

EQUATORIAL REALTY DEVELOPMENT, INC. & CARMELO & BAUERMANN, INC., PETITIONERS, VS. MAYFAIR THEATER, INC., RESPONDENT.

G.R. No. 106063. November 21, 1996

Ponente: HERMOSISIMA, JR., J.

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HERMOSISIMA, JR., J.:

Before us is a petition for review of the decision[1] of the Court of Appeals[2] involving questions in the resolution of which the respondent appellate court analyzed and interpreted particular provisions of our laws on contracts and sales. In its assailed decision, the respondent court reversed the trial court[3] which, in dismissing the complaint for specific performance with damages and annulment of contract,[4] found the option clause in the lease contracts entered into by private respondent Mayfair Theater, Inc. (hereafter, Mayfair) and petitioner Carmelo & Bauermann, Inc. (hereafter, Carmelo) to be impossible of performance and unsupported by a consideration and the subsequent sale of the subject property to petitioner Equatorial Realty Development, Inc. (hereafter, Equatorial) to have been made without any breach of or prejudice to, the said lease contracts.[5]

We reproduce below the facts as narrated by the respondent court, which narration, we note, is almost verbatim the basis of the statement of facts as rendered by the petitioners in their pleadings:

"Carmelo owned a parcel of land, together with two 2-storey buildings constructed thereon located at Claro M. Recto Avenue, Manila, and covered by TCT No. 18529 issued in its name by the Register of Deeds of Manila.

On June 1, 1967 Carmelo entered into a contract of lease with Mayfair for the latter's lease of a portion of Carmelo's property particularly described, to wit:

‘A PORTION OF THE SECOND FLOOR of the two-storey building, situated at C.M. Recto Avenue, Manila, with a floor area of 1,610 square meters.

THE SECOND FLOOR AND MEZZANINE of the two-storey building, situated at C.M. Recto Avenue, Manila, with a floor area of 150 square meters,’

for use by Mayfair as a motion picture theater and for a term of twenty (20) years. Mayfair thereafter constructed on the leased property a movie house known as ‘Maxim Theatre.’

Two years later, on March 31, 1969, Mayfair entered into a second contract of lease with Carmelo for the lease of another portion of Carmelo's property, to wit:

‘A PORTION OF THE SECOND FLOOR of the two-storey building, situated at C.M. Recto Avenue, Manila, with a floor area of 1,064 square meters.

THE TWO (2) STORE SPACES AT THE GROUND FLOOR and MEZZANINE of the two-storey building situated at C.M. Recto Avenue, Manila, with a floor area of 300 square meters and bearing street numbers 1871 and 1875,’

for similar use as a movie theater and for a similar term of twenty (20) years. Mayfair put up another movie house known as 'Miramar Theatre' on this leased property.

Both contracts of lease provides (sic) identically worded paragraph 8, which reads:

'That if the LESSOR should desire to sell the leased premises, the LESSEE shall be given 30-days exclusive option to purchase the same.

In the event, however, that the leased premises is sold to someone other than the LESSEE, the LESSOR is bound and obligated, as it hereby binds and obligates itself, to stipulate in the Deed of Sale thereof that the purchaser shall recognize this lease and be bound by all the terms and conditions thereof.'

Sometime in August 1974, Mr. Henry Pascal of Carmelo informed Mr. Henry Yang, President of Mayfair, through a telephone conversation that Carmelo was desirous of selling the entire Claro M. Recto property. Mr. Pascal told Mr. Yang that a certain Jose Araneta was offering to buy the whole property for US Dollars 1,200,000, and Mr. Pascal asked Mr. Yang if the latter was willing to buy the property for Six to Seven Million Pesos.

Mr. Yang replied that he would let Mr. Pascal know of his decision. On August 23, 1974, Mayfair replied through a letter stating as follows:

'It appears that on August 19, 1974 your Mr. Henry Pascal informed our client's Mr. Henry Yang through the telephone that your company desires to sell your above-mentioned C.M. Recto Avenue property.

Under your company's two lease contracts with our client, it is uniformly provided:

'8. That if the LESSOR should desire to sell the leased premises the LESSEE shall be given 30-days exclusive option to purchase the same. In the event, however, that the leased premises is sold to someone other than the LESSEE, the LESSOR is bound and obligated, as it is (sic) herebinds (sic) and obligates itself, to stipulate in the Deed of Sale thereof that the purchaser shall recognize this lease and be bound by all the terms and conditions hereof (sic).'

Carmelo did not reply to this letter.

On September 18, 1974, Mayfair sent another letter to Carmelo purporting to express interest in acquiring not only the leased premises but 'the entire building and other improvements if the price is reasonable. However, both Carmelo and Equatorial questioned the authenticity of the second letter.

Four years later, on July 30, 1978, Carmelo sold its entire C.M. Recto Avenue land and building, which included the leased premises housing the 'Maxim' and 'Miramar' theatres, to Equatorial by virtue of a Deed of Absolute Sale, for the total sum of P11,300,000.00.

In September 1978, Mayfair instituted the action a quo for specific performance and annulment of the sale of the leased premises to Equatorial. In its Answer, Carmelo alleged as special and affirmative defense (a) that it had informed Mayfair of its desire to sell the entire C.M. Recto Avenue property and offered the same to Mayfair, but the latter answered that it was interested only in buying the areas under lease, which was impossible since the property was not a condominium; and (b) that the option to purchase invoked by Mayfair is null and void for lack of consideration. Equatorial, in its Answer, pleaded as special and affirmative defense that the option is void for lack of consideration (sic) and is unenforceable by reason of its impossibility of performance because the leased premises could not be sold separately from the other portions of the land and building. It counterclaimed for cancellation of the contracts of lease, and for increase of rentals in view of alleged supervening extraordinary devaluation of the currency. Equatorial likewise cross-claimed against co-defendant Carmelo for indemnification in respect of Mayfair's claims.

During the pre-trial conference held on January 23, 1979, the parties stipulated on the following:

‘1. That there was a deed of sale of the contested premises by the defendant Carmelo x x x in favor of defendant Equatorial x x x;

2. That in both contracts of lease there appear (sic) the stipulation granting the plaintiff exclusive option to purchase the leased premises should the lessor desire to sell the same (admitted subject to the contention that the stipulation is null and void);

3. That the two buildings erected on this land are not of the condominium plan;

4. That the amounts stipulated and mentioned in paragraphs 3 (a) and (b) of the contracts of lease constitute the consideration for the plaintiff’s occupancy of the leased premises, subject of the same contracts of lease, Exhibits A and B;

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6. That there was no consideration specified in the option to buy embodied in the contract;

7. That Carmelo & Bauermann owned the land and the two buildings erected thereon;

8. That the leased premises constitute only the portions actually occupied by the theaters; and

9. That what was sold by Carmelo & Bauermann to defendant Equatorial Realty is the land and the two buildings erected thereon.’

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After assessing the evidence, the court a quo rendered the appealed decision, the decretal portion of which reads as follows:

‘WHEREFORE, judgment is hereby rendered:

(1) Dismissing the complaint with costs against the plaintiff;

(2) Ordering plaintiff to pay defendant Carmelo & Bauermann P40,000.00 by way of attorney’s fees on its counterclaim;

(3) Ordering plaintiff to pay defendant Equatorial Realty P35,000.00 per month as reasonable compensation for the use of areas not covered by the contract (sic) of lease from July 31, 1979 until plaintiff vacates said area (sic) plus legal interest from July 31, 1978; P70,000.00 per month as reasonable compensation for the use of the premises covered by the contracts (sic) of lease dated (June 1, 1967 from June 1, 1987 until plaintiff vacates the premises plus legal interest from June 1, 1987; P55,000.00 per month as reasonable compensation for the use of the premises covered by the contract of lease dated March 31, 1969 from March 30, 1989 until plaintiff vacates the premises plus legal interest from March 30, 1989; and P40,000.00 as attorney’s fees;

(4) Dismissing defendant Equatorial’s crossclaim against defendant Carmelo & Bauermann.

The contracts of lease dated June 1, 1967 and March 31, 1969 are declared expired and all persons claiming rights under these contracts are directed to vacate the premises’.”[6]

The trial court adjudged the identically worded paragraph 8 found in both aforecited lease contracts to be an option clause which however cannot be deemed to be binding on Carmelo because of lack of distinct consideration therefor.

The court a quo ratiocinated:

"Significantly, during the pre-trial, it was admitted by the parties that the option in the contract of lease is not supported by a separate consideration. Without a consideration, the option is therefore not binding on defendant Carmelo & Bauermann to sell the C.M. Recto property to the former. The option invoked by the

plaintiff appears in the contracts of lease x x x in effect there is no option, on the ground that there is no consideration. Article 1352 of the Civil Code, provides:

‘Contracts without cause or with unlawful cause, produce no effect whatever. The cause is unlawful if it is contrary to law, morals, good custom, public order or public policy.’

Contracts therefore without consideration produce no effect whatsoever. Article 1324 provides:

‘When the offeror has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option is founded upon consideration, as something paid or promised.’

in relation with Article 1479 of the same Code:

‘A promise to buy and sell a determinate thing for a price certain is reciprocally demandable.

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promisor if the promise is supported by a consideration distinct from the price.’

The plaintiff cannot compel defendant Carmelo to comply with the promise unless the former establishes the existence of a distinct consideration. In other words, the promisee has the burden of proving the consideration. The consideration cannot be presumed as in Article 1354:

‘Although the cause is not stated in the contract, it is presumed that it exists and is lawful unless the debtor proves the contrary.’

where consideration is legally presumed to exist. Article 1354 applies to contracts in general, whereas when it comes to an option it is governed particularly and more specifically by Article 1479 whereby the promisee has the burden of proving the existence of consideration distinct from the price. Thus, in the case of *Sanchez vs. Rigo*, 45 SCRA 368, 372-373, the Court said:

‘(1) Article 1354 applies to contracts in general, whereas the second paragraph of Article 1479 refers to sales in particular, and, more specifically, to an accepted unilateral promise to buy or to sell. In other words, Article 1479 is controlling in the case at bar.

