

JEJOMAR ERWIN S. BINAY, JR., PETITIONER, VS. HON. CONCHITA CARPIO-MORALES, IN HER CAPACITY AS THE OMBUDSMAN, AND THE DEPARTMENT OF INTERIOR AND LOCAL GOVERNMENT, RESPONDENTS.

Ponente: REYES, JR., J.C., J.

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REYES, JR., J.C., J.:

Per the expanded concept of judicial review[1] within the context of Constitutional Law, and in line with the mandate to assay the proper balance between colliding assertions of State authority and individual liberty,[2] We now address petitioner's application for issuance of a writ of preliminary injunction.

In retrospect, on March 12, 2015, Jejomar Erwin S. Binay, Jr. filed before the Court a "Petition for Certiorari [With Extremely Urgent Application for Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction]" assailing the Joint Order dated March 10, 2015 of the Office of the Ombudsman (Ombudsman) with respect to Binay, Jr.'s preventive suspension for six months. (Rollo, pp. 5-29)

On March 16, 2015, the Court issued a Resolution for issuance of a Temporary Restraining Order (TRO), effective for a period of sixty (60) days from notice thereof, conditioned upon the posting by petitioner of a bond in the amount of Five Hundred Thousand Pesos (Php500,000.00). Simultaneous with the issuance of the TRO, hearings for the application of a preliminary injunction were scheduled on March 30, 2015 and March 31, 2015, at 2:00 o'clock in the afternoon. The Honorable Conchita Carpio-Morales, in her capacity as the Ombudsman, and the Department of Interior and Local Government (DILG) were also required, as respondents, to file their Comments on the Petition for Certiorari within an inextendible period of ten (10) days from receipt of a copy thereof. (Rollo, pp. 366-370)

In support of his application for the issuance of TRO and/or Writ of Preliminary Injunction, petitioner asserted that:

"7.4. The assailed Joint Order expressly states that the preventive suspension of the Petitioner shall be immediately executory and the same is in the process of implementation to the damage and prejudice of the Petitioner.

- In the absence of a restraining order, the issues raised herein shall be rendered moot and academic.
- There is no other ordinary, speedy, and adequate remedy that exists to prevent the infliction of irreparable injury against the Petitioner.

7.5. The Petitioner is entitled to injunctive relief since he has a clear and unmistakable right to hold public office, having validly won by a landslide vote in the 2010 and 2013 local elections and assumed the position of Mayor in the City of Makati.

7.6. The issuance of the order of preventive suspension necessarily violated Petitioner's rights since it seeks to suspend him for allegations, which assuming without conceding to be true, can no longer hold him

administratively liable considering the doctrines laid down in the cases of *Aguinaldo v. Santos*, *Garcia v. Mojica*, *Salalima v. Guingona, Jr.* (Citations omitted)

7.7. Moreover, the assailed Joint Order clearly violates Republic Act No. 6770 that requires that evidence of guilt must be strong before a preventive suspension order can be issued. In this case, however, it is evident that the evidence of guilt is not strong because there is no evidence or factual basis that would sustain the charges against the Petitioner...

7.8. With such violation of Petitioner's clear and unmistakable rights, the issuance of a Temporary Restraining Order is of urgent and paramount necessity in order to prevent serious damage not only to the Petitioner, but also to his constituents." (Rollo, pp. 26-27).

On March 30, 2015, oral arguments were held and counsels for the petitioner[3] as well as for the Ombudsman[4] presented their respective legal positions before the Court.

Through the Office of the Solicitor General, the Office of the Ombudsman pressed for suspension of Court proceedings scheduled for March 30 and 31, 2015 in view of the Petition for Certiorari, docketed as G.R. No. 217123-27, entitled "Hon. Conchita Carpio-Morales, in her capacity as Ombudsman v. Court of Appeals [Sixth Division] and Jejomar Erwin S. Binay, Jr" filed by the Ombudsman on March 25, 2015, now pending before the Supreme Court. On the strength of "judicial courtesy", the OSG claimed that this Court should defer action on the Petition for Certiorari in CA GR SP No. 139453 since commencement of the scheduled hearing therefor would render moot and moribund matters to be tackled by the High Tribunal in G.R. No. 217123-27.

Mindful of the acknowledged absence of a Temporary Restraining Order from the Supreme Court in G.R. No. 217123-27, the Motion to Suspend was rejected in open court by the Division on the strength of the explicit command in Section 7, Rule 65 of the Rules of Court, as amended by A.M. No. 07-7-12-SC:[5]

The public respondent shall proceed with the principal case within ten (10) days from the filing of a petition for certiorari with a higher court or tribunal, absent a temporary restraining order or a preliminary injunction, or upon its expiration. Failure of the public respondent to proceed with the principal case may be a ground for an administrative charge.

