

BANK OF AMERICA NT & SA, PETITIONER, VS. COURT OF APPEALS, SECURITIES AND EXCHANGE COMMISSION, POTENCIANO ILUSORIO, JORGE GO, EDUARDO LOPEZ, EDGARDO T. KALAW, WILLIAM CARLOS UY,...

G.R. No. 78017. June 08, 1990

Ponente: NARVASA, J.

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NARVASA, J.:

The Insular Bank of Asia and America (IBAA) was established in accordance with a Memorandum of Agreement dated March 25, 1974 executed by three (3) other banks, namely: First Insular Bank of Cebu, Bank of Asia, and Bank of America NT & SA. A fourth bank, Dai-Ichi Kangyo Bank, acquired 10% of the issued capital stock of the new bank shortly after its formation.[1]

Some four years later, or more precisely on July 19, 1978, a class action was commenced in the Securities & Exchange Commission against (a) Bank of America NT & SA (hereafter simply BA), (b) Andrew Gotianun, and (c) six (6) other unknown defendants said to be relatives of Gotianun and identified only as Mario Doe, Danilo Doe, etc. The complaint described defendant Gotianun, and his relatives "and their corporations" as owning and controlling the Family Savings Bank, referred to them collectively as the "Family Savings Bank Group." [2] Also included among the defendants as "nominal party" was Manuel Escaler, the Corporate Secretary of IBAA. The class suit was brought by about 40 persons, Potenciano Ilusorio, Conrado Alcantara, etc. (private respondents herein), allegedly constituting "a majority of the successors in interest of the former Bank of Asia," and calling themselves the ASIA GROUP. The plaintiffs averred that since the subject matter of the suit was "of common interest to all the stockholders of the Insular Bank of Asia and America (IBAA)," and said stockholders "are so numerous that it is impracticable to bring them all before the Commission," their complaint was being filed in their own behalf and in behalf of "all other stockholders of INSULAR BANK OF ASIA AND AMERICA similarly situated" as they. [3]

In the complaint, BA was charged, essentially, with having violated the Agreement of March 25, 1974 stipulating inter alia that "none of the parties * * shall sell their shares in the consolidated bank to any other party without first offering the shares proportionately to the other two or their nominees . . ." The basic accusation against Gotianun and his Family Savings Bank Group, on the other hand, was that, although aware of the Agreement of March 25, 1974 and "in complete and utter disregard and violation thereof," they had induced their co-defendant BA "to sell to them, as in fact they claim they have purchased, the IBAA shares of defendant BA." [4] That illicit transfer, the complaint alleged, had made all said defendants (except Escaler) liable to the plaintiffs for actual, moral, and exemplary damages, as well as attorney's fees, in the aggregate sum of not less than P 16,000,000.00. [5] The class action was docketed as SEC Case No. 1613.

Answers were filed in due course by the defendants, and trial commenced on the issues thus raised.

In the course of the proceedings, three (3) orders of SEC Associate Commissioner Sixto de Guzman were

rendered and then challenged before this Court through special civil actions of certiorari.

The first was an Order dated September 17, 1979 which basically:[6]

- "(a) Indefinitely prohibited the Vice Chairman of the Board of IBAA from exercising the functions of the chairman and presiding over meetings in the latter's absence;
- (b) Restricted the scope of the duties and functions of the Executive Vice President;
- (c) Declared as suspended all resolutions of the board which would increase or otherwise change the participation of the respective representation of the various groups therein prior to their adoption;
- (d) Directed that 'henceforth no movements of officers, directors and members of the executive committees may be made without prior consultation with and/or approval by this Commission;'
- (e) Recognized the continuing validity of the ** Memorandum of Agreement dated 25 March 1974."

