

PHILIPPINE NATIONAL BANK, PETITIONER, VS. COURT OF APPEALS AND INDUSTRIAL ENTERPRISES, INC., RESPONDENTS.

G.R. No. 118357. May 06, 1997

Ponente: ROMERO, J.

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ROMERO, J.:

This is a petition for review on certiorari of the Decision[1] of the Court of Appeals affirming in toto the November 27, 1992 decision[2] of the Regional Trial Court of Makati, Branch 150 which disposed of Civil Case No. 8109, "Industrial Enterprises, Inc. v. Marinduque Mining and Industrial Corporation, Geronimo Velasco (in his capacity as the then Minister of Energy) and Philippine National Bank," an action for rescission of contract and damages, as follows:

"WHEREFORE, in the light of the foregoing, and as plaintiff Industrial Enterprises, Inc. was able to establish by preponderant evidence the allegations in its Complaint and causes of action against defendants Marinduque Mining and Industrial Corporation and Philippine National Bank, the Court finds both defendants civilly liable to plaintiff and, therefore, orders them to jointly and severally:

1. pay plaintiff the sum of P31.66 Million as of July 31, 1983, for the expenses invested by plaintiff in the property subject of this case, as computed by Sycip, Gorres, Velayo and Company and brought to current value per SGV formula, as agreed in the Memorandum of Agreement;
2. pay plaintiff the sum of P37,569,733.00, for the indemnification and rehabilitation cost, plus interest at the legal rate from March 31, 1991, until fully paid;
3. pay plaintiff the sum of P120 Million for unrealized profit for five (5) years from August, 1983, the date of defendant MMIC's takeover of the property, to October, 1988, when plaintiff was re-awarded the contract, plus interest at the legal rate, from the date of this decision, until fully paid;
4. pay plaintiff an amount not less than ten (10) percent of the losses it incurred and its unrealized profits as indicated in Numbers 1 to 3, for the injury done to plaintiff's business standing and commercial credit;
5. pay plaintiff an amount not less than five (5) percent of the above obligation as reimbursement to plaintiff for litigation expenses and attorney's fees; and

6. COST OF SUIT.

And finally, the extrajudicial foreclosure sale held on August 31, 1984, in Catbalogan, Samar, over the property of plaintiff, part of the Giporlos Coal Project, is hereby declared NULL and VOID.

SO ORDERED."

Marinduque Mining and Industrial Corporation (MMIC) was founded by Jesus S. Cabarrus in 1949.[3] Four years later or in 1953, Cabarrus established J. Cabarrus, Inc. which subsequently was renamed Industrial Enterprises,

Inc. (IEI). During the period when most of the facts relevant to this case transpired, Cabarrus and his family owned about 12% to 14% of the shares of stock in the MMIC[4] where he was the President. He was also the President of IEI.

On July 27, 1979, IEI entered into a coal operating contract with the Bureau of Energy Development (BED), with Cabarrus and then Minister of Energy Geronimo Velasco as signatories.[5] The contract was pursuant to the Coal Development Act of 1976 (P.D. No. 972, as amended) and covered 2,000 hectares of two (2) coal blocks in Barrio Carbon, Magsaysay, Eastern Samar.

While exploring this area, IEI found the adjacent areas, comprising of three (3) coal blocks, to be likewise coal potentials. Hence, upon confirmation by the BED that these three (3) adjacent coal blocks were in the free area, IEI filed an application for another coal operating contract on August 12, 1981. Simultaneously, IEI applied for the conversion of its July 27, 1979 coal operating contract from exploration to development/production. IEI also followed up its application on the three (3) newly-discovered coal blocks. All of these coal blocks were collectively known as the Giporlos Coal Project.

Sometime in April, 1982, Minister Velasco informed Cabarrus that IEI's application for exploration of the three (3) coal blocks had been disapproved and that, instead, the contract would be awarded to MMIC. Following Cabarrus' letter of May 4, 1982[6] requesting that the rejection of IEI's application be made in writing, Minister Velasco wrote him a letter dated June 2, 1982,[7] where Minister Velasco said:

"We appreciate your desire to increase Industrial Enterprises, Inc.'s (IEI) involvement in coal development. In line, however, with the objective of rationalizing the country's overall coal supply-demand balance, we believe that coal users who have the capability to go into coal production themselves should, as much as possible, be encouraged and given the preference to do so. This ensures maximum utilization of local coal and will be beneficial to coal producer/user in the long run. In your area of interest, therefore, we believe that the logical coal operator should be Marinduque Mining and Industrial Corporation (MMIC) which is now developing the Bagacay coal deposit in order to support MMIC's coal conversion program at the Nonoc Nickel Refinery. As a member of the board of MMIC, I am fully aware that this coal conversion program is critical to the profitability and the survival of the Nonoc Nickel Refinery. It is, therefore, imperative that MMIC secure its own coal supply.

Consistent with the above rationale, you are aware that MMIC Board has in fact taken concrete steps to consolidate the Giporlos and Bagacay coal areas under MMIC and, for this purpose, has authorized Chairman Cesar C. Zalamea to create a committee (of which I was asked to be Chairman) to evaluate the Giporlos coal blocks of IEI to serve as basis for their acquisition by MMIC. As President of MMIC, you are likewise aware that the Board has recently hired the services of SGV to make an evaluation of the proper pricing for the IEI coal interest to be paid for by MMIC. With these developments indicating the imminent formal acquisition of Giporlos coal areas by MMIC, it would indeed be inconsistent now for us to award additional coal blocks in the same area to IEI. We believe that these additional coal areas, if at all, should be applied for and awarded direct to MMIC.

In view of the foregoing, please be advised that we are denying IEI's application, and we suggest instead that MMIC apply for the same blocks."

