FEDERAL BUILDERS, INC., PETITIONER, VS. DAIICHI PROPERTIES AND DEVELOPMENT, INC., RESPONDENT.

G.R. No. 142525. February 13, 2009

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

This Petition for Review on Certiorari under Rule 65 of the Rules of Court assails the Decision[1] of the Court of Appeals dated 9 November 1999 in CA-G.R. SP No. 54122 which set aside the Orders of the Arbitral Tribunal of the Construction Industry Arbitration Commission denying the Motion to Commission an Independent Quantity Surveyor of Daiichi Properties and Development, Inc. (Daiichi), and the Court of Appeals' Resolution[2] dated 23 February 2000 denying the motion for reconsideration of the said decision.

Daiichi invited bidders for the general construction of its high-rise building project named Orient Plaza. One of those who submitted its proposal was Federal Builders, Inc. (Federal). Federal emerged as the winning bidder for the construction project.

On 29 December 1995, Daiichi and Federal executed a Construction Agreement which, among other things, stipulated that the cement and steel bars to be used in the construction of Orient Plaza would be provided by Daiichi while the labor and other materials would be supplied by Federal, viz:

> - 834,273 bags of cement, as the guaranteed maximum quantity of cement to be supplied by Daiichi;
>
> - 9,262,334.45 kilograms of steel bars, as the guaranteed maximum quantity of steel bars, also to be supplied by Daiichi; and
>
> - P212,000,000.00 as the fixed price of [Federal's] labor and other materials.[3]

The Construction Agreement likewise granted Daiichi the right to revise the construction plans for the project, thus:

> 2.10 All variations or departures from the bid plans, this Contract Agreement and other
>
> related contract and bid documents to the issued construction plans and other future revisions shall be considered as change order.
>
> x x x x
>
> 8.01. The CONTRACTOR is obliged to undertake any additional work or extra work
>
> or omission or reduction of work which the OWNER may require.
>
> x x x x
>
> 8.04. The OWNER may ... at any time during the progress of the work by written
>
> instructions, cause alterations in the original plans and specifications to be made by way of addition, deletion,

> or otherwise deviating therefrom; and said work shall be executed by the CONTRACTOR under the direction of the Construction Manager in the same manner as if the same had been part of the original plans and specifications.[4]

In the course of the construction, Daiichi made some changes by reducing the concrete strength from 8,000 to 6,000 pounds per square inch, which reduction resulted in a decrease in the required quantities of cement, steel bars, other materials and a diminution of the labor costs. Pursuant to this, Daiichi issued revised construction plans. Daiichi and Federal also agreed to reduce the contract price of the project and to submit a separate evaluation of the deductive costs arising from the revisions of the construction plans. While the parties agreed that due to the reduction in the concrete strength, a corresponding decrease in the required quantities of cement, steel bars, other materials and labor must follow, they cannot agree on the method in arriving at the deductive cost. Daiichi presented its own estimate of the deductive cost by getting the difference between the quantities/peso value of steel bars, cement, labor and materials required under the original plan with the quantities/peso value of the same items required under the revised plan; thus:

> Change in Quantity
>
> =
>
> Quantity of
> Materials required
> Under Revised Plan.
>
> —
>
> Quantity of Materials
> Required Under Original
> Plan

Using the foregoing methodology, Daiichi computed the deductive cost at P64,602,110.59.

For its part, Federal insisted on a different formula to obtain the deductive cost by comparing the quantities/peso value of steel bars, cement, labor and materials required under the construction agreement (or guaranteed maximum) with the quantity of materials required under the revised plan, to wit:

> Change in Quantity
>
> =
>
> Guaranteed Maximum
> or Fixed Quantity of
> Materials under the
> Construction Agreement.
>
> —
>
> Quantity of Materials
> required under Revised
> Plan.

By employing the foregoing formula, Federal reached the amount of P31,326,810.15 as the deductive costs.

On account of this differing computations in determining the deductive costs, Daiichi engaged the services of an independent quantity surveyor, Davis Langdo and Seah Philippines, Inc. (DLS), to conduct a survey of the

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deductive costs. DLS came out with its own estimate of the deductive cost in the amount of P68,441,415.58, which is closer to that submitted by Daiichi.

Daiichi also made some deductions from the amount it paid to Federal using the former's manner of computation.

Feeling aggrieved, Federal filed a petition for arbitration with the Construction Industry Arbitration Commission (CIAC) on 9 November 1998. The parties agreed that their dispute be settled by the Arbitral Tribunal.

