

**PHILIPPINE NATIONAL CONSTRUCTION CORPORATION,
PETITIONER, VS. HON. AMALIA F. DY IN HER CAPACITY AS
PRESIDING JUDGE OF RTC MANDALUYONG CITY, BRANCH 213,
RADSTOCK SECURITIES, LTD....**

G.R. NO. 156887. October 03, 2005

Ponente: AZCUNA, J.

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AZCUNA, J.:

Philippine National Construction Corporation (PNCC) filed this Petition for Review on Certiorari under Rule 45 of the Rules of Court to nullify the decision and resolution of the Court of Appeals in CA-G.R. SP No. 66654, which affirmed the trial court's: 1) issuance of a Writ of Preliminary Attachment; and 2) denial of the Motion to Dismiss. Also a party is the Republic of the Philippines, admitted as petitioner-in-intervention, as it is claiming an interest in one of the real properties attached by the questioned writ.

The Court of Appeals succinctly summarized the antecedent facts as follows:[1]

Sometime between 1978 and 1980, Marubeni Corporation (or Marubeni) a corporation organized under the laws of Japan, extended two loan accommodations to PNCC for the following purposes: (1) to finance the purchase of copper concentrates by CDCP Mining Corporation (a subsidiary of PNCC) in the sum of US\$5,000,000.00 which PNCC guaranteed to pay jointly and severally up to the amount of P20,000,000.00; and (2) to finance the completion of the expansion project of CDCP-M/Basay including working capital in the amount of Y5.46 billion or its equivalent in Philippine Pesos of P2,099,192,619.00 which PNCC also guaranteed to pay jointly and severally. This credit obligation was assigned on January 10, 2001 by Marubeni to the respondent Radstock Securities Limited (or Radstock), a corporation organized under the laws of British Virgin Islands with office address at Suite 602, 76 Kennedy Road, Hong Kong, pursuant to a Deed of Assignment of even date. After its due date demands for payment were made on PNCC by Marubeni and Radstock, but it failed and refused to pay the obligation. As a consequence, Radstock filed suit against PNCC for sum of money and damages with prayer for the issuance of writ of preliminary attachment through its attorney-in-fact Atty. Elizabeth A. Andres.

On January 23, 2001, the trial court, presided by Judge Amalia F. Dy, granted the issuance of the Writ of Preliminary Attachment, thus allowing the garnishment of PNCC's bank accounts and the attachment of several real properties.[2] On February 14, 2001, PNCC moved to Set Aside the Order of January 23, 2001, and/or Discharge the Writ of Attachment.[3] Two weeks, later PNCC filed another motion this time seeking to dismiss the main case. The court a quo denied both motions. After the corresponding Motions for Reconsideration were also denied, PNCC instituted a special civil action for certiorari in the Court of Appeals, docketed as CA-G.R. SP No. 66654.[4]

The main case, however, was not suspended and continued while CA-G.R. SP No. 66654 was pending. In its Answer in the main case, PNCC reiterated its grounds in its Motion to Dismiss as affirmative defenses:[5] 1) plaintiff has no capacity to sue; 2) the loan obligation has already prescribed as there was no valid demand made;

and 3) the letter of guarantee was signed by a person not authorized by a valid board resolution.

In CA-G.R. SP No. 66654, PNCC reargued similar grounds to question the denial of the Motion to Dismiss: a) the cause of action is barred by prescription; b) the pleading asserting the claim states no cause of action; c) the condition precedent for filing of the instant suit has not been complied with; and d) plaintiff has no legal capacity to sue. As to the Writ of Attachment, it was argued that the trial court committed grave abuse of discretion in issuing it as there were no valid grounds to grant the writ.[6]

On August 30, 2002, the Court of Appeals rendered its decision in CA-G.R. SP No. 66654, finding that the court a quo did not act with grave abuse of discretion and furthermore, insofar as the Motion to Dismiss was concerned, that the denial order is interlocutory and hence cannot be questioned in a special civil action. Reconsideration was denied by a resolution dated January 22, 2003.