On March 28, 1983, Minister Velasco informed Cesar Zalamea, Chairman of the Board of the Development Bank of the Philippines (DBP) and of the MMIC, that IEI's application for the conversion of its coal operating contract for the Giporlos area from exploration to development/production had been put "under advisement in the light of the ongoing discussion for the transfer of IEI's rights and obligations" to MMIC.[8]

Thereafter, MMIC and IEI, through Chairman Zalamea and President Cabarrus,[9] respectively, entered into a

Memorandum of Agreement (MOA) whereby IEI assigned to MMIC all its rights and interests under the July 27, 1979 coal operating contract. The MOA provided as follows:

"NOW, THEREFORE, the parties have agreed, as hereby they agree, one with the other, as follows:

1. That IEI, subject and conformably with the whereas clauses hereinabove stated, hereby assigns and transfers all its rights and interests on the Coal Operating Contract described in the first whereas clause; and MMIC shall in consideration of the above assignment and transfer —

(a) Undertake all the obligations required of IEI under said Coal Operating Contract;

(b) Reimburse all costs and expenses actually incurred as of 31 July 1983 by IEI on the coal property and brought up to current values, as shall be audited and confirmed by Sycip, Gorres and Velayo as of said date of 31 July 1983; and

(c) Pay to IEI the total sum equivalent to P4.17 per ton of proven and positive reserves of coal to be confirmed by an independent geologist who shall be designated and appointed by mutual agreement of the parties.

2. That the total sum due from MMIC to IEI under this agreement shall be paid upon the effectivity of this agreement in the following manner —

(a) An assumption by MMIC of the outstanding loan obligation (evidenced by Promissory Note No. 1516 for P3.3 Million and Promissory Note No. 11098 for P5.0 Million) of IEI to Manila Banking Corporation which as of 31 July 1983 stands at P8.3 Million.

(b) Payment in cash to IEI of the difference between the above amount of P8.3 Million and the sum total of subparagraphs (b) and (c) par. 1, above.

3. That this agreement shall only become binding and effective upon its approval by the BED, which approval shall be secured jointly by MMIC and IEI."

MMIC and IEI, again through Zalamea and Cabarrus, respectively, jointly informed the BED on August 10, 1983, that they had entered into the MOA "at the instance and suggestion of the Hon. Minister of Energy in one of the earlier meetings of the Board of Directors of MMIC." [10] MMIC and IEI were informed of the approval of the MOA on August 29, 1983 by the then Acting BED Director Wenceslao R. de la Paz. [11]

MMIC took over possession and control of the two (2) coal blocks even before the MOA was finalized. However, instead of continuing the exploration and development work actively pursued by IEI, MMIC completely stopped all works and dismissed the work force thereon, leaving only a caretaker crew.

Consequently, IEI made written demands to MMIC, pursuant to the MOA, for the reimbursement of all costs and expenses it had incurred on the project which, as of July 31, 1983, had amounted to P31.66 million as audited by the Sycip, Gorres and Velayo Company.

In view of MMIC's failure to comply with its obligations under the MOA, IEI filed a complaint against MMIC and Minister Velasco on August 7, 1984, for rescission of the MOA and damages, before the Regional Trial Court of Makati, Branch 137. Docketed as Civil Case No. 8109, the complaint alleged that MMIC acted in gross and evident bad faith in entering into the MOA when it had no intention at all to operate the two (2) coal blocks and of complying with any of its obligations under the said agreement. It likewise alleged that Minister Velasco was instrumental in causing the assignment of the coal operating contracts to MMIC when he did not act on complainant IEI's application for conversion of its coal operating contract from exploration to development/production and in rejecting its application for another coal operating contract for the exploration of

additional three (3) coal blocks which he had reserved for MMIC.

Meanwhile, on July 13, 1981, for various credit accommodations secured from the Philippine National Bank (PNB), aggregating to four billion pesos (P4,000,000,000.00) excluding interest and charges as of November 30, 1980, as well as from the DBP, amounting to two billion pesos (P2,000,000,000.00), MMIC entered into a Mortgage Trust Agreement (MTA)[12] whereby it constituted a mortgage *pari passu* of its assets in favor of PNB and DBP. These assets are described in the third "whereas clause" of the MTA as follows:

"(1) all the MORTGAGOR'S assets described and covered under the Deed of Real Estate and Chattel Mortgage executed by the MORTGAGOR in favor of PNB dated October 9, 1978, acknowledged before Notary Public of Manila, Lucas R. Vidad, as Doc. No. 1004, Page No. 94, Book No. VII, Series of 1978, as amended, which are made integral parts of this Agreement by way of reference; and

(2) additional assets of the MORTGAGOR described and identified in the list hereto attached as Annex 'A', including assets of whatever kind, nature or description, which the MORTGAGOR may hereafter acquire whether in substitution of, in replenishment, or in addition thereto, (the 'Mortgaged Properties')."[13]

Under the MTA, the PNB was constituted and appointed as the trustee tasked with holding in trust the mortgaged properties "for the equal and ratable benefit of the Beneficiaries in proportion to the amount of the obligation of the MORTGAGOR to each of them" as provided therein.[14] One of the conditions of the mortgage was that:

"x x x. Should the MORTGAGORS fail to deliver said properties, as aforesated, the TRUSTEE, through its duly authorized representative, is authorized to take possession of said properties and bring the same to the location of any of their respective offices or to any other place and the expenses of locating and bringing said properties to such place shall be for the account of the MORTGAGOR and shall form part of the sums secured by this mortgage; Provided, however, that the TRUSTEE shall have the option of selling said properties at any place where their respective offices shall be located or at any place where said properties may be found."[15] (Underscoring supplied.)

The MTA also provided that:

"For the purpose of extra-judicial foreclosure, the MORTGAGOR hereby appoints the TRUSTEE, through its duly authorized representatives, its attorney-in-fact to sell the mortgaged properties in accordance with the provision of Act No. 3135, as amended, and/or Act No. 1508, as amended, and subject to the stipulations herein set forth, to sign all documents and perform any act requisite or necessary to accomplish said purpose and to appoint their representatives or substitutes as such attorneys-in-fact with all the powers herein conferred. In extra-judicial foreclosure under Act No. 3135, as amended, the auction sale shall take place in the City or Capital of the Province where the mortgaged properties are situated. In extra-judicial foreclosure under Act No. 1508, as amended, the auction sale shall take place in such City or Municipality as the TRUSTEE at its option, may elect by virtue of the provisions of the first paragraph of this Condition."[16] (Underscoring supplied.)

