

VICTORIA ONG, PETITIONER, VS. ERNESTO BOGÑALBAL AND HON. COURT OF APPEALS, RESPONDENT.

G.R. NO. 149140. September 12, 2006

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

In this Special Civil Action for Certiorari under Rule 65 of the Rules of Court, petitioner seeks the nullification of a 22 May 2001 Court of Appeals Resolution denying her Motion for Reconsideration of a 31 March 2000 Decision.[2]

The Court of Appeals found the facts to be as follows:

On January 2, 1995, [herein respondent] Ernesto Bogñalbal, an architect-contractor doing business under the name and style of E.B. Bogñalbal Construction, entered into an "Owner- Contractor Agreement" with [herein petitioner] Victoria Ong, a businesswoman, for the construction of a proposed boutique owned by the latter to be known as Les Galeries de Paris located at the 3rd Floor of the Shangri-La Plaza, Epifanio Delos Santos Avenue corner Shaw Boulevard, Mandaluyong City (Exhibits "A" and "1", pp. 100-102, *ibid*). The agreement provides that in consideration of the sum of two hundred thousand pesos (P200,000.00), the contractor agrees to furnish labor, tools and equipment to complete the work on the boutique as per specification within forty-five (45) days excluding Sundays from the date of delivery of the construction materials. Payment by the owner shall be made by progress billing to be collected every two (2) weeks based on the accomplishment of work value submitted by the contractor to the owner as certified for payment by the architect assigned on site. The agreement likewise provides for a change order as a result of fluctuation in the cost of labor. Moreover, should the owner require the contractor to perform work over and above that required, the additional cost shall be added to the contract amount and if ordered to omit work as required by their agreement, the cost of work omitted shall be deducted from the contract amount.

Actual work on the project commenced on January 19, 1995. For work accomplished during the period January 19 to 28, 1995, [respondent Bogñalbal] submitted and was paid his progress billing no. 1 in the sum of P35,950.00 equivalent to 17.975% of the total job to be performed (Exh. "E", p. 106, *ibid*). Partial billing nos. 2 and 3 for the period from January 29 to February 15, 1995 and February 16 to March 3, 1995 in the sum of P69,000.00 and P41,500.00, equivalent to 34.65% and 20.63% of the total job, respectively, were likewise made to respondent and paid for by the latter (Exhs. "F" and "G", pp. 107-108, *ibid*).

It is with respect to progress billing no. 4 that the present controversy arose. When [respondent Bogñalbal] submitted the fourth progress billing on March 31, 1995 for the period covering March 4 to 18, 1995, in the sum of P30,950.00 equivalent to 15.47% of the total job (Exh. "B", p. 103, *ibid*), [petitioner Ong] refused to pay the same. As in the previous three billings, the fourth billing was first evaluated and recommended for payment by Supervising Architect John Noel R. Cano, an employee of Balce-Sindac and Associates, the principal designer of the [petitioner Ong's] boutique (Exh. "H-1", p. 110, *ibid*).

The reason for [petitioner Ong's] refusal to pay the fourth (4th) progress billing is not clear on the record. It is [respondent Bogñalbal's] contention that [petitioner Ong] refused to pay since she was insisting that the

flooring, which she asked to be changed from vinyl tiles to kenzo flooring where polyurethane is to be used as coating, be first completed within three (3) days from April 22, 1995. [Respondent Bogñalbal], however, insisted that the same is not possible because the floor needed to be cured first to avoid adverse chemical reaction of the polyurethane on the color of the flooring. Due to the insistence of [petitioner Ong] that the flooring be finished in time for the arrival of the furniture from abroad, [respondent Bogñalbal] proceeded with the work but the rushed work resulted in the reddish reaction of the polyurethane on the floor, which was not acceptable to respondent (TSN, March 28, 1996, pp. 30-32; June 21, 1996, pp. 15-18).

On the other hand, [petitioner Ong] contends that her refusal to pay was because the fourth billing was allegedly in excess and over the value of the work accomplished during the period. To settle the matter, the parties purportedly met whereby [respondent Bogñalbal] supposedly agreed to finish the kenzo flooring on or before April 24, 1995 before [petitioner Ong] would pay the fourth (4th) progress billing. However, instead of complying with his commitment, [respondent Bogñalbal] abandoned the project on April 24, 1995 when it became apparent that he could not complete the kenzo flooring on the date agreed upon.

Due to [petitioner Ong's] continued refusal to pay [respondent Bogñalbal's] fourth (4th) progress billing despite written demands from his counsel (Exhs. "C" and "D", pp. 104-105, *ibid*), the latter was constrained to file an action for sum of money with damages with the Metropolitan Trial Court (MeTC) of Caloocan City.

The complaint, which was docketed as Civil Case No. 22143 and raffled to Branch 49 of the court, prayed for actual damages in the total sum of P50,450.00 representing P30,950.00 (4th progress billing), P16,000.00 on the change order from vinyl tiles to kenzo flooring and an unidentified amount. It likewise prayed for moral and exemplary damages, as well as attorney's fees.