The order was impugned in two petitions filed in this Court by "Benjamin Limso and Luis Aboitiz, Jr., et al., representing the Insular Group in IBAA, ** docketed as G.R. No. 51678 and G.R. No. 51651, respectively." [7]

The second order contested in this Court was a temporary restraining order issued ex parte by Commissioner de Guzman on July 19, 1978, "preventing the enforcement for the time being of the sale complained of and the exercise of rights thereunder." [8] Invalidation thereof was sought through two other petitions subsequently filed by Gotianun and BA on March 31, 1980 and April 8, 1980, respectively, it being alleged that Commissioner de Guzman had "unjustifiably refused to act on the Motions to Lift/Dissolve ** (said order of July 19, 1978)" separately presented by Gotianun and BA in December, 1979. [9] The petitions were docketed in this Court as G.R. No. 53493 and 53543, respectively. [10] In these cases, this Court issued on April 21, 1980 an injunctive writ, upon bonds of P1 million each posted by BA and Gotianun, forbidding Commissioner de Guzman to give "continued effect and force to the ** Temporary Restraining Order of 19 July 1978," and directing him "to return to ** Gotianun all the certificates of stock covering the IBAA shares in dispute for the purpose of registration of the sale in the name of ** (said) Gotianun in the corporate books **," save that no subsequent sale or assignment of his rights by virtue thereof may be made without prior approval of the Court." [11]

The third order was that promulgated ex parte on December 17, 1979, abolishing the IBAA board of directors and creating a management committee with the same composition as the abolished board except that the four directors representing BA were replaced. The order was issued on petition of the ASIA Group on the ground that BA, having wholly sold its IBAA stocks, had no more interest in IBAA and would even be benefited if IBAA suffered business paralyzation or losses. [12] This order was attacked by Gotianun through petitions in intervention in G.R. Nos. 51651 and 51678, which were admitted. The petitions in intervention theorized that the order was issued without power, and without due process of law, besides being confiscatory. This Court issued a temporary restraining order enjoining implementation of the Order of December 17, 1979. [13]

After some time, a joint motion dated September 25, 1985 was filed with the Securities and Exchange Commission in Case No. 1613 by the plaintiffs therein (the ASIA GROUP, Potenciano Ilusorio, et al.), and one of the defendants, Andrew Gotianun, praying for the dismissal: (1) of the complaint as against defendant Andrew Gotianun in toto and with prejudice, as well as (2) of Gotianun's "counterclaim against plaintiffs in toto and with prejudice, ** (both) without pronouncements as to costs and attorney's fees." The joint motion set out the following additional stipulations:

- "4. Plaintiffs hereby reserve their right to pursue all their causes of action pleaded in the complaint against Bank of America NT & SA, it being the position of the plaintiffs that the defendants Bank of America NT & SA and Andrew Gotianun were sued on different causes of action (i.e., plaintiffs sued defendant Bank of

America NT & SA for violation of contract and sued defendant Andrew Gotianun for tort). Furthermore, plaintiffs contend that defendants Bank of America NT & SA and Andrew Gotianun are not indispensable parties to the adjudication of the distinct, separate and independent causes of action pleaded against each one. The plaintiffs, however, waive their cause of action for rescission/annulment of the subject sale of IBAA shares of stock by Bank of America NT & SA to Andrew Gotianun. Defendant Andrew Gotianun likewise reserves his right to pursue his cross-claim against defendant Bank of America NT & SA.

5. The parties ** (further) agree and undertake to file immediately appropriate motions for the withdrawal/dismissal with prejudice and without pronouncements as to costs and attorney's fees, all related cases now pending between them with the Supreme Court."

On the same day, September 25, 1989, the lawyers of petitioners Benjamin Limso and of Eduardo Aboitiz, et al., together with the lawyers of Andrew Gotianun, and of Potenciano Ilusorio, et al. (the ASIA GROUP, supra), filed with this Court separate motions jointly praying for the dismissal of G.R. No. 51651 and G.R. No. 51678, respectively, "with prejudice and without pronouncement as to costs and attorney's fees, the said parties having settled amicably the disputes between themselves involved in SEC Case No. 1613 thereby rendering (the proceedings in both cases) moot and academic." [14]