(2) In order that said unilateral promise may be binding upon the promisor, Article 1479 requires the concurrence of a condition, namely, that the promise be supported by a consideration distinct from the price.

Accordingly, the promisee cannot compel the promisor to comply with the promise, unless the former establishes the existence of said distinct consideration. In other words, the promisee has the burden of proving such consideration. Plaintiff herein has not even alleged the existence thereof in his complaint.’[7]

It follows that plaintiff cannot compel defendant Carmelo & Bauermann to sell the C.M. Recto property to the former."

Mayfair taking exception to the decision of the trial court, the battleground shifted to the respondent Court of Appeals. Respondent appellate court reversed the court a quo and rendered judgment:

"1. Reversing and setting aside the appealed Decision;

2. Directing the plaintiff-appellant Mayfair Theater, Inc. to pay and return to Equatorial the amount of P11,300,000.00 within fifteen (15) days from notice of this Decision, and ordering Equatorial Realty Development, Inc. to accept such payment;

3. Upon payment of the sum of P11,300,000, directing Equatorial Realty Development, Inc. to execute the deeds and documents necessary for the issuance and transfer of ownership to Mayfair of the lot registered

under TCT Nos. 17350, 118612, 60936, and 52571; and

4. Should plaintiff-appellant Mayfair Theater, Inc. be unable to pay the amount as adjudged, declaring the Deed of Absolute Sale between the defendants-appellants Carmelo & Bauermann, Inc. and Equatorial Realty Development, Inc. as valid and binding upon all the parties.”[8]

Rereading the law on the matter of sales and option contracts, respondent Court of Appeals differentiated between Article 1324 and Article 1479 of the Civil Code, analyzed their application to the facts of this case, and concluded that since paragraph 8 of the two lease contracts does not state a fixed price for the purchase of the leased premises, which is an essential element for a contract of sale to be perfected, what paragraph 8 is, must be a right of first refusal and not an option contract. It explicated:

“Firstly, the court a quo misapplied the provisions of Articles 1324 and 1479, second paragraph, of the Civil Code.

Article 1324 speaks of an ‘offer’ made by an offeror which the offeree may or may not accept within a certain period. Under this article, the offer may be withdrawn by the offeror before the expiration of the period and while the offeree has not yet accepted the offer. However, the offer cannot be withdrawn by the offeror within the period if a consideration has been promised or given by the offeree in exchange for the privilege of being given that period within which to accept the offer. The consideration is distinct from the price which is part of the offer. The contract that arises is known as option. In the case of *Beaumont vs. Prieto*, 41 Phil. 670, the Supreme Court, citing *Bouvier*, defined an option as follows: ‘A contract by virtue of which A, in consideration of the payment of a certain sum to B, acquires the privilege of buying from or selling to B, certain securities or properties within a limited time at a specified price.’ (pp. 686-7).

Article 1479, second paragraph, on the other hand, contemplates of an ‘accepted unilateral promise to buy or to sell a determinate thing for a price within (which) is binding upon the promisee if the promise is supported by a consideration distinct from the price.’ That ‘unilateral promise to buy or to sell a determinate thing for a price certain’ is called an offer. An ‘offer’, in law, is a proposal to enter into a contract (*Rosenstock vs. Burke*, 46 Phil. 217). To constitute a legal offer, the proposal must be certain as to the object, the price and other essential terms of the contract (Art. 1319, Civil Code).

Based on the foregoing discussion, it is evident that the provision granting Mayfair ‘30-days exclusive option to purchase’ the leased premises is NOT AN OPTION in the context of Arts. 1324 and 1479, second paragraph, of the Civil Code. Although the provision is certain as to the object (the sale of the leased premises) the price for which the object is to be sold is not stated in the provision. Otherwise stated, the questioned stipulation is not, by itself, an ‘option’ or the ‘offer to sell’ because the clause does not specify the price for the subject property.

Although the provision giving Mayfair ‘30-days exclusive option to purchase’ cannot be legally categorized as an option, it is, nevertheless, a valid and binding stipulation. What the trial court failed to appreciate was the intention of the parties behind the questioned proviso.

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The provision in question is not of the pro-forma type customarily found in a contract of lease. Even appellees have recognized that the stipulation was incorporated in the two Contracts of Lease at the initiative and behest of Mayfair. Evidently, the stipulation was intended to benefit and protect Mayfair in its rights as lessee in case Carmelo should decide, during the term of the lease, to sell the leased property. This intention of the parties is achieved in two ways in accordance with the stipulation. The first is by giving Mayfair ‘30-days exclusive option to purchase’ the leased property. The second is, in case Mayfair would opt not to purchase the leased property, ‘that the purchaser (the new owner of the leased property) shall recognize the lease and be bound by all the terms and conditions thereof.’

In other words, paragraph 8 of the two Contracts of Lease, particularly the stipulation giving Mayfair '30-days exclusive option to purchase the (leased premises),' was meant to provide Mayfair the opportunity to purchase and acquire the leased property in the event that Carmelo should decide to dispose of the property. In order to realize this intention, the implicit obligation of Carmelo once it had decided to sell the leased property, was not only to notify Mayfair of such decision to sell the property, but, more importantly, to make an offer to sell the leased premises to Mayfair, giving the latter a fair and reasonable opportunity to accept or reject the offer, before offering to sell or selling the leased property to third parties. The right vested in Mayfair is analogous to the right of first refusal, which means that Carmelo should have offered the sale of the leased premises to Mayfair before offering it to other parties, or, if Carmelo should receive any offer from third parties to purchase the leased premises, then Carmelo must first give Mayfair the opportunity to match that offer.

In fact, Mr. Pascal understood the provision as giving Mayfair a right of first refusal when he made the telephone call to Mr. Yang in 1974. Mr. Pascal thus testified:

'Q. Can you tell this Honorable Court how you made the offer to Mr. Henry Yang by telephone?

A. I have an offer from another party to buy the property and having the offer we decided to make an offer to Henry Yang on a first-refusal basis.' (TSN, November 8, 1983, p. 12.).

and on cross-examination:

'Q. When you called Mr. Yang on August 1974 can you remember exactly what you have told him in connection with that matter, Mr. Pascal?

A. More or less, I told him that I received an offer from another party to buy the property and I was offering him first choice of the entire property.' (TSN, November 29, 1983, p. 18).

We rule, therefore, that the foregoing interpretation best renders effectual the intention of the parties." [9]

Besides the ruling that paragraph 8 vests in Mayfair the right of first refusal as to which the requirement of distinct consideration indispensable in an option contract, has no application, respondent appellate court also addressed the claim of Carmelo and Equatorial that assuming *arguendo* that the option is valid and effective, it is impossible of performance because it covered only the leased premises and not the entire Claro M. Recto property, while Carmelo's offer to sell pertained to the entire property in question. The Court of Appeals ruled as to this issue in this wise:

"We are not persuaded by the contentions of the defendants-appellees. It is to be noted that the Deed of Absolute Sale between Carmelo and Equatorial covering the whole Claro M. Recto property, made reference to four titles: TCT Nos. 17350, 118612, 60936 and 52571. Based on the information submitted by Mayfair in its appellant's Brief (pp. 5 and 46) which has not been controverted by the appellees, and which We, therefore, take judicial notice of the two theaters stand on the parcels of land covered by TCT No. 17350 with an area of 622.10 sq. m. and TCT No. 118612 with an area of 2,100.10 sq. m. The existence of four separate parcels of land covering the whole Recto property demonstrates the legal and physical possibility that each parcel of land, together with the buildings and improvements thereon, could have been sold independently of the other parcels.

At the time both parties executed the contracts, they were aware of the physical and structural conditions of the buildings on which the theaters were to be constructed in relation to the remainder of the whole Recto property. The peculiar language of the stipulation would tend to limit Mayfair's right under paragraph 8 of the Contract of Lease to the acquisition of the leased areas only. Indeed, what is being contemplated by the questioned stipulation is a departure from the customary situation wherein the buildings and improvements are included in and form part of the sale of the subjacent land. Although this situation is not common, especially considering the non-condominium nature of the buildings, the sale would be valid and capable of being

performed. A sale limited to the leased premises only, if hypothetically assumed, would have brought into operation the provisions of co-ownership under which Mayfair would have become the exclusive owner of the leased premises and at the same time a co-owner with Carmelo of the subjacent land in proportion to Mayfair's interest over the premises sold to it." [10]

Carmelo and Equatorial now comes before us questioning the correctness and legal basis for the decision of respondent Court of Appeals on the basis of the following assigned errors:

"I

THE COURT OF APPEALS GRAVELY ERRED IN CONCLUDING THAT THE OPTION CLAUSE IN THE CONTRACTS OF LEASE IS ACTUALLY A RIGHT OF FIRST REFUSAL PROVISIO. IN DOING SO THE COURT OF APPEALS DISREGARDED THE CONTRACTS OF LEASE WHICH CLEARLY AND UNEQUIVOCALLY PROVIDE FOR AN OPTION, AND THE ADMISSION OF THE PARTIES OF SUCH OPTION IN THEIR STIPULATION OF FACTS.

II

WHETHER AN OPTION OR RIGHT OF FIRST REFUSAL, THE COURT OF APPEALS ERRED IN DIRECTING EQUATORIAL TO EXECUTE A DEED OF SALE EIGHTEEN (18) YEARS AFTER MAYFAIR FAILED TO EXERCISE ITS OPTION (OR, EVEN ITS RIGHT OF FIRST REFUSAL ASSUMING IT WAS ONE) WHEN THE CONTRACTS LIMITED THE EXERCISE OF SUCH OPTION TO 30 DAYS FROM NOTICE.

III

THE COURT OF APPEALS GRIEVOUSLY ERRED WHEN IT DIRECTED IMPLEMENTATION OF ITS DECISION EVEN BEFORE ITS FINALITY, AND WHEN IT GRANTED MAYFAIR A RELIEF THAT WAS NOT EVEN PRAYED FOR IN THE COMPLAINT.