In her answer with counterclaim, [petitioner Ong] refused payment of the fourth (4th) progress billing since [respondent Bogñalbal] failed to perform what was incumbent upon him under their agreement, but instead abandoned the job to her great damage and prejudice. As to the P16,000.00 value of the change order, she alleged that the same was premature since she had never received any billing for said change order duly certified for payment and approved by the Architect assigned on site. Besides, [petitioner Ong] averred that the P16,000.00 being charged by [respondent Bogñalbal] was grossly disproportionate with the quantity of the work actually accomplished by the former. By way of counterclaim, [petitioner Ong] prayed for actual damages by reason of [respondent Bogñalbal's] refusal to finish the job agreed upon which forced her to hire a new contractor to complete the same for which she paid the sum of P78,000.00 and for loss of business opportunity in the amount of P50,000.00. She likewise prayed for moral, exemplary and liquidated damages, as well as attorney's fees.

After trial on the merits, the [MeTC], in a Decision dated June 18, 1998, ruled in favor of [respondent Bogñalbal,] awarding to him the sum of P30,950.00 representing the fourth progress billing, P13,000.00 representing the value of the accomplished work on the kenzo flooring, P15,000.00 as attorney's fees, P20,000.00 and P25,000.00 as moral and exemplary damages, respectively (p. 175, *ibid.*).

Aggrieved by the decision of the court, [petitioner Ong] elevated the case on appeal to the Regional Trial Court (RTC) of Caloocan City. The appeal was docketed as Civil Case No. C-18466 and raffled to Branch 126 thereof.

The court a quo, after requiring the parties to submit their respective memoranda, reversed and set aside the ruling of the MTC and rendered judgment in favor of [petitioner Ong] in a Decision dated February 18, 1999 (p. 407, *ibid.*). It is worthy to note that although the RTC ruled in favor of [petitioner Ong], it did not specify the relief granted to her in the dispositive portion of its decision.[3]

Respondent Bogñalbal then filed a Petition for Review with the Court of Appeals. On 31 March 2000, the Court of Appeals granted the Petition, disposing of the case as follows:

WHEREFORE, IN VIEW OF THE FOREGOING, the petition is hereby GRANTED. The Decision of the Regional Trial Court dated February 18, 1999 is REVERSED and SET ASIDE, and the Decision of the Metropolitan Trial Court dated June 18, 1998 is REINSTATED. No pronouncement as to costs.[4]

The dispositive portion of the reinstated 18 June 1998 Metropolitan Trial Court (MeTC) Decision is as follows:

WHEREFORE, after a careful consideration of the foregoing evidence, the Court finds the same to strongly preponderates (sic) in favor of the plaintiff and hereby orders defendant Victoria Ong to pay plaintiff Ernesto Bognalbal the amount of THIRTY THOUSAND NINE HUNDRED FIFTY PESOS (P30,950.00) representing the value of his accomplished work for the period from March 4 to March 18, 1995, the amount of (P13,000.00) THIRTEEN THOUSAND PESOS representing the value of his accomplished work on the kenzo flooring equivalent to 60% of the agreed fee of P25,000.00 minus the amount of P2,000.00 paid under the third progress billing, the amount of FIFTEEN THOUSAND (P15,000.00) PESOS as and for attorney's fees, the amount of TWENTY THOUSAND (P20,000.00) PESOS AS MORAL damages and the amount of TWENTY-FIVE THOUSAND (P25,000.00) PESOS as exemplary damages. Defendant is further ordered to pay the costs of this suit.

For lack of sufficient basis, the counterclaim of the defendant is hereby dismissed.[5]

On 22 May 2001, the Court of Appeals denied petitioner Ong's Motion for Reconsideration in the assailed Resolution, a copy of which was received by petitioner, through counsel, on 11 June 2001.

In the instant Petition for Certiorari, filed on 10 August 2001, petitioner Ong alleges that:

THE RESPONDENT COURT COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION IN DENYING THE MOTION FOR RECONSIDERATION AND IN RESOLVING THE ABOVE-ENTITLED CASE IN FAVOR OF THE PRIVATE RESPONDENT.[6]

Propriety/Impropriety of Special Civil
Action for Certiorari under
Rule 65

Petitioner claims that a special civil action for certiorari is proper since appeal by certiorari under Rule 45 is limited only to questions of law. This is wrong. The writ of certiorari is proper to correct errors of jurisdiction committed by the lower court, or grave abuse of discretion which is tantamount to lack of jurisdiction. Where the error is not one of jurisdiction but an error of law or fact which is a mistake of judgment, appeal is the remedy.[7]

It is true that, as a general rule, in the exercise of the Supreme Court's power of review, the Court is not a trier of facts and does not normally undertake the re-examination of the evidence presented by the contending parties during the trial of the case considering that the findings of facts of the Court of Appeals are conclusive and binding on the Court. However, the Court had recognized several exceptions to this rule, to wit: (1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of facts are conflicting; (6) when in making its findings the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and (11) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.[8]

If the allegedly erroneous findings of fact by the Court of Appeals amounts to grave abuse of discretion amounting to lack of or excess of jurisdiction, the proper remedy would indeed be a petition for certiorari under Rule 65. However, if the allegedly erroneous findings of fact constitute only a mistake of judgment, the proper remedy is a petition for review on certiorari under Rule 45. Since the petition filed in the case at bar is one under Rule 65, we would be constrained to dismiss the same if we find a mere error of judgment.

