

DEVELOPMENT BANK OF THE PHILIPPINES, NATIONAL DEVELOPMENT COMPANY AND NATIONAL STEEL CORPORATION, PETITIONERS, VS. JUDGE AMIR PUNDOGAR, IN HIS CAPACITY AS PRESIDING JUDGE OF THE...

G.R. No. 96921. January 29, 1993

Ponente: ROMERO, J.

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ROMERO, J.:

Behind the innocuous title of the case is the unraveling of a tale of the government's dashed hopes of taking off for an industrial economy through the setting up of an integrated steel plant that it supported in the sixties through gargantuan investments therein; of how the said enterprise floundered after repeatedly defaulting in its obligations leading to the inevitable foreclosure of its assets; of how it laid low for fourteen years spanning the martial law regime only to resurface now to claim what it vigorously insists is its own; and how the government, through the highest reaches of officialdom, is now waging an equally relentless fight to permanently keep what it considers to belong to it by just and legitimate title in order that it may resume its interrupted economic dream.

In legalese, this is a special civil action for certiorari which seeks to annul and set aside the trial court's Order dated August 31, 1990 which denied petitioners' motion to dismiss and also the Order dated December 27, 1990 which likewise denied petitioners' motion for reconsideration.

The historical antecedents of the present petition hark back to 1955 when Republic Act No. 1396 was enacted authorizing National Shipyards and Steel Corporation (NASSCO) to establish a pig-iron smelting plant. When NASSCO started negotiations with the United States Export-Import Bank (EXIMBANK) for a \$62.3 million loan, the latter suggested that the management of the project be placed in the hands of the private sector. After a public bidding, the Jacinto Steel, Inc. (JSI) was entrusted with the implementation of the project. Later, in October 1963, Iligan Integrated Steel Mills, Inc. (IISMI) was incorporated with the Jacintos and the Government, through the GSIS, SSS and NASSCO as principal investors and about fifty other minority stockholders.[1]

On January 22, 1964, an agreement was entered into by the Government, IISMI and the EXIMBANK whereby the latter would provide the funds required to launch the project into commercial operation, including provisions for overruns and other financial assistance. On the same date, IISMI and the Government entered into a collateral agreement whereby the Government committed to extend equity and non-equity funds to IISMI during the construction period, including an amount of no less than P34 million. Pursuant to a Second Collateral Agreement dated July 26, 1966, the Development Bank of the Philippines granted IISMI additional loans which were secured by real and chattel mortgages over all of IISMI's assets.

In order to forestall a threatened foreclosure due to defaults in loan payments, IISMI instituted on June 1, 1971 an injunction suit against the Republic of the Philippines, Development Bank of the Philippines (DBP), Central Bank of the Philippines (CB), Board of Investments (BOI) and the Sheriff of Lanao del Norte and Iligan City. The complaint[2] which was docketed as Civil Case No. 1701 alleged that the inability of IISMI to meet its

obligations was due to "(g)overnment violations of its commitments to the Integrated Steel Project" which "were all in pursuance of the concerted and single-minded plan of the defendants to foreclose the mortgaged properties of the plaintiff and/or take over the management and ownership of IISMI or its properties, plants, or mills."

The preliminary injunction issued by the court[3] on August 11, 1971 was questioned by the DBP in G.R. No. L-34188 and the CB in G.R. No. L-33986. When the motion to dismiss filed by the Republic and the BOI on the grounds of improper venue and non-suability of the State was denied, the parties likewise questioned the denial order in G.R. No. L-33949. Subsequently, this Court ordered the consolidation of these petitions and set them all for a joint hearing.[4]

While these cases were pending before the Court, then President Marcos issued Proclamation 1081 on September 21, 1972 declaring a state of martial law. He thereafter issued four Letters of Instructions[5] directing the Secretary of National Defense to take over and control the operation of IISMI and other Jacinto-held companies "for the duration of the present national emergency or until otherwise ordered" because the acts of management of IISMI "indicated that IISMI disposed of property by fraudulent means and that the funds or money earned was (sic) not properly accounted for, and neither were they applied for payment of obligations due the Government and the government-owned corporations."

On October 23, 1973, the Court ordered the lower court "to resume proceedings in Civil Case No. 1701 by receiving further evidence which the parties may desire to present relative to all the issues they have so far raised and, thereafter, to resolve all the incidents related to the writ of preliminary injunction said court has issued and every other incident in the said case and/or render final judgment in the main case on the merits." [6]

On January 10, 1974, the lower court[7] issued an Order dissolving the writ of preliminary injunction.[8] It held that there was mismanagement of the financial affairs of IISMI by its corporate officials through the diversion of its profits to other Jacinto-controlled corporations especially to Ferro Products Inc. (FERRO), its known marketing instrumentality and biggest single buyer, which led to its failure to meet its different due and demandable obligations to DBP. More specifically, mismanagement was shown by the setting up of an unrealistic pricing scheme where, while the floating exchange rate jacked up the cost of materials by 50%, the selling price of goods sold to FERRO was increased by only 25% and FERRO resold the goods at prices higher by 30%, thus realizing in the process additional gross profits of 5%; by giving FERRO extraordinarily long credit terms of 90-180 days; by unduly postponing FERRO's payments of its matured payables through re-invoicing; by unjustifiably delaying the collecting trade and non-trade receivables from FERRO and other Jacinto-controlled corporations; by heavily loading the selling expenses of IISMI with other nonlegitimate charges which created an economic imbalance between its income and expenses; by giving interest-free loans and direct advances from IISMI funds to the Jacintos and their corporations; by passing on to IISMI travel and representation expenses of the Jacintos and their own corporations thus, using IISMI funds to pay expenses of some Jacinto-controlled corporations; by making IISMI borrow at 12% interest per annum from Jacinto-controlled corporations instead of IISMI collecting receivables from its debtors especially FERRO; by appropriating IISMI's money to the Jacintos' private benefit; by debiting IISMI for goods and shipments actually received not by IISMI but by the Jacintos and their corporations; and by importing raw materials for Jacinto-controlled corporations through the use of DBP guaranties intended for IISMI.

Likewise, the court found that there were attempts to hide these corporate malpractices by "window dressing" of the financial statements and records of IISMI and of the Jacinto-controlled corporations. This consisted in understating profits to create the impression that losses were not due to improper operations but rather to other factors like the floating exchange rate; painting a favorable but unreal cash position on the part of IISMI; creating an ostensibly favorable asset position by including as IISMI's assets goods returned by FERRO to the Security

Bank and Trust Co.; by overstating the inventories account; and by understating the account receivables from FERRO and other Jacinto-controlled corporations by intercepting legitimate payables to IISMI.

Moreover, the lower court rejected the claim of IISMI that its failure to meet its obligations was due to the floating exchange rate, holding that IISMI could only claim a loss of P51.9 million owing to the floating rate as importations before February 1970 were sold at pre-devaluation prices even after devaluation. However, no such loss could be claimed after June 1970 since price adjustments could and should have been instituted by IISMI after that time. Furthermore, despite the disposition of the processed raw materials, IISMI failed to use the proceeds to liquidate its accounts which, as of June 30, 1972 had ballooned to P407 million. Such failure compelled DBP to assume payments in its capacity as guarantor to assume payments due to IISMI's creditors.

Lastly, the court held that IISMI cannot pin the blame for the delay in payments of its obligations on the alleged delay in the release of DBP, SSS and GSIS funds. The bulk of IISMI's obligations arose from subsequent raw material importations guaranteed by DBP. These accounts were only incurred by IISMI after DBP, SSS and GSIS had released their respective funds to IISMI.