Soon after the Court of Appeals rendered its decision, judgment was promulgated in the main case finding PNCC liable to Radstock in the amount of P13,151,956,528 plus interests and attorney's fees. Needless to state, all of PNCC's affirmative defenses that were reiterations of the grounds of the Motion to Dismiss were thrown out as being inconsistent with the evidence presented.[7] A notice of appeal was then filed by PNCC to the Court of Appeals.

In this petition, which is solely to question the decision and resolution in CA-G.R. SP No. 66654 and not the judgment in the main case, PNCC alleges that the Court of Appeals gravely erred in holding that certiorari is not available against the denial of a Motion to Dismiss and that the court a quo did not gravely abuse its discretion in issuing the questioned orders. On March 19, 2003, we issued a temporary restraining order enjoining the court a quo from implementing the Writ of Preliminary Attachment and ordering the suspension of the proceedings before it and the Court of Appeals.[8]

Before ruling on the merits of the present petition, we address a procedural issue on forum shopping raised by private respondent Radstock. Radstock complains that the present petition constitutes a clear case of forum shopping given that the issues pertaining to the Motion to Dismiss have been ruled upon in the decision of the main case and PNCC had elevated said decision before the Court of Appeals. Thus, there are two fora, those of the appeal and of the certiorari case, where the same issues are being litigated. Radstock argues that PNCC should have refrained from filing this petition since it already knew that the Court of Appeals will consider the same issues after it had filed the notice of appeal.

Forum shopping is defined as an act of a party, against whom an adverse judgment or order has been rendered in one forum, of seeking and possibly getting a favorable opinion in another forum, other than by appeal or special civil action for certiorari. It may also be the institution of two or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition.[9]

In this case, PNCC did not file this petition and the appeal with the intention of reversing a single adverse judgment or order. This petition was filed to assail the denial of the Motion to Dismiss and Set Aside the Order and/or Discharge the Writ of Attachment, while the notice of appeal was filed against the final judgment in the main case. Similar issues may be found in both actions but the parallelism is only the offshoot of PNCC reiterating Motion to Dismiss grounds as affirmative defenses, which is allowed by the Rules.[10] Naturally, the trial court had to resolve them in the main case and these will, as a matter of course, be resolved by the Court of Appeals on appeal apart from the certiorari case. Thus, finding two related proceedings involving similar issues are to be expected when repetition of grounds is permitted and PNCC was not obviously and deliberately seeking a friendlier forum when it filed the present petition but merely pursuing the next proper recourse permitted by the Rules.

We now consider the denials of the Motion to Dismiss and the Motion to Set Aside the Order and/or Discharge the Writ of Attachment.

It must first be emphasized that PNCC instituted a special action for certiorari proceedings under Rule 65 with the Court of Appeals. For a special action for certiorari to lie, it must be convincingly proven that the lower court committed grave abuse of discretion, or an act too patent and gross as to amount to an evasion of a duty, or a virtual refusal to perform the duty enjoined or act in contemplation of law, or that the trial court exercised its powers in an arbitrary and despotic manner by reason of passion and personal hostility.[11] Mere errors of judgment are not correctable by certiorari. PNCC must show that the trial court had acted in such a whimsical and capricious manner when it resolved its Motions to Dismiss and Set Aside the Order and/or Discharge the Writ of Attachment.

Bearing this standard in mind, we proceed to discuss the denial of the Motion to Dismiss.

It is generally recognized that a special civil action is not the proper remedy to assail a denial of a motion to dismiss. The order of the trial court denying a motion to dismiss is merely interlocutory which does not terminate nor finally dispose of the case, but leaves something to be done by the court before the case is finally decided on the merits.[12] The proper remedy in such a case is to appeal after a decision has been rendered. Certiorari is resorted to only to correct a grave abuse of discretion or a whimsical exercise of judgment equivalent to lack of jurisdiction.[13] Ordinary error would not be enough.

We have carefully reviewed the Motion to Dismiss and the action taken by the court a quo and we find nothing that may constitute a grave abuse. The Order of April 19, 2001 which first denied the Motion to Dismiss meticulously explained the legal and factual basis for the trial court's rejection of the four grounds raised by PNCC:[14]

With respect to the first issue of whether or not the instant action had already been barred by prescription, the Court, after judicious examination of the environmental circumstances of this case and upon examination of the pertinent jurisprudence, is inclined to rule in the NEGATIVE. The averment on the pleadings submitted by the parties had so far revealed that the above-entitled case instituted by plaintiff Radstock Securities Limited for a sum of money and damages against defendant Philippine National Construction Corporation is not barred by prescription in light of the several demand letters and correspondences exchanged by the parties up to July 25, 1996. Further, it is interesting to note that defendant had, in the Board meeting held last October 20, 2000, clearly acknowledged the subject indebtedness to Marubeni. . . .