IV

THE COURT OF APPEALS VIOLATED ITS OWN INTERNAL RULES IN THE ASSIGNMENT OF APPEALED CASES WHEN IT ALLOWED THE SAME DIVISION XII, PARTICULARLY JUSTICE MANUEL HERRERA, TO RESOLVE ALL THE MOTIONS IN THE 'COMPLETION PROCESS' AND TO STILL RESOLVE THE MERITS OF THE CASE IN THE 'DECISION STAGE'." [11]

We shall first dispose of the fourth assigned error respecting alleged irregularities in the raffle of this case in the Court of Appeals. Suffice it to say that in our Resolution, [12] dated December 9, 1992, we already took note of this matter and set out the proper applicable procedure to be the following:

"On September 20, 1992, counsel for petitioner Equatorial Realty Development, Inc. wrote a letter-complaint to this Court alleging certain irregularities and infractions committed by certain lawyers, and Justices of the Court of Appeals and of this Court in connection with case CA-G.R. CV No. 32918 (now G.R. No. 106063). This partakes of the nature of an administrative complaint for misconduct against members of the judiciary. While the letter-complaint arose as an incident in case CA-G.R. CV No. 32918 (now G.R. No. 106063), the disposition thereof should be separate and independent from Case G.R. No. 106063. However, for purposes of receiving the requisite pleadings necessary in disposing of the administrative complaint, this Division shall continue to have control of the case. Upon completion thereof, the same shall be referred to the Court En Banc for proper disposition." [13]

This court having ruled the procedural irregularities raised in the fourth assigned error of Carmelo and Equatorial, to be an independent and separate subject for an administrative complaint based on misconduct by the lawyers and justices implicated therein, it is the correct, prudent and consistent course of action not to pre-empt the administrative proceedings to be undertaken respecting the said irregularities. Certainly, a discussion thereupon by us in this case would entail a finding on the merits as to the real nature of the questioned procedures and the

true intentions and motives of the players therein.

In essence, our task is two-fold: (1) to define the true nature, scope and efficacy of paragraph 8 stipulated in the two contracts of lease between Carmelo and Mayfair in the face of conflicting findings by the trial court and the Court of Appeals; and (2) to determine the rights and obligations of Carmelo and Mayfair, as well as Equatorial, in the aftermath of the sale by Carmelo of the entire Claro M. Recto property to Equatorial.

Both contracts of lease in question provide the identically worded paragraph 8, which reads:

"That if the LESSOR should desire to sell the leased premises, the LESSEE shall be given 30-days exclusive option to purchase the same.

In the event, however, that the leased premises is sold to someone other than the LESSEE, the LESSOR is bound and obligated, as it hereby binds and obligates itself, to stipulate in the Deed of Sale thereof that the purchaser shall recognize this lease and be bound by all the terms and conditions thereof." [14]

We agree with the respondent Court of Appeals that the aforecited contractual stipulation provides for a right of first refusal in favor of Mayfair. It is not an option clause or an option contract. It is a contract of a right of first refusal.

As early as 1916, in the case of *Beaumont vs. Prieto*, [15] unequivocal was our characterization of an option contract as one necessarily involving the choice granted to another for a distinct and separate consideration as to whether or not to purchase a determinate thing at a predetermined fixed price.

"It is unquestionable that, by means of the document Exhibit E, to wit, the letter of December 4, 1911, quoted at the beginning of this decision, the defendant Valdes granted to the plaintiff Borck the right to purchase the Nagtajan Hacienda belonging to Benito Legarda, during the period of three months and for its assessed valuation, a grant which necessarily implied the offer or obligation on the part of the defendant Valdes to sell to Borck the said hacienda during the period and for the price mentioned, x x x. There was, therefore, a meeting of minds on the part of the one and the other, with regard to the stipulations made in the said document. But it is not shown that there was any cause or consideration for that agreement, and this omission is a bar which precludes our holding that the stipulations contained in Exhibit E is a contract of option, for, x x x there can be no contract without the requisite, among others, of the cause for the obligation to be established.

In his Law Dictionary, edition of 1897, Bouvier defines an option as a contract, in the following language:

‘A contract by virtue of which A, in consideration of the payment of a certain sum to B, acquires the privilege of buying from, or selling to B, certain securities or properties within a limited time at a specified price. (*Story vs. Salamon*, 71 N.Y., 420.)’

From vol. 6, page 5001, of the work ‘Words and Phrases,’ citing the case of *Ide vs. Leiser* (24 Pac., 695; 10 Mont., 5; 24 Am. St. Rep., 17) the following quotation has been taken:

‘An agreement in writing to give a person the option to purchase lands within a given time at a named price is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something; that is, the right or privilege to buy at the election or option of the other party. The second party gets in praesenti, not lands, nor an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or, rather, from his point of view, he receives the right to elect to buy.’

But the two definitions above cited refer to the contract of option, or, what amounts to the same thing, to the case where there was cause or consideration for the obligation, the subject of the agreement made by the

parties; while in the case at bar there was no such cause or consideration." [16] (Underscoring ours.)

The rule so early established in this jurisdiction is that the deed of option or the option clause in a contract, in order to be valid and enforceable, must, among other things, indicate the definite price at which the person granting the option, is willing to sell.

Notably, in one case we held that the lessee loses his right to buy the leased property for a named price per square meter upon failure to make the purchase within the time specified; [17] in one other case we freed the landowner from her promise to sell her land if the prospective buyer could raise P4,500.00 in three weeks because such option was not supported by a distinct consideration; [18] in the same vein in yet one other case, we also invalidated an instrument entitled, "Option to Purchase" a parcel of land for the sum of P1,510.00 because of lack of consideration; [19] and as an exception to the doctrine enumerated in the two preceding cases, in another case, we ruled that the option to buy the leased premises for P12,000.00 as stipulated in the lease contract, is not without consideration for in reciprocal contracts, like lease, the obligation or promise of each party is the consideration for that of the other. [20] In all these cases, the selling price of the object thereof is always predetermined and specified in the option clause in the contract or in the separate deed of option. We elucidated, thus, in the very recent case of *Ang Yu Asuncion vs. Court of Appeals* [21] that:

"x x x. In sales, particularly, to which the topic for discussion about the case at bench belongs, the contract is perfected when a person, called the seller, obligates himself, for a price certain, to deliver and to transfer ownership of a thing or right to another, called the buyer, over which the latter agrees. Article 1458 of the Civil Code provides:

‘Art. 1458. By the contract of sale one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent.

A contract of sale may be absolute or conditional.’

When the sale is not absolute but conditional, such as in a ‘Contract to Sell’ where invariably the ownership of the thing sold is retained until the fulfillment of a positive suspensive condition (normally, the full payment of the purchase price), the breach of the condition will prevent the obligation to convey title from acquiring an obligatory force. x x x.

An unconditional mutual promise to buy and sell, as long as the object is made determinate and the price is fixed, can be obligatory on the parties, and compliance therewith may accordingly be exacted.

An accepted unilateral promise which specifies the thing to be sold and the price to be paid, when coupled with a valuable consideration distinct and separate from the price, is what may properly be termed a perfected contract of option. This contract is legally binding, and in sales, it conforms with the second paragraph of Article 1479 of the Civil Code, viz:

‘ART. 1479. x x x.

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promisor if the promise is supported by a consideration distinct from the price (1451a).’

Observe, however, that the option is not the contract of sale itself. The optionee has the right, but not the obligation, to buy. Once the option is exercised timely, i.e., the offer is accepted before a breach of the option, a bilateral promise to sell and to buy ensues and both parties are then reciprocally bound to comply with their respective undertakings.

Let us elucidate a little. A negotiation is formally initiated by an offer. An imperfect promise (*policitacion*) is merely an offer. Public advertisements or solicitations and the like are ordinarily construed as mere invitations

to make offers or only as proposals. These relations, until a contract is perfected, are not considered binding commitments. Thus, at any time prior to the perfection of the contract, either negotiating party may stop the negotiation. The offer, at this stage, may be withdrawn; the withdrawal is effective immediately after its manifestation, such as by its mailing and not necessarily when the offeree learns of the withdrawal (*Laudico vs. Arias*, 43 Phil. 270). Where a period is given to the offeree within which to accept the offer, the following rules generally govern:

(1) If the period is not itself founded upon or supported by a consideration, the offeror is still free and has the right to withdraw the offer before its acceptance, or, if an acceptance has been made, before the offeror's coming to know of such fact, by communicating that withdrawal to the offeree (see Art. 1324, Civil Code; see also *Atkins, Kroll & Co. vs. Cua*, 102 Phil. 948, holding that this rule is applicable to a unilateral promise to sell under Art. 1479, modifying the previous decision in *South Western Sugar vs. Atlantic Gulf*, 97 Phil. 249; see also Art. 1319, Civil Code; *Rural Bank of Parañaque, Inc. vs. Remolado*, 135 SCRA 409; *Sanchez vs. Rigos*, 45 SCRA 368). The right to withdraw, however, must not be exercised whimsically or arbitrarily; otherwise, it could give rise to a damage claim under Article 19 of the Civil Code which ordains that 'every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.'

(2) If the period has a separate consideration, a contract of 'option' is deemed perfected, and it would be a breach of that contract to withdraw the offer during the agreed period. The option, however, is an independent contract by itself, and it is to be distinguished from the projected main agreement (subject matter of the option) which is obviously yet to be concluded. If, in fact, the optioner-offeror withdraws the offer before its acceptance (exercise of the option) by the optionee-offeree, the latter may not sue for specific performance on the proposed contract ('object' of the option) since it has failed to reach its own stage of perfection. The optioner-offeror, however, renders himself liable for damages for breach of the option. x x x."

In the light of the foregoing disquisition and in view of the wording of the questioned provision in the two lease contracts involved in the instant case, we so hold that no option to purchase in contemplation of the second paragraph of Article 1479 of the Civil Code, has been granted to Mayfair under the said lease contracts.

Respondent Court of Appeals correctly ruled that the said paragraph 8 grants the right of first refusal to Mayfair and is not an option contract. It also correctly reasoned that as such, the requirement of a separate consideration for the option, has no applicability in the instant case.