Thus, the lower court concluded:

"It is settled jurisprudence that an applicant for writ of preliminary injunction should be able to establish a clear case, free from doubt and dispute. Since injunction is an equitable remedy, an applicant must also come to court with clean hands. As discussed above, the evidence show that IISMI has failed to satisfy both basic requirements to entitle it to a writ of preliminary injunction." [9]

On February 25, 1974, the court deemed the pre-trial conference terminated and dismissed the complaint filed by IISMI with prejudice for its failure to appear during the pre-trial despite due notice. [10]

After the finality of the January 10, 1974 Order, DBP filed an application for extrajudicial foreclosure of the IISMI mortgages. On February 26, 1974, the IISMI plant and assets were thus auctioned to DBP as the highest bidder. After one year, or on March 24, 1975, DBP consolidated its ownership over the said properties. [11]

On December 29, 1989 or fourteen (14) years from said consolidation of ownership, IISMI, Fernando Jacinto and Jacinto Steel, Inc. (JSI) filed a complaint [12] docketed as Civil Case No. 111-1549 before Branch 3 of the Iligan Regional Trial Court against petitioners DBP, National Development Corporation (NDC) and National Steel Corporation (NSC) praying that judgment be rendered ---

"1. Setting aside and declaring as null and void:

1.1 The extra-judicial foreclosure conducted by the provincial sheriff of Iligan City on February 26, 1974 of the mortgage contract dated August 1, 1966, additional mortgage dated January 13, 1967, addendum to chattel mortgage dated January 13, 1967, additional mortgage dated May 20, 1968 and additional mortgage dated December 22, 1969, all executed by IISMI in favor of DBP.

1.2 The certificate of sale issued by the provincial sheriff of Iligan City in consequence of the extra-judicial foreclosure of the mortgages referred to in 1.1 of this prayer;

2. Ordering all defendants, jointly and severally, to restore and/or return to IISMI all the properties subject of the extrajudicial foreclosure of the mortgages referred to in 1.1 or 1.2 of this prayer portion;

3. Ordering the Register of Deeds, Iligan City, to cancel Transfer Certificate of Title No. P-25, 959 (a.f.) of the Registry of Deeds for Iligan City and to issue replacement transfer certificates of title in the name of IISMI." [13]

Petitioners filed their respective motions to dismiss [14] on the grounds of lack of jurisdiction, failure to state

cause of action, prescription and res judicata. On March 31, 1990, private respondents filed an amended complaint.[15] Petitioners adopted their earlier motions to dismiss as their motion to dismiss the amended complaint.[16] On May 4, 1990, National Steel Corporation filed a motion to cancel notice of lis pendens which was opposed by private respondents on June 22, 1990.

On August 31, 1990, the lower court[17] issued an order denying the motions to dismiss.[18] The motion for reconsideration was likewise denied on December 27, 1990.[19]

Hence, the present petition for certiorari which was filed on February 5, 1991 seeking the nullification of the two aforementioned orders. On February 7, 1991, this Court issued a Temporary Restraining Order requiring respondent Judge Amir Pundogar to desist from taking any further proceeding in Civil Case No. 111-1549.

For a clear disposition of the issues raised, we shall consider them seriatim.

I. PROCEDURAL GROUND

Private respondents question the propriety of the instant petition for certiorari before the Court on the ground that the Order denying a motion to dismiss, being interlocutory, cannot be the subject of a special civil action. They aver that the proper remedy is to file in the lower court an answer interposing as defenses the objections raised in the motion to dismiss, proceed to trial and, in case of an adverse decision, elevate the same by appeal.

Petitioners, on the other hand, argue that the case at bar is an exception to the general rule. Besides, there is no appeal nor any other plain, speedy and adequate remedy. They contend that the instant petition can be entertained by the Court for the purpose of correcting the questioned Orders which were issued by respondent judge with grave abuse of discretion.

Private respondents correctly cited the general rule in elevating cases to this Court. The rule, however, admits of exceptions, such as when the court, in denying the motion to dismiss acts without or in excess of jurisdiction or with grave abuse of discretion. In such an instance, certiorari becomes available in order to relieve the defendant of the trouble of undergoing the ordeal and expense of a useless trial.[20] As will be seen in the subsequent discussion, petitioners are rightfully entitled to the recourse availed of as it is part of the supervisory authority of the Court to correct the error committed.[21]

Furthermore, the direct invocation of this Court's original jurisdiction to issue writs of certiorari should be allowed as there are special reasons therefor clearly and specifically set out in the petition[22] as quoted hereunder:

"The Respondent Judge's unlawful refusal to immediately dismiss, and the continuing pendency of, Civil Case No. 111-1549 has coated the Jacinto claim with a misleading veneer of plausibility which is obstructing and causing inevitable delays in (i) the government's and NDC's plans to privatize NSC at the earliest possible time and under optional conditions generating the maximum returns for NDC, the country and the Filipino people; (ii) NSC's Integrated Steel Mill Project and (iii) the development of the nation's steel industry as well as the country's industrialization both of which have already suffered an incalculable fall due to IISMI's ruin masterminded and engineered by Jacinto and his family." [23]

II. SUBSTANTIVE GROUNDS

A. RES JUDICATA

Petitioners contend that the final Orders of January 10, 1974 and February 25, 1974 in Civil Case No. 1701 bar IISMI from filing Civil Case No. 111-1549, which questions the same DBP foreclosure upon the very same claim that the foreclosure was fraudulent, that is, IISMI defaulted on its loans due to GSIS-SSS-DBP-CB conspiracy.

The only difference is that in Civil Case No. 1701, they asked for a prospective relief (that the threatened DBP foreclosure be enjoined) while in Civil Case No. 111-1549, they asked for a retrospective relief (that the foreclosure be annulled).

Private respondents, on the other hand, argue that the present action cannot be barred by *res judicata* because the proceedings in Civil Case No. 1701 is not a judgment on the merits and there is no identity of causes of action between the first and the second cases.

Res judicata is indeed present. Imbedded in Philippine jurisprudence are the elements constituting *res judicata* as a ground for the dismissal of a complaint: a) the former judgment must be final; b) the court which rendered it had jurisdiction over the subject matter and the parties; c) it must be a judgment on the merits and d) there must be, between the first and second actions, identity of parties, subject matter and causes of action.[24]

The first three requisites are obviously present. The Orders of January 10, 1974 and February 25, 1974 attained finality as no motion for reconsideration or appeal had been filed.[25] The said Orders were issued by the CFI of Lanao del Norte, Branch 11 which had jurisdiction over the injunction case as the property subject of the complaint is located within its territorial jurisdiction. These Orders are judgments on the merits. In the Order of January 10, 1974 where the writ of preliminary injunction was lifted, then Judge Tutaan, after considering not only the evidence presented during the hearing of the motion for preliminary injunction but also the additional evidence presented after this Court ordered the resumption of proceedings, found that a case of mismanagement existed. On the other hand, the Order of February 25, 1974 whereby the complaint was dismissed with prejudice for failure to appear during the pre-trial despite due notice, had the effect of an adjudication upon the merits.[26]

For the fourth requisite to exist, the identity required is not only of the parties and subject matter but also of the causes of action. In Civil Case No. 1701, the complaint was filed by IISMI against the Republic, BOI, CB and DBP. In Civil Case No. 111-1549, the complaint was filed by IISMI, Fernando Jacinto and Jacinto Steel, Inc. against DBP, NDC and NSC. For *res judicata* to apply, absolute identity of parties is not required because substantial identity is sufficient.[27] Inclusion of additional parties will not affect the application of the principle of *res judicata*. [28] In both cases, the subject matter involved is the Iligan Integrated Steel Mills, Inc.

As regards identity of causes of action, this requisite is similarly present although the same may not be quite apparent. In Civil Case No. 1701, the caption clearly indicates that the action is one for injunction while in Civil Case No. 111-1549, the caption does not state the title of the action as required by Sec. 1, Rule 7 of the Rules of Court. This omission notwithstanding, the test of identity of causes of action lies, not in the form of the action, but on whether the same evidence would support and establish the former and the present causes of action.[29]

A comparison between the allegations of the complaints in Civil Case No. 1701 and that of Civil Case No. 111-1549 reveals that there is indeed identity of causes of action. In both cases, private respondents claim that DBP has no right to foreclose because it violated its financial commitments to IISMI and that it conspired with other agencies of the government to cause the latter's financial ruin. It follows, therefore, that the evidence that private respondents used to support Civil Case No. 1701 is the same evidence that they would utilize to establish Civil Case No. 111-1549.