Credibility of Architect Noel Cano

The contract between petitioner and respondent provides:

4.01 Progress Billing will commence 15 days after the Contractor receive[s] the notice to proceed from the Owner.

4.02 Balance will be collected every 2-weeks, based on the accomplishment of work value submitted by the contractor to the Owner and to be certified for payment by the architect assigned on site.

4.03 Final and full payment of the consideration herein above-mentioned shall be made by the owner to the contractor upon fulfilling the condition set forth and approved by the architect assigned on site.[9]

Pursuant thereto, the architect on site, Architect John Noel Cano, certified for payment four progress billings, which petitioner Ong paid on the following dates[10]

Partial Progress Billing	Date Sent	Covered Period	Amount	Part of Project Accomplished (contract price: P 200,000.00)	Date of Partial Payment	Date of Full Payment
1st	28 January 1995	19-28 January	P35,950.00	17.975 %	---	6 February 1995
2nd	15 February 1995	29 January to 15 February	P69,300.00	34.650 %	22 February 1995	4 March 1995
3rd	8 March 1995	16 February to 3 March	P41,500.00	20.750 %	24 March 1995	6 April 1995
4th	31 March 1995	4-18 March	P30,950.00	15.475 %	---	---
Total						
			P181,700.0	88.850 %		

As earlier stated, this controversy arose with respect to the fourth partial billing. Petitioner Ong claims that the fourth partial billing is not yet due and demandable, since only 60% of the work has been accomplished. Petitioner Ong claims that Architect Cano's certification as to the accomplishment of the work cannot be trusted, since Architect Cano was allegedly biased in favor of respondent Bogñalbal.[11]

Petitioner Ong claims that "Arch. Cano was an associate of [respondent Bogñalbal] in his construction business, and because of this, he was partial, biased and unprofessional about his work." [12] Petitioner Ong adds that work was conducted on the job site seven days a week, but Architect Cano was present only twice or thrice a week, and therefore "[h]e was in no position to determine whether or not [respondent Bogñalbal] performed as claimed." [13]

The afore-quoted Article 4.02 of the Owner-Contractor Agreement between petitioner Ong and respondent Bogñalbal, which provides that the "[b]alance shall be collected every 2-weeks, based on the accomplishment of work value submitted by the contractor to the Owner and to be certified for payment by the architect on site," [14] makes the second paragraph of the following provision of the Civil Code applicable:

Art. 1730. If it is agreed that the work shall be accomplished to the satisfaction of the proprietor, it is understood that in case of disagreement the question shall be subject to expert judgment.

If the work is subject to the approval of a third person, his decision shall be final, except in case of fraud or manifest error.

The existence of fraud or manifest error, being an exception to the finality of the decision of a third person under Article 1730, should be adequately proven by petitioner Ong.

Petitioner Ong, however, miserably failed to prove the same. Petitioner Ong's allegation that "the certifications may have been purposely doctored or engineered in such a fashion as to unduly favor [respondent Bogñalbal], in the desire of Architect Cano to return a favor or repay a debt of gratitude"[15] is a bare speculation that cannot be given any credence. It is utterly inappropriate for petitioner Ong to paint Architect Cano as "biased, partial, and unprofessional" just because Architect Cano's architectural firm, Balce-Sindac & Associates, was allegedly recommended to her by respondent Bogñalbal. The fact remains that it was petitioner Ong and Balce-Sindac & Associates which had privity of contract with each other, petitioner Ong having contracted with the latter firm for its project architectural design and plan. Balce-Sindac & Associates, in turn, assigned Architect Cano as supervising architect on site. The alleged recommendation by respondent Bogñalbal is enormously inadequate to prove bad faith on the part of Architect Cano. Good faith is always presumed.[16] It is the one who alleges bad faith who has the burden to prove the same.[17]

Neither was petitioner able to prove manifest error on the part of Architect Cano. The presence of Architect Cano only twice or thrice a week was not adequately proven to have made him incompetent to determine the completion of the project. Determination of project completion requires inspection of a product rather than a process. Besides, whereas Architect Cano provided a detailed progress report that substantiate respondent Bogñalbal's allegation that 88.45% of the project had been accomplished,[18] petitioner Ong was not able to demonstrate her repeated claim that only 60% of the project has been completed.[19] Petitioner Ong alleged that the same was admitted by respondent Bogñalbal in the pleadings filed with this Court,[20] but we were unable to find any such admission. It seems that petitioner Ong was referring to the Kenzo flooring, 60% of which respondent claims to have finished.[21]

Time and again, this Court has ruled that the findings of the lower court respecting the credibility of witnesses are accorded great weight and respect since it had the opportunity to observe the demeanor of the witnesses as they testified before the court. Unless substantial facts and circumstances have been overlooked or misunderstood by the latter which, if considered, would materially affect the result of the case, this Court will undauntedly sustain the findings of the lower court.[22] In the case at bar, the credibility of Architect Cano was upheld by the MeTC, which had the opportunity to observe Architect Cano's demeanor as he testified. Neither the Court of Appeals, nor the RTC, questioned such credibility, the RTC having ruled in favor of petitioner Ong pursuant to an interpretation of law.[23]