There is nothing in the identical Paragraphs "8" of the June 1, 1967 and March 31, 1969 contracts which would bring them into the ambit of the usual offer or option requiring an independent consideration.

An option is a contract granting a privilege to buy or sell within an agreed time and at a determined price. It is a separate and distinct contract from that which the parties may enter into upon the consummation of the option. It must be supported by consideration.[22] In the instant case, the right of first refusal is an integral part of the contracts of lease. The consideration is built into the reciprocal obligations of the parties.

To rule that a contractual stipulation such as that found in paragraph 8 of the contracts is governed by Article 1324 on withdrawal of the offer or Article 1479 on promise to buy and sell would render ineffectual or "inutile" the provisions on right of first refusal so commonly inserted in leases of real estate nowadays. The Court of Appeals is correct in stating that Paragraph 8 was incorporated into the contracts of lease for the benefit of Mayfair which wanted to be assured that it shall be given the first crack or the first option to buy the property at the price which Carmelo is willing to accept. It is not also correct to say that there is no consideration in an agreement of right of first refusal. The stipulation is part and parcel of the entire contract of lease. The consideration for the lease includes the consideration for the right of first refusal. Thus, Mayfair is in effect stating that it consents to lease the premises and to pay the price agreed upon provided the lessor also consents that,

should it sell the leased property, then, Mayfair shall be given the right to match the offered purchase price and to buy the property at that price. As stated in *Vda. De Quirino vs. Palarca*,^[23] in reciprocal contract, the obligation or promise of each party is the consideration for that of the other.

The respondent Court of Appeals was correct in ascertaining the true nature of the aforecited paragraph 8 to be that of a contractual grant of the right of first refusal to Mayfair.

We shall now determine the consequential rights, obligations and liabilities of Carmelo, Mayfair and Equatorial.

The different facts and circumstances in this case call for an amplification of the precedent in *Ang Yu Asuncion vs. Court of Appeals*.^[24]

First and foremost is that the petitioners acted in bad faith to render Paragraph 8 "inutile."

What Carmelo and Mayfair agreed to, by executing the two lease contracts, was that Mayfair will have the right of first refusal in the event Carmelo sells the leased premises. It is undisputed that Carmelo did recognize this right of Mayfair, for it informed the latter of its intention to sell the said property in 1974. There was an exchange of letters evidencing the offer and counter-offers made by both parties. Carmelo, however, did not pursue the exercise to its logical end. While it initially recognized Mayfair's right of first refusal, Carmelo violated such right when without affording its negotiations with Mayfair the full process to ripen to at least an interface of a definite offer and a possible corresponding acceptance within the "30-day exclusive option" time granted Mayfair, Carmelo abandoned negotiations, kept a low profile for some time, and then sold, without prior notice to Mayfair, the entire Claro M. Recto property to Equatorial.

Since Equatorial is a buyer in bad faith, this finding renders the sale to it of the property in question rescissible. We agree with respondent Appellate Court that the records bear out the fact that Equatorial was aware of the lease contracts because its lawyers had, prior to the sale, studied the said contracts. As such, Equatorial cannot tenably claim to be a purchaser in good faith, and, therefore, rescission lies.

"x x x Contract of Sale was not voidable but rescissible. Under Article 1380 to 1381(3) of the Civil Code, a contract otherwise valid may nonetheless be subsequently rescinded by reason of injury to third persons, like creditors. The status of creditors could be validly accorded the *Bonnevies* for they had substantial interests that were prejudiced by the sale of the subject property to the petitioner without recognizing their right of first priority under the Contract of Lease.

According to Tolentino, rescission is a remedy granted by law to the contracting parties and even to third persons, to secure reparation for damages caused to them by a contract, even if this should be valid, by means of the restoration of things to their condition at the moment prior to the celebration of said contract. It is a relief allowed for the protection of one of the contracting parties and even third persons from all injury and damage the contract may cause, or to protect some incompatible and preferent right created by the contract. Rescission implies a contract which, even if initially valid, produces a lesion or pecuniary damage to someone that justifies its invalidation for reasons of equity.

It is true that the acquisition by a third person of the property subject of the contract is an obstacle to the action for its rescission where it is shown that such third person is in lawful possession of the subject of the contract and that he did not act in bad faith. However, this rule is not applicable in the case before us because the petitioner is not considered a third party in relation to the Contract of Sale nor may its possession of the subject property be regarded as acquired lawfully and in good faith.

Indeed, Guzman, Bocaling and Co. was the vendee in the Contract of Sale. Moreover, the petitioner cannot be deemed a purchaser in good faith for the record shows that it categorically admitted it was aware of the lease in favor of the *Bonnevies*, who were actually occupying the subject property at the time it was sold to it.

Although the Contract of Lease was not annotated on the transfer certificate of title in the name of the late Jose Reynoso and Africa Reynoso, the petitioner cannot deny actual knowledge of such lease which was equivalent to and indeed more binding than presumed notice by registration.

A purchaser in good faith and for value is one who buys the property of another without notice that some other person has a right to or interest in such property and pays a full and fair price for the same at the time of such purchase or before he has notice of the claim or interest of some other person in the property. Good faith connotes an honest intention to abstain from taking unconscientious advantage of another. Tested by these principles, the petitioner cannot tenably claim to be a buyer in good faith as it had notice of the lease of the property by the Bonnevis and such knowledge should have cautioned it to look deeper into the agreement to determine if it involved stipulations that would prejudice its own interests.

The petitioner insists that it was not aware of the right of first priority granted by the Contract of Lease. Assuming this to be true, we nevertheless agree with the observation of the respondent court that:

If Guzman-Bocaling failed to inquire about the terms of the Lease Contract, which includes Par. 20 on priority right given to the Bonnevis, it had only itself to blame. Having known that the property it was buying was under lease, it behooved it as a prudent person to have required Reynoso or the broker to show to it the Contract of Lease in which Par. 20 is contained."^[25]

Petitioners assert the alleged impossibility of performance because the entire property is indivisible property. It was petitioner Carmelo which fixed the limits of the property it was leasing out. Common sense and fairness dictate that instead of nullifying the agreement on that basis, the stipulation should be given effect by including the indivisible appurtenances in the sale of the dominant portion under the right of first refusal. A valid and legal contract where the ascendant or the more important of the two parties is the landowner should be given effect, if possible, instead of being nullified on a selfish pretext posited by the owner. Following the arguments of petitioners and the participation of the owner in the attempt to strip Mayfair of its rights, the right of first refusal should include not only the property specified in the contracts of lease but also the appurtenant portions sold to Equatorial which are claimed by petitioners to be indivisible. Carmelo acted in bad faith when it sold the entire property to Equatorial without informing Mayfair, a clear violation of Mayfair's rights. While there was a series of exchanges of letters evidencing the offer and counter-offers between the parties, Carmelo abandoned the negotiations without giving Mayfair full opportunity to negotiate within the 30-day period.

Accordingly, even as it recognizes the right of first refusal, this Court should also order that Mayfair be authorized to exercise its right of first refusal under the contract to include the entirety of the indivisible property. The boundaries of the property sold should be the boundaries of the offer under the right of first refusal. As to the remedy to enforce Mayfair's right, the Court disagrees to a certain extent with the concluding part of the dissenting opinion of Justice Vitug. The doctrine enunciated in *Ang Yu Asuncion vs. Court of Appeals* should be modified, if not amplified under the peculiar facts of this case.

As also earlier emphasized, the contract of sale between Equatorial and Carmelo is characterized by bad faith, since it was knowingly entered into in violation of the rights of and to the prejudice of Mayfair. In fact, as correctly observed by the Court of Appeals, Equatorial admitted that its lawyers had studied the contract of lease prior to the sale. Equatorial's knowledge of the stipulations therein should have cautioned it to look further into the agreement to determine if it involved stipulations that would prejudice its own interests.

Since Mayfair has a right of first refusal, it can exercise the right only if the fraudulent sale is first set aside or rescinded. All of these matters are now before us and so there should be no piecemeal determination of this case and leave festering sores to deteriorate into endless litigation. The facts of the case and considerations of justice and equity require that we order rescission here and now. Rescission is a relief allowed for the protection of one

of the contracting parties and even third persons from all injury and damage the contract may cause or to protect some incompatible and preferred right by the contract.[26] The sale of the subject real property by Carmelo to Equatorial should now be rescinded considering that Mayfair, which had substantial interest over the subject property, was prejudiced by the sale of the subject property to Equatorial without Carmelo conferring to Mayfair every opportunity to negotiate within the 30-day stipulated period.[27]

This Court has always been against multiplicity of suits where all remedies according to the facts and the law can be included. Since Carmelo sold the property for P11,300,000.00 to Equatorial, the price at which Mayfair could have purchased the property is, therefore, fixed. It can neither be more nor less. There is no dispute over it. The damages which Mayfair suffered are in terms of actual injury and lost opportunities. The fairest solution would be to allow Mayfair to exercise its right of first refusal at the price which it was entitled to accept or reject which is P11,300,000.00. This is clear from the records.

To follow an alternative solution that Carmelo and Mayfair may resume negotiations for the sale to the latter of the disputed property would be unjust and unkind to Mayfair because it is once more compelled to litigate to enforce its right. It is not proper to give it an empty or vacuous victory in this case. From the viewpoint of Carmelo, it is like asking a fish if it would accept the choice of being thrown back into the river. Why should Carmelo be rewarded for and allowed to profit from, its wrongdoing? Prices of real estate have skyrocketed. After having sold the property for P11,300,000.00, why should it be given another chance to sell it at an increased price?

Under the *Ang Yu Asuncion vs. Court of Appeals* decision, the Court stated that there was nothing to execute because a contract over the right of first refusal belongs to a class of preparatory juridical relations governed not by the law on contracts but by the codal provisions on human relations. This may apply here if the contract is limited to the buying and selling of the real property. However, the obligation of Carmelo to first offer the property to Mayfair is embodied in a contract. It is Paragraph 8 on the right of first refusal which created the obligation. It should be enforced according to the law on contracts instead of the panoramic and indefinite rule on human relations. The latter remedy encourages multiplicity of suits. There is something to execute and that is for Carmelo to comply with its obligation to the property under the right of the first refusal according to the terms at which they should have been offered then to Mayfair, at the price when that offer should have been made. Also, Mayfair has to accept the offer. This juridical relation is not amorphous nor is it merely preparatory. Paragraphs 8 of the two leases can be executed according to their terms.