Private respondents claim that there is no identity of causes of action because the amended complaint added several allegations which were not present in the complaint for injunction (Civil Case No. 1701) as they could not have been alleged in that case, and therefore, the evidence necessary to sustain Civil Case No. 111-1549 could not have been the same as in the former case. On the contrary, petitioners insist that there is identity of causes of action because respondent Judge cannot resolve the issue presented in Civil Case No. 111-1549 and grant the reliefs sought without annulling the 1974 Orders. Hence, the additional allegations will not change the cause of

action in the two cases.

We agree with petitioners. It should be noted that said additional allegations may be categorized into three: first, those that have arisen after the filing of Civil Case No. 1701; second, those that pertain to the foreclosure; and third, developments after the EDSA Revolution.

The first group of allegations supposedly affecting the validity of the foreclosure consists of the declaration of Martial Law,[30] the issuance of LOI No. 27,[31] the seizure of IISMI's records and the detention of some of its officers,[32] the cancellation of passports of the members of the Jacinto family,[33] and the withdrawal of IISMI's counsel.[34] It is significant to note that while these matters were not alleged in Civil Case No. 1701 as they developed only after its filing, said events had in fact been brought to the attention of this Court which disposed of them in this wise:

"x x x the Court finds no other alternative but to terminate the present proceedings in this Court, so as to give way to further proceedings in the Court below, wherein all pertinent issues arising from the developments which have taken place since August 17, 1972 may be appropriately and fully threshed out, considering that the factual matters involved therein would require the formal and proper presentation of varied and voluminous evidence which the Court is not adequately equipped to receive."[35] (underscoring supplied)

Thus, the CFI of Lanao del Norte, when it resumed the hearing, was expected to settle, not only the allegations in the complaint, but even those matters that had developed during the pendency of the three petitions for certiorari before this Court. It follows perforce, that the subsequent dismissal of Civil Case No. 1701 for failure to prosecute is not limited solely to the allegations of the complaint therein. Hence, these additional allegations can no longer be raised for the second time as *res judicata* now operates. This is supported by Sec. 49 of Rule 39 of the Rules of Court which states:

"Sec. 49 Effect of Judgments

x x x x x x x x

(b) In other cases the judgment or order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity; (underscoring supplied)

x x x x x x x x"

The second group of allegations pertaining to the foreclosure are specifically, that the sheriff sold IISMI at public auction when it was not in the possession of the mortgagee[36] and that the Jacintos offered to redeem the same.[37] We make short shrift of these allegations by pointing out that the sheriff's act of selling the property which was then under government control is woven into the very warp and woof of the issue of the legality of the take-over.

Considering that private respondents had waived their opportunity to question the take-over, they cannot raise the same belatedly. Otherwise, the effect would be to allow private respondents to evade their liabilities simply because the foreclosure happened at the time when martial law was in effect.

As to the claim that the Jacintos offered in a letter to redeem IISMI through a credit line facilitated by a foreign bank, suffice it to say that this is not the redemption contemplated by the law and its inclusion will not make *res judicata* inoperable.[38]

Lastly, private respondents alleged "facts which transpired after EDSA", viz.: the Enrile Memorandum to

President Aquino, the Enrile Memorandum to former Department of Trade and Industry Secretary Jose Concepcion, the Order of Dismissal issued by the PCGG, the Legal Opinion of DBP's former Chief Legal Counsel dated December 5, 1986, the Opinion of the Deputy Government Corporate Counsel dated January 14, 1984, and the Letter of the Undersecretary of Justice dated February 13, 1987.[39] Private respondents have erroneously termed these "opinions" written after the EDSA Revolution as "facts". Truth to tell, no fact or event has supervened which may justify the overturning of a finding of the court which had long become final. These are but long debunked, tired reiterations of the same Jacinto refrain, of "fraudulent, illegal and systematic deprivation of IISMI of its assets (w)as part of a general preconceived plan . . . to oppress, impoverish and destroy Jacinto and his family and their interests." [40]

B. JURISDICTION

Petitioners assert that the lower court has no jurisdiction because the present case seeks to annul the Orders of January 10, 1974 and February 25, 1974 of the then CFI of Lanao del Norte. As such, it is the Court of Appeals which has the exclusive original jurisdiction over actions for annulment of judgments of Regional Trial Courts.[41] They observe that while private respondents concede that this case does not expressly pray for the annulment of the said decision, their prayers, if granted, will, of necessity, invalidate the foreclosure. Furthermore, petitioners assert that since the allegations raised in both cases are the same, respondent Judge cannot resolve the issues presented without annulling the questioned Orders in Civil Case No. 1701.

On the other hand, private respondents believe that the lower court has jurisdiction over the instant case as it involves reconveyance of real property[42] and that the Orders are limited to the circumstances prevailing at the time of the filing of the complaint.

For its part, the lower court did not consider the attack on jurisdiction well-taken because the annulment of the decision in Civil Case No. 1701 is not being sought by private respondents.[43]

We agree with petitioners that the lower court committed grave abuse of discretion in taking jurisdiction over Civil Case No. 111-1549. The failure of respondents to expressly pray for the annulment of the Orders dated January 10, 1974 and February 25, 1974 does not mean lack of interest on their part in having them declared void. To be sure, the prayers are explicitly limited to seeking the nullification of the extrajudicial foreclosure on February 26, 1974 and the certificate of sale issued by the provincial sheriff of Iligan City, the restoration and/or return to IISMI of all the foreclosed properties and the cancellation of TCT No. P-25.959 (a.f.), as well as the issuance of a replacement transfer certificate of title in the name of IISMI. A close scrutiny of the allegations in the complaint, however, would reveal that if the prayers are to be granted, the resultant effect would be to annul the findings of mismanagement made in the Order of January 10, 1974 and to re-litigate the same claims which had been earlier dismissed with prejudice in the Order of February 25, 1974. Private respondents' submission that the action is one for reconveyance of property is misleading, as reconveyance is but the inevitable consequence once these two Orders are annulled.

C. PRESCRIPTION

Petitioners contend that the action has prescribed since the case was filed almost sixteen (16) years after the 1974 Orders. They assert that, based on the allegations in the complaint, if tort or quasi-delict were committed, the four-year prescriptive period[44] has obviously lapsed. If constructive trust is established, the ten-year prescriptive period[45] has likewise expired.

Private respondents counter that regardless of the prescriptive period (four or ten years) applicable, the same was suspended during the martial law regime which should be treated as a force majeure and hence, the prescriptive

period should start to run only on February 25, 1986.[46] Involving as it does an issue of fact, they aver that the presentation of evidence must be made before the trial court. Furthermore, they allege that since the action is one to recover immovable property, the same prescribes in thirty (30) years.[47] In any case, they assert that the action is imprescriptible under Art. 1410 of the New Civil Code.[48]

We can do no better than to cite the case of *Tan v. Court of Appeals*,[49] reiterated in *National Development Co. v. Court of Appeals*[50] and quote the portion of the decision which deals with the issue of whether or not martial law interrupted the running of the prescriptive periods:

"We cannot accept the petitioners' contention that the period during which authoritarian rule was in force had interrupted prescription and that the same began to run only on February 25, 1986, when the Aquino government took power. It is true that under Article 1154:

'ART. 1154. The period during which the obligee was prevented by a fortuitous event from enforcing his right is not reckoned against him.'

fortuitous events have the effect of tolling the period of prescription. However, we cannot say, as a universal rule, that the period from September 21, 1972 through February 25, 1986 involves a force majeure. Plainly, we cannot box in the 'dictatorial'; period within the term without distinction, and without, by necessity, suspending all liabilities, however demandable, incurred during that period, including perhaps those ordered by this Court to be paid. While this Court is cognizant of acts of the last regime, especially political acts, that might have indeed precluded the enforcement of liability against that regime and/or its minions, the Court is not inclined to make quite a sweeping pronouncement, considering especially the unsettling effects such a pronouncement is likely to bring about. It is our opinion that claims should be taken on a case-to-case basis. This selective rule is compelled, among others, by the fact that not all those imprisoned or detained by the past dictatorship were true political oppositionists, or, for that matter, innocent of any crime or wrongdoing. Indeed, not a few of them were manipulators and scoundrels."[51] (underscoring supplied)

In order to prove that they were prevented from commencing the suit during the Marcos regime, private respondents narrated that the passports of the Jacinto family, who were then abroad, were cancelled; all their resources were taken over by the Government; their lawyers were constrained to withdraw their appearances because of the change in the membership of the Board of Directors of IISMI, and the incarceration of the executives of IISMI who would have been witnesses in the case. They would have the Court take judicial notice of these facts.