The basic issue submitted to the Arbitral Tribunal appears to be the determination of the correct approach in order to obtain the deductive costs brought about by the revisions in the project.

In the course of the hearing, Daiichi filed on 2 June 1999 a Motion to Commission an Independent Quantity Surveyor in order to determine the actual quantities of materials required to complete the project under the original or old plan and the revised plan.[5] Daiichi was of the opinion that the only way to ascertain the deductive costs was to compare the materials required under the old and the new plans. Federal opposed the said motion on the grounds that Daiichi already submitted estimates from an independent quantity surveyor, and that there was no need to make an estimate of the old plans since the same were never implemented. Federal insisted that the estimate of the old plan was irrelevant since the quantity of materials required for the project was reflected in the construction agreement.

On 29 June 1999, the Arbitral Tribunal issued an Order denying Daiichi's Motion to Commission an Independent Quantity Surveyor, reasoning that the commissioning of an independent surveyor was not absolutely necessary, and that the engagement of such surveyor would only be useful if both parties agreed on such engagement.

Daiichi filed a motion for reconsideration, which was also denied by the Arbitral Tribunal in an Order dated 13 July 1999.

Unfazed, Daiichi questioned the orders of the Arbitral Tribunal before the Court of Appeals.

In a Decision dated 9 November 1999, the Court of Appeals set aside the orders of the Arbitral Tribunal and ordered the latter to commission an independent quantity surveyor to determine the actual quantities of materials required under the original plan and the revised plans therefor as requested by Daiichi. The decretal portion of the Decision reads:

> WHEREFORE, the instant petition is hereby GRANTED and the assailed orders dated June 29, 1999 and July 13, 1999 of the respondent Arbitral Tribunal are hereby NULLIFIED and SET ASIDE. Accordingly, the respondent Arbitral Tribunal is hereby ordered, subject to the prescription of Section 5, Chapter XV of the Rules of Procedure Governing Construction Arbitration, to commission an independent quantity surveyor to determine the actual quantities of materials required to complete the "Orient Square" project under the original/bid plan and the revised plans therefor.[6]

Federal filed a motion for reconsideration which was denied by the Court of Appeals in a Resolution dated 23 February 2000.

Hence, this petition.

It bears stressing that this case must be dismissed outright since Federal chose the wrong remedy in bringing this case before this Court. Petitioner should have filed a petition for review under Rule 45 of the 1997 Rules of Civil Procedure instead of a Special Civil Action for Certiorari under Rule 65. The proper remedy of a party aggrieved by a decision of the Court of Appeals is a petition for review under Rule 45, which is not identical to a Petition for Certiorari under Rule 65. Under Rule 45, decisions, final orders or resolutions of the Court of Appeals in any case, i.e., regardless of the nature of the action or proceedings involved, may be appealed to this Court by filing a

petition for review, which would be but a continuation of the appellate process over the original case. On the other hand, a special civil action under Rule 65 is an independent action based on the specific grounds therein provided and, as a general rule, cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that to be taken under Rule 45. Accordingly, when a party adopts an improper remedy, as in this case, such petition may be dismissed outright.

At any rate, even if we were to ignore the procedural defects, the instant petition must still be dismissed as the Court of Appeals did not commit any grave abuse of discretion amounting to want or excess of jurisdiction in reversing the orders of the Arbitral Tribunal.

Incertiorari proceedings under Rule 65 of the Rules of Court, the inquiryis limited essentially to whether or not the public respondent acted without or in excess of its jurisdiction or with grave abuse of discretion.[7]

A court, tribunal, board or officer acts without jurisdiction if it/he does not have the legal power to determine the case.[8] There is excess of jurisdiction where, being clothed with the power to determine the case, the tribunal, board or officer oversteps its/his authority as determined by law. And there is grave abuse of discretion where the court, tribunal, board or officer acts in a capricious, whimsical, arbitrary or despotic manner in the exercise of its/his judgment as to be said to be equivalent to lack of jurisdiction.[9]

The Court of Appeals is far from being abusive in rendering its questioned decision.

The Court of Appeals annulled and set aside the Arbitral Tribunal's orders on the ground that said orders completely failed to give Daiichi the vital piece of information necessary for the judicious resolution of the case thereby ignoring the letter, spirit, policy and objective of the Rules of Procedure Governing Construction Arbitration which require, among other things, that arbitrators must employ all reasonable means to ascertain facts in each case. To the mind of the Court of Appeals, the Arbitral Tribunal must exert all its best efforts to thresh out the matters relevant to the case and to apprise itself of the evidence that contending parties may present to support their respective theories. According to the appellate court, since it is Daiichi's claim that the deductive cost can only be established by finding out the quantities of materials required to complete the project under the original plan and the revised plan, the Arbitral Tribunal should have allowed the commissioning of an independent expert who would give an objective information for the tribunal to reach a sensible, if not well-informed, resolution of the controversy.