The MTA was amended on April 27, 1984 with PNB Senior Vice President Gerardo Agulto, Jr. and MMIC Senior Vice President Jose Luis Javier as signatories.[17] Premised on the fact that the mortgagor (MMIC) had "acquired additional personal and real properties, including, but not limited to, leasehold rights on mining claims, which pursuant to the terms of the Mortgage Trust Agreement are deemed covered by the mortgage as after-acquired assets," the MTA amended Sec. 2.01 thereof to read as follows:

"As security for the prompt and full payment by the MORTGAGOR of the Secured Obligations, the MORTGAGOR hereby establishes and constitutes in favor of the MORTGAGEES a first lien and mortgage of the first rank in and to each and every item of the Mortgaged Properties, together with any and all substitutes or replacements for or renewals of or additions to any thereof, all of which belong to and are in the possession

of (or will belong to and will be in the possession of) the MORTGAGOR, free and clear of any liens or encumbrances of any nature whatsoever." (Underscoring supplied.)[18]

MMIC defaulted in the payment of its loan obligation with PNB and DBP which, as of July 15, 1984 stood at P23.55 billion. As a consequence thereof, PNB and DBP simultaneously filed in the provinces of Rizal, Samar, Negros and Surigao, joint petitions for sale on foreclosure under Act Nos. 1508 and 3135,[19] of the MMIC assets located at: (a) Island Cement in Antipolo, Rizal; (b) Sipalay Copper Mine in Negros; (c) Bagacay and Giporlos Coal Projects in Samar, and (d) Nonoc Nickel Project in Surigao. The petitions were premised on: (1) the MOA of July 13, 1984 which delineated MMIC's mortgaged properties; (2) the April 27, 1984 amendment to the MTA in favor of DBP and PNB which included in the mortgage MMIC's additional after-acquired assets; (3) the liabilities of MMIC secured by the mortgage being past due, and (4) Presidential Decree No. 385 mandating PNB and DBP to institute foreclosure proceedings when the arrearages of the borrower have exceeded twenty percent (20%) of the principal obligation.

Deputy Sheriff Esteban G. Malindog of the Regional Trial Court in Catbalogan, Samar, Branch XXVII, complied with the requirements of the law as to the posting and publication of the notice of sale. Said notice, dated August 15, 1984, set for August 31, 1984 the auction sale of the various mining equipment and other assets of MMIC, including the equipment at the Giporlos Project.

On August 15, 1984, IEI advised PNB and DBP at their respective Manila and Makati offices that the purchase price of the Giporlos Coal Project that it had assigned to MMIC per the MOA, was still unpaid.[20] However, despite said notice, the foreclosure sale proceeded as scheduled and the various machineries and equipment of MMIC were sold to PNB as the sole bidder for P33,940,940.00.

In its letter of September 20, 1984 to PNB and DBP,[21] IEI requested that the movable properties in the Giporlos Coal Project which were detailed in a list attached to its August 15, 1984 letter to said banks, be excluded from the foreclosed assets of MMIC as the purchase price thereof under the MOA had remained unpaid. IEI further informed PNB and DBP that a suit for rescission of the assignment of the Giporlos Coal Project to MMIC (and damages) had been filed before the Regional Trial Court of Makati.

On June 24, 1985, in view of the inclusion of the mining equipment and other movable properties at the Giporlos Coal Project in the foreclosure sale of the assets of MMIC, IEI filed an amended complaint impleading the PNB as an additional defendant.[22] The amended complaint was admitted by the trial court on September 23, 1985.[23]

On April 23, 1986, the lower court[24] rendered a decision finding that:

"With respect to the plaintiff's claim against the Philippine National Bank, the evidence on record is clear that said defendant bank is equally guilty of bad faith because it was advised beforehand that the heavy equipment and movable property which are part of the Giporlos Coal Project were still unpaid; however, despite that actual knowledge or information, the said defendant bank proceeded to extrajudicially foreclose the mortgage on the said properties; moreover, the foreclosure proceedings were held in Catbalogan, Province of Samar, although the said movable properties are actually found or located at Giporlos, Eastern Samar (Exhibit 'OOO'), a province, distinct and separate from, and outside the jurisdiction of, the Province of Samar; these foreclosure proceedings in Catbalogan, Samar, are clearly contrary to the provisions of Act 1508, as amended; likewise, the inclusion of the movable properties which are part of the Giporlos Coal Project is contrary to the provisions of the last paragraph of Sec. 7 of said Act No. 1508, as amended, which provides that a chattel mortgage shall be determined to cover only the properties described therein and not like or substituted property thereafter acquired by the mortgagor and placed in the same depository as the property originally mortgaged, anything in the mortgage to the contrary notwithstanding." [25]

Noting the futility of proceeding with the trial of the case because there was "no genuine issue of any material facts," the lower court rendered a summary judgment disposing of Civil Case No. 8109 as follows:

"WHEREFORE, judgment is hereby rendered:

- a- declaring the memorandum agreement, Exhibit 'C' as rescinded or annulled and without further force and effect between the parties thereto;
- b- declaring and sustaining the continued efficacy and validity of the coal operating contract, Exhibit 'A' between plaintiff and defendant BED;
- c- ordering the reversion or return of the two coal blocks covered by the coal operating contract dated July 27, 1979, Exhibit 'A', from the defendant MMIC to and in favor of the plaintiff together with or including all the pieces of equipment MMIC received by said defendant in virtue of the rescinded memorandum of agreement, Exhibit 'C';
- d- ordering the defendant Bureau of Energy Development to issue its corresponding formal written affirmation and confirmation of the coal operating contract, Exhibit 'A', and to expeditiously cause the conversion thereof from exploration to development/production or exploitation contract in favor of the plaintiff;
- e- directing the Bureau of Energy Development and the Ministry of Energy to give due course to plaintiff's application for a coal operating contract for the exploration of the three additional coal blocks in the plaintiff's Giporlos Coal Project;
- f- condemning the defendant MMIC to pay the plaintiff the amount of P3,431,645.00 representing expenditures on the two coal blocks covered by Exhibit 'A' from July 31, 1983 up to May 1984 and such further amounts from said date up to the finality of this decision to be computed in accordance with the formula adopted in the report of Sycip, Gorres and Velayo referred to in paragraph 14 of the Amended Complaint;
- g- ordering the defendant MMIC to pay the plaintiff the sum of P6,500,000.00 representing rehabilitation expenses to be incurred by plaintiff in putting back the two coal blocks and the pieces of equipment thereon in the same workable and operating condition as they were at the time they were taken possession of by said defendant MMIC and the defendant PNB shall be subsidiarily liable therefor;
- h- condemning the defendants MMIC and PNB jointly and solidarily liable to pay the plaintiff moral damages in the amount of P300,000.00, as exemplary damages of P200,000.00 and the amount of P200,000.00 as and for attorney's fees;
- i- declaring the extra-judicial foreclosure sale executed for and in behalf of the defendant Philippine National Bank of the mining equipment and other movable property which are enumerated in Exh. 'OOO' and which are part of the Giporlos Coal Project, as null and void and of no force and effect as against the plaintiff; in the event of the loss or deterioration of the said mining equipment and other movable property, the said defendants PNB and MMIC shall be held jointly and solidarily liable to the plaintiff for the current market value thereof; and
- j- ordering the defendants MMIC and PNB to pay the cost of this suit.

SO ORDERED."[26]

PNB and IEI filed separately motions for the reconsideration of said summary judgment.[27] PNB alleged that the lower court did not have jurisdiction over the subject matter and nature of the action as the MOA between MMIC and IEI was an incident arising out of a mining claim which was within the jurisdiction of the BED. Moreover, the validity of the extrajudicial foreclosure proceedings which PNB effected on said properties was a genuine

material issue which was not determinable through summary judgment. Inasmuch as the merit of the case was resolved through summary judgment, PNB was denied its constitutional right to due process. Furthermore, the award of damages to IEI was improper as PNB was not a party to the MOA.

For its part, IEI contended that the decision failed to award consequential damages in its favor considering the finding that MMIC and PNB acted in bad faith and that it failed to realize profits of about P14.5 million on the confirmed coal reserves of 3,485,915 metric tons computed at P4.17 per metric ton.

On the other hand, the public defendant and MMIC filed their respective notices of appeal to the then Intermediate Appellate Court.[28]

On July 14, 1986, IEI filed a motion for execution pending appeal[29] alleging that MMIC had failed and refused to fulfill its obligations under the MOA and that it even allowed the PNB to unlawfully foreclose the mortgage on the heavy equipment and other movable properties in the Giporlos Coal Project. According to IEI, to allow this situation to persist would only aggravate the damages suffered by all concerned parties. It added that the grant of the motion for execution pending appeal would not only stop the continuing injury to the common weal but it would also hasten the day when the coal blocks could be placed in useful production to provide gainful employment to the people in the community. By the same token, IEI averred, granting of the motion would accelerate realization of scarce foreign exchange savings occasioned by the local production of a substitute energy source that would thereby contribute to the relief of an ailing economy.

This motion was opposed by the public defendant, the MMIC and the PNB.[30] The public defendant averred that the execution of the decision "would cause great irreparable damage and injury to public interest" and that there were no "good reasons" of superior circumstance that demand urgency of the execution pending appeal. MMIC opposed the motion on the ground that the court had lost jurisdiction after the perfection of its appeal while PNB's objection was on the ground that there were no good reasons to justify the issuance of a writ of execution and that the issuance thereof was premature.

In its order of September 15, 1986, the lower court denied the motions for reconsideration of IEI and PNB for lack of merit. It ordered the elevation of the records of the case to the Court of Appeals considering that the MMIC and the public defendant had filed their notices of appeal on time. It likewise directed the issuance of a writ of execution pending appeal to enforce the April 23, 1986 decision upon the filing of a bond in the amount of five million pesos (P5,000,000.00) conditioned on the payment of damages the defendants might suffer should the court finally rule that the plaintiff was not entitled to the writ.

In granting the writ of execution, the court held that "the immediate resumption of operation of the two coal blocks in question became imperative and is of urgent necessity at this time when our government is in dire need of capitalization to encourage the establishment of business to generate employment and dollar-producing energy sources." In the court's perception, this was enough reason to entitle IEI to execution pending appeal pursuant to Sec. 2, Rule 39 of the Rules of Court.

The corresponding writ having been issued on September 22, 1986,[31] on September 26, 1986, Pioquinto P. Villapana was appointed Special Sheriff to assist and cooperate with Deputy Sheriff Arturo Flores in its enforcement. However, execution of the writ was curtailed.

The appeal to the Court of Appeals was docketed as CA-G.R. CV No. 12660. On October 14, 1988, IEI filed a motion to dismiss the case against Minister Velasco on the grounds of IEI's reapplication for the two coal blocks with the Office of Energy Affairs (OEA) and its loss of interest in pursuing the case against Minister Velasco.[32] The motion was favorably acted upon by the Court of Appeals thereby effectively dropping Minister Velasco as a

defendant in Civil Case No. 8109 through the decision of May 29, 1989,[33] where the Court of Appeals disposed of the appeal as follows:

"WHEREFORE, the judgment appealed from is hereby reversed and set aside and the appeal of plaintiff Industrial Enterprises, Inc., is DISMISSED. The complaint against the defendants Marinduque Iron Mines Corporation and Minister of Energy is dismissed for lack of jurisdiction. The case against defendant PNB is remanded to the lower court for further proceedings.