Alleged novation of the Owner-Contractor Agreement

Petitioner Ong also claims, as a defense against payment of the fourth progress billing, that "the only reason why the fourth billing was not paid was because [respondent Bogñalbal] himself agreed and committed to collect the fourth progress billing after he completed the Kenzo flooring." [24] Petitioner Ong claims that, because of this promise, her obligation to pay respondent Bogñalbal has not yet become due and demandable.[25]

The Court of Appeals rejected this argument, ruling that respondent Bogñalbal's stoppage of work on the project prior to its completion cannot justify petitioner Ong's refusal to pay the fourth progress billing and the value of respondent Bogñalbal's accomplished work on the Kenzo flooring. On the contrary, according to the Court of Appeals, respondent Bogñalbal was justified to refuse to continue the project due to petitioner Ong's failure to pay

the fourth progress billing.[26] According to the Court of Appeals:

Records reveal that [herein respondent Bogñalbal] submitted his fourth (4th) progress billing for work accomplished on [herein petitioner Ong's] boutique for the period covering March 4 to 18, 1995 (Exh. "B", *ibid.*). Said billing was in accordance with the parties' agreement that it will be collected every two (2) weeks, based on the accomplishment of work value submitted by the contractor to the owner and certified for payment by the architect assigned on site (Article 4.02, Owner-contractor Agreement; Exh. "A-1", p. 101, *ibid.*). However, [petitioner Ong], immediately upon her receipt of said billing, refused to pay the same since it was allegedly "in excess and over the value of the work accomplished during the period." This was, in fact, part of the statement/findings of the facts of the lower court's decision (p. 2, RTC Decision; p. 400, *ibid.*).

[Petitioner Ong], at the very outset, refused to pay the fourth (4th) billing despite actual work accomplished on her boutique which was certified by the architect on site, John Noel Cano, all in accordance with the agreement of the parties. [Respondent Bogñalbal's] eventual decision not to proceed anymore with the contract cannot be used as a reason to justify [petitioner Ong's] refusal to pay her obligation. This notwithstanding the parties' supposed verbal agreement that collection of said billing will be held on abeyance until after [respondent Bogñalbal] finished the work on the kenzo flooring which [petitioner Ong] requested to be changed from its original plan of vinyl tile flooring. The proven fact is that there was work accomplished on [petitioner Ong's] boutique equivalent to the bill being charged her in the fourth (4th) progress billing in accordance with their contract. While the fourth (4th) billing covered the accomplished work therefor as certified by the architect assigned on site, the agreement as to the kenzo flooring is subject to another bill covered by the change order. (Emphasis supplied.)[27]

The Court of Appeals is in error. If the parties indeed had a verbal agreement that collection of said billing will be held on abeyance until after respondent Bogñalbal finished the work on the Kenzo flooring, there would have been a novation of petitioner Ong's obligation to pay the price covered by the fourth billing by changing the principal conditions therefor. This falls under the first type of novation under Article 1291 of the Civil Code which provides:

Article 1291. Obligations may be modified by:

- (1) Changing their object or principal conditions;
- (2) Substituting the person of the debtor;
- (3) Subrogating a third person in the rights of the creditor.

While the subject of novation is, in the Civil Code, included in Book IV, Title I, Chapter 4, which refers to extinguishment of obligations, the effect of novation may be partial or total. There is partial novation when there is only a modification or change in some principal conditions of the obligation. It is total, when the obligation is completely extinguished.[28] Also, the term principal conditions in Article 1291 should be construed to include a change in the period to comply with the obligation. Such a change in the period would only be a partial novation, since the period merely affects the performance, not the creation of the obligation.[29]

If petitioner Ong's allegation was true, then the fourth partial billing's principal condition -- that the "(b)alance shall be collected every 2-weeks, based on the accomplishment of work value submitted by the contractor to the Owner and to be certified for payment by the architect assigned on site"[30] " would have been modified to include another condition, that of the finishing of the Kenzo flooring by respondent Bogñalbal.

As previously discussed, the Court of Appeals did not bother to review the evidence on petitioner Ong's allegation of respondent Bogñalbal's promise to finish the Kenzo flooring before the fourth progress billing shall be paid. The Court of Appeals instead brushed off the contention with its explanation that "[respondent Bogñalbal's] eventual decision not to proceed anymore with the contract cannot be used as a reason to justify [petitioner Ong's]

refusal to pay her obligation, x x x notwithstanding the parties" supposed verbal agreement that collection of said billing will be held on abeyance until after [respondent Bogñalbal] finished the work on the kenzo flooring which [petitioner Ong] requested to be changed from its original plan of vinyl tile flooring."

Novation is never presumed. Unless it is clearly shown either by express agreement of the parties or by acts of equivalent import, this defense will never be allowed.[31]

The evidence preponderates in favor of respondent Bogñalbal that there had been no novation of the contract. At best, what was proven was a grudging accommodation on the part of respondent Bogñalbal to continue working on the project despite petitioner Ong's failure to pay the fourth progress billing. Respondent Bogñalbal's fourth partial billing demand letters dated 21 April 1995 and 15 May 1995, both of which were served upon petitioner Ong after the alleged 20 April 1995 meeting,[32] is inconsistent with the theory that the meeting had produced a novation of the petitioner Ong's obligation to pay the subject billing.

