an ancillary prayer for his preventive suspension. For purposes of this case, the charges referred to may be subsumed under the category of oppression, misconduct, and disgraceful or immoral conduct.

On January 31, 1996, Graft Investigator Eduardo R. Benitez issued a resolution finding private respondents guilty of grave misconduct and ordering his dismissal from the service with forfeiture of all benefits under the law. His resolution bore the approval of Director Napoleon Baldrias and Assistant Ombudsman Abelardo Aportadera of their office.

Herein respondent Ombudsman, in an Order dated February 26, 1996, approved the aforesaid resolution with modifications, by finding private respondent guilty of misconduct and meting out the penalty of suspension without pay for one year. After private respondent moved for reconsideration, respondent Ombudsman discovered that the former's new counsel had been his "classmate and close associate" hence he inhibited himself. The case was transferred to respondent Deputy Ombudsman Jesus F. Guerrero who, in the now challenged Joint Order of June 18, 1997, set aside the February 26, 1997 Order of respondent Ombudsman and exonerated private respondents from the administrative charges.

II

In the present appeal, petitioner argues that Section 27 of Republic Act No. 6770 (Ombudsman Act of 1989)^[1] pertinently provides that -

In all administrative disciplinary cases, orders, directives or decisions of the Office of the Ombudsman may be appealed to the Supreme Court by filing a petition for *certiorari* within ten (10) days from receipt of the written notice of the order, directive or decision or denial of the motion for reconsideration in accordance with Rule 45 of the Rules of Court. (Emphasis supplied)

However, she points out that under Section 7, Rule III of Administrative Order No. 07 (Rules of Procedure of the office of the Ombudsman),^[2] when a respondent is absolved of the charges in an administrative proceeding decision of the ombudsman is final and unappealable. She accordingly submits that the office of the ombudsman has no authority under the law to restrict, in the manner provided in its aforesaid Rules, the right of appeal allowed by Republic Act No. 6770, nor to limit the power of review of this Court. Because of the aforesaid provision in those Rules of Procedure, she claims that she found it "necessary to take an alternative recourse under Rule 65 of the Rules of Court, because of the doubt it creates on the availability of appeals under Rule 45 of the Rules of Court.

Respondents filed their respective comments and rejoined that the Office of the Ombudsman is empowered by the Constitution and the law to promulgate its own rules of procedure. Section 13(8), Article XI of the 1987 Constitution provides, among others, that the Office of the Ombudsman can "(p)romulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law."

Republic Act No. 6770 duly implements the Constitutional mandate with these relevant provisions:

Sec. 14. *Restrictions.* - x x x No court shall hear any appeal or application for remedy against the decision or findings of the Ombudsman except the

Supreme Court on pure question on law.

x x x

Sec. 18. *Rules of Procedure.* - (1) The Office of the Ombudsman shall promulgate its own rules of procedure for the effective exercise or performance of its powers, functions, and duties.

x x x

Sec. 23. *Formal Investigation.* - (1) Administrative investigations by the Office of the Ombudsman shall be in accordance with its rules of procedure and consistent with the due process. x x x

x x x

Sec. 27. *Effectivity and Finality of Decisions.* - All provisional orders at the Office of the Ombudsman are immediately effective and executory.

A motion for reconsideration of any order, directive or decision of the Office of the Ombudsman must be filed within five (5) days after receipt of written notice shall be entertained only on any of the following grounds:

x x x

Findings of fact by the Office of the Ombudsman when supported by substantial evidence are conclusive. Any order, directive or decision imposing the penalty of public censure or reprimand, suspension of not more than one month salary shall be final and unappealable.

In all administrative disciplinary cases, orders, directives or decisions of the Office of the Ombudsman may be appealed to the Supreme Court by filing a petition for certiorari within ten (10) days from receipt of the written notice of the order, directive or decision or denial of the motion for reconsideration in accordance with Rule 45 of the Rules of Court.

The above rules may be amended or modified by the Office of the Ombudsman as the interest of justice may require.

Respondents consequently contend that, on the foregoing constitutional and statutory authority, petitioner cannot assail the validity of the rules of procedure formulated by the Office of the Ombudsman governing the conduct of proceeding before it, including those with respect to the availability or non-availability of appeal in administrative cases. Such as Section 7, Rule III of Administrative Order No.07.

Respondents also question the propriety of petitioner's proposition that, although she definitely prefaced her petition by categorizing the same as "an appeal by certiorari under Rule 45 of the Rules of Court," she makes the aforementioned ambivalent statement which in effect asks that, should the remedy under Rule 45 be unavailable, her petition be treated in the alternative as an original action for certiorari under Rule 65. The parties thereafter engage in a discussion of the

differences between a petition for review on certiorari under Rule 45 and a special civil action of certiorari under Rule 65.