Cost against appellant Industrial Enterprises, Inc.

SO ORDERED."[34]

elevated the decision to this Court through a petition for review on certiorari under G.R. No. 88550 while the PNB filed in the Court of Appeals a motion for the reconsideration of the same decision. On September 21, 1989, the Court of Appeals resolved the motion for reconsideration with the following findings:

"Considering, therefore, that PNB was impleaded as party defendant only in connection with its foreclosure of the mortgages on the properties of the principal defendant MMIC, and considering that the main action against MMIC has been dismissed for lack of jurisdiction, there appears to be no cogent reason to continue the case against PNB which is merely a secondary defendant. There is thus merit in PNB's contention that since the case against MMIC has been dismissed, the case against PNB should likewise be dismissed, considering that PNB merely stepped into the shoes of MMIC.

Moreover, there is no privity of contract between PNB and IEI. Hence, there is no direct cause of action by IEI against PNB independently of MMIC, it being merely a foreclosing mortgage creditor of the latter. At any rate, the record shows that there is an on-going litigation between MMIC stockholders and PNB before the Regional Trial Court of Makati (Civil Case No. 9900) for the annulment of the PNB's extra-judicial foreclosure of MMIC's mortgaged properties."[35]

Accordingly, the Court of Appeals modified its decision of May 29, 1989 by dismissing the case against the PNB.

Meanwhile, G.R. No. 88550 was eventually decided by this Court on April 18, 1990.[36] In denying the petition of IEI, the Court held:

"Clearly, the doctrine of primary jurisdiction finds application in this case since the question of what coal areas should be exploited and developed and which entity should be granted coal operating contracts over said areas involves a technical determination by the BED as the administrative agency in possession of the specialized expertise to act on the matter. The Trial Court does not have the competence to decide matters concerning activities relative to the exploration, exploitation, development and extraction of mineral resources like coal. These issues preclude an initial judicial determination. It behooves the courts to stand aside even when apparently they have statutory power to proceed in recognition of the primary jurisdiction of an administrative agency.

'One thrust of the multiplication of administrative agencies is that the interpretation of contracts and the determination of private rights thereunder is no longer a uniquely judicial function, exercisable only by our regular courts' (Antipolo Realty Corp. v. National Housing Authority, 153 SCRA 399, at 407).

The application of the doctrine of primary jurisdiction, however, does not call for the dismissal of the case below. It need only be suspended until after the matters within the competence of the BED are threshed out and determined. Thereby, the principal purpose behind the doctrine of primary jurisdiction is salutarily served."

Pursuant to this Decision, IEI lodged a complaint against MMIC and PNB before the OEA. After due hearing, a decision was issued by Executive Director W. R. de la Paz on January 25, 1991, with a decretal portion which reads:

"Wherefore, in the light of the foregoing, insofar as the Memorandum of Agreement is concerned, such agreement may already be deemed rescinded and of no force and effect in view of the re-award made in IEI's favor of the same coal areas subject of this dispute. However, on the issue of the effects and consequences of the right to claim damages for unpaid financial obligations and such other damages incidental thereto, by one party as against the other, this matter may be referred to the regular courts for appropriate adjudication.

Similarly, this likewise holds true insofar as the foreclosed properties involved in this case are concerned where respondent Philippine National Bank was impleaded."^[37]

In accordance with this ruling of the OEA, on March 1, 1991, IEI filed in the lower court a motion to set Civil Case No. 8109 for hearing.^[38] On June 17, 1991, PNB filed a motion to dismiss^[39] alleging that the issue in this case, i.e., the validity of the foreclosure of MMIC's assets, was virtually the same issue raised before the Regional Trial Court of Makati in Civil Case No. 9900, "Jesus S. Cabarrus, Jesus Cabarrus, Jr., Jaime T. Cabarrus, Jose Miguel Cabarrus, Alejandro S. Pastor, Jr., Antonio U. Miranda & Manuel M. Antonio v. Development Bank of the Philippines and Philippine National Bank," a case filed by the plaintiffs as stockholders of MMIC in their behalf as well as in behalf of other stockholders, which prayed, among others, that the foreclosures effected by DBP and PNB on the assets of MMIC be declared null and void.^[40]

The motion to dismiss was denied by the lower court on July 10, 1991 on the ground that there was no substantial identity in the cause of action, the relief sought and the parties in the two cases.^[41]

As aforesaid, the lower court rendered the decision of November 27, 1992 finding MMIC and PNB jointly and severally liable to IEI for damages and declaring null and void the August 31, 1984 extrajudicial foreclosure sale in Catbalogan, Samar. This was affirmed on December 20, 1994 by the Court of Appeals under CA-G.R. CV No. 40836.

MMIC did not interpose an appeal from the Decision of the Court of Appeals but the PNB filed the instant petition for review on certiorari questioning the following "conclusions" of the Court of Appeals:

- (1) there was implied conspiracy or community of design among the defendants to ruin IEI;
- (2) PNB acted in bad faith in including the IEI Giporlos equipment at the extrajudicial foreclosure sale on August 31, 1984, and
- (3) PNB is liable for a quasi-delict.

Petitioner PNB also contends that the Court of Appeals erred in not holding that (a) because Minister Velasco had been dropped as party defendant, PNB was also absolved from liability because it was solidarily liable with Minister Velasco, and (b) IEI's claim against PNB for actual, consequential and moral damages including attorney's fees, litigation expenses and costs of suit, has neither legal nor factual bases.^[42]

In its comment on the petition, private respondent IEI contends in the main that the issues raised by petitioner PNB are all factual in nature and, therefore, they have no place before this Court. We hold otherwise.

At the core of the instant petition is the legal question of ownership of the chattels involved at the time of foreclosure. This issue appears to have been glossed over by the courts below. Equally appropriate for determination by this Court is the legality of the foreclosure proceedings on the assets of the MMIC. These two issues are the keys to the resolution of the instant petition.