More importantly, assuming that there was indeed a novation of the obligation of petitioner Ong to pay the fourth billing so as to include as additional condition the completion of the Kenzo flooring, such new condition would, nevertheless, be deemed fulfilled. This is pursuant to Article 1186 of the Civil Code, which provides:

Article 1186. The condition shall be deemed fulfilled when the obligor voluntarily prevents its fulfillment.

According to petitioner Ong herself:

Petitioner sent [respondent Bogñalbal] letters demanding that he should return to the jobsite with his people and comply with his commitment. When the demand letters were ignored, petitioner was constrained to hire the services of another contractor, for which she had to unnecessarily incur expenses in the amount of P78,000.00. But just the same, the completion of the project was delayed for eighty two (82) days, which also caused petitioner additional damages.[33]

The Civil Code indeed provides that, "(i)f a person obliged to do something fails to do it, the same shall be executed at his cost. This same rule shall be observed if he does it in contravention of the tenor of the obligation. Furthermore, it may be decreed that what has been poorly done be undone." [34] There is no question, however, that such allegation constitutes an admission that Petitioner Ong had voluntarily prevented the fulfillment of the condition which should have given rise to her obligation to pay the amount of the fourth billing. Respondent Bogñalbal would no longer have the opportunity to finish the Kenzo flooring if another contractor had already finished the same. Such condition would, hence, be deemed fulfilled under Article 1186 of the Civil Code, and, therefore, petitioner Ong's obligation to pay the amount of the fourth billing has been converted to a pure obligation.

Authority of respondent Bogñalbal
to abandon work

This Court has held that, even if respondent Bogñalbal unjustifiably withdrew from the project, petitioner Ong's obligation is nevertheless due and demandable because of the third-party certification by Architect Cano on the completion of the fourth project billing as required by their contract. This Court has also held that petitioner Ong has not sufficiently proven the alleged contract novation adding a new condition for her payment of the fourth progress billing.

The following arguments of petitioner Ong are already inconsequential as to whether she should be held liable for the fourth billing: (1) that the power to resolve contracts under Article 1191[35] of the Civil Code cannot be invoked extrajudicially in the absence of stipulation to the contrary;[36] (2) that petitioner never rushed respondent Bogñalbal to complete the Kenzo flooring in three days;[37] (3) and that respondent Bogñalbal failed

to complete the Kenzo flooring on time because of his incompetence.[38] All these arguments merely amplify petitioner Ong's primary contention that respondent Bogñalbal was not justified in abandoning the project.[39]

The issue of whether or not respondent Bogñalbal is justified in abandoning the project is relevant to the resolution of petitioner Ong's counterclaim against respondent Bogñalbal.

The Court rules in favor of petitioner Ong on this score. There is nothing in the record which would justify respondent Bogñalbal's act of abandoning the project.

However, contrary to the finding of the RTC, Article 1724 is inapplicable to this case. Article 1724 provides:

Art. 1724. The contractor who undertakes to build a structure or any other work for a stipulated price, in conformity with plans and specifications agreed upon with the landowner, can neither withdraw from the contract nor demand an increase in the price on account of the higher cost of labor or materials, save when there has been a change in the plans and specifications, provided:

- (1) Such change has been authorized by the proprietor in writing; and
- (2) The additional price to be paid to the contractor has been determined in writing by both parties.

According to the RTC, the exception in Article 1724 (change in plans and specifications authorized by the proprietor in writing, and the additional price therefor being determined by the proprietor in writing) applies only with respect to the prohibition to "demand an increase in the price on account of the higher cost of labor or materials" and not with respect to the prohibition to "withdraw from the contract." There is therefore no exception allowed by law insofar as withdrawal from the contract is concerned, and, hence, respondent Bogñalbal cannot claim the change order as a justification for his abandonment of the project. [40]

This is incorrect. According to this Court in *Arenas v. Court of Appeals*,[41] Article 1724 contemplates disputes arising from increased costs of labor and materials. Article 1724 should, therefore, be read as to prohibit a contractor from perpetrating two acts: (1) withdrawing from the contract on account of the higher cost of the labor or materials; and (2) demanding an increase in the price on account of the higher cost of the labor or materials.[42] This focus on disputes arising from increased cost of labor and materials is even more evident when the origin of Article 1754 is reviewed. Article 1754 of the 1950 Civil Code is based on Article 1593[43] of the Spanish Civil Code, which states:

Art. 1593. An architect or contractor who, for a lump sum, undertakes the construction of a building, or any other work to be done in accordance with a plan agreed upon with the owner of the ground, may not demand an increase of the price, even if the cost of the materials or labor has increased; but he may do so when any change increasing the work is made in the plans, provided the owner has given his consent thereto.

Article 1593 of the Spanish Civil Code did not contain a similar prohibition against abandonment, and was entirely focused on its apparent objective to providing an exception to the rule that a contracting party cannot unilaterally amend (by increasing the contract price) the contract despite supervening circumstances.

Neither party is claiming that the abandonment arose from increased costs of labor and materials. Petitioner Ong claims that respondent Bogñalbal failed to complete the Kenzo flooring on time because of his incompetence.[44] Respondent Bogñalbal claims, on the other hand, that he abandoned the work because of petitioner Ong's continuing refusal to pay the fourth progress billing in violation of their contract.[45] Since the dispute has nothing to do with increased costs of labor and materials, Article 1724 is not applicable.[46]

Thus, it is the general rules on contracts which are applicable. Expounding on the argument by respondent Bogñalbal, the Court of Appeals held:

It should be noted that 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 (par. 1, Art. 1191, Civil Code).