We cannot do so. If this Court does, then it would be relieving private respondents of their bounden duty to show that during martial law they were so circumstanced that it was impossible for them to commence, continue or even resist an action. And yet a fullblown hearing is not even necessary as the so-called "special circumstances" do not convince this Court that, in this particular case, martial law should be treated as force majeure that suspends the running of prescription. Likewise, petitioners have consistently pointed out that during the hearing of the motion to dismiss, private respondents failed to adduce any proof regarding their allegations on the tolling of the prescriptive period. Private respondents have not, in any of their pleadings, rebutted this.

The allegation regarding the refugee status of the Jacintos finds utterly no support in the records. Considering the voluminous pleadings they had filed before this Court, it comes as a surprise that they never offered documentary evidence to prove their possession of such status, let alone explain its legal implications. For the Court to now give evidentiary value to this unsupported allegation is to be recreant to its sworn duty to uphold and apply the law.

The dissenting opinion of our respected Colleague poses as the threshold issue: "whether or not in the name of

economic development, the Government can act in a manner basically unfair and arbitrary and deny to a party with a legitimate grievance, a remedy in law." To the extent that it anchors practically the whole opinion on the assumption that the Government has indeed acted "in a manner basically unfair and arbitrary" as to "deny to a party with a legitimate grievance, a remedy in law" is to mislead him who seeks to address the imponderables of the case objectively, impartially and fairly.

To cast the issue in such terminology is to ensnare the unwary who, in much the same manner, is confronted with the question: "When did you stop beating your wife?" on the false assumption that the addressee is in fact guilty of the obnoxious act of wife-bashing.

The dissenting opinion stands for the proposition that the private respondents were denied due process inasmuch as, being abroad when part of the trial was being conducted, they were not given their day in court.

We are strongly convinced, however, upon careful scrutiny of the records that private respondents have in fact been accorded the guaranties of due process. There is no question that they were accorded the opportunity to be heard which is the touchstone for determining whether a party litigant has been granted the right to due process, but they can hardly blame anyone if they somehow failed to fully utilize this. To aver now that they have been deprived of the same is not to prove said assertion. It is important to note that when martial law was declared, the Jacintos were already abroad. Their physical absence did not, however, deter them from filing Civil Case No. 1701. They had present counsel as their counsel at the time. For almost a year, these lawyers acted on their behalf and obtained appropriate judicial relief. Their lawyer-client relationship was only terminated when their counsel filed on July 30, 1973 a Manifestation and Omnibus Motion praying for leave to withdraw from representation in the cases before us. On this point, we made this observation in *Republic v. CFI of Lanao del Norte*:

"From the latest pleadings of petitioners, however, supported, as they are, by official reports which are more specific and factual, the situation relative to the equities in these cases appears to Us to have changed considerably. And in the face of this circumstance, counsel for IISMI have not been able to present sufficiently documented denials and rebuttals of the new allegations of petitioners, albeit they excuse themselves by alleging that they have lost contact with their clients, the principal private investors who used to be in control of respondent corporation. It is claimed that said private investors have gone abroad to places unknown to said counsel, for which reason, precisely, the latter are even asking for leave to be allowed to withdraw their representation. Under the circumstances, and considering that to await the uncertain return of the private investors would jeopardize the efforts of the government to make the national project herein involved, as conceived in the triangular agreement among the Republic, the Exim Bank and IISMI itself, namely, the establishment of an integrated steel complex to meet the requirements of the industry and economy of the whole country, totally operative without further loss of time, the Court is of the considered opinion that all the matters here in dispute should be referred to the respondent court for further proceedings and appropriate resolution. Indeed, having in view the nature and volume of the evidence which the parties would have to present in connection with the factual issues raised by petitioners regarding what they claim to have discovered or unearthed after the Secretary of National Defense took over the 'management, control and operation' of IISMI, may be justly and comprehensively resolved only after such evidence have been received by the trial court, rather than this Court, since it has the ready adequate machinery for the purpose. And with such additional evidence, the trial court would naturally be in a better position than before to rule on the injunctions which have given rise to these proceedings.

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Anent the prayer of all the counsel of IISMI to be given leave to withdraw their representation of said respondent, it is important to note that said request is not accompanied by proof of their client's consent to such withdrawal. Ordinarily, under Section 26 of Rule 138, such consent is required. And even in the instances where the same section dispenses with the client's consent, it is generally the rule that the client should be

notified of the petition of counsel. But it is not inconceivable that under peculiar circumstances, the court may be justified in relieving a lawyer from continuing his appearance in an action or proceeding, without hearing the client, as, for instance, when a situation develops, like in the cases at bar where the client stops having any contact with the lawyer, who is thereby left without the usual means which are indispensable in the successful or, at least, proper defense of the client's cause, such as, actual knowledge of relevant facts, the identity of usable witnesses, pertinent documents and other evidence, not to speak of the money needed for even the minimum of litigation expenses and the possible advances of attorney's fees. Understandably, no responsible lawyer can be expected to do justice to any cause under such conditions, and, it would be an unjust imposition to compel him to continue his services in relation thereto. While perhaps the absence of legal counsel may create an apparent denial of the party's inherent right to legal assistance, in these particular cases, it can rightly be said that in a large sense and for obvious reasons, movant counsel's clients have it in their power to remedy the situation.”[52] (underscoring supplied)

The foregoing shows that, contrary to the present claim of private respondents that their lawyers were constrained to withdraw their appearances, this Court had earlier found this not to be the case and even impressed upon the Jacintos that they had it in their power to remedy the situation. When their counsel's motion to withdraw was granted by this Court, their logical move should have been to engage the services of other lawyers to represent them before the CFI of Lanao del Norte. This they failed to do.

However, while abroad, they managed to hire the services of one Mr. Floyd H. Shebley and Mr. Jose W. Diokno, a staunch anti-Marcos man and former senator of the Philippines. Considering this and the fact that the absence of private respondents did not actually prevent them from filing the injunction case, perforce, when they lost therein, they could have filed an appeal or a separate action to annul the same.

The allegations regarding their absence, the cancellation of their passports, the seizure of their resources and the incarceration of other IISMI officials had all been raised earlier in the Republic case. Not having been convinced then, neither is this Court convinced now. Raising them for the second time to compel a relitigation will not suffice to make this Court reverse itself. Thus, we rule that, under the factual circumstances of this case, the martial law years did not have the effect of interrupting the running of the prescriptive period.

The dissenting opinion would have us remand the case to the trial court to give it the opportunity to examine "if the doctrine of constructive or implied trust should be applied under the circumstances of this case." And yet, it pre-empted the lower court by concluding that certainly, DBP, NDC and NSC are constructive trustees because they had full and complete knowledge of the dispossession of valuable properties. Thus, they are supposed to be the trustees who should hold the properties of IISMI for the benefit of the beneficiary or cestui que trust, the Jacintos. Under Article 1456 of the New Civil Code, a constructive trust is created if the property is acquired through mistake or fraud. But this basic requisite is utterly wanting in the instant case. Here, the assets of IISMI mortgaged to DBP were eventually foreclosed lawfully upon repeated default of the debtor IISMI to pay its debts. Subsequently, DBP sold the property to NSC under legally-sanctioned procedures. Nowhere is there an iota of evidence showing acquisition of property through mistake or fraud by DBP and later, NSC. If there be anyone guilty of fraud, it is the Jacintos, as determined and ruled upon by the Court of First Instance of Lanao del Norte. Clearly, there can be no room for the application of the concept of constructive trust in favor of the Jacintos.