Apart from the basic norm in Section 7, Rule 65, the Court was also aware of, and thus applied, the High Court's clarification in a plethora of cases to the effect that the principle of judicial courtesy remains to be the exception rather than the rule.[6]

After counsels for the petitioner and respondents presented their oral arguments, the Court was then tasked to resolve petitioner's application for a preliminary injunction in CA GR SP No. 139453.

THE COURT'S RULING ON THE PROVISIONAL REMEDY

Following an assiduous inspection of available data, and guided by jurisprudential guideposts, We resolved to GRANT the application for preliminary injunction.

It is settled that a writ of preliminary injunction is a provisional remedy which is adjunct to a main suit, as well as a preservative remedy issued to maintain the status quo of the things subject of the action or the relations between the parties during the pendency of the suit. Its purpose is to prevent threatened or continuous irremediable injury to the parties before their claims can be thoroughly studied and educated. The sole aim of this relief is to preserve the status quo until the merits of the case are fully heard. (*Lukang v. Pagbilao Development Corp.*, G.R. No. 195374, March 10, 2014).

Section 3, Rule 58 of the 1997 Rules of Civil Procedure provides that an application for a writ of preliminary

injunction may be granted if the following grounds are established:

(a)

That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;

(b)

That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or

(c)

That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

Consistent with the Court's authority to issue a provisional remedy in actions pending before it,[7] a writ of preliminary injunction can ensue upon convergence of these preconditions: (a) the invasion of a right sought to be protected is material and substantial; (b) the right of the complainant is clear and unmistakable; and (c) there is an urgent and paramount necessity for the writ to prevent serious damage. (*Lukang v. Pagbilao Development Corp.*, G.R. No. 195374, March 10, 2014).

Petitioner asserts, and this Court agrees, that the aforementioned elements are attendant to his cause.

For entitlement to the writ, it is sufficient that the complainant shows that he has an ostensible right to the final relief prayed for in his Complaint. (*Lukang v. Pagbilao Development Corp.*, G.R. No. 195374, March 10, 2014). While it is not required that petitioner's right be conclusively established at this stage, it is nevertheless necessary to show, at least tentatively, that it exists and is not vitiated by any substantial challenge or contradiction. Even amidst the pleadings presented by public respondents, inclusive of oral discourse thereon, it appeared that petitioner's onus was effectively discharged and it jibed with consistent case law.

In *Garcia v. Court of Appeals* (G.R. No. 185132, April 24, 2009), the Supreme Court declared that "the suspension from office of an elective official, whether as a preventive measure or as a penalty, will undeservedly deprive the electorate of the services of the person they have conscientiously chosen and voted into office."

Garcia was simply an echo of teachings in *Joson v. Court of Appeals* (G.R. No. 160652, February 13, 2006) where the High Court declared that suspension from office of an elective official would deprive the electorate of the services of the person they have voted into office.

Along this line, the concept of condonation,[8] as advocated by petitioner and opposed by public respondent Ombudsman, will assume resonance.

Premised on *Aguinaldo*, *Salalima* and *Garcia*, petitioner asserted that the public respondent Ombudsman can hardly impose preventive suspension of petitioner, given his election in 2010 and re-election in 2013 as Makati City Mayor, relative to his perceived illegal participation in anomalous activities for the Makati City Hall Building II project from 2007 to 2013.[9]

In *Aguinaldo v. Santos* (G.R. No. 94115, August 21, 1992), the Supreme Court made it clear that:

...the rule is that a public official can not be removed for administrative misconduct committed during a prior term, since his re-election to office operates as a condonation of the officer's previous misconduct to the extent of cutting off the right to remove him therefor.

Although there were acts which were apparently committed by petitioner beyond his first term---the alleged payments for July 3, July 4, and July 24, 2013, corresponding to Hillmarc's Construction Corporation and MANA---still, petitioner contended that he cannot be held administratively liable therefor, based on *Salalima* and *Garcia*.

Indeed, a perusal of *Garcia* disclosed that, while payments were made after the official's election, if payments were effected pursuant to contracts before the re-election, the principle of condonation was not necessarily foreclosed:

...a reelected local official may not be held administratively accountable for misconduct committed during his prior term of office. The rationale for this holding is that when the electorate put him back into office, it is presumed that it did so with full knowledge of his life and character, including his past misconduct. If, armed with such knowledge, it still reelects him, then such reelection is considered a condonation of his past misdeeds.