[Herein petitioner Ong's] breach of contract was her failure to pay what she was legally bound to pay under her contract with [respondent Bogñalbal]. Payment, being the very consideration of the contract, is certainly not a mere casual or slight breach but a very substantial and fundamental breach as to defeat the object of the parties making the agreement, due to which rescission of the contract may be had (Ang vs. Court of Appeals, 170 SCRA 286, 296). [Petitioner Ong's] contention that [respondent Bogñalbal] should have had more capital to absorb a little delay in her payment is not quite tenable (TSN, June 21 1996; p. 7).[47]

This Court, however, has held in Tan v. Court of Appeals,[48] that:

[T]he power to rescind obligations is implied in reciprocal ones in case one of the obligors should not comply with what is incumbent upon him x x x. However, it is equally settled that, in the absence of a stipulation to the contrary, this power must be invoked judicially; it cannot be exercised solely on a party's own judgment that the other has committed a breach of the obligation. Where there is nothing in the contract empowering [a party] to rescind it without resort to the courts, [such party's] action in unilaterally terminating the contract x x x is unjustified.

In the case at bar, there is nothing in the Owner-Contractor Agreement empowering either party to rescind it without resort to the courts. Hence, respondent Bogñalbal's unilateral termination the contract without a court action is unjustified.

Petitioner Ong's Counterclaim

Since respondent Bogñalbal is unjustified in abandoning the project, should this Court award damages to petitioner Ong? Considering that both parties committed a breach of their respective obligations, Article 1192 of the Civil Code is on all fours:

Art. 1192. In case both parties have committed a breach of the obligation, the liability of the first infractor shall be equitably tempered by the courts. If it cannot be determined which of the parties first violated the contract, the same shall be deemed extinguished, and each shall bear his own damages.

Under this provision, the second infractor is not liable for damages at all;[49] the damages for the second breach, which would have been payable by the second infractor to the first infractor, being compensated instead by the mitigation of the first infractor's liability for damages arising from his earlier breach. The first infractor, on the other hand, is liable for damages, but the same shall be equitably tempered by the courts, since the second infractor also derived or thought he would derive some advantage by his own act or neglect.[50] Article 2215, however, seems contradictory, as it gives the court the option whether or not to equitably mitigate the damages, and does not take into account which infractor first committed breach:

Art. 2215. In contracts, quasi-contracts, and quasi-delicts, the court may equitably mitigate the damages under circumstances other than the case referred to in the preceding article,[51] as in the following instances:

(1) That the plaintiff himself has contravened the terms of the contract; x x x

It is a cardinal principle that a statute must be so construed as to harmonize all apparent conflicts, and give effect to all its provisions whenever possible.[52]

Articles 1192 and 2215 of the Civil Code are not irreconcilably conflicting. The plaintiff referred to in Article 2215(1) should be deemed to be the second infractor, while the one whose liability for damages may be mitigated is the first infractor. Furthermore, the directions to equitably temper the liability of the first infractor in Articles 1192 and 2215 are both subject to the discretion of the court, despite the word "shall" in Article 1192, in the sense

that it is for the courts to decide what is equitable under the circumstances.

In the case at bar, both respondent Bogñalbal and petitioner Ong claim that it was the other party who first committed a breach of contractual obligations.[53] Considering this Court's finding that there had been no contract novation requiring respondent Bogñalbal to finish the Kenzo flooring before the fourth progress billing shall be paid, it is crystal clear that it was petitioner Ong who first violated the contract. As such, it is petitioner Ong who is liable to pay damages, which may, however, be reduced, depending on what is equitable under the circumstances. On the other hand, since respondent Bogñalbal is the second infractor, he is not liable for damages in petitioner Ong's counterclaim.

Care must, however, be judiciously taken when applying Article 1192 of the Civil Code to contracts such as this where there has been partial performance on the part of either or both reciprocal obligors. Article 1192, in making the first infractor liable for mitigated damages and in exempting the second infractor from liability for damages, presupposes that the contracting parties are on equal footing with respect to their reciprocal principal obligations. Actual damages representing deficiencies in the performance of the principal obligation should be taken out of the equation.[54]

In the case at bar, the partial performance of respondent Bogñalbal (88.85%^[55] of the original contract and 60% of the Kenzo flooring) is more than the partial payment of petitioner Ong (73.375%^[56] of the original contract and 0% of the Kenzo flooring).

For reference, the MeTC Decision, which was reinstated by the Court of Appeals, awarded the following to respondent Bogñalbal:

Value of accomplished work on the original contract for the period 4 to 18 March 1995:

P 30,950.00

Value of accomplished work on the Kenzo flooring (60% of the agreed fee of P 25,000, minus P2,000 paid under the third progress billing)

P 13,000.00

Moral damages

P 20,000.00

Exemplary damages

P 25,000.00

TOTAL

P 88,950.00

123Petitioner Ong should first be obliged to pay the value of the accomplished work (P30,950.00 and P13,000.00), before the damage scheme under Article 1192 of the Civil Code is applied. Therefore, this Court would have been limited to determining how much of the moral and exemplary damages, for which petitioner Ong is liable, may be mitigated by the amount of damages caused by respondent Bogñalbal, as provided under Article 1192.