Another joint motion bearing the same date, September 25, 1985, was also filed in this Court by the attorneys of Andrew Gotianun and the ASIA GROUP, in G.R. No. 53493, also asking for the dismissal of the petition "with prejudice and without pronouncement as to cost and attorney's fees, said parties having settled amicably all disputes between themselves involved in SEC Case No. 1613 thereby rendering moot and academic the above-entitled proceedings before this Honorable Court." [15] The joint motion further stipulated that -

"Private respondents (i.e., the ASIA GROUP: Potenciano Ilusorio, et al.) hereby waive and renounce, absolutely and irrevocably, the restriction imposed, for their benefit, by this Honorable Court in its Resolution of 21 April 1980 that petitioner may not sell or assign the IBAA shares in dispute without prior approval of this Court,' and private respondents, by reason of the amicable settlement, now recognize the right of petitioner (Gotianun) to enjoy and dispose of said shares of stock without other limitations than those established by law."

G.R. Nos. 51651, 51678 and 53493, were accordingly dismissed as prayed for, by Resolution of this Court dated October 1, 1985. [16] With the dismissal of those three (3) cases, only G.R. No. 53543 was left pending with this Court.

Said G.R. No. 53543 was decided by the Court en banc by Resolution promulgated on November 5, 1985. The resolution annulled and set aside the SEC TRO of July 19, 1978 "effective as of April 21, 1980, when this Court enjoined the continued enforcement of the said TRO." The resolution [17] declared that it was not possible under the facts "to hold that the SEC TRO of July 19, 1978 was, as of that time, issued by respondent (Associate Commissioner) de Guzman with grave abuse of discretion," there being then "a prima facie showing that the plaintiffs in SEC Case No. 1613 were entitled to an injunctive relief." However, the Resolution went on to say,

"The setting ** was altogether different 17 months later, i.e., in December 1979, when motions to lift the SEC TRO of July 19, 1978 were filed in SEC Case No. 1613. The issues raised in the motions were dependent upon factual questions on which extended hearings had been held and evidence taken in SEC, aside from the numerous memoranda submitted by the parties. It may be presumed that by and large, the SEC was then already in a position to act on the motions, but it tarried and allowed protracted quibbling which effectively extended the life of the TRO that had long been issued without the benefit of hearing and without bond. Its inaction was an evasion of positive duty to resolve the motions with all deliberate speed, amounting to a grave abuse of discretion under the circumstances and violative of the rule which frowns upon prolonged or indefinite 'temporary restraining orders' issued ex parte. (See Board of Transportation vs. Castro, 125 SCRA

410). Incidentally, it was the same policy considerations which impelled the subsequent issuance on April 16, 1982 of Presidential Decree No. 114 fixing twenty days as the maximum duration of an ex parte restraining order and providing for its automatic termination."

Now, with regard to the joint motion to dismiss in SEC Case No. 1613, an opposition was submitted by BA, dated October 4, 1985.[18] BA contended that the dismissal (1) of the complaint as against Gotianun and (2) of the latter's counterclaim should not be granted unless the complaint and Gotianun's cross-claim were also dismissed as against BA. BA argued that by thus moving for dismissal, plaintiffs had "effectively conceded that the subject sale was a lawful and valid sale and was not tainted with any legal infirmities," and "if the sale is considered valid and effective as against the buyer, Andrew Gotianun, then it must likewise be considered valid and effective as against the seller, BA," what was involved being "a single, indivisible sales transaction by virtue of which ** Gotianun acquired ownership from BA of the subject shares," and plaintiffs' causes of action against BA and Gotianun "are not distinct, separate and independent." BA also pointed out that if the complaint against Gotianun were dismissed and the case against BA allowed to proceed, Gotianun would be an indispensable party, for if it were subsequently found that plaintiffs' right of first refusal had indeed been violated by BA, "the logical result arising from such a finding is that the sale of the subject shares must be annulled or declared invalid," and the subject shares would have to be reverted to BA and the purchase price thereof, returned by BA to Gotianun.