...

As held in *Salalima*:

The rule adopted in "*The rule adopted in Pascual*, qualified in *Aguinaldo* insofar as criminal cases are concerned, is still a good law. Such a rule is not only founded on the theory that an official's reelection expresses the sovereign will of the electorate to forgive or condone any act or omission constituting a ground for administrative discipline which was committed during his previous term. We may add that sound policy dictates it. To rule otherwise would open the floodgates to exacerbating endless partisan contests between the reelected official and his political enemies, who may not stop to hound the former during his new term with administrative cases for acts alleged to have been committed during his previous term. His second term may thus be devoted to defending himself in the said cases to the detriment of public service . . ." (Emphasis added.)

The above ruling in *Salalima* applies to this case. Petitioner cannot anymore be held administratively liable for an act done during his previous term, that is, his signing of the contract with F.E. Zuellig.

The assailed retainer agreement in *Salalima* was executed sometime in 1990. Governor *Salalima* was reelected in 1992 and payments for the retainer continued to be made during his succeeding term. This situation is no different from the one in the present case, wherein deliveries of the asphalt under the contract with F.E. Zuellig and the payments therefor were supposed to have commenced on September 1998, during petitioner's second term.

Even the Honorable Deputy Ombudsman *Mosquera*, in behalf of the Office of the Ombudsman, recognized the right of petitioner to raise the principle of condonation as a defense subject to the caveat that it must be raised in the course of the investigation as prelude to any administrative liability. It likewise advanced the perception that invocation of condonation will be legally inconsequential to the imposition of the preventive suspension which is not a penalty for any administrative offense.[10]

The Court was not persuaded that a distinction must be made.

As explained by the Supreme Court in *Garcia v. Court of Appeals*: (supra)

...if it were established in the CA that the acts subject of the administrative complaint were indeed committed

during petitioner Garcia's prior term, then, following settled jurisprudence, he can no longer be administratively charged. Further, if this Court, in G.R. No. 181311, reverses the trial court's ruling or nullifies it for want of jurisdiction then the complaint-affidavit of the private respondents will no longer have a leg to stand on. It was imperative, therefore, on the part of the appellate court, as soon as it was apprised of the said considerable grounds, to issue an injunctive relief so as not to render moot, nugatory and ineffectual the resolution of the issues in the certiorari petition. An injunctive relief is not intended to determine a controverted right, but is calculated to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party. (Emphasis supplied)

To reiterate, there was no disagreement that petitioner was elected in 2010 and re-elected as City Mayor of Makati in 2013. The acts constitutive of the charges in the Complaint pertained to events from November 8, 2007, when City Ordinance No. 2007-A-015 appropriated P1,240,000,000.00 as supplemental budget for 2007. From this budget, P400,000,000.00 was allocated for the parking building. It was allegedly during this time that a Negotiated Contract for the architectural and engineering services were negotiated and approved. Disbursements allegedly favored Hilmarc and MANA amidst irregularities in the bidding process during the term of petitioner as City Mayor of Makati.

Yet, to subscribe to public respondent Ombudsman's submission that condonation can only be appreciated by the investigating body after it is ventilated as an exculpation by petitioner and considered solely by public respondent, following the exercise of its investigatory power, will ignore the Court's constitutional power and duty to evaluate the factual and legal foundations for,[11] nay, impediments to, a preventive suspension in an administrative case.

Verily, Ombudsman vs. Capulong[12] is the authority for the current view that Rule 65 will be the appropriate remedial tool to check the legality of a preventive suspension order as an interlocutory matter. Nor was the current Petition rendered infirm by the mere happenstance that no previous Motion for Reconsideration was explored by petitioner to address the Joint Order of preventive suspension,[13] for it is axiomatic in adjective law that a direct resort to Rule 65 will be the swift relief "...where the order is a patent nullity" or "where the orders were also issued either in excess of or without jurisdiction."[14]

Withal, in regard to the idea put forward by public respondent Ombudsman that petitioner can still be pinned for his demeanor, relative to transactions after his 2013 re-election, the available data thus far disclosed conveyed a different perspective from Us borne of admissions in *judicio*[15] from public respondent Ombudsman that payments were supposedly approved by petitioner on November 28, 2011.[16] Moreover, there was also no concrete indication and evidence of petitioner's participation on the Annexes from both parties for the alleged incidents on July 3, 2013, July 4, 2013, and July 24, 2013.[17]

While public office is a public trust and there is no vested right to hold public office, still, it is the policy of the Court to exercise utmost scrutiny in reviewing suspension orders brought before its jurisdiction by reason of jurisprudential aversion towards the preventive measure as expressed in *Ganzon v. Court of Appeals* (G.R. No. 93252, August 5, 1991):

The plain truth is that this Court has been ill at ease with suspensions, for the above reasons, and so also, because it is out of the ordinary to have a vacancy in local government. The sole objective of a suspension, as we have held, is simply "to prevent the accused from hampering the normal cause of the investigation with his influence and authority over possible witnesses" or to keep him off "the records and other evidence." It is a means, and no more, to assist prosecutors in firming up a case, if any, against an erring local official.