On the question of interest payments on the principal amount of P11,300,000.00, it must be borne in mind that both Carmelo and Equatorial acted in bad faith. Carmelo knowingly and deliberately broke a contract entered into with Mayfair. It sold the property to Equatorial with purpose and intent to withhold any notice or knowledge of the sale coming to the attention of Mayfair. All the circumstances point to a calculated and contrived plan of non-compliance with the agreement of first refusal.

On the part of Equatorial, it cannot be a buyer in good faith because it bought the property with notice and full knowledge that Mayfair had a right to or interest in the property superior to its own. Carmelo and Equatorial took unconscientious advantage of Mayfair.

Neither may Carmelo and Equatorial avail of considerations based on equity which might warrant the grant of interests. The vendor received as payment from the vendee what, at the time, was a full and fair price for the property. It has used the P11,300,000.00 all these years earning income or interest from the amount. Equatorial, on the other hand, has received rents and otherwise profited from the use of the property turned over to it by Carmelo. In fact, during all the years that this controversy was being litigated, Mayfair paid rentals regularly to

the buyer who had an inferior right to purchase the property. Mayfair is under no obligation to pay any interests arising from this judgment to either Carmelo or Equatorial.

WHEREFORE, the petition for review of the decision of the Court of Appeals, dated June 23, 1992, in CA-G.R. CV No. 32918, is HEREBY DENIED. The Deed of Absolute Sale between petitioners Equatorial Realty Development, Inc. and Carmelo & Bauermann, Inc. is hereby deemed rescinded; petitioner Carmelo & Bauermann is ordered to return to petitioner Equatorial Realty Development the purchase price. The latter is directed to execute the deeds and documents necessary to return ownership to Carmelo & Bauermann of the disputed lots. Carmelo & Bauermann is ordered to allow Mayfair Theater, Inc. to buy the aforesaid lots for P11,300,000.00.

SO ORDERED.

Regalado, Davide, Jr., Bellosillo, Melo, Puno, Kapunan, Mendoza, and Francisco, JJ., concur.

Narvasa, C.J., No part: related to interested party.

Padilla, J., See separate opinion.

Romero, J., Please see Concurring and Dissenting opinion.

Vitug, J., Pls. see dissenting opinion.

Panganiban, J., Please see Separate Concurring Opinion.

Torres, Jr., J., joins Justice Jose Vitug in his dissent.

[1] Decision in CA-G.R. CV No. 32918 penned by Justice Manuel Herrera, promulgated on June 23, 1992; Rollo, pp. 37-54.

[2] Twelfth Division composed of the following members: Associate Justices Manuel Herrera, Nicolas Lapeña, Jr., and Maria Alicia Austria.

[3] Regional Trial Court, Branch VII, Manila, presided by Judge Alfredo Cantos.

[4] Docketed as Civil Case No. 118019, entitled, "Mayfair Theater, Inc. vs. Carmelo and Bauermann, Inc., et al."

[5] Decision of the RTC in Civil Case No. 118019; Rollo, pp. 241-248.

[6] Decision of the Court of Appeals in CA-G.R. No. 32918, supra, pp. 1-7; Rollo, pp. 37-43.

[7] Decision of the RTC, supra; Rollo, pp. 244-246.

[8] Decision of the Court of Appeals, p. 18; Rollo, p. 54.

[9] Ibid., pp. 12-15; Rollo, pp. 48-51.

[10] Ibid., pp. 15-16; Rollo, pp. 51-52.

[11] Petition dated July 16, 1992, pp. 8-9; Rollo, pp. 9-10; Joint Memorandum dated February 15, 1993, p. 9; Rollo, p. 481.

[12] Rollo, pp. 416-417.

[13] Resolution of the Second Division dated December 9, 1992, p. 2; Rollo, p. 417.

[14] Paragraph 2.4, Petition, pp. 3-4; Rollo, pp. 4-5.

[15] 41 Phil. 670 (1916).

[16] Beaumont vs. Prieto, supra, pp. 686-687.

- [17] Tuason, Jr., etc. vs. de Asis, et al., 107 Phil. 131 (1960).
- [18] Mendoza vs. Comple, 15 SCRA 162.
- [19] Sanchez vs. Rigos, 45 SCRA 368 (1972).
- [20] Vda. de Quirino vs. Palarca, 29 SCRA 1 (1969).
- [21] 238 SCRA 602 (1994), pp. 611-614.
- [22] Dela Cavade vs. Diaz, 37 Phil. 982 (1918); Beaumont fvs. Prieto, 41 Phil. 670 (1916).

[23] 29 SCRA 1 (1969).

[24] 238 SCRA 602 (1994).

- [25] Guzman, Bocaling & Co. vs. Bonnevie, 206 SCRA 668 (1992), pp. 675-677.
- [26] Aquino vs. Tañedo, 39 Phil. 517.
- [27] Guzman, Bocaling & Co. vs. Bonnevie, supra.

SEPARATE OPINION

PADILLA, J.:

I am of the considered view (like Mr. Justice Jose A. R. Melo) that the Court in this case should categorically recognize Mayfair's right of first refusal under its contract of lease with Carmelo and Bauermann, Inc. (hereafter, Carmelo) and, because of Carmelo's and Equatorial's bad faith in riding "roughshod" over Mayfair's right of first refusal, the Court should order the rescission of the sale of the Claro M. Recto property by the latter to Equatorial (Art. 1380-1381[3], Civil Code). The Court should, in this same case, to avoid multiplicity of suits, likewise allow Mayfair to effectively exercise said right of first refusal, by paying Carmelo the sum of P11,300,000.00 for the entire subject property, without any need of instituting a separate action for damages against Carmelo and/or Equatorial.

I do not agree with the proposition that, in addition to the aforesaid purchase price, Mayfair should be required to pay a compounded interest of 12% per annum of said amount computed from 1 August 1978. Under the Civil Code, a party to a contract may recover interest as indemnity for damages in the following instances:

"Art. 2209. If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six per cent per annum.

Art. 2210. Interest may, in the discretion of the court, be allowed upon damages awarded for breach of contract."

There appears to be no basis in law for adding 12% per annum compounded interest to the purchase price of P11,300,000.00 payable by Mayfair to Carmelo since there was no such stipulation in writing between the parties (Mayfair and Carmelo) but, more importantly, because Mayfair neither incurred in delay in the performance of its obligation nor committed any breach of contract. Indeed, why should Mayfair be penalized by way of making it pay 12% per annum compounded interest when it was Carmelo which violated Mayfair's right of first refusal under the contract?

The equities of the case support the foregoing legal disposition. During the intervening years between 1 August

1978 and this date, Equatorial (after acquiring the C.M. Recto property for the price of P11,300,000.00) had been leasing the property and deriving rental income therefrom. In fact, one of the lessees in the property was Mayfair. Carmelo had, in turn, been using the proceeds of the sale, investment-wise and/or operation-wise in its own business.

It may appear, at first blush, that Mayfair is unduly favored by the solution submitted by this opinion, because the price of P11,300,000.00 which it has to pay Carmelo in the exercise of its right of first refusal, has been subjected to the inroads of inflation so that its purchasing power today is less than when the same amount was paid by Equatorial to Carmelo. But then it cannot be overlooked that it was Carmelo's breach of Mayfair's right of first refusal that prevented Mayfair from paying the price of P11,300,000.00 to Carmelo at about the same time the amount was paid by Equatorial to Carmelo. Moreover, it cannot be ignored that Mayfair had also incurred consequential or "opportunity" losses by reason of its failure to acquire and use the property under its right of first refusal. In fine, any loss in purchasing power of the price of P11,300,000.00 is for Carmelo to incur or absorb on account of its bad faith in breaching Mayfair's contractual right of first refusal to the subject property.

ACCORDINGLY, I vote to order the rescission of the contract of sale between Carmelo and Equatorial of the Claro M. Recto property in question, so that within thirty (30) days from the finality of the Court's decision, the property should be retransferred and delivered by Equatorial to Carmelo with the latter simultaneously returning to Equatorial the sum of P11,300, 000.00.

I also vote to allow Mayfair to exercise its right of first refusal, by paying to Carmelo the sum of P11,300,000.00 without interest for the entire subject property, within thirty (30) days from re-acquisition by Carmelo of the titles to the property, with the corresponding obligation of Carmelo to sell and transfer the property to Mayfair within the same period of thirty (30) days.

SEPARATE CONCURRING OPINION

PANGANIBAN, J.:

In the main, I concur with the ponencia of my esteemed colleague, Mr. Justice Regino C. Hermosisima, Jr., especially with the following doctrinal pronouncements:

1. That while no option to purchase within the meaning of the second paragraph of Article 1479 of the Civil Code was given to Mayfair Theater, Inc. ("Mayfair"), under the two lease contracts a right of first refusal was in fact granted, for which no separate consideration is required by law to be paid or given so as to make it binding upon Carmelo & Bauermann, Inc. ("Carmelo");
2. That such right was violated by the latter when it sold the entire property to Equatorial Realty Development, Inc. ("Equatorial") on July 30, 1978, for the sum of P11,300,000.00;
3. That Equatorial is a buyer in bad faith as it was aware of the lease contracts, its own lawyers having studied said contracts prior to the sale; and
4. That, consequently, the contract of sale is rescissible.
5. That, finally, under the proven facts, the right of first refusal may be enforced by an action for specific performance.

There appears to be unanimity in the Court insofar as items 1, 2 and 3 above are concerned. It is in items 4 and 5 that there is a marked divergence of opinion. Hence, I shall limit the discussion in this Separate Concurring Opinion to such issues, namely: Is the contract of sale between Carmelo and Equatorial rescissible, and corollarily, may the right of first refusal granted to Mayfair be enforced by an action for specific performance?