Privity between MMIC and private respondent was established by the execution of the MOA. An important issue then is whether or not the chattels mortgaged to petitioner were covered by the MOA so as to legally subject the same chattels to MMIC's ownership and, eventually, to the foreclosure proceedings.

The MOA was an assignment of private respondent's "rights and interests on the Coal Operating Contract described in the first whereas clause" thereof. In its most general and comprehensive sense, an assignment is "a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all kinds of property, and is peculiarly applicable to intangible personal property and, accordingly, it is ordinarily employed to describe the transfer of non-negotiable choses in action and of rights in or connected with property as distinguished from the particular item or property." [43]

An assignment is a contract between the assignor and the assignee. It generally operates by way of such contract or agreement. It is subject to the same requisites as to validity of contracts. [44] Whether or not a transfer of a particular right or interest is an assignment or some other transactions depends, not on the name by which it calls itself, but on the legal effect of its provisions. This rule applies in determining whether a particular transaction is an assignment or a sale. [45]

As the aforequoted portions of the MOA state, its subject is described in the "whereas clauses" thereof as follows:

"WHEREAS, IEI is the duly authorized operator over two coal blocks over an area outlined and more particularly described in Annex 'A' of the Coal Operating Contract entered into on the 27th day of July 1979 and between the Ministry of Energy, through the Bureau of Energy Development ('BED'), and IEI; the Coal Operating Contract and Annex A thereof being hereto attached and made an integral part of this contract;"

Annex "A" of the coal operating contract is the technical description of the 2,000-hectare coal-bearing land in Carbon, Magsaysay, Eastern Samar. Therefore, as expressed in the MOA, the subject of the assignment was only private respondent's rights and interests over the coal operating contract covering said coal-rich land in Eastern Samar.

However, a close scrutiny of the contract reveals that the MOA includes all tangible things found in the coal-bearing land. Unquestionably, rights may be assigned as they are intangible personal properties. The term "interests," on the other hand, is broader and more comprehensive than the word "title" and its definition in a narrow sense by lexicographers as any right in the nature of property less than title, indicates that the terms are not considered synonymous. [46] It is practically synonymous, however, with the word "estate" which is the totality of interest which a person has from absolute ownership down to naked possession. [47] An "interest" in land is the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable. [48]

That the MOA conveyed to MMIC more than the title to or rights over the coal operating contract but also the "things" covered thereby, is manifest in the manner by which the parties, particularly private respondent IEI, implemented the MOA. It disclosed the intention to include in the MOA the equipment and machineries used in coal exploration. This intention is evident in the following letters of private respondent: (1) letter of April 16, 1984 to Alfredo Velayo, President of MMIC, where private respondent, through Cabarrus, included in the conditions for the negotiated rescission of the MOA, the payment to private respondent of the amount of ten million pesos (P10,000,000.00) for expenses such as those for the "recondition (of) the equipment which have been left to the elements;" [49] (2) letter of May 2, 1984 to Velayo, where private respondent mentioned a "list of probable equipment(s) that IEI would be interested to apply as part payment in the event of rescission of contract;" [50] (3) letter of June 4, 1984 to Zalamea as Chairman of the Board of the MMIC, [51] where private respondent attached an updated statement of account and the expenses for rehabilitation of equipment, and (4) letter of August 15, 1984 to petitioner and the DBP where private respondent enclosed a copy of "the movable properties included in said Memorandum of Agreement" of August 1983. [52] Notably, all these listed equipment were sold at the foreclosure sale initiated by petitioner. [53]

Also worth noting is the absence of proof that, like a good father of the family, private respondent exerted some effort to take the chattels out of the premises upon the execution of the MOA. All that private respondent proved, through the testimony of Cabarrus, was that the equipment and machineries were taken over by MMIC, piled up and left to rot that trees even grew on them.[54] Coupled with this is private respondents' failure to prove the presence of insurmountable force[55] that would have prevented it from retrieving its equipment and machineries from the Giporlos Project area. All these show that private respondent considered these chattels as subjects of the MOA.

Private respondent had all the right to exclude these chattels from the MOA because they were not expressly stipulated therein. However, its sheer inaction upon the execution of the MOA and its subsequent admissions through the aforesaid letters, conclusively show that these equipment and machineries were subjects of the assignment of rights to MMIC. It was only when the foreclosure sale was about to take place that private respondent lifted a finger to object thereto on the ground that the consideration stipulated in the MOA had not yet been paid by MMIC.

Moreover, while the MOA was expressly a contract for the assignment of rights and interests, it is in fact a contract of sale. Under Art. 1458 of the Civil Code, 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. By the MOA, private respondent obligated itself to transfer ownership of the coal operating contract and the properties found therein. The coal operating contract is a determinate thing as it has been particularly designated in the MOA. The subject of the coal operating contract was physically segregated from all other pieces of coal-rich Eastern Samar property by the technical description attached to said contract.[56] A list of the equipment and machineries found on the property might not have been attached to the MOA but these were itemized with specificity in private respondent's letter of August 15, 1984.

Private respondent delivered the properties subject of the contract to MMIC, which immediately gained control and possession of the Giporlos Project. This is explicit in private respondent's numerous demand letters[57] which are exemplified by its letter of February 7, 1984 to Zalamea which states:

"Considering that all details necessary to determine the final purchase price are in place; considering that the property has already been transferred in your name; and considering finally that cash payment is stipulated in the contract, demand is hereby respectfully made for the payment of the purchase price soonest."[58] (Underscoring supplied.)

Another very telling letter of private respondent is that of April 16, 1984 to Mr. Alfredo Velayo, President of MMIC, which partly reads:

"After the Memorandum of Agreement was signed, BED promptly approved the transfer from IEI to MMIC. After the price was fixed with the assistance of SGV and BED, MMIC took over the entire project last July 1983. x x x."[59]

For its part, MMIC never denied that it had taken possession and control over the Giporlos Project. In its replies to private respondent's demand letters, MMIC in fact acknowledged its obligations under the MOA while professing incapacity to fulfill the same.