PARAMETERS OF THE COURT'S RULING

Through Our exposition at this juncture, let it be underscored that the subject matter of the Temporary Restraining Order (TRO) issued by the Court on March 16, 2015 was the enforcement of the Joint Order dated March 10, 2015 issued by the Office of the Ombudsman which seeks to preventively suspend herein petitioner for six (6) months without pay arising from the administrative case.

A Temporary Restraining Order (TRO) seeks to restrain a party until the propriety of granting a temporary injunction can be determined. It goes no further than to preserve the status quo until that determination. (*Marohombsar v. Adiong*, AM No. RTJ-02-1674, January 22, 2004).

Now, status quo refers to “the last actual peaceable uncontested status which preceded the pending controversy.” Therefore, the status quo could not be that were petitioner was preventively suspended since the suspension did not precede the present controversy; it is the controversy. (*Garcia v. Mojica*, G.R. No. 139043, September 10, 1999).

On the other hand, although public respondent Ombudsman persistently invoked what it perceived to be a legal obstacle to the issuance of an injunction, as an offshoot of Section 14 of R.A. 6770,[18] it must be echoed that Section 27 of R.A. 6770, and “...any other provision of law or issuance implementing the aforesaid Act and insofar as they provide the appeals in administrative disciplinary cases from the Supreme Court,...” were declared invalid in *Fabian vs. Desierto*.[19] As incremental scholastic inputs, Ombudsman vs. Samaniego[20] clarified that what the Court of Appeals cannot obstruct via injunction in Section 12, Rule 43 on appeal was the Decision of the Ombudsman in an administrative case. Necessarily, and in keeping with *Capulong*, this Court can thus impede an interlocutory order, such as a preventive suspension order from the Office of the Ombudsman.

It is equally imperative to stress in bold strokes that neither did We suggest that the investigation conducted by the Office of the Ombudsman should now be halted insofar as the administrative and criminal case of petitioner since *Garcia vs. Mojica* was also categorical that the Ombudsman’s power to investigate is distinct from the authority to preventively suspend.[21] Notwithstanding these pronouncements lifted from calibrated propositions and documentations from the parties, it did not perforce mean, too, that We virtually placed the cart ahead of the horse, so to speak, inasmuch as We only adhered to the message in *Strategic Alliance Development Corporation vs. Star Infrastructure Development Corporation*[22] that:

“... Far from amounting to a prejudgment of the case, the restraint of said acts in the service of the office of a writ of preliminary injunction, i.e., the restoration of the status quo ante as well [as the] preservation of the rights of the litigant during the pendency of the case.”

In fine, it appeared to Us, at first blush, that there were, indeed, serious areas of concern for petitioner which can hardly be subjected to mathematical calculation.[23] Prior to appreciation of the parties’ entire discourse, neither was the provisional remedy in Section 5, Rule 58 obstructed, nor rendered *fait accompli*, by the so-called full implementation of the preventive suspension order inasmuch as petitioner’s desolation, in the form of continuing,[24] but unwarranted displacement, is an acknowledged exception to the alleged moot nature of petitioner’s immediate recourse.

Accordingly, in view of the foregoing premises, the Court hereby resolved to:

1. GRANT petitioner Jejomar Erwin S. Binay, Jr.’s prayer for the issuance of a writ of preliminary injunction, enjoining respondents Office of the Ombudsman and the Department of Interior and Local Government and their agents and/or representatives from enforcing the Joint Order dated March 10, 2015, and to respect and preserve the status quo before the issuance of the aforesaid Joint Order, relative to petitioner’s preventive suspension for six

(6) months without pay;

2. ORDER petitioner to file a bond^[25] in the amount of FIVE HUNDRED THOUSAND PESOS (P500,000.00) which shall answer for whatever damages which may be sustained by reason of the preliminary injunction in the event that it is finally decided that petitioner is not entitled thereto;

3. DIRECT the Division Clerk of Court to ISSUE the corresponding writ of preliminary injunction against respondents upon proof of petitioner's posting of the requisite bond.