As earlier discussed, however, this mitigation is subject to the discretion of the court, depending on what is equitable under the circumstances. It would have been within this Court's power to mitigate the moral and exemplary damages for which petitioner Ong is liable if she had only filed an ordinary appeal under Rule 45 of

the Rules of Court. It would be an exaggeration to consider such non-mitigation by the Court of Appeals as grave abuse of discretion leading to lack of or excess of jurisdiction, which would have been reviewable by this Court in a certiorari proceeding under Rule 65.[57] Grave abuse of discretion implies a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, or, when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty enjoined or to act at all in contemplation of law.[58] Mere abuse of discretion is not enough -- it must be grave.[59]

All of the foregoing shows that while there had been some errors of law on the part of the Court of Appeals, the Petition would still fail even if it were a Petition for Review under Rule 45. With more reason is this Court constrained to dismiss a Petition for Certiorari under Rule 65, which requires not a mere error in judgment, but a grave abuse of discretion amounting to lack of or excess of jurisdiction.

Finally, this Court notices that the prayer in the instant Petition for Certiorari only seeks to nullify the Resolution of the Court of Appeals on petitioner Ong's Motion for Reconsideration, without praying for the nullification of the Decision itself sought to be reconsidered. The reason seems to be the fact that petitioner Ong, through counsel, received the Decision more than sixty days prior to the filing of the Petition. A Petition seeking to nullify such Decision was, thus, perceived to be violative of Section 4, Rule 65 of the 1997 Rules of Civil Procedure, which originally provides:

SEC. 4. Where petition filed. - The petition may be filed not later than sixty (60) days from notice of the judgment, order or resolution sought to be assailed in the Supreme Court or, if it relates to the acts or omissions of a lower court or of a corporation, board, officer or person, in the Regional Trial Court exercising jurisdiction over the territorial area as defined by the Supreme Court. It may also be filed in the Court of Appeals whether or not the same is in aid of its appellate jurisdiction, x x x.

Section 4, Rule 65 was, however, amended on 1 September 2000, several months before the filing of this Petition, to insert the following provision:

In case a motion for reconsideration or new trial is timely filed, whether such motion is required or not, the sixty (60) day period shall be counted from notice of the denial of said motion.

This insertion gives petitioner Ong a fresh 60-day period to assail the Decision via a Petition for Certiorari, which is what this Petition really seeks and which is how this Court has treated the same.

WHEREFORE, the Decision of the Court of Appeals reinstating the Decision of the Metropolitan Trial Court holding petitioner Victoria Ong liable for damages is affirmed. The instant Petition for Certiorari is hereby DISMISSED for lack of merit. Costs against petitioner.

SO ORDERED.

MINITA V. CHICO-NAZARIO

Panganiban, C. J., (Chairperson), Ynares-Santiago, Austria-Martinez and Callejo, Sr., JJ. concur

[1] Spelled as Bogalbal in some parts of the rollo.

[2] Penned by Associate Justice Fermin A. Martin, Jr. with Associate Justices Romeo A. Brawner and Andres B. Reyes, concurring; rollo, pp. 31-41.

[3] Id. at 32-36.

[4] Id. at 40-41.

[5] Id. at 53-54.

[6] Id. at 11.

[7] De Gala-Sison v. Maddela, G.R. No. L-24584, 30 October 1975, 67 SCRA 478, 485; Matute v. Macadaeg, 99 Phil. 340, 344 (1956).

[8] The Insular Life Assurance Company, Ltd. v. Court of Appeals, G.R. No. 126850, 28 April 2004, 428 SCRA 79, 86.

[9] Rollo, p. 165.

[10] Id. at 33-34.

[11] Id. at 192-196.

[12] Id. at 192.

[13] Id. at 195.

[14] Id. at 165.

[15] Id. at 196.

[16] Cf. Civil Code, Article 527.

[17] Rev. Ao-As v. Hon. Court of Appeals, G.R. No. 128464, 20 June 2006.

[18] Rollo, pp. 168-169.

[19] Id. at 176, 182-183, 198.

[20] Id. at 182.

[21] Id. at 152.

[22] People v. Lua, 326 Phil. 556, 563-564 (1996).

[23] Cf. rollo, p. 60.

[24] Rollo, p. 183.

[25] Id. at 188.

[26] Id. at 37.

[27] Id. at 37-38.

[28] IV Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, 1991 Ed., p. 382.

[29] Inchausti & Co. v. Yulo, 34 Phil. 978, 986 (1914); Zapanta v. de Rotaecche, 21 Phil. 154, 159 (1912).

[30] Rollo, p. 165.

[31] Aboitiz v. De Silva, 45 Phil. 883, 890 (1924), citing Zapanta v. De Rotaecche, supra note 29; Martinez v. Cavives, 25 Phil. 581, 586 (1913); Vaca v. Kosca, 26 Phil. 388 (1913).

[32] Rollo, p. 187. The demand letters are Exhibits "C" and "D" (rollo, p. 35). Take note also that the first demand

letter was served before the 24 April 1995 abandonment.

[33] Id. at 177.

[34] Article 1167, Civil Code.

[35] Article 1191 of the Civil Code provides:

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 fulfillment and 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 of the Mortgage Law.[36] Rollo, pp. 182-183.