The opposition was overruled. By Order dated October 29, 1985, the SEC granted the joint motion and DISMISSED, with prejudice, the complaint against defendant Andrew Gotianun and the latter's counterclaims against the plaintiffs in SEC Case No. 1613 -- leaving the action to proceed only as between the ASIA GROUP and BA.[19] It found "the joint motion not to be contrary to law, morals, good customs and public policy," and declared that since this Court, in the Resolution of October 1, 1985, supra, had dismissed G.R. Nos. 51651, 51678 and 53493 "for being moot and academic because 'the parties have settled amicably all disputed between themselves,'" it had "no other alternative but to grant the joint motion to dismiss." BA moved for reconsideration. Its motion was denied, by Order dated January 22, 1986.[20]

BA went to the Court of Appeals. It filed with that Court a petition for certiorari under Rule 65 of the Rules of Court, praying for invalidation of the Orders of October 29, 1985 and January 22, 1986 in SEC Case No. 1613.[21]

The ASIA GROUP moved to dismiss the petition. It contended that the orders sought to be annulled had long become final, and the SEC had in truth acted in accordance with law.[22]

The Court of Appeals dismissed the petition by a Resolution dated January 8, 1987.[23] It ruled that --

- 1) the order of dismissal promulgated by the SEC on October 29, 1983 was a final one; appeal was available; for certiorari to lie, it must be shown that there is no appeal or other plain, speedy and adequate remedy in the ordinary course of law; where an appeal is lost for failure to take it timely, a special civil action for certiorari cannot substitute therefor;
- 2) even if the order were interlocutory, still certiorari would not lie because the order was issued in the proper exercise of jurisdiction and without grave abuse of discretion;
- 3) BA failed to exhaust its administrative remedies before resorting to the special civil action of certiorari; it failed to appeal the order of October 29, 1983 to the SEC en banc; and
- 4) laches had set in against BA; it waited for 107 days from denial of its motion for reconsideration before it filed its certiorari suit, on May 9, 1986.

BA is before this Court once again, this time on an appeal by certiorari under Rule 45 from the judgment of the

Court of Appeals above mentioned. It brands as reversible error the conclusions of the Court of Appeals just described. It also faults said Court for not passing upon the merits of its cause, i.e., that BA and Gotianun had been sued under a common cause of action; they are indispensable parties in SEC Case No. 1613; the ASIA GROUP cannot waive its right to proceed against Gotianun without likewise waiving its right to proceed against BA, and the benefit of a dismissal of the proceedings against Gotianun must necessarily extend to and inure to the benefit of BA.

Whether from the adjective or the substantive aspect, BA's contentions lack merit. They must be as they hereby are rejected.

The concept of a final order or judgment is well known. It is one that finally disposes of a case, leaving nothing more to be done by the court (or quasi-court) in respect thereto.[24] The challenged SEC Order of October 29, 1985 was such a final order, in the sense that it finally disposed of the case as between the plaintiffs, the ASIA GROUP, and defendant Andrew Gotianun and his relatives and business partners. It left nothing more for the SEC to adjudicate in so far as the case affected the ASIA GROUP vis a vis Andrew Gotianun and his group.

Implicit in the order of dismissal of the action as between the ASIA and Gotianun groups -- leaving the action to proceed as between the ASIA GROUP and BA -- is the proposition that the interest of the Gotianun Group is distinct and severable from that of BA, making applicable the rule set forth in Section 4, Rule 36 of the Rules of Court on several judgments, viz.:

"SEC. 4. Several judgments.--In an action against several defendants, the court may, when a several judgment is proper, render judgment against one or more of them, leaving the action to proceed against the others."