SO ORDERED.

Acosta, F. P., and Peralta, Jr., E.B., JJ., concur.

[1] Section 1, Article 8, 1987 Constitution; Bernas, *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 2003 edition, page xxxviii – "...This function, conveniently labeled "Judicial Review," involves the power and duty on the part of the Court of pronouncing void any such act which does not square with its own reading of the constitutional instrument..." citing Corwin, *Constitution of the United States of America* (1963); Bernas, *Vide*, page 920 – "The Court has used this authority to check even independent bodies such as the Electoral Tribunal, political parties and the House of Representatives and administrative agencies..." (citations omitted); *Biraogo vs. The Philippine Truth Commission*, and companion case, G.R. No. 192935, G.R. No. 193036, citing Justice Laurel, *Angara vs. Electoral Commission*, 63 Phil. 139,158 (1936).

[2] Cruz, *Constitutional Law*, 1987 edition, page 1.

[3] Atty. Claro Certeza, Atty. Maria Patricia Alvarez and Atty. Jose Julius Castro.

[4] Assistant Solicitor General Hermes Ocampo, Senior State Solicitor Raymund Rigodon and Deputy Ombudsman for Luzon Gerard Mosquera.

[5] Dated December 4, 2007, effective December 27, 2007.

[6] *Trajano v. Uniwide Sales Warehouse Club*, G.R. No. 190253, June 11, 2014; *Datu Michael Abas Kida et al. v. Senate of the Philippines*, G.R. No. 196271, February 28, 2012. Cf. *Republic of the Philippines v. MERALCO*, G.R. No. 201715, December 11, 2013.

[7] Section 2, Rule 58, Section 7, Rule 65, 1997 Rules of Civil Procedure.

[8] *Petition for Certiorari*, paragraph 2.2 (i), page 4; Ombudsman's Comment Ex Abundanti Ad Cautelam, paragraphs 2-3, pp. 18-27.

[9] Cf. *Remulla, Jr., vs. The Hon. Court of Appeals, et al.*, G.R. No. 216075, Resolution, February 25, 2015.

[10] Respondent Ombudsman's Comment, pp. 18-25.

[11] *Ombudsman vs. Capulong*, G.R. No. 201643, March 12, 2014 – "... It does not preclude the courts from passing upon the validity of a preventive suspension order, it being a manifestation of its constitutionally mandated power and authority to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

[12] *Vide*.

[13] Respondent Ombudsman's Comment, pp. 6-7.

[14] 1 Regalado, Remedial Law Compendium, 10[th] Revised Edition, 2010, pp. 796, 798, citing Aguilar vs. Tan, L-23600, January 30, 1970, Marcelo vs. De Guzman, et al., L-29077, June 29, 1982, Vigan Electric Light Co., Inc. vs. Public Services Commission, L-19850, January 30, 1964 and other cases.

[15] Section 4, Rule 129, Section 2 (a), Rule 131, Revised Rules on Evidence; Peralta, Jr., Perspectives of Evidence, 2005 edition, pp. 71-78, citations omitted.

[16] Cf. public respondent Ombudsman's Comment, pp. 13 and 26; Petition for Certiorari, Annex J and L; public respondent Ombudsman's Comment, Annex J and L.

[17] Petition for Certiorari, unmarked Annex after Annex L and before Annex A-2; Annex YY-9; public respondent Ombudsman's Annex L-1, Annex YY-9.

[18] Cited at public respondent Ombudsman's Comment, pp. 27-29; Restrictions. – No writ of injunction shall be issued by any court to delay an investigation being conducted by the Ombudsman under this Act, unless there is a prima facie evidence that the subject matter of the investigation is outside the jurisdiction of the Office of the Ombudsman.

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 of law.

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

[20] G.R. No. 175573, October 5, 2010.

[21] Also invoked by public respondent Ombudsman's Comment, page 22.

[22] G.R. No. 187872, April 11, 2011.

[23] Social Security Commission vs. Bayona, G.R. No. L-1355, May 30, 1962.

[24] Section 3 (a)(c), Rule 58, 1997 Rules of Civil Procedure; 1 Regalado, Vide, pp. 730-731, citing Dayrit vs. De los Santos, 18 Phil. 275, Meralco vs. Del Rosario, et al., 22 Phil. 433; cf. National Artist for Literature Almario, et al., vs. The Hon. Executive Secretary, et al., G.R. No. 189028, July 16, 2013 .

[25] Section 4(b), Rule 58.

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