It is with a great amount of trepidation that I respectfully disagree with the legal proposition espoused by two equally well-respected colleagues, Mme. Justice Florida Ruth P. Romero and Mr. Justice Jose C. Vitug -- who are both acknowledged authorities on Civil Law -- that a breach of the covenanted right of first refusal, while warranting a suit for damages under Article 19 of the Civil Code, cannot sanction an action for specific performance without thereby negating the indispensable element of consensuality in the perfection of contracts.

Ang Yu Asuncion Not In Point

Such statement is anchored upon a pronouncement in *Ang Yu Asuncion vs. CA*,^[1] which was penned by Mr. Justice Vitug himself. I respectfully submit, however, that that case turned largely on the issue of whether or not the sale of an immovable in breach of a right of first refusal that had been decreed in a final judgment would justify the issuance of certain orders of execution in the same case. The validity of said orders was the subject of the attack before this Court. These orders had not only directed the defendants to execute a deed of sale in favor of the plaintiffs, when there was nothing in the judgment itself decreeing it, but had also set aside the sale made in breach of said right of first refusal and even canceled the title that had been issued to the buyer, who was not a party to the suit and had obviously not been given its day in court. It was thus aptly held:

"The final judgment in Civil Case No. 87-41058, it must be stressed, has merely accorded a 'right of first refusal' in favor of petitioners. The consequence of such a declaration entails no more than what has heretofore been said. In fine, if, as it is here so conveyed to us, petitioners are aggrieved by the failure of private respondents to honor the right of first refusal, the remedy is not a writ of execution on the judgment, since there is none to execute, but an action for damages in a proper forum for the purpose.

Furthermore, whether private respondent Buen Realty Development Corporation, the alleged purchaser of the property, has acted in good faith or bad faith and whether or not it should, in any case, be considered bound to respect the registration of the *lis pendens* in Civil Case No. 87-41058 are matters that must be independently addressed in appropriate proceedings. Buen Realty, not having been impleaded in Civil Case No. 87-41058, cannot be held subject to the writ of execution issued by respondent Judge, let alone ousted from the ownership and possession of the property, without first being duly afforded its day in court."^[2]

In other words, the question of whether specific performance of one's right of first refusal is available as a remedy in case of breach thereof was not before the Supreme Court at all in *Ang Yu Asuncion*. Consequently, the pronouncements there made bearing on such unlitigated question were mere obiter. Moreover, as will be shown later, the pronouncement that a breach of the right of first refusal would not sanction an action for specific performance but only an action for damages (at p. 615) is at best debatable (and in my humble view, imprecise or incorrect), on top of its being contradicted by extant jurisprudence.

Worth bearing in mind is the fact that two juridical relations, both contractual, are involved in the instant case: (1) the deed of sale between the petitioners dated July 30, 1978, and (2) the contract clause establishing Mayfair's right of first refusal which was violated by said sale.

With respect to the sale of the property, Mayfair was not a party. It therefore had no personality to sue for its annulment, since Art. 1397 of the Civil Code provides, *inter alia*, that "(t)he action for the annulment of contracts may be instituted by all who are thereby obliged principally or subsidiarily."

But the facts as alleged and proved clearly in the case at bar make out a case for rescission under Art. 1177, in relation to Art. 1381(3), of the Civil Code, which pertinently read as follows:

"Art. 1177. The creditors, after having pursued the property in possession of the debtor to satisfy their claims, may exercise all the rights and bring all the actions of the latter for the same purpose, save those which are

inherent in his person; they may also impugn the acts which the debtor may have done to defraud them.-

"Art. 1381. The following contracts are rescissible:

xxx xxx xxx

(3) Those undertaken in fraud of creditors when the latter cannot in any other manner collect the claims due them;

xxx xxx xxx" (*italics supplied*)

The term "creditors" as used in these provisions of the Civil Code is broad enough to include the obligee under an option contract[3] as well as under a right of first refusal, sometimes known as a right of first priority.[4] Thus, in *Nietes*, the Supreme Court, speaking through then Mr. Chief Justice Roberto Concepcion, repeatedly referred to the grantee or optionee as "the creditor" and to the grantor or optioner as "the debtor." [5] In any case, the personal elements of an obligation are the active and passive subjects thereof, the former being known as creditors or obligees and the latter as debtors or obligors.[6] Insofar as the right of first refusal is concerned, Mayfair is the obligee or creditor.

As such creditor, Mayfair had, therefore, the right to impugn the sale in question by way of *accion pauliana* under the last clause of Art. 1177, *aforequoted*, because the sale was an act done by the debtor to defraud him of his right to acquire the property.[7] Rescission was also available under par. 3, Art. 1381, *above-quoted*, as was expressly held in *Guzman, Bocaling & Co.*, a case closely analogous to this one as it was also an action brought by the lessee to enforce his "right of first priority" -- which is just another name for the right of first refusal -- and to annul a sale made by the lessor in violation of such right. In said case, this Court, speaking through Mr. Justice Isagani A. Cruz, affirmed the invalidation of the sale and the enforcement of the lessee's right of first priority this wise:[8]

"The petitioner argues that assuming the Contract of Sale to be voidable, only the parties thereto could bring an action to annul it pursuant to Article 1397 of the Civil Code. It is stressed that private respondents are strangers to that agreement and therefore have no personality to seek its annulment.

The respondent court correctly held that the Contract of Sale was not voidable but rescissible. Under Article(s) 1380 to 1381(3) of the Civil Code, a contract otherwise valid may nonetheless be subsequently rescinded by reason of injury to third persons, like creditors. The status of creditors could be validly accorded the *Bonnevies* for they had substantial interests that were prejudiced by the sale of the subject property to the petitioner without recognizing their right of first priority under the Contract of Lease." (*emphasis supplied*)

By the same token, the status of a defrauded creditor can, and should, be granted to Mayfair, for it certainly had substantial interests that were prejudiced by the sale of the subject property to petitioner *Equatorial* in open violation of Mayfair's right of first refusal under its existing contracts with *Carmelo*.

In fact, the parity between that case and the present one does not stop there but extends to the crucial and critical fact that there was manifest bad faith on the part of the buyer. Thus, in *Guzman*, this Court affirmed in toto the appealed judgment of the Court of Appeals which, in turn, had affirmed the trial court's decision insofar as it invalidated the deed of sale in favor of the petitioner-buyer, cancelled its TCT, and ordered the lessor to execute a deed of sale over the leased property in favor of the lessee for the same price and "under the same terms and conditions," aside from affirming as well the damages awarded, but at a reduced amount.[9] In other words, the aggrieved party was allowed to acquire the property itself.

The inescapable conclusion from all of the foregoing is not only that rescission is the proper remedy but also --

and more importantly -- that specific performance was actually used and given free rein as an effective remedy to enforce a right of first refusal in the wake of its violation, in the cited case of Guzman.

On the other hand, and as already commented on above, the pronouncement in *Ang Yu Asuncion* to the effect that specific performance is unavailable to enforce a violated right of first refusal is at best a debatable legal proposition, aside from being contradicted by extant jurisprudence. Let me explain why.

The consensuality required for a contract of sale is distinct from, and should not be confused with, the consensuality attendant to the right of first refusal itself. While indeed, prior to the actual sale of the property to Equatorial and the filing of Mayfair's complaint for specific performance, no perfected contract of sale involving the property ever existed between Carmelo as seller and Mayfair as buyer, there already was, in law and in fact, a perfected contract between them which established a right of first refusal, or of first priority.

Specific Performance Is Viable Remedy

The question is: Can this right (of first refusal) be enforced by an action for specific performance upon a showing of its breach by an actual sale of the property under circumstances showing palpable bad faith on the part of both seller and buyer?

The answer, I respectfully submit, should be 'yes.'

As already noted, Mayfair's right of first refusal in the case before us is embodied in an express covenant in the lease contracts between it as lessee and Carmelo as lessor, hence the right created is one springing from contract.[10] Indubitably, this had the force of law between the parties, who should thus comply with it in good faith.[11] Such right also established a correlative obligation on the part of Carmelo to give or deliver to Mayfair a formal offer of sale of the property in the event Carmelo decides to sell it. The decision to sell was eventually made. But instead of giving or tendering to Mayfair the proper offer to sell, Carmelo gave it to its now co-petitioner, Equatorial, with whom it eventually perfected and consummated, on July 30, 1978, an absolute sale of the property, doing so within the period of effectivity of Mayfair's right of first refusal. Less than two months later, or in September 1978, with the lease still in full force, Mayfair filed the present suit.

Worth stressing at this juncture is the fact that Mayfair had the right to require that the offer to sell the property be sent to it by Carmelo, and not to anybody else. This was violated when the offer was made to Equatorial. Under its covenant with Carmelo, Mayfair had the right, at that point, to sue for either specific performance or rescission, with damages in either case, pursuant to Arts. 1165 and 1191, Civil Code.[12] An action for specific performance and damages seasonably filed, fortified by a writ of preliminary injunction, would have enabled Mayfair to prevent the sale to Equatorial from taking place and to compel Carmelo to sell the property to Mayfair for the same terms and price, for the reason that the filing of the action for specific performance may juridically be considered as a solemn, formal, and unqualified acceptance by Mayfair of the specific terms of the offer of sale. Note that by that time, the price and other terms of the proposed sale by Carmelo had already been determined, being set forth in the offer of sale that had wrongfully been directed to Equatorial.

As it turned out, however, Mayfair did not have a chance to file such suit, for it learned of the sale to Equatorial only after it had taken place. But it did file the present action for specific performance and for invalidation of the wrongful sale immediately after learning about the latter act. The act of promptly filing this suit, coupled with the fact that it is one for specific performance, indicates beyond cavil or doubt Mayfair's unqualified acceptance of the misdirected offer of sale, giving rise, thereby, to a demandable obligation on the part of Carmelo to execute the corresponding document of sale upon the payment of the price of P11,300,000.00. In other words, the principle of consensuality of a contract of sale should be deemed satisfied. The aggrieved party's consent to, or

acceptance of, the misdirected offer of sale should be legally presumed in the context of the proven facts.