Of course the party aggrieved by such a "several" or separate judgment may disagree with the Court as to its propriety, in which case he may seek its reversal by appealing therefrom.[25] But it is appeal that is the remedy against a final order or judgment,[26] not a special civil action of certiorari under Rule 65. Appeal is in fact antithetical to the special civil action of certiorari. Section 1, Rule 65 clearly and explicitly lays down the rule that certiorari is proper only if "there is no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law;" and the rule has been consistently applied except only in those rare instances where appeal is satisfactorily shown to be an inadequate remedy under the circumstances.[27]

In the case at bar, BA did not appeal, either to the Commission en banc or to the Court of Appeals. Actually, the law is that from an adverse judgment or order of a Commissioner, an appeal may be taken to the Commission en banc,[28] and thence, to the Court of Appeals.[29] There is no showing whatever in this case that such an appeal could not have been taken by BA on account of some insuperable cause, or that it would not have been adequate in the premises. BA simply failed to avail, within the prescribed period, of that plain remedy indicated by law from the adverse Order of October 29, 1985. As a result, the final Order of October 29, 1985 became final,[30] and unalterable.

Having become final because never appealed, the Order of October 29, 1985 may no longer be modified in any substantial respect. The issues thereby resolved may no longer be re-litigated. Any attempt to do so through another action or proceeding would be barred by the familiar doctrine of res adjudicata, even if the subsequent proceeding resorted to were the special civil action of certiorari under Rule 65. Well known is the rule, too, that certiorari as a special civil action may not be resorted to as a substitute for a lost appeal [31]-- whether the appeal prescribed by law be by certiorari or by writ of error.[32]

Moreover, it seems quite indubitable that the cause of action of the ASIA GROUP against BA is distinct and separate from its cause of action against the latter's co-defendants, the Gotianun Group. The violation by BA of its contractual commitment under the Agreement of March 25, 1974, not to sell its stock in IBAA to any third person

without first offering it to the other parties to the agreement, is what constitutes ASIA GROUP's cause of action against it. On the other hand, the act of the Gotianun Group of inducing BA to sell, and actually purchasing, its IBAA stock, despite awareness of the provisions of the Agreement, is what the complaint states to be the cause of action against said Gotianun Group, from which allegation it is necessarily inferred that if the Gotianun Group were in reality unaware of the agreement, no cause of action could arise against it. In other words, it is not alone the act of negotiating for, and subsequently consummating, the purchase of BA's stock in IBAA that would make the Gotianun Group liable to the ASIA GROUP, but also the Gotianun Group's knowledge of the right of first refusal stipulated in the agreement; so that the absence of such knowledge would remove any basis for holding the Gotianun Group responsible in damages to the ASIA GROUP. Stated otherwise, BA's act of selling its stock to the Gotianun Group without first having offered it for sale to ASIA GROUP or the other parties to the Agreement of March 25, 1974, is a breach of the agreement and makes it liable in damages to said parties. It does not however make the Gotianun Group necessarily liable; it would be liable only if it bought the stock with knowledge of the prohibition in the agreement, not if it was unaware thereof. This was indeed this Court's view of the parties' situation, pronounced in its Resolution of November 5, 1985 in G.R. No. 53543,[33] viz.:

"(b) Gotianun allegedly was aware of the stipulation in the Consolidation Agreement that the majority of the successors in interest of the former stockholders of the defunct ASIA (who have become IBAA stockholders) or their nominees had the right of first refusal. If really such was the case, Gotianun -- in the absence of a waiver of said right -- could not be deemed a buyer in good faith. Conversely, if Gotianun was not aware of ASIA Group's right of first refusal, when he bought the BA shares in 1978, he could claim to be a buyer in good faith regardless of whether there was a waiver or not **."

The waiver, therefore, of ASIA GROUP of its cause of action against the Gotianun Group -- evidently founded on the acknowledgment that the latter had no knowledge of the right of first refusal stipulated in the Agreement of March 25, 1974 -- had no relevance and no possible effect on the ASIA GROUP's right to proceed against BA for violation of such right of first refusal. Hence, the correctness of the rendition by the SEC of the order approving the compromise agreement between the ASIA and Gotianun Groups and dismissing the former's complaint against the latter -- an order in the nature of a several or separate judgment in accordance with Section 4, Rule 36 of the Rules of Court, supra-- cannot thus be gainsaid.