If the MOA merely embodied an assignment of rights over the coal-operating contract and the properties found in the Giporlos Project and not a sale thereof, then private respondent would not have insisted on the payment of MMIC's obligations under the MOA by attaching a statement of account to most of its demand letters.[60] In assignments, a consideration is not always a requisite, unlike in sales. Thus, an assignee may maintain an action based on his title and it is immaterial whether or not he paid any consideration therefor.[61] Furthermore, in an

assignment, title is transferred but possession need not be delivered.[62] In this case, private respondent transferred possession over the subjects of the "assignment" to MMIC.

Since the MOA was actually a contract of sale, MMIC acquired ownership over the Giporlos Project when private respondent delivered it to MMIC. Under the Civil Code, unless the contract contains a stipulation that ownership of the thing sold shall not pass to the purchaser until he has fully paid the price,[63] ownership of the thing sold shall be transferred to the vendee upon the actual or constructive delivery thereof.[64] In other words, payment of the purchase price is not essential to the transfer of ownership as long as the property sold has been delivered.[65] Such delivery (traditio) operated to divest the vendor of title to the property which may not be regained or recovered until and unless the contract is resolved or rescinded in accordance with law.[66]

Consequently, the properties in the Giporlos Project were, therefore, owned by MMIC notwithstanding its failure to pay the consideration stipulated in the MOA. Private respondent, after such delivery and MMIC's continuous refusal to pay the consideration for the contract, correctly opted to rescind the contract.[67] That private respondent did not succeed in collecting payment prior to the filing of the complaint for rescission with damages is a fault entirely attributable to MMIC which at the time, acted upon the orders of government authorities.

It is erroneous for private respondent and the courts below to impute bad faith on the part of petitioner for foreclosing the properties in the Giporlos Project. Petitioner was simply acting in accordance with its rights as a mortgagee. The MTA, as amended, clearly provides that the mortgage covers even "after- acquired" properties. Because petitioner was simply implementing this contractual provision of the MTA, its knowledge that MMIC had not yet paid the consideration stipulated in the MOA could not have resulted in foreclosure in bad faith. After all, petitioner was a total stranger as regards the MOA.

Similarly, neither may petitioner be deemed to have conspired with MMIC and government authorities in divesting private respondent of its rights over the Giporlos Project. Petitioner's involvement consisted in its exercising its right to foreclose the mortgage only after the MOA, which effectively wrenched the Giporlos Project from private respondent's control, had become a *fait accompli*. A lawful act, done in a lawful way, no matter how damaging the result, never lays the basis for a claim of fraudulent conspiracy.[68] That a scheme to favor the financially strapped MMIC over private respondent had been hatched and was in existence when the MOA was executed is now beyond this Court's adjudicatory power. Suffice it to state that an action may be maintained against persons who falsely and fraudulently recommend an insolvent person as worthy of credit, by reason of which plaintiff is induced to trust him.[69]

In view of the noninvolvement of petitioner in the alleged conspiracy to strip private respondent of its rights over the Giporlos Project, petitioner cannot be made solidarily liable with the MMIC for damages. However, although petitioner's rights to foreclose the mortgage and to subject the equipment of private respondent to the foreclosure sale are unassailable, we find that the foreclosure proceedings fell short of the requirements of the law.

The provision of the MTA vesting petitioner as trustee with the authority to choose the place where the sale of the properties involved therein should be made is clearly in contravention of the following provisions of Act No. 3135 as amended:

"SEC. 2. Said sale cannot be made legally outside the province in which the property sold is situated; and in case the place within said province in which the sale is to be made is the subject of stipulation, such sale shall be made in said place or in the municipal building of the municipality in which the property or part thereof is situated."

The Giporlos Project is situated in Eastern Samar, a province separate and distinct from Samar where the

foreclosure sale took place.[70] Hence, the foreclosure sale is null and void. Even the Chattel Mortgage Law (Act No. 1508) relied upon by private respondent in assailing the propriety of the public auction sale in Samar, provides that the said sale should be made "in the municipality where the mortgagor resides" or "where the property is situated." [71] It has not been established that petitioner considered Catbalogan, Samar where the foreclosure sale was conducted, as its "residence."

Moreover, the designation of a special sheriff to conduct the foreclosure sale is questionable. According to Sheriff Malindog, he was designated as a special sheriff by the judge of the Regional Trial Court of Samar, through the clerk of court, upon the request of petitioner's counsel, one Atty. Aliena, even though there was a sheriff in Eastern Samar.[72]

Appointment of special sheriffs for the service of writs of execution or for the purpose of conducting a foreclosure sale under Act No. 3135 is allowed only when there is no sheriff in the area where the property involved is located or when the sheriff himself is involved in the action. This restriction is founded on the requirement of law that sheriffs who take delivery of money or property in trust must be duly bonded.[73] The said situations calling for the appointment of a special sheriff being absent in this case, the appointment of Malindog as a special sheriff by the judge of the Regional Trial Court of Samar is unauthorized. Such lack of authority resulted in the nullification of the foreclosure sale conducted by Malindog.

Ordinarily, by the nullification of the foreclosure sale, the properties involved would revert to their original status of being mortgaged.[74] However, the situation in this case is an exception to that rule. The MOA, the source of MMIC's right of ownership over the properties sold at the foreclosure sale, has been rescinded. Consequently, petitioner should exclude said properties from the MMIC's properties which were mortgaged *pari passu* to the petitioner and DBP through the MTA. However, since the foreclosed properties had been turned over to the Asset Privatization Trust,[75] petitioner must reimburse private respondent the value thereof at the time of the foreclosure sale.

WHEREFORE, the Decision of the Court of Appeals is hereby REVERSED and SET ASIDE insofar as it renders petitioner solidarily liable with Marinduque Mining and Industrial Corporation for damages and AFFIRMED insofar as it nullifies the foreclosure sale of August 31, 1984. Petitioner Philippine National Bank shall exclude the properties sold at the foreclosure sale from the mortgaged properties of Marinduque Mining and Industrial Corporation and return the same to private respondent Industrial Enterprises Inc. or, should such return be not feasible, reimburse said private respondent the value thereof at the time of the foreclosure sale.