To say, therefore, that the wrongful breach of a right of first refusal does not sanction an action for specific performance simply because, factually, there was no meeting of the minds as to the particulars of the sale since ostensibly no offer was ever made to, let alone accepted by, Mayfair, is to ignore the proven fact of presumed consent. To repeat, that consent was deemed given by Mayfair when it sued for invalidation of the sale and for specific performance of Carmelo's obligation to Mayfair. Nothing in the law as it now stands will be violated, or even simply emasculated, by this holding. On the contrary, the decision in *Guzman* supports it.

Moreover, under the Civil Code provisions on the nature, effect and kinds of obligations,[13] Mayfair's right of first refusal may be classified as one subject to a suspensive condition - namely, if Carmelo should decide to sell the leased premises during the life of the lease contracts, then it should make an offer of sale to Mayfair. Futurity and uncertainty, which are the essential characteristics of a condition,[14] were distinctly present. Before the decision to sell was made, Carmelo had absolutely no obligation to sell the property to Mayfair, nor even to make an offer to sell, because in conditional obligations, where the condition is suspensive, the acquisition of rights depends upon the happening of the event which constitutes the condition.[15] Had the decision to sell not been made at all, or had it been made after the expiry of the lease, the parties would have stood as if the conditional obligation had never existed.[16] But the decision to sell was in fact made. And it was made during the life and efficacy of the lease. Undoubtedly, the condition was duly fulfilled; the right of first refusal effectively accrued and became enforceable; and correlatively, Carmelo's obligation to make and send the offer to Mayfair became immediately due and demandable.[17] That obligation was to deliver to Mayfair an offer to sell a determinate thing for a determinate price. As things turned out, a definite and specific offer to sell the entire property for the price of P11,300,000.00 was actually made by Carmelo -- but to the wrong party. It was that particular offer, and no other, which Carmelo should have delivered to Mayfair, but failed to deliver. Hence, by the time the obligation of Carmelo accrued through the fulfillment of the suspensive condition, the offer to sell had become a determinate thing.

Art. 1165 of the Civil Code, earlier quoted in footnote 12, indicates the remedies available to the creditor against the debtor, when it provides that "(w)hen what is to be delivered is a determinate thing, the creditor, in addition to the right granted him by Article 1170, may compel the debtor to make the delivery," clearly authorizing not only the recovery of damages under Art. 1170 but also an action for specific performance.

But even assuming that Carmelo's prestation did not involve the delivery of a determinate offer but only a generic one, the second paragraph of Art. 1165 explicitly gives to the creditor the right "to ask that the obligation be complied with at the expense of the debtor." The availability of an action for specific performance is thus clear and beyond doubt. And the correctness of *Guzman* becomes all the more manifest.

Upon the other hand, the obiter in *Ang Yu Asuncion* is further weakened by the fact that the jurisprudence upon which it supposedly rests -- namely, the cases of *Madrigal & Co. vs. Stevenson & Co.*[18] and *Salonga vs. Farrales*[19]-- did NOT involve a right of first refusal or of first priority. Nor did those two cases involve an option to buy. In *Madrigal*, plaintiff sued defendant for damages claiming wrongful breach of an alleged contract of sale of 2,000 tons of coal. The case was dismissed because "the minds of the parties never met upon a contract of sale by defendant to plaintiff,"[20] each party having signed the broker's memorandum as buyer, erroneously thinking that the other party was the seller! In *Salonga*, a lessee, who was one of several lessees ordered by final judgment to vacate the leased premises, sued the lessor to compel the latter to sell the leased premises to him, but his suit was not founded upon any right of first refusal and was therefore dismissed on the ground that there was no perfected sale in his favor. He just thought that because the lessor had decided to sell and in fact sold portions of the property to her other lessees, she was likewise obligated to sell to him even in the absence of a perfected

contract of sale. In fine, neither of the two cases cited in support of the legal proposition that a breach of the right of first refusal does not sanction an action for specific performance but, at best, only one for damages, provides such support.

Finally, the fact that what was eventually sold to Equatorial was the entire property, not just the portions leased to Mayfair, is no reason to deprive the latter of its right to receive a formal and specific offer. The offer of a larger property might have led Mayfair to reject the offer, but until and unless such rejection was actually made, its right of first refusal still stood. Upon the other hand, an acceptance by Mayfair would have saved all concerned the time, trouble, and expense of this protracted litigation. In any case, the disquisition by the Court of Appeals on this point can hardly be faulted; in fact, it amply justifies the conclusions reached in its decision, as well as the dispositions made therein.

IN VIEW OF THE FOREGOING, I vote to DENY the petition and to AFFIRM the assailed Decision.

[1] 238 SCRA 602, December 2, 1994.

[2] At pp. 615-616; underscoring supplied.

[3] Cf. *Nietes vs. CA*, 46 SCRA 654, 662, August 18, 1972.

[4] *Guzman, Bocaling & Co. vs. Bonnevie*, 206 SCRA 668, March 2, 1992.

[5] *Supra*, at p. 662.

[6] Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines*, 1986 Ed., Vol. IV, pp. 54-55.

[7] *Id.*, p. 140.

[8] *Supra*, at p. 675.

[9] *Supra*, at pp. 672-673.

[10] Art. 1157, par. 2, Civil Code.

[11] Arts. 1159 and 1315, Civil Code.

[12] "Art. 1165. When what is to be delivered is a determinate thing, the creditor, in addition to the right granted him by Article 1170, may compel the debtor to make the delivery.

If the thing is indeterminate or generic, he may ask that the obligation be complied with at the expense of the debtor.

If the obligor delays, or has promised to deliver the same thing to two or more persons who do not have the same interest, he shall be responsible for any fortuitous event until he has effected the delivery.

* * * * *

"Art. 1191. The power to rescind obligations is implied in reciprocal ones, in case one of the obligors should not comply with what is incumbent upon him.

The injured party may choose between the fulfillment and the rescission of the obligation, with the payment of damages in either case. He may also seek rescission, even after he has chosen fulfillment, if the latter should become impossible.

The court shall decree the rescission claimed, unless there be just cause authorizing the fixing of a period.

This is understood to be without prejudice to the rights of third persons who have acquired the thing, in accordance with Articles 1385 and 1388 and the Mortgage Law."

[13] Chapters 2 and 3, Title I, Book IV of the Civil Code.

[14] Tolentino, Civil Code, 1991 Ed., Vol. IV, p. 144.

[15] Art. 1181, Civil Code; *Wise & Co. vs. Kelly*, 37 Phil. 696 (1918).

[16] *Gaite vs. Fonacier*, 2 SCRA 830, July 31, 1961; *Rose Packing Co., Inc. vs. Court of Appeals*, 167 SCRA 309, November 14, 1988.

[17] *Hermosa vs. Longara*, 93 Phil. 977, 982 (1953).

[18] 15 Phil. 38 (1910).

[19] 105 SCRA 359, July 10, 1981.

[20] *Supra*, at p. 43.

CONCURRING & DISSENTING OPINION

ROMERO, J.:

I share the opinion that the right granted to Mayfair Theater under the identical par. 8 of the June 1, 1967 and March 31, 1969 contracts constitute a right of first refusal.

An option is a privilege granted to buy a determinate thing at a price certain within a specified time and is usually supported by a consideration which is why, it may be regarded as a contract in itself. The option results in a perfected contract of sale once the person to whom it is granted decides to exercise it. The right of first refusal is unlike an option which requires a certainty as to the object and consideration of the anticipated contract. When the right of first refusal is exercised, there is no perfected contract of sale because the other terms of the sale have yet to be determined. Hence, in case the offeror reneges on his promise to negotiate with offeree, the latter may only recover damages in the belief that a contract could have been perfected under Article 19 of the New Civil Code.

I beg to disagree, however, with the majority opinion that the contract of sale entered into by Carmelo and Bauermann, Inc. and Equatorial Realty, Inc., should be rescinded. Justice Hermosissima, in citing Art. 1381 (3) as ground for rescission apparently relied on the case of *Guzman, Bocaling and Co. v. Bonnevie* (206 SCRA 668 [1992]) where the offeree was likened to the status of a creditor. The case, in citing *Tolentino*, stated that rescission is a remedy granted by law to contracting parties and even to third persons, to secure reparation for damages caused to them by a contract, even if this should be valid, by means of restoration of things to their condition prior to celebration of the contract. It is my opinion that "third persons" should be construed to refer to the wards, creditors, absentees, heirs and others enumerated under the law who are prejudiced by the contract sought to be rescinded.

It should be borne in mind that rescission is an extreme remedy which may be exercised only in the specific instances provided by law. Article 1381 (3) specifically refers to contracts undertaken in fraud of creditors when the latter cannot in any manner collect the claims due them. If rescission were allowed for analogous cases, the law would have so stated. While Article 1381 (5) itself says that rescission may be granted to all other contracts specially declared by law to be subject to rescission, there is nothing in the law that states that an offeree who failed to exercise his right of refusal because of bad faith on the part of the offeror may rescind the subsequent contract entered into by the offeror and a third person. Hence, there is no legal justification to rescind the contract

between Carmelo and Bauermann, Inc. and Equatorial Realty.

Neither do I agree with Justice Melo that Mayfair Theater should pay Carmelo and Bauermann, Inc. the amount of P11,300,000.00 plus compounded interest of 12% p.a. Justice Melo rationalized that had Carmelo and Bauermann sold the property to Mayfair, the latter would have paid the property for the same price that Equatorial bought it. It bears emphasis that Carmelo and Bauermann, Inc. and Mayfair never reached an agreement as to the price of the property in dispute because the negotiations between the two parties were not pursued to its very end. We cannot, even for reasons of equity, compel Carmelo to sell the entire property to Mayfair at P11,300,000.00 without violating the consensual nature of contracts.

I vote, therefore, not to rescind the contract of sale entered into by Carmelo and Bauermann, Inc. and Equatorial Realty Development Corp.

DISSENTING OPINION

VITUG, J.:

I share the opinion that the right granted to Mayfair Theater, Inc., is neither an offer nor an option but merely a right of first refusal as has been so well and amply essayed in the ponencia of our distinguished colleague Mr. Justice Regino C. Hermosisima, Jr.