We agree with the Court of Appeals.

As mentioned earlier, the crux of the controversy lies in the formula to arrive at the deductive cost. Daiichi postulates that the deductive cost is ascertained by getting the difference between the quantities/peso value of steel bars, cement, labor and materials required under the original plan with the quantities/peso value of the same items required under the revised plan. Two reference points must be determined first, i.e., the old quantity and the new quantity which are to be matched. To determine the old quantity (quantity of materials required under the old plan) and the new quantity (quantity of materials required under the revised plan), it is necessary that a quantitative survey must first be conducted on these two items. Without such survey, Daiichi asserts, the deductive cost can never be determined.

Federal, for its part, has a different formula to obtain the deductive cost by comparing the quantities required under the construction agreement and those required under the revised plan.

Obviously Daiichi and Federal disagree on one item in the formula. Daiichi insists that the old quantity must be factored in, while Federal contends that in place of the old quantity, the quantity required under the construction agreement should instead be brought in. Although in Federal's formula, the quantity required under the

construction agreement is already established, as evidenced by the construction agreement contract, what remains unknown, however, are the items in Daiichi's formula which are the quantities under the revised plan and the old plan. By not allowing Daiichi to commission an independent survey on these unknown items, the tribunal effectively prevents respondent from presenting evidence for its cause. Furthermore, this case undeniably involves highly technical matters within the special training and expertise of those engaged in the construction industry. Persons specialized in this field, and are fair-minded, are invaluable sources of needed information that can shed light on the confusing and contradicting claims asserted by the parties. The Court cites with approval the disquisition of the Court of Appeals in this regard:

> A determination of the quantities of materials required to complete the project under the original bid plans and the revised plans is doubtless necessary for the judicious resolution of the underlying dispute between the parties. Given the tedious and technical process involved in this undertaking, the participation of an impartial third person who will provide the Arbitral Tribunal with the necessary detailed information is, contrary to what the assailed orders imply, virtually a must. Thus, its refusal to consider what [Daiichi] aptly describes as "vital" and "unimpeachable" piece of information constitutes an utter disregard of the spirit, if not the letter, of the Rules of Procedure Governing Construction Arbitration, Article 1, Section 3 of which exhorts arbitrators to "use every and all reasonable means to ascertain facts in each case speedily and objectively and without regard to technicalities of law or procedure."
>
> Just like any dispenser of justice, the [Arbitral Tribunal] is bound to seek the truth or what approximates it. It cannot engage in and rely on speculation, conjecture and guesswork, which, needless to state, cannot be an acceptable norm for an intelligent judgment. [Daiichi's] motion to commission an independent quantity surveyor was an earnest attempt to provide the [Arbitral Tribunal] with a credible tool to get at the truth, to afford it with a rational basis to fairly settle clashing interests. x x x.[10]

As to the Arbitral Tribunal's ratiocination that the hiring of an independent quantity surveyor can be useful only if both parties agree to such engagement, the Court of Appeals rightly impugned said excuse as frail and baseless, viz:

> This justification is specious inasmuch as the designation of an independent quantity surveyor may be made on the basis alone of the motion of one party. Section 5, Chapter XV of the Rules of Procedure Governing Construction Arbitration says so:
> "Section 5. Appointment of Experts. - The service of technical or legal experts may be utilized in the settlement of disputes if requested by one of the parties x x x."[11]

The Court is in a quandary why the Arbitral Tribunal refused to grant the motion of Daiichi. The tribunal ignored the effort of a party whose only desire was to elucidate and give details of the pertinent information, not necessarily favorable to the latter, particularly those which can be provided by an independent quantity surveyor. By doing so, the tribunal was being unmindful of Article 1, Section 3 of the Rules of Procedure Governing Construction Arbitration, which exhorts the arbitrators to "use every and all reasonable means to ascertain facts in each case speedily and objectively and without regard to technicalities of law or procedure." The information that the independent surveyor can provide is not at all inconsequential, for it redounds to the very thesis of Daiichi, i.e., that the deductive cost is arrived at by determining the quantities of materials required to complete the project under the old plan or original bid and the revised plan. The stubborn refusal of the Arbitral Tribunal to commission an independent quantity surveyor despite the clear right of Daiichi to the same was characterized by capriciousness and arbitrariness amounting to grave abuse of discretion. In the language of the appellate court:

> The error is so egregious as to justify a charge of grave abuse of discretion. As it were, the Court is at a loss to understand why a simple motion, containing a reasonable plea not necessarily favorable to [Daiichi], but envisaged to assist in the judicious resolution of the basic dispute between the parties, would elicit an

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> unrealistic response from the [Arbitral Tribunal].[12]

As to Federal's claim that there is no necessity to conduct a survey, since Daiichi has already submitted estimates from an independent quantity surveyor, we find said argument tenuous. The survey initiated by Daiichi cannot be said to be independent, because it was done through its behest. An independent survey sanctioned by the Arbitral Tribunal, and not at the prodding of any contending party, is suitable in this kind of controversy.

Federal contends that the Court of Appeals encroached on the Arbitral Tribunal's jurisdiction in finding Daiichi's formula more acceptable, thereby pre-empting any decision which the Tribunal had yet to make.

This is inaccurate. The Court of Appeals resolved primarily the issue of the grave abuse of discretion committed by the Arbitral Tribunal in refusing to commission an independent survey of the original plan and the revised plan. While the said court may have intimated that the formula of Daiichi was desirable, the former did so to lay emphasis on its position that the Arbitral Tribunal could not, without abusing its discretion, blindly preclude Daiichi from presenting evidence or information to substantiate its theory. This information, to the Court of Appeals' mind, can only be elicited from the commissioning of an independent quantity surveyor. A solid testimony attesting to the fact that the Court of Appeals did not attempt to pre-empt the Arbitral Tribunal's disposition of the main case is evidenced by the declaration of the same court, to wit:

> Much has been made by [Federal] of what it views as the insignificant evidentiary value of a second survey report. In this regard, suffice it to state that the worth of such document, be it accepted as evidence, or, to borrow from the Arbitral Tribunal, as procedural device, is for the Tribunal to decide at the first instance.[13] (Emphasis supplied.)

Moreover, the tenor of the dispositive portion of the Court of Appeals' Decision does not order the Arbitral Tribunal to adopt the formula of Daiichi in resolving the focal issue of the case. The appellate court simply directed the tribunal to commission an independent surveyor. Indeed, it is the dispositive part of the judgment that actually settles and declares the rights and obligations of the parties, finally, definitively, authoritatively, notwithstanding the existence of inconsistent statements in the body that may tend to confuse.[14] It is the dispositive part that controls, for purposes of execution.[15] Hence, there is no doubt that the Court of Appeals decided the case within the ambit of its authority.

In fine, this Court defers to the findings of the Court of Appeals, there being no cogent reason to veer away from such.

WHEREFORE, the Decision of the Court of Appeals dated 9 November 1999 nullifying the Arbitral Tribunal's Orders dated 29 June 1999 and 13 July 1999, and ordering the said tribunal to commission an independent quantity surveyor, is hereby AFFIRMED. Upon finality of this Decision, the Arbitral Tribunal is hereby directed to issue, with all deliberate dispatch, an Order commissioning an independent surveyor to determine the actual quantities of materials required to complete the "Orient Plaza" project under the original plan and the revised plan, and to resolve the main case.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Velasco,[*] and Peralta, JJ., concur.

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[*] Associate Justice Presbitero J. Velasco, Jr. was designated to sit as additional member replacing Associate Justice Antonio Eduardo B. Nachura per Raffle dated 11 February 2009.

[1] Penned by Associate Associate Justices Cancio C. Garcia with Bernardo Ll. Salas and Candido V. Rivera,

concurring; rollo, pp. 36-47.

[2] Rollo, p. 49.

[3] Id. at 37.

[4] Id. at 38.

[5] Id. at 168.

[6] Id. at 46-47.

[7] People v. Court of Appeals,G.R. No. 144332, 10 June 2004, 431 SCRA 610, 617.

[8] Litton Mills, Inc. v. Galleon Trader, Inc., G.R. No. L-40867, 26 July 1988, 163 SCRA 489, 494.

[9] Id.

[10] Rollo, pp. 45-46.

[11] Id. at 46.

[12] Id.

[13] Id.

[14] Espiritu v. Court of First Instance of Cavite, G.R. No. L-44696, 18 October 1988, 166 SCRA 394, 399.

[15] Id.

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