Ultimately, they also attempt to review and rationalize the decision of this Court applying Section 27 of Republic Act No. 6770 *vis-à-vis* Section 7, Rule III of Administrative Order No. 07. As correctly pointed out by public respondents, *Ocampo IV vs. Ombudsman, et al.*^[3] and *Young vs. Office of the Ombudsman, et al.*^[4] were original actions for certiorari under Rule 65. *Yabut vs. Office of the Ombudsman, et al.*^[5] was commenced by a petition for review on certiorari under Rule 45. Then came *Cruz, Jr. vs. People, et al.*,^[6] *Olivas vs. Office of the Ombudsman, et al.*,^[7] *Olivarez vs. Sandiganbayan, et al.*,^[8] and *Jao, et al. vs. Vasquez*,^[9] which were for *certiorari*, prohibition and/or mandamus under Rule 65. *Alba vs. Nitorreda, et al.*^[10] was initiated by a pleading unlikely denominated as an "Appeal/Petition for Certiorari and/or Prohibition," with a prayer for ancillary remedies, and ultimately followed by *Constantino vs. Hon. Ombudsman Aniano Desierto, et al.*^[11] which was a special civil action for certiorari.

Considering, however the view that this Court now takes of the case at bar and the issues therein which will shortly be explained, it refrains from preemptively resolving the controverted points raised by the parties on the nature and propriety of application of the writ of certiorari when used as a mode of appeal or as the basis of a special original action, and whether or not they may be resorted to concurrently or alternatively, obvious though the answers thereto appear to be. Besides, some seemingly *obiter* statements in *Yabuts* and *Alba* could bear reexamination and clarification. Hence, we will merely observe and lay down the rule at this juncture that Section 27 of Republic Act No. 6770 is involved only whenever an appeal by certiorari under Rule 45 is taken from a decision in an administrative disciplinary action. It cannot be taken into account where an original action for certiorari under Rule 65 is resorted to as a remedy for judicial review, such as from an incident in a criminal action.

III

After respondents' separate comments had been filed, the Court was intrigued by the fact, which does appear to have been seriously considered before, that the administrative liability of a public official could fall under the jurisdiction of both the Civil Service Commission and the Office of the Ombudsman. Thus, the offenses imputed to herein private respondent were based on both Section 19 of Republic Act. No. 6770 and Section 36 of Presidential Decree No. 807. Yet, pursuant to the amendment of section 9, Batas Pambansa Blg. 129 by Republic Act No. 7902, all adjudications by Civil Service Commission in administrative disciplinary cases were made appealable to the Court of Appeals effective March 18, 1995, while those of the Office of the Ombudsman are appealable to this Court.

It could thus be possible that in the same administrative case involving two respondents, the proceedings against one could eventually have been elevated to the Court of Appeals, while the other may have found its way to the Ombudsman from which it is sought to be brought to this Court. Yet systematic and efficient case management would dictate the consolidation of those cases in the Court of Appeals, both for expediency and to avoid possible conflicting decisions.

Then there is the consideration that Section 30, Article VI of the 1987 Constitution provides that "(n)o law shall be passed increasing the appellate indiction of the Supreme Court as provided in this Constitution without its advice and consent," and that Republic Act No. 6770, with its challenged Section 27, took effect on November 17, 1989, obviously in spite of that constitutional grounds must be raised by a party to the case, neither of whom did so in this case, but that is not an inflexible rule, as we shall explain.

Since the constitution is intended for the observance of the judiciary and other departments of the government and the judges are sworn to support its provisions, the courts are not at liberty to overlook or disregard its commands or countenance evasions thereof. When it is clear that a statute transgresses the authority vested in a legislative body, it is the duty of the courts to declare that the constitution, and not the statute, governs in a case before them for judgement.^[12]

Thus, while courts will not ordinarily pass upon constitutional questions which are not raised in the pleadings,^[13] the rule has been recognized to admit of certain exceptions. It does not preclude a court from inquiring into its own jurisdiction or compel it to enter a judgement that it lacks jurisdiction to enter. If a statute on which a court's jurisdiction in a proceeding depends is unconstitutional, the court has no jurisdiction in the proceeding, and since it may determine whether or not it has jurisdiction, it necessarily follows that it may inquire into the constitutionality of the statute.^[14]

Constitutional question, not raised in the regular and orderly procedure in the trial are ordinarily rejected unless the jurisdiction of the court below or that of the appellate court is involved in which case it may be raised at any time or on the court's own motion.^[15] The Court *ex mero motu* may take cognizance of lack of jurisdiction at any point in the case where the fact is developed.^[16] The court has a clearly recognized right to determine its own jurisdiction in any proceeding.^[17]

The foregoing authorities notwithstanding, the Court believed that the parties hereto should be further heard on this constitutional question. Correspondingly, the following resolution was issued on May 14, 1998, the material parts stating as follows:

The Court observes that the present petition, from the very allegations thereof, is "an appeal by certiorari under Rule 45 of the Rules of Court from the 'Joint Order (Re: Motion for Reconsideration)' issued in OMB-Adm. Case No. 0-95-0411, entitled 'Teresita G. Fabian vs. Engr. Nestor V. Agustin, Asst. Regional Director, Region IV-A, EDSA, Quezon City,' which absolved the latter from the administrative charges for grave misconduct, among other."

It is further averred therein that the present appeal to this Court is allowed under Section 27 of the Ombudsman Act of 1987 (R.A. No. 6770) and, pursuant thereto, the Office of the Ombudsman issued its Rules of Procedure, Section 7 whereof is assailed by petitioner in this proceeding. It will be recalled that R.A. No. 6770 was enacted on November 17, 1989, with Section 27 thereof pertinently providing that all administrative