The dissenting opinion finds it strange that "in the 20 years which followed these executive and trial determinations, no charges - criminal or civil - were filed against the alleged saboteurs." If the petitioners did not file criminal or civil charges against the Jacintos despite findings of fraud and mismanagement by the lower court, it was merely exercising the option open to any creditor-mortgagee. From its arsenal, it may choose any legal weapon which it deems proper to accomplish its objective and which is suitable for its planned strategy. Why fault it if it merely wants to recover debts and recoup losses without having to necessarily draw blood by jailing

its debtors? Obviously, too, no criminal charges can be filed against them as they were then beyond the jurisdiction of the courts.

D. FAILURE TO STATE CAUSE OF ACTION

A cause of action is an act or omission of one party in violation of the legal right of the other. Its essential elements are, namely: (1) the existence of a legal right in the plaintiff, (2) a correlative legal duty on the part of the defendant, and (3) an act or omission of the defendant in violation of plaintiff's right with consequential injury or damage to the plaintiff for which he may maintain an action for the recovery of damages or other appropriate relief.[53]

Petitioners maintain that the Jacintos and JSI have no legal right to file the instant case as they were mere stockholders of IISMI which, as a corporation having a personality distinct and separate from its stockholders, is the proper party to institute the same. On the other hand, private respondents argue that they are instituting a derivative suit on behalf of IISMI.

Before a derivative suit can be filed, the stockholder or member bringing the suit must first exhaust his remedies within the corporation, i.e., he must have made a demand on the directors or trustees to sue and the latter must have either failed or refused to do so. This demand, however, is not necessary where it would be futile to make it.[54]

There is no allegation in the complaint that would show that a demand on the board of directors of IISMI was in fact made. But even if the Jacintos and JSI omitted to make the same, they can still file the instant case as a derivative suit. They have alleged that "at this time, IISMI is without a duly or legally constituted board of directors and no election of officers has been held." [55] It would be futile for them to make a demand on the board of directors whose very constitution is being questioned. Private respondents, having the legal right to file the instant case, we find that the complaint states a cause of action.

However, a finding that a complaint states a cause of action does not imply that the complainant is assured of a ruling in his favor. While a motion to dismiss based on failure of the complainant to state a cause of action necessarily carries with it the admission, for purposes of the motion, of the truth of all material facts pleaded in the complaint,[56] what is submitted for determination therein is the sufficiency of the allegations in the complaint.[57] Corollarily, the denial of a motion to dismiss does not necessarily resolve the issues raised in the complaint in favor of the complainant inasmuch as, after the trial, the defendant might prove to have a better right to the subject matter in litigation.

Moreover, a motion to dismiss may be based on only one of the grounds enumerated in Sec. 1, Rule 16 of the Rules of Court. That the petitioners were able to prove the presence of three of the four grounds they raised, viz., res judicata, lack of jurisdiction and prescription, more than warrants the reversal of the Order below denying the petitioners' motion to dismiss.

III. INCIDENTAL ISSUESA. TERMINATION OF COUNSEL

After having been served with summons in Civil Case No. 111-1549, DBP engaged the services of the Office of the Solicitor General (OSG) which represented it earlier in Civil Case No. 1701.[58] Then Solicitor General Francisco I. Chavez "graciously accepted" this request[59] in a letter dated February 7, 1990. Surprisingly, however, on February 8, 1992, DBP filed a Notice of Termination of Counsel.

The conflict between DBP and OSG had its roots when Mr. Jose Ma. P. Jacinto sent a letter dated August 8, 1991 addressed to then Acting Secretary of Justice Silvestre H. Bello III requesting a "review of the government

position on the matter of our claims, so that action can be taken -- or at least a recommendation made - for a speedy settlement thereof." [60] This request was made in view of the following opinions which, according to the said letter, "previously acknowledged the merits of our claims"

a) PCGG Order dated February 19, 1987 which said that "the takeover of the assets of IISMI was effected thru Letters of Instructions Nos. 27, 35, 39 and 49" and that "due process may not have been observed when DBP foreclosed the IISMI."

b) Memorandum-Letter dated December 5, 1986 by Atty. Prospero C. Nograles, DBP Chief Legal counsel, which states that the "IISMI case established a clear example of aggression by the past regime and smacks of an abuse of human rights through the use of sheer force by the military."

c) Opinion No. 003, series of 1987, dated January 14, 1987 by Atty. Ariel F. Aguirre of the Office of the Government Corporate Counsel (OGCC) which concluded that LOI No. 27 "directing the then Secretary of National Defense to take over or cause the take over of the management, control and operation of IISMI was an arbitrary and unprecedented excuse of undefinable state power" and that LOI Nos. 35, 39, and 49 "likewise suffer the same infirmity" and

d) Letter dated February 13, 1987 by Undersecretary Silvestre H. Bello III of the Department of Justice stating that "we find no cogent reason to disagree with both opinions (of Messrs. Nograles and Aguirre) upon the facts as presented and hereby confirm the same."

Acting Secretary of Justice Silvestre H. Bello III issued 1st Indorsement dated September 19, 1991 referring the letter of Mr. Jose Ma. P. Jacinto to the Office of the Solicitor General "it appearing that there is a pending case in court being handled by the Office of the Solicitor General." [61]

In response, the OSG thru the former Solicitor General Ramon S. Desuasido, Assistant Solicitor General Edgardo L. Kilayko and Solicitor Felixberto C. de la Cruz sent a Second Indorsement which said:

"We share the opinion dated December 5, 1986 of the then DBP counsel (now Congressman) Prospero Nograles that the foreclosure proceedings on IISMI were legally flawed because at the time of foreclosure the mortgaged assets were in the possession of the military pursuant to Letter of Instruction No. 27 ordering the military to take over the IISMI plant." [62]

and recommended:

"We could have recommended that the Jacintos be given a fresh period of time to pay their loan to DBP. One big obstacle, however, is that DBP sold the foreclosed IISMI assets to the National Steel Corporation in 1981. We do not believe that the NSC would be willing to return the assets to the Jacintos after paying P983 million for them to DBP.

Perhaps the Office of the President and/or the Department of Justice could summon the parties to explore avenues of an out-of-court settlement. For, really if there are incontrovertible badges of confiscation of the Jacintos' property by the Marcos dictatorship, this Government should not perpetuate that injustice." [63]

Because of the above-quoted Second Indorsement carrying the signatures of the very same Solicitors representing DBP, the latter filed the Notice of Termination of Counsel alleging that the OSG without consulting DBP "advanced a conclusion prejudicial to its client" considering that it consistently maintained "that DBP's foreclosure of IISMI plant and assets in 1974 is legally valid, binding, conclusive and final" and that issues in the instant petition are sub judice.

The OSG filed a Manifestation [64] dated February 26, 1992 stating that the "ground for the contemplated termination of services of OSG as DBP's counsel is "baseless" since the second Indorsement merely suggested an

out-of-court settlement or compromise which the law encourages especially in civil cases[65] and that the Second Indorsement is a mere opinion between the OSG and the DOJ of which no copy was ever furnished to anyone, let alone the Jacintos.

Although the OSG had been representing DBP, the latter wishes to terminate such relation and assign its own Legal Department created under Section 12 of E.O. 81 (Revised Charter of DBP)[66] to act as its counsel. We hold that in the circumstances of this case, we should grant the prayer.

As early as January 11, 1989, then Secretary of Justice Sedfrey Ordoñez issued Opinion No. 16, Series of 1989 addressed to Ms. Lilia R. Bautista of the Department of Trade and Industry regarding her query as to the legal impediment to the privatization of the NSC due to the "claims of the Fernando Jacinto family to certain properties or assets of the Iligan Integrated Steel Mills, Inc. (IISMI)." This opinion earlier reviewed the same matters raised in the August 8, 1991 letter of Mr. Jose Ma. P. Jacinto. We quote the pertinent portions:

"As a matter of policy and by well-settled precedents, this Department has consistently declined to render an opinion on questions that are fundamentally judicial or which might subsequently be the subject of litigation before the courts, particularly, those questions which involve the interest of private parties who may take issue with said opinion and bring the matter before the courts (see DOJ Ops. No. 125, s. 1958; No. 112, s. 1971; No. 76, s. 1977 and No. 117, s. 1985).