SO ORDERED.

Regalado, (Chairman), Puno, Mendoza, and Torres, Jr., JJ., concur.

[1] Penned by Associate Justice Ricardo J. Francisco and concurred in by Associate Justices Ramon A. Barcelona and Godardo A. Jacinto.

[2] Penned by Judge Zeus C. Abrogar.

[3] TSN, October 21, 1991, p. 28.

[4] *Ibid.*, p. 32 – 34.

[5] Exh. A.

[6] Exh. B.

[7] Exh. B-1.

[8] Exh. B -2

[9] Records show that at the time of the signing of the MOA, Cabarrus was also the President of MMIC as he retired from that position on December 31, 1983 (MMIC Report '83, Exh. DDD-2, pp. 3 & 34).

[10] Exh. C.

[11] Exh. W.

[12] Exh. 1-PNB.

[13] Exh. 1-B.

[14] Sec. 3.01 of MTA.

[15] Sec. 5.08, *ibid.*

[16] *Ibid.*, Exh. 1 – C.

[17] Exh. 2-PNB.

[18] Exh. 2-A.

[19] Exh. 3-PNB.

[20] Exh. KKK.

[21] Exh. LLL.

[22] RTC Records, p. 206.

[23] *Ibid.*, p. 276.

[24] Presided by Judge Benigno M. Puno.

[25] Decisions p. 21; RTC record, p. 369.

[26] Record, pp. 370-371.

[27] *Ibid.*, pp. 372-376 & 387-389.

[28] *Ibid.*, pp. 378-391.

[29] *Ibid.*, pp. 414—416.

[30] *Ibid.*, p. 419-447.

[31] *Ibid.*, pp. 484-486.

[32] Rollo, p. 79.

[33] Penned by Justice Nicolas P. Lapeña, Jr. and concurred in by Justices Emeterio C. Cui and Justo P. Torres, Jr.

[34] RTC Record, p. 513.

[35] *Ibid.*, pp. 514-515.

[36] The decision was penned by Associate Justice Ameurfina A. Melencio – Herrera and concurred by Associate Justices Edgardo L. Paras, Teodoro R. Padilla, Abraham F. Sarmiento and Florenz D. Regalado. It is published in

184 SCRA 426.

[37] Exh. ZZZ; RTC Record, pp. 520-527.

[38] Ibid., pp. 517-518.

[39] Ibid., pp. 538-540.

[40] By virtue of Administrative Order No. 14 dated February 3, 1987 and the Deeds of Transfer both dated February 27, 1987, the National Government, thru the Asset Privatization Trust, became the assignee and transferee of all the PNB and DBP accounts pertaining to MMIC. Pursuant to the Compromise and Arbitration Agreement entered into by the parties in Civil Case No. 9900 and APT, said case was dismissed by the trial court on October 14, 1992 and submitted instead to arbitration under R.A. 876. In its decision dated November 24, 1993 the Arbitration Committee declared invalid the foreclosure on MMIC's assets. (C.A. Rollo, pp. 198-263).

[41] RTC Record, p. 566.

[42] Petition p. 40.

[43] MORENO'S PHILIPPINE LAW DICTIONARY, 3rd ed., p. 75.

[44] 6A C.J.S. 593.

[45] Ibid., p. 594.

[46] 22 WORDS AND PHRASES 87 citing *In re Baldwin's Estate*, 134 P. 2d 259, 263, 21 Cal. 2d 586.

[47] Ibid., citing *Providence Washington Ins. Co. v. Pass*, for use of *Nalley*, 12 S.E. 2d 460, 461, 64 Ga. App. 221.

[48] Ibid., at p. 92 citing *Bahls v. Dean*, 170 N.W. 861, 866, 222 Iowa 1291.

[49] Exh. MM.

[50] Exh. RR.

[51] Exh. TT.

[52] Exh. KKK.

[53] Exh. OOO.

[54] TSN, October 7, 1991, p. 12.

[55] When mention of the presence of the insurgents in the area was made, Cabarrus claimed at the witness stand that they were never a problem to him and his company. (TSN, January 15, 1992, pp. 29-30).

[56] Art. 1460 of the Civil Code states that a thing is "determinate when it is particularly designated or physically segregated from all others of the same class."

[57] Exhs. Y, Z, BB, CC, EE, GG, II, KK, MM, PP, TT and WW.

[58] Exh. Z.

[59] Exh. MM.

[60] Exhs. CC, CC-1, KK, KK-1, PP, PP-1, TT, TT-1.

[61] 6A C.J.S. 781.

[62] 4A WORDS AND PHRASES 106 citing Paramount Building & Loan Ass'n. of City of Newark v. Sacks, 152 A. 457, 458, 107 N.J. Eq. 328.

[63] Art. 1478.

[64] Art. 1477.

[65] Sampaguita Pictures, Inc. v. Jalwindor Manufacturers, Inc., L-43059. October 11, 1979, 93 SCRA 420, 425.

[66] See: Pingol v. Court of Appeals, G.R. No. 102909, September 6, 1993, 226 SCRA 118, 128.

[67] Ocampo v. Court of Appeals, G.R. No. 97442, June 30, 1994, 233 SCRA 551, 560.

[68] 15A C.J.S. 614.

[69] Ibid, at p. 615.

[70] Exhs. MMM & OOO.

[71] Sec. 14.

[72] TSN, July 27, 1992, p. 37.

[73] Commissioner of Public Highways v. San Diego, L-30098, February 18, 1970, 31 SCRA 616, 631-632.

[74] See: Seven Brothers Shipping Corporation v. Court of Appeals, G.R. No. 109573, July 13, 1995, 246 SCRA 33, 40.

[75] TSN, October 21, 1991, pp. 5-6; TSN, December 21, 1991, pp. 22-23; RTC, decision, p. 18: Records, p. 751.

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