...

Regarding the issue of whether or not the plaintiff has a valid cause of action against the defendant, the Court notes that the defendant heavily relies on the argument that the subject letter of guarantee executed by Alfredo Asuncion is void for lack of authority from the PNCC Board of Directors. This is misplaced in light of the fact that when a corporation such as the defendant in this case presents an officer to be the duly authorized signatory to a document coupled with submission of a duly notarized Secretary's Certificate said third party has every right to rely on the regularity of actions done by said corporation. . . .

...

As regards the issue of whether or not the condition precedent for filing the instant suit has not been complied with, the [C]ourt finds the contention asserted by defendant to be bereft of merit. In setting up this ground of prematurity, defendant argues that plaintiff failed to comply with the provisions on arbitration embodied in the advance agreement executed on August 9, 1978 and loan Agreement executed on May 19, 1980. Apparently however, this case is being filed against defendant PNCC under the letters of guarantee [sic]. [P]laintiff is not filing this case against CDCP-M under the loan agreement and the advance payment agreement entered

between Marubeni and CDPM wherein [sic] arbitration clauses are provided.

...

Lastly, the defendant contended that the plaintiff has no legal capacity to sue and in support thereof it claims that RADSTOCK is engaged in business in the Philippines without any proof that it has a required license. This argument is erroneous. The plaintiff in this case is suing on an isolated transaction.... As correctly stated by the Plaintiff, it does not intend to engage in any other business in the Philippines except to sue and collect what has been assigned to it by Marubeni Corporation.

If error had been committed by the trial court, it was not of the character of grave abuse that relief through the extraordinary remedy of certiorari may be availed. Indeed, the grounds relied upon by PNCC are matters that are better threshed out during the trial since they can only be considered after evidence has been adduced and weighed.

We now consider the denial of the Motion to Set Aside the Order and/or Discharge the Writ of Attachment.

Radstock grounded its application for a Writ of Preliminary Attachment on Section 1 (d) and (e) of Rule 57 of the Rules of Court which provides:

SECTION 1. Grounds upon which attachment may issue. – A plaintiff or any proper party may, at the commencement of the action or at any time thereafter, have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered in the following cases:

...

(d) In an action against a party who has been guilty of fraud in contracting the debt or incurring the obligation upon which the action is brought, or in the performance thereof;

(e) In an action against a party who has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

...

In support of these grounds, the affidavit of merit alleged the following:[15]

3. Despite repeated demands and periodic statements of accounts sent to PNCC for the settlement of the credit obligation Yen 5.46 Billion, its interests and penalties within three (3) days from demand in writing, and in the case of credit obligation for P20,000,000 which PNCC had agreed to punctually liquidate the said advances to its subsidiary, PNCC failed to pay and honor its obligations herein stated.

4. That in PNCC's 1994 Financial Statements, the obligations of PNCC to Marubeni was not reflected.

5. That PNCC knowing that it is bankrupt and that it does not have enough assets to meet its existing obligations is now offering for sale its assets as shown in the reports published in newspapers of general circulation.

6. That the above series of acts as enumerated in paragraphs 3, 4 and 5[,] Marubeni believes, constitute fraud on the part of PNCC in contracting the obligations mentioned herein and will surely prejudice its creditors.

7. PNCC had never performed its obligations to Marubeni despite the fact that PNCC had undertaken other business operations where it had generated substantial revenues as the toll charges collected from the expressways it had constructed[;] it had not made any attempt to pay on its loans to Marubeni.

8. Instead of liquidating first its outstanding obligations to Marubeni, defendant had contracted additional obligations which loans had also been mismanaged resulting in the bankruptcy of PNCC.

9. Marubeni believes further that the above series of acts under pars. 7 and 8 also constitute fraud on the part of PNCC.