[37] Id. at 184-188.

[38] Id. at 188-192.

[39] Id. at 179-182.

[40] Id. at 59.

[41] G.R. No. 56524, 27 January 1989, 169 SCRA 558, 564-565, citing Weldon Construction Corporation v. Court of Appeals, G.R. No. L-35721, 12 October 1987, 154 SCRA 618, 631-632.[42] Cf. V Paras, 1995 Ed., p. 482: "[As a general rule, a contractor] CANNOT withdraw or demand a higher price EVEN IF there be a higher cost of labor or materials".

[43] ARTICULO 1.593

El Arquitecto o contratista que se encarga por un a juste alzado de la construccion de un edificio u otra obra en vista de un plano convenido con el propietario del suelo, no puede pedir aumento de precio aunque se haya aumentado el de los jornales o materiales; pero podra hacerlo cuando se haya hecho algun cambio en el plano que produzca aumento de obra, siempre que hubiese dado su autorizacion el propietario.

[44] Rollo, pp. 188-192.

[45] Id. at 158.

[46] Arenas v. Court of Appeals, supra note 41, citing Weldon Construction Corporation v. Court of Appeals, supra note 41.

[47] Rollo, p. 39.

[48] G.R. No. 80479, 28 July 1989, 175 SCRA 656, 661-662.

[49] Cf. Civil Code, Article 1169, par. 3: "In reciprocal obligations, neither party incurs in delay if the other does not comply or is not ready to comply in a proper manner with what is incumbent upon him. From the moment one of the parties fulfills his obligation, delay by the other begins."

This provision completely exculpates the second party who defers performance of his obligation from damages under Article 1170 until the other party performs what is incumbent upon him. On the other hand, Article 1192

does not really exculpate the second infractor from liability, as the second infractor is actually punished for his breach by mitigating the damages to be awarded to him from the previous breach of the other party.

Article 1169, paragraph 3 is, however, only meant to provide an exception to the first paragraph of the same article, wherein delay is determined to commence at the time the obligee makes a judicial or extrajudicial demand. The purpose of the entire Article 1169 is to determine the commencement of delay, since Article 1170 makes the obligor liable for damages in case of fraud, negligence, delay, or contravention of the tenor of the obligation. Article 1169 should be applied only when there is an eventual performance of the obligation, the issue being whether there was delay before the eventual performance, as to hold the obligor liable for damages under Article 1170 by reason of the delay, despite eventual performance of the obligation.

In the case at bar, the damages prayed for by both parties are allegedly brought about not by mere delay, but by total breach of the obligation, as shown by the invocation of Articles 1724 (abandonment) and 1191 (resolution/rescission) of the Civil Code. There was no eventual performance on the part of either petitioner Ong or respondent Bogñalbal.

[50] Report of the Code Commission, p. 130.

[51] Article 2214 refers to quasi-delicts:

Art. 2214. In quasi-delicts, the contributory negligence of the plaintiff shall reduce the damages that he may recover.

[52] *People v. Palmon*, 86 Phil. 350, 353-354 (1950); *People v. Peñas*, 86 Phil. 596, 598 (1950); *Esperat v. Avila*, 126 Phil. 965, 971 (1967); *People v. Laba*, 139 Phil. 313, 321 (1969); *Aisporna v. Court of Appeals*, 198 Phil. 838, 847 (1982).

[53] Respondent Bogñalbal claims that he was constrained to stop working on the remaining portion of the project after petitioner allegedly refused, and still refuses, to pay the fourth progress billing (Rollo, p. 151); petitioner Ong, on the other hand, claims that respondent Bogñalbal agreed to collect the fourth progress billing after he has completed the Kenzo flooring (Rollo, p. 183).

[54] For example, S sells 10 boxes of mangoes to B for P1,000 each (or a total of P10,000). B made a partial payment of P5,000, defaulting in the payment of the other P5,000, but S had previously delivered only 7 boxes and defaulted in the delivery of the other 3 boxes. If the parties did not eventually perform their respective obligations (such that there is breach and not mere delay), the courts should first put the parties in equal footing with respect to their reciprocal principal obligations. Hence, B, the second infractor, would indeed be exempt from the payment of damages, but this exemption should only be applied after she pays P2,000 in actual damages representing the excess of S's partial performance of her reciprocal principal obligation.

[55] Cf. table within this Decision's subheading "Credibility of Architect Cano."

[56] *Id.*; We get 73.375% by adding together the partial accomplishments in the first three progress billings: 17.975% + 34.650% + 20.750% = 73.375%.

[57] *Rigor v. Tenth Division of the Court of Appeals*, G.R. No. 167400, 30 June 2006, citing *Travelaire & Tours Corp. v. National Labor Relations Commission*, 355 Phil. 932, 937 (1998).

[58] *Akbayan-Youth v. Comelec*, 355 Phil. 318, 342 (2001).

[59] *Montecillo v. Civil Service Commission*, 412 Phil. 524, 529 (2001), citing *Tomas Claudio Memorial College, Inc. v. Court of Appeals*, G.R. No. 124262, 12 October 1999, 316 SCRA 502, 508; *Tañada v. Angara*,

G.R. No. 118295, 2 May 1997, 272 SCRA 18, 79.

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