Unfortunately, it would seem that Article 1381 (paragraph 3) of the Civil Code invoked to be the statutory authority for the rescission of the contract of sale between Carmelo & Bauermann, Inc., and Equatorial Realty Development, Inc., has been misapplied. The action for rescission under that provision of the law, unlike in the resolution of reciprocal obligations under Article 1191 of the Code, is merely subsidiary and relates to the specific instance when a debtor, in an attempt to defraud his creditor, enters into a contract with another that deprives the creditor to recover his just claim and leaves him with no other legal means, than by rescission, to obtain reparation. Thus, the rescission is only to the extent necessary to cover the damages caused (Article 1384, Civil Code) and, consistent with its subsidiary nature, would require the debtor to be an indispensable party in the action (see *Gigante vs. Republic Savings Bank*, 135 Phil. 359).

The concept of a right of first refusal as a simple juridical relation, and so governed (basically) by the Civil Code's title on "Human Relations," is not altered by the fact alone that it might be among the stipulated items in a separate document or even in another contract. A "breach" of the right of first refusal can only give rise to an action for damages primarily under Article 19 of the Civil Code, as well as its related provisions, but not to an action for specific performance set out under Book IV of the Code on "Obligations and Contracts." That right, standing by itself, is far distant from being the obligation referred to in Article 1159 of the Code which would have the force of law sufficient to compel compliance per se or to establish a creditor-debtor or obligee-obligor relation between the parties. If, as it is rightly so, a right of first refusal cannot even be properly classed as an offer or as an option, certainly, and with much greater reason, it cannot be the equivalent of, nor be given the same legal effect as, a duly perfected contract. It is not possible to cross out, such as we have said in *Ang Yu Asuncion vs. Court of Appeals* (238 SCRA 602), the indispensable element of consensuality in the perfection of contracts. It is basic that without mutual consent on the object and on the cause, a contract cannot exist (Art. 1305, Civil Code); corollary to it, no one can be forced, least of all perhaps by a court, into a contract against his will or compelled to perform thereunder.

It is sufficiently clear, I submit, that, there being no binding contract between Carmelo and Mayfair, neither the rescission of the contract between Carmelo and Equatorial nor the directive to Carmelo to sell the property to Mayfair would be legally appropriate.

My brief disquisition should have ended here except for some personal impressions expressed by my esteemed colleague, Mr. Justice Artemio V. Panganiban, on the Ang Yu decision which perhaps need to be addressed.

The discussion by the Court in Ang Yu on the right of first refusal is branded as a mere obiter dictum. Justice Panganiban states: The case "turned largely on the issue of whether or not the sale of an immovable in breach of a right of first refusal that had been decreed in a final judgment would justify the issuance of certain orders of execution in the same case. x x x. In other words, the question of whether specific performance of one's right of first refusal is available as a remedy in case of breach thereof was not before the Supreme Court at all in Ang Yu Asuncion."

Black defines an obiter dictum as "an opinion entirely unnecessary for the decision of the case" and thus "are not binding as precedent." (Black's Law Dictionary, 6th edition, 1990). A close look at the antecedents of Ang Yu as found by the Court of Appeals and as later quoted by this Court would readily disclose that the "right of first refusal" was a major point in the controversy. Indeed, the trial and the appellate courts had rule on it. With due respect, I would not deem it "entirely unnecessary" for this Court to itself discuss the legal connotation and significance of the decreed (confirmatory) right of first refusal. I should add that when the ponencia recognized that, in the case of Buen Realty Development Corporation (the alleged purchaser of the property), the latter could not be held subject of the writ of execution and be ousted from the ownership and possession of the disputed property without first affording it due process, the Court decided to simply put a cap in the final disposition of the case but it could not have intended to thereby mitigate the import of its basic ratio decidendi.

Justice Panganiban opines that the pronouncement in Ang Yu, i.e., that a breach of the right of first refusal does not sanction an action for specific performance but only an action for damages, "is at best debatable (x x x imprecise or incorrect), on to top of its being contradicted by extant jurisprudence." He then comes up with the novel proposition that "Mayfair's right of first refusal may be classified as one subject to a suspensive condition -- namely, if Carmelo should decide to sell the leased premises during the life of the lease contracts, then it should make an offer of sale to Mayfair," presumably enforceable by action for specific performance.

It would be perilous a journey, first of all, to try to seek out a common path for such juridical relations as contracts, options, and rights of first refusal since they differ, substantially enough, in their concepts, consequences and legal implications. Very briefly, in the area on sales particularly, I borrow from Ang Yu, a unanimous decision of the Supreme Court En Banc, which held:

"In the law on sales, the so-called 'right of first refusal' is an innovative juridical relation. Needless to point out, it cannot be deemed a perfected contract of sale under Article 1458 of the Civil Code. Neither can the right of first refusal, understood in its normal concept, per se be brought within the purview of an option under the second paragraph of Article 1479, aforequoted, or possibly of an offer under Article 1319 of the same Code. An option or an offer would require, among other things, a clear certainty on both the object and the cause or consideration of the envisioned contract. In a right of first refusal, while the object might be made determinate, the exercise of the right, however, would be dependent not only on the grantor's eventual intention to enter into a binding juridical relation with another but also on terms, including the price, that obviously are yet to be later firmed up. Prior thereto, it can at best be so described as merely belonging to a class of preparatory juridical relations governed not by contracts (since the essential elements to establish the vinculum juris would still be indefinite and inconclusive) but by, among other laws of general application, the pertinent scattered provisions of the Civil Code on human conduct."

An obligation, and so a conditional obligation as well (albeit subject to the occurrence of the condition), in its context under Book IV of the Civil Code, can only be "a juridical necessity to give, to do or not to do" (Art. 1156,

Civil Code), and one that is constituted by law, contracts, quasi-contracts, delicts and quasi-delicts (Art. 1157, Civil Code) which all have their respective legal significance rather well settled in law. The law certainly must have meant to provide congruous, albeit contextual, consequences to its provisions. *Interpretare et concordare legibus est optimus interpretandi*. As a valid source of an obligation, a contract must have the concurrence of (a) consent of the contracting parties, (b) object certain (subject matter of the contract) and (c) cause (Art. 1318, Civil Code). These requirements, clearly defined, are essential. The consent contemplated by the law is that which is manifested by the meeting of the offer and of the acceptance upon the object and the cause of the obligation. The offer must be certain and the acceptance absolute (Article 1319 of the Civil Code). Thus, a right of first refusal cannot have the effect of a contract because, by its very essence, certain basic terms would have yet to be determined and fixed. How its "breach" be also its perfection escapes me. It is only when the elements concur that the juridical act would have the force of law between the contracting parties that must be complied with in good faith (Article 1159 of the Civil Code; see also Article 1308, of the Civil Code), and, in case of its breach, would allow the creditor or obligee (the passive subject) to invoke the remedy that specifically appertains to it.

The judicial remedies, in general, would, of course, include: (a) The principal remedies (i) of specific performance in obligations to give specific things (Articles 1165 and 1167 of the Civil Code), substitute performance in an obligation to do or to deliver generic things (Article 1165 of the Civil Code) and equivalent performance for damages (Articles 1168 and 1170 of the Civil Code); and (ii) of rescission or resolution of reciprocal obligations; and (b) the subsidiary remedies that may be availed of when the principal remedies are unavailable or ineffective such as (i) *accion subrogatoria* or subrogatory action (Article 1177 of the Civil Code; see also Articles 1729 and 1893 of the Civil Code); and (ii) *accion pauliana* or rescissory action (Articles 1177 and 1381 of the Civil Code). And, in order to secure the integrity of final judgments, such ancillary remedies as attachments, replevin, garnishments, receivership, examination of the debtor, and similar remedies, are additionally provided for in procedural law.

Might it be possible, however, that Justice Panganiban was referring to how Ang Yu could relate to the instant case for, verily, his remark, earlier quoted, was followed by an extensive discussion on the factual and case milieu of the present petition? If it were, then I guess it was the applicability of the Ang Yu decision to the instant case that he questioned, but that would not make Ang Yu "imprecise" or "incorrect."

Justice Panganiban would hold the Ang Yu ruling to be inconsistent with *Guzman, Bocaling & Co. vs. Bonnevie* (206 SCRA 668). I would not be too hasty in concluding similarly. In *Guzman*, the stipulation involved, although loosely termed a "right of first priority," was, in fact, a contract of option. The provision in the agreement there stated:

"20. - In case the LESSOR desires or decides to sell the leased property, the LESSEES shall be given a first priority to purchase the same, all things and considerations being equal.- (At page 670; underscoring supplied.)

In the above stipulation, the Court ruled, in effect, that the basic terms had been adequately, albeit briefly, spelled out with the lease consideration being deemed likewise to be the essential cause for the option. The situation undoubtedly was not the same that prevailed in *Ang Yu* or, for that matter, in the case at bar. The stipulation between *Mayfair Theater, Inc.*, and *Carmelo & Bauermann, Inc.*, merely read:

"That if the LESSOR should desire to sell the leased premises, the LESSEE shall be given 30-days exclusive option to purchase the same."

The provision was too indefinite to allow it to even come close to within the area of the *Guzman* ruling.

Justice Panganiban was correct in saying that the "cases of *Madrigal & Co. vs. Stevenson & Co.* and *Salonga vs.*

Farrales (cited in Ang Yu) did NOT involve a right of first refusal or of first priority. Nor did those two cases involve an option to buy." The two cases, to set the record straight, were cited, not because they were thought to involve a right of first refusal or an option to buy but to emphasize the indispensability of consensuality over the object and cause of contracts in their perfection which would explain why, parallel therewith, Articles 1315 and 1318 of the Civil Code were also mentioned.

One final note: A right of first refusal, in its proper usage, is not a contract; when parties instead make certain the object and the cause thereof and support their understanding with an adequate consideration, that juridical relation is not to be taken as just a right of first refusal but as a contract in itself (termed an "option"). There is, unfortunately, in law a limit to an unabated use of common parlance.

With all due respect, I hold that the judgment of the trial court, although not for all the reasons it has advanced, should be REINSTATED.

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