Nonetheless, we are stating our comments and observations on the 'issuances' mentioned in your request to assist DTI in resolving the controversy regarding the IISMI assets in question vis-a-vis the implementation of its program of privatization as mandated by existing policies.

At the outset, it must be stressed that the Memorandum dated March 7, 1986, issued by the former head of the Ministry of National Defense (MND) for the President, which the counsel for the Jacintos claimed to have been confirmed by the subject four (4) 'issuances', merely advised the President of the action taken by the said official in his capacity as sequestrator with respect to the Jacinto assets. The directive, referred to in the said Memorandum, which was to return the said assets to their 'rightful owners' proceeded from the view of their sequestrator that the 'continued sequestration' of said assets had become untenable due to the dismantling and abolition of the old regime.

To begin with, the IISMI assets were not owned by the Jacintos but by IISMI; it appears that IISMI, in turn, was owned by public and private stockholders among whom the Jacintos were just a minority. In fact, we note from the memorandum of NSC's legal counsel that the Government, through the GSIS and the SSS, was the single biggest stockholder of IISMI. Moreover, the IISMI assets were no longer under sequestration at the time of the toppling of the Marcos regime. The said assets have long been in the possession of NSC which purchased and holds the same, not by virtue of sequestration, but as an incident of its ownership, otherwise known as 'jus possidendi'. Hence, we do not see the relevance of the aforesaid memorandum of March 7, 1986, insofar as the former IISMI assets, now owned by NSC, are concerned. The NSC was a purchaser of the IISMI assets for value and in good faith. With reference to the said assets no question of 'continued sequestration' can be raised. It must also be emphasized that the NSC bought said property not from the sequestrator, but from a mortgagee, DBP, which had foreclosed the mortgage from the said assets.

With reference to the four so-called issuances it suffices here to note that the DBP, through its Chairman's letter dated February 8, 1988, has clarified that the Nograles opinion contained in this memorandum of December 5, 1986 merely represent his own personal opinion, that it 'does not represent DBP's position with respect to the Jacinto family's claim regarding the plant and assets of . . . IISMI' and that, contrary to the conclusion of Atty. Nograles –

'1. DBP effected the foreclosure of the IISMI plant and assets in good faith and after obtaining judicial clearance. The foreclosure was, and remains, valid, legal, binding and final.

2. The foreclosure was a necessary, last resort measure which DBP had to take in order to protect the Government's interests and huge exposure in IISMI after IISMI continued unabatedly to default on its obligations to DBP despite numerous extensions and other relief measures granted by DBP.'

The same observation can be made with respect to the letter dated February 13, 1987 of Undersecretary of Justice Silvestre H. Bello III, confirming the Nograles opinion. It is clear that the facts or circumstances surrounding the former IISMI assets have not been fully disclosed to the latter by Atty. Nograles. In fact, the aforementioned DBP Counsel secured the said letter after then Minister of Justice Neptali A. Gonzales has sent him a letter dated January 27, 1987 which declined his request for an approval of his Memorandum.

The lack of full disclosure of the facts and circumstances referred to above is also evident in the case of Opinion No. 003 dated January 14, 1987 of the Deputy Government Corporate Counsel, the pertinent portion of which reads:

'Considering that we have no access to the pertinent documents relative to the transactions of proceedings affecting the IISMI and you did not also furnish us copies thereof and considering further the urgency of your request for our comments, we will endeavor to delve into the issues in the light of your factual account contained in your memorandum to the Chairman and Vice-Chairman of the DBP's Board of Governors and which was the basis of the opinion you articulated therein.'

Aside from the fact that the opinion of the OGCC is merely persuasive and has no binding force, the admitted absence of a full consideration of the pertinent facts involved, and the fact that the opinion (OGCC's) was prematurely rendered and based on a personal opinion (Atty. Nograles') give us cogent reasons to conclude that the aforesaid opinion of the OGCC has no relevance or pertinency to your privatization plans for NSC.

Upon the other hand, the PCGG pronouncement that due process may not have been observed in the foreclosure by the DBP of the IISMI assets was embodied in the same issuance wherein the PCGG acknowledged that it had no jurisdiction to act on the matter and dismissing the Jacinto's claim for lack of jurisdiction, as it raised judicial questions which must be addressed to the regular courts of justice. Given the absence of jurisdiction, the PCGG's opinions about due process are of the same character as an obiter dictum or a dictum not necessarily involved in the case or which was made without full consideration of the point or which a tribunal is not required to decide and therefore, lacks the force of an adjudication (*Morales vs. Paredes*, 55 Phil. 565, 567 [1931]; *People vs. Macadaeg, et al.*, 91 Phil. 410, 413 [1952]). Worse, since PCGG ruled itself without jurisdiction over the questions raised, it follows that it had no jurisdiction to render an obiter dictum. Accordingly, the above-mentioned pronouncement of the PCGG also served no useful purpose or was a surplusage, since it would not bind the parties to the case nor any court, which the PCGG conceded as the sole authority to pass upon the questions raised in the Jacinto petition and to grant the relief therein prayed for. We took note, however, of the issue of prescription of any judicial action that the Jacintos may file, raised by the NSC Legal Counsel which is likewise an issue addressed to the court."^[67]

The foregoing opinion of his predecessor should have guided then Acting Secretary Silvestre H. Bello III. It should be noted that it was his First Indorsement which led to the issuance by the OSG lawyers concerned of the controversial Second Indorsement. While the same was not issued publicly as it was merely addressed to the Acting Secretary of the Department of Justice, the fact that it might be used, as in fact it was used, by private respondents in their pleading before this Court, should have cautioned the OSG to be more careful in dealing with matters which may have legal repercussions.

Government agencies, including government corporations, must look to the Solicitor General, in the first instance, to represent them in legal proceedings. However, in much the same way that the Solicitor General is not absolutely required to represent a government agency, neither is the latter absolutely compelled to avail of the Solicitor General's services. A justifiable departure from the general rule is when the agency has lost confidence in the Solicitor General, as demonstrated by its past actuations exemplified in the instant case where the DBP

would rather rely on its "in house" resources for legal services. In this case, therefore, we grant DBP's prayer to terminate the services of the OSG.

B. TEMPORARY RESTRAINING ORDER

In a Manifestation and Motion[68] dated April 29, 1992, private respondents prayed that an order be issued commanding the petitioners NDC and NSC to cease and desist from conducting the privatization and sale of NSC during the pendency of the action. They explained that "the claims of IISMI and JACINTO on the assets held by NSC and the privatization of NSC through the sale of 51% of its shares, are so inextricably intertwined," so that a decision in their favor "will greatly prejudice the buyers of these shares." They added that the sale "will further complicate the already complex issues" and might render the implementation or execution of a favorable decision "extremely difficult, if not impossible."

On May 19, 1992, we resolved to issue a Temporary Restraining Order (TRO) enjoining the petitioners National Development Corporation (NDC) and National Steel Corporation (NSC), "to CEASE and DESIST from conducting the privatization and sale of National Steel Corporation (NSC) during the pendency of this action." [69]

Petitioners filed an Urgent Motion to Lift TRO[70] explaining that any sale of the 51% shares does not in any way threaten the private respondents' claim over the IISMI assets which constitute only "1.1% of the total financial asset base of NSC of P24.8 billion."

In the Resolution of May 28, 1992,[71] we granted petitioners' urgent motion to set the case for Oral Argument. At the hearing on June 4, 1992, the counsel for private respondents admitted that they had actually no facts to support their assertion of ownership over the 51% shares of NSC but were merely proceeding from inference.[72]

After the hearing, the Court resolved to deny the petitioners' motion to lift the temporary restraining order and to require private respondents to post a cash or surety bond in the amount of P1.5 million.[73]

WHEREFORE, there being grave abuse of discretion on the part of the court a quo in denying petitioners' motion to dismiss and motion for reconsideration, the instant petition is hereby GRANTED. The Temporary Restraining Order issued on February 7, 1991 is made PERMANENT and respondent Judge Amir Pundogar is hereby ordered to DISMISS Civil Case No. 111-1549. The Temporary Restraining Order issued on May 9, 1992 is hereby DISSOLVED.