Besides, it would seem an obvious proposition that a plaintiff has the right to choose which of several persons to implead as defendants in, or to drop from, his complaint. None of the defendants has the right to compel said plaintiff to prosecute the action against a party if he does not wish to do so. Of course, the plaintiff will have to suffer the consequences of any error he might commit in exercising his option. For the defendant that he does not implead, or drops from the action, may well be an indispensable party, in which event his action will have to be dismissed, since according to the law, no final adjudication can be had of the action without such an indispensable party.[34] The remedy of a co--defendant who is not dropped, therefore, is not to insist that the plaintiff continue to prosecute his action against the dropped defendant, but to move for dismissal of the action against himself, or take such appropriate action as might otherwise be proper.

WHEREFORE, the petition for review on certiorari is DENIED, with costs against the petitioner.

SO ORDERED.

Gancayco and Medialdea, JJ., concur.

Cruz, J., no part. Counsel in G.R. No. 51651.

Griño- Aquino, J., on official leave.

- [1] Rollo, pp. 8-9
- [2] Id., p. 84
- [3] Id., pp. 9; 83, 84 et seq.
- [4] Id., pp. 90-91
- [5] Id., pp. 93-95
- [6] Id., p. 10
- [7] Id., pp. 10-11. The cases were deemed submitted for decision in a Resolution dated November 10, 1980.
- [8] Id., p. 9
- [9] SEE Rollo, pp. 190-191
- [10] Id., pp. 11-12
- [11] Id., pp.12, 135-137
- [12] Id., p. 192
- [13] Id., p. 193
- [14] Id., pp. 139-143
- [15] Id., pp. 143-144
- [16] Id., pp. 155-156
- [17] Id., pp. 173-174, 186-196
- [18] Id., pp. 147-153
- [19] Id., pp. 154-156
- [20] Id., p. 185
- [21] Id., pp. 197-228
- [22] Id., pp. 229-237
- [23] Written for the Court by Coquia, J., with whom concurred Luciano and Cui, JJ.
- [24] SEE Investments, Inc. v. Tobacco Industries, Inc., and Court of Appeals (and cases therein cited), 147 SCRA 334 (1987)
- [25] SEE Santos v. Pecson, et al. (Dissenting Opinion), 79 Phil. 261, 165, 170, cited in Feria, J., Civil Procedure, 1969 ed., p. 499
- [26] Sec. 2, Rule 41, Rules of Court
- [27] SEE Pan Realty Corp. v. C.A., et al. (and cases therein cited), G.R. No. 47726, Nov. 23, 1988
- [28] PD 902-A, Sec. 6
- [29] SEC. 29, B.P. Blg. 129

[30] This is not a mere play on words; it is a juridical actuality. A "final" judgment (in the sense of one that finally disposes of a case, leaving nothing more to be done by the court as to its merits, and is therefore appealable) becomes "final" "upon expiration of the period to appeal therefrom, if no appeal has been duly perfected" or, an appeal therefrom having been taken, the judgment of the appellate tribunal in turn becomes final and the records of the case are returned to the court of origin. Such a judgment that has become "final," is then correctly categorized as a "final and executory judgment" in respect to which, as the law explicitly provides, "execution shall issue as a matter of right." *Investments, Inc. v. C.A.*, G.R. No.60036, Jan. 27, 1987, *supra*

[31] *Mercado v. C.A.*, 162 SCRA 75; *De la Cruz v. IAC*, 134 SCRA 417; *Balagtas Realty Corp. v. Romillo, Jr.*, 130 SCRA 415; *Lobete v. Sundiam*, 123 SCRA 95

[32] SEE *Pan Realty Corp. v. C.A., et al.* (and cases therein cited), G.R. No. 47726, Nov. 23, 1988, *supra*

[33] SEE footnote 17 and related text, at pp 5-6. *supra*

[34] Sec 7, Rule 3; SEE *Lim Tanhu v. Ramolete*, 66 SCRA 231

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