We do not see how the above allegations, even on the assumption they are all true, can be considered as falling within sub-paragraphs (d) and (e). The first three assert, in essence, that PNCC has failed to pay its debt and is offering for sale its assets knowing that it does not have enough to pay its obligations. As previously held, fraudulent intent cannot be inferred from a debtor's inability to pay or comply with obligations.^[16] Also, the fact that PNCC has insufficient assets to cover its obligations is no indication of fraud even if PNCC attempts to sell them because it is quite possible that PNCC was entering into a bona fide good faith sale where at least fair market value for the assets will be received. In such a situation, Marubeni would not be in a worse position than before as the assets will still be there but just liquidated. Also, that the Financial Statements do not reflect the loan obligation cannot be construed as a scheme to defraud creditors.

As to the last two paragraphs, these merely stated that while PNCC continued to receive revenues from toll charges and other loan obligations the debt to Marubeni remained unpaid. Again, no fraud can be deduced from these acts. While these may be sufficient averments to be awarded damages once substantiated by competent evidence and for which a writ of execution will issue, they are not sufficient to obtain the harsh provisional remedy of preliminary attachment which requires more than mere deliberate failure to pay a debt.

In short, what was missing and what should have been alleged in the affidavit of merit was that the disposition of assets was attended by the so-called "badges of fraud," i.e., inadequate consideration, fictitious sale, etc.... As it is, the affidavit does not contain sufficient concrete and specific grounds to sustain the issuance of the Writ of Preliminary Attachment. Mere general averments render the writ defective and the court that ordered its issuance acted with grave abuse of discretion tantamount to excess of jurisdiction.

From the preceding discussions, we rule that the Writ of Preliminary Attachment should be discharged. As to the petition-in-intervention, our finding on the impropriety of the writ will effectively lift the attachment and garnishment on all affected properties, including the property claimed by the Republic of the Philippines. Hence, the petition-in-intervention is mooted and we find it unnecessary to further discuss the issues raised therein.

WHEREFORE, the petition is partly GRANTED and insofar as the Motion to Set Aside the Order and/or Discharge the Writ of Attachment is concerned, the Decision of the Court of Appeals on August 30, 2002 and its Resolution of January 22, 2003 in CA-G.R. SP No. 66654 are REVERSED and SET ASIDE. The attachments over the properties by the writ of preliminary attachment are hereby ordered LIFTED effective upon the finality of this Decision. The Decision and Resolution of the Court of Appeals are AFFIRMED in all other respects. The Temporary Restraining Order is DISSOLVED immediately and the Court of Appeals is directed to PROCEED forthwith with the appeal filed by PNCC.

No costs.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Quisumbing, Ynares-Santiago, and Carpio, JJ., concur.

[1] Court of Appeals Decision, Rollo, p. 68.

[2] Order of January 23, 2001, Rollo, p. 96.

[3] Motion of February 14, 2001, Rollo, p. 113.

[4] Omnibus Order of July 5, 2001, Rollo, p. 178.

[5] RTC Decision, Rollo, p. 564.

[6] Petition for Certiorari, Rollo, p. 190.

[7] RTC Decision, Rollo, p. 562.

[8] This was an amendment to an earlier temporary restraining order, dated March 14, 2003, which merely enjoined the implementation of the writ of preliminary attachment.

[9] Bukidnon Doctors' Hospital, Inc. v. Metropolitan Bank & Trust Co., G.R. No. 161882, July 8, 2005.

[10] Quiaoit v. Consolacion, G.R. No. L-41824, September 30, 1976, 73 SCRA 208.

[11] Vda. de Daffon v. Court of Appeals, G.R. No. 129017, August 20, 2002, 387 SCRA 427.

[12] Bonifacio Construction Management Corp. v. The Hon. Estela Perlas-Bernabe, et al., G.R. No. 148174, June 30, 2005.

[13] Indiana Aerospace University v. Commission on Higher Education, G.R. No. 139371, April 4, 2001, 356 SCRA 367.

[14] Rollo, p. 159.

[15] Affidavit, Rollo, pp. 302-303.

[16] Insular Bank of Asia & America v. Court of Appeals, G.R. No. 61011, October 18, 1990, 190 SCRA 629.

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