SO ORDERED.

Bidin, Griño-Aquino, Regalado, Davide, Jr., Nocon, Bellosillo, and Melo, JJ., concur.

Gutierrez, Jr., and Cruz, JJ., see dissenting opinion.

Campos, Jr., J., see concurring opinion.

Narvasa, C.J., Feliciano, and Padilla, JJ., no part.

[1] Petitioner DBP states that the Government has a total equity contribution of P30 million while the Jacintos made an initial investment of only P6 million and, eventually, a supposed total investment of P24 million. (Rollo, pp. 928-929). However, private respondents maintain that they have P36,336,800 worth of shares. (Rollo, p. 482).

[2] Annex "V" of Petition; Rollo, pp. 285-326.

[3] By Judge Teodulo Tandayag.

[4] Republic v. CFI of Lanao del Norte, Branch II, October 23, 1973, 53 SCRA 319-320.

- [5] LOI No. 27, October 14, 1972; LOI 35, October 28, 1972, LOI 39, November 9, 1972 and LOI 49, January 5, 1973.
- [6] Note 4 at p. 351.
- [7] By Judge Eduardo Tutaan who succeeded Judge Teodulo Tandayag.
- [8] Annex "W" of Petition; Rollo, pp. 327-349.
- [9] Ibid, at p. 349.
- [10] Annex "AA" of Petition; Rollo, pp. 424-427.
- [11] Rollo, p. 955.
- [12] Annex "C" of Petition; Rollo, pp. 44-70.
- [13] Ibid, pp. 69-70.
- [14] Annexes "D", "E", and "F" of Petition; Rollo, pp. 104-108; 109-122 and 123-124.
- [15] Annex "H" of Petition; Rollo, pp. 143-167.
- [16] Annexes "I", "K", and "L" of Petition; Rollo, pp. 168-171, 179-180 and 181-184.
- [17] Through Judge Amir Pundogar.
- [18] Annex "A" of Petition; Rollo, pp. 38-42.
- [19] Annex "B" of Petition; Rollo, p. 43.
- [20] *National Power Corporation v. Court of Appeals*, G.R. No. 84695, May 8, 1990, 185 SCRA 169 citing *Newsweek, Inc. v. Intermediate Appellate Court*, G.R. No. 63559, May 30, 1986, 142 SCRA 171.
- [21] *Berberabe v. Nicolas*, L-38843, August 26, 1977, 78 SCRA 341 citing *Manila Electric Co. v. Enriquez*, 110 Phil. 499 (1960), *Savory Luncheonette v. Lakas Ng Mangagawang Filipino*, No. L-38964, January 31, 1975, 62 SCRA 258 and *De Midgely v. Fernando*, No. L-34314, May 13, 1975, 71 O.G. No. 41, p. 6830, 64 SCRA 23.
- [22] *People v. Cuaresma*, G.R. No. 67787, April 18, 1989, 172 SCRA 415.
- [23] Petition, p. 29; Rollo, p. 34.
- [24] *Mendoza v. Court of Appeals*, G.R. No. 81909, September 5, 1991, 201 SCRA 343; *Gutierrez v. Court of Appeals*, G.R. No. 82475, January 28, 1991, 193 SCRA 437; *Stasa, Inc. v. Court of Appeals*, G.R. No. 79385, February 28, 1990, 182 SCRA 879; *Filipinas Investment and Finance Corp. v. IAC*, G.R. Nos. 66059-60, December 4, 1989, 179 SCRA 728; *Wolverine Worldwide, Inc. v. Court of Appeals*, G.R. No. 78298, January 30, 1989, 169 SCRA 627.
- [25] *Wolverine Worldwide, Inc. v. Court of Appeals*, supra.
- [26] Section 3, Rule 17, Rules of Court; *Peninsula Construction, Inc. v. Eisma*, G.R. No. 84098, March 5, 1991, 194 SCRA 667 citing *Olivares v. Gonzales*, L-34500, March 18, 1988, 159 SCRA 33, *Vda. de Denoso v. Court of Appeals*, L-32141, July 29, 1988, 163 SCRA 683, and *Vallangca v. Court of Appeals*, G.R. No. 55336, May 4, 1989, 173 SCRA 42; *Vda. de Cruz v. Carriaga, Jr.*, G.R. Nos. 75109-10, June 28, 1989, 174 SCRA 330; *Geralde v. Sabido*, L-35440, August 19, 1982, 115 SCRA 839; *Garcia v. Court of Appeals*, L-19783, July 30, 1965, 14 SCRA 721; *Canite v. Madrigal & Company, Inc.*, L-17836, August 30, 1962, 5 SCRA 943.

[27] *Geralde v. Sabido*, supra; *Anticamara v. Ong*, L-29689, April 14, 1978, 82 SCRA 337.

[28] *Gutierrez v. Court of Appeals*, supra; *Salamanca v. Ramos*, L-30360, February 26, 1988, 158 SCRA 152; and *Zansibarian Residents Asso. v. Municipality of Makati*, G.R. No. 62136, February 28, 1985, 135 SCRA 235.

[29] *Mendoza v. Court of Appeals*, supra; *Nabus v. Court of Appeals*, G.R. No. 91670, February 7, 1991; *Vda. de Vocal v. Vda. de Suria*, L-26281, May 31, 1979, 90 SCRA 336; *Garcia v. CA*, supra; and *Vda. de Cruz v. Carriaga*, supra.

[30] Amended Complaint paragraph 23.

[31] *Ibid*, par. 24.

[32] *Ibid*, par. 24.2.

[33] *Ibid*, par. 25.

[34] *Ibid*, par. 30.3.

[35] *Republic v. CFI of Lanao del Norte, Branch 11*, supra, at p. 346.

[36] Amended Complaint, par. 33.

[37] *Ibid*, par. 36.

[38] Assertions with respect to the obligation of DBP to render an accounting of the rentals received from NSC as well as the foreclosure being conducted without notice are not raised as allegations in the complaint but belatedly discussed in the pleadings filed before us. The issue here being limited to whether or not grave abuse of discretion was committed in denying the Motion to Dismiss and the Motion for Reconsideration, the same cannot therefore, be properly appreciated.

[39] Amended Complaint, pars. 45-46.

[40] *Ibid.*, par. 40.

[41] Section 9(2), BP 129.

[42] Section 19(2), BP 129.

[43] *Rollo*, p. 42.

[44] Art. 1146, New Civil Code.

[45] *Alcoz v. Intermediate Appellate Court*, G.R. No. 79317, June 28, 1988, 162 SCRA 823.

[46] Art. 1154, New Civil Code.

[47] Art. 1141, New Civil Code.

[48] The action or defense for the declaration of the inexistence of a contract does not prescribe.

[49] G.R. No. 90365, March 18, 1991, 195 SCRA 355.

[50] G.R. No. 98467, July 10, 1992.

[51] Note 49, at pp. 367-368.

[52] Pp. 347-350.

- [53] Mathay v. Consolidated Bank and Trust Company, L-23136, August 26, 1974, 58 SCRA 559.
- [54] Jose C. Campos, Jr. and Maria Clara Lopez-Campos, *The Corporation Code; Comments, Notes and Selected Cases*, Vol. I, 1990 Ed., p. 820.
- [55] Rollo, p. 144.
- [56] Sunbeam Convenience Foods, Inc. v. Court of Appeals, G.R. No. 50464, January 29, 1990, 181 SCRA 443.
- [57] Calalang v. IAC, G.R. No. 74613, February 27, 1991, 194 SCRA 514, 521.
- [58] Rollo, pp. 920-921.
- [59] *Ibid*, p. 922.
- [60] *Ibid*, p. 1017.
- [61] *Ibid*, p. 1018.
- [62] *Ibid*, p. 918.
- [63] *Ibid*.
- [64] Rollo, pp. 1006-1015.
- [65] Citing Art. 2029, New Civil Code and Sec. 1, Rule 20, Rules of Court.
- [66] "Section 12. Legal Matters and Cases. - The Bank shall have its own Legal Department, the head of which shall be appointed by the Board of Directors of the Bank upon recommendation of the Chairman."
- [67] Rollo, pp. 1256-1259.
- [68] Rollo, pp. 1044-1064.
- [69] *Ibid*, pp. 1128-1130.
- [70] *Ibid*, pp. 1175-1181.
- [71] *Ibid*, pp. 1211-1212.
- [72] Hearing of June 4, 1992, TSN, pp. 104-108.
- [73] Rollo, pp. 1266-1267.

CAMPOS, JR., J.:Concurring Opinion

I agree with the majority decision that the petitioner's claim to recover the IISMI be denied. I wish to add a short remark on the issue of due process as invoked by my dissenting colleagues.

Nowhere has the oft-repeated remark that the Due Process Clause has been utilized and exploited as a haven of refuge by the shrewd and cunning been more vividly demonstrated in all its subtle and manipulative forms as in this case. In a nutshell, we have in this case a reputedly wealthy family utilizing the corporate form of business organization to borrow hundreds of millions of pesos from a government bank and from foreign banks under guaranty of the Philippine government, for the ostensibly worthwhile project of establishing a national steel plant for our country, but who funneled the borrowed money to some other purpose than to develop the steel industry. Instead, the family, long before martial law was declared, ran away with the funds to a foreign country, defaulted in paying their loans and when sued by the banking institution, escaped to America and Europe. Returning to the

Philippines after more than ten years of self-imposed exile, they are now claiming back their foreclosed properties on the lame excuse that, as political refugees, they were persecuted and were denied due process of law. How much fraud and misrepresentation can be perpetrated under the mantle of due process?

The majority decision is not in defense of the martial law regime nor an attempt to justify the events which took place during such period. It is a conclusive denial of the right of the petitioners to recover, and I find the conclusion to be just and equitable in the light of the applicable law on the matter, and a different judgment would tend to unsettle long standing rules and principles governing similar situations.

CRUZ, J.:Dissenting Opinion

I join Mr. Justice Hugo E. Gutierrez, Jr. in his excellent dissent.

What bothers me most about this case is the obvious denial of due process from the Jacintos that the ponencia resolutely refuses to acknowledge. In blandly pronouncing the observance of this guaranty, the majority have closed their eyes to the realities of the deposed dictatorship and the absoluteness of Marcos's power then.

We reject history in arbitrarily assuming that the people were free during that era and that the judiciary was independent and fearless. We know it was not; even the Supreme Court at that time was not free. This is an undeniable fact that we cannot just blink away. Insisting on the contrary would only make our sincerity suspect and even provoke scorn for what can only be described as our incredible credulity.

In *National Development Company and New Agrix, Inc. v. Philippine Veterans Bank*, 192 SCRA 257, this Court en banc declared:

It is not denied that the private respondent did file a claim with the AGRIX Claims Committee pursuant to this decree. It must be noted, however, that this was done in 1980, when President Marcos was the absolute ruler of this country and his decrees were the absolute law. Any judicial challenge to them would have been futile, not to say foolhardy. The private respondent, no less than the rest of the nation, was aware of that reality and knew it had no choice under the circumstances but to conform.

It is true that there were a few venturesome souls who dared to question the dictator's decisions before the courts of justice then. The record will show, however, that not a single act or issuance of President Marcos was ever declared unconstitutional, not even by the highest court, as long as he was in power. To rule now that the private respondent is estopped for having abided with the decree instead of boldly assailing it is to close our eyes to a cynical fact of life during that repressive time.

It is not enough to say that the Jacintos were represented by counsel, for the real question is whether their attorneys had adequate opportunity to defend them, including access to evidence secreted in unclassified government files. That these prestigious lawyers eventually withdrew one by one suggests only too clearly their frustration at the hands of an administration bent on enforcing the despot's will at all cost.

On the Jacinto's failure to return to the country and prosecute their case, I need only to restate my dissent in *Marcos v. Garchitorena*, G.R. Nos. 90110-13, February 22, 1990, thus:

There is something unfair in preventing a person from appearing in court to defend himself and then declaring him in default for his inability to do so. This much should be obvious even to the layman; to lawyers, it is an outrage crying for justice.

Although they may have forfeited the respect of most of their countrymen, the petitioners have not lost the right to due process as guaranteed in every free society.

I respectfully submit that we should not make any prejudgment on the merits of the Jacinto claim as long as we have heard only the side of the petitioners as endorsed in the majority opinion. That is only one-half of the picture. Fair play requires that we also hear the other side before making an impartial judgment based on the evidence and arguments of both parties.

It is truly mystifying that we should seem so eager now to defend the martial law regime when we were so opposed to it before, although some were more vocal than others. I am baffled that when what we should do is condemn and correct its misdeeds, we would instead retroactively validate them.

Finally, let me say that I am not moved by the hysterical alarms of the petitioners that the government is losing hundreds of millions of pesos every day that we maintain the temporary restraining order. Is money the principal consideration in this case? I have always believed that due process is not a negotiable commodity that can be traded in the market for thirty pieces of silver.

GUTIERREZ, JR., J.:Dissenting Opinion

The issue in this petition is whether or not in the name of economic development, the Government can act in a manner basically unfair and arbitrary and deny to a party with a legitimate grievance, a remedy in law.

With all due respect to the majority of the Court, I find its recitation of the alleged facts unfair. The absorbing litany of mismanagement, diversion of profits, fixing of financial statements, and other horrifying corporate malpractices arose from a court trial where only one party could present its side. The owners were stripped through military action of all their properties. They could not come home as they would have been immediately arrested and tried before a military tribunal. The respondents were abandoned by their lawyers who refused to appear in a delusive trial where their clients could not take part in their own defense.

The very conclusion which the majority opinion sustains is quite revealing.

The trial court concluded “that an applicant for writ of preliminary injunction should be able to establish a clear case free from doubt and dispute.” How could the applicant in forced exile several thousand kilometers away establish any case at all?

The Government had brilliant lawyers appearing in the case; the key witnesses had every opportunity to memorize the facts they wanted to perpetuate in the records, quote their own prepared notes freely, and say anything favorable to their case with absolutely no fear of cross-examination, rebuttal, or contradiction.

The trial court stated that “since injunction is an equitable remedy, an applicant must come to court with clean hands.” Whether the applicant had clean hands or dirty hands was beyond ascertainment as he could not enter the country, much less appear in court. That is precisely what this dissent maintains -- the respondents should be allowed to show their hands in court and to prove that those hands are not dirty.

We are setting a bad precedent if we validate a strong arm government’s stripping away a person’s liberty and property on a feigned semblance of due process.

The complaint in this case, docketed as Civil Case No. 111-1549, prays among other things that the extrajudicial foreclosure conducted by the provincial sheriff of Iligan City on February 26, 1974 of the mortgaged properties of Iligan Integrated Steel Mills, Inc. (IISMI) be set aside as null and void and for said properties to be returned to IISMI.

The petitioners asked for the summary dismissal of the complaint on the grounds of ?

(1) Failure to state a cause of action and lack of capacity to sue;

- (2) Prescription of the cause of action and its being barred by laches;
- (3) Existence of a prior judgment on the same subject matter and issues between the same parties barring the refiling of the respondent's case; and
- (4) Lack of jurisdiction of the trial court over the case.

The respondent court denied both the motion to dismiss and a motion for reconsideration of the order to dismiss.

Hence, this petition.

As earlier stated, the basis for this dissent is simple - the private respondents must be given their day in court. Valuable properties whose initial values have now multiplied several times through the passage of the years should not have been arbitrarily seized and the seizure validated through a default judgment even as the original owners were denied the opportunity to defend themselves. We do not assert that the Jacinto family is correct on the merits and that the foreclosed properties should be returned to them. The rules of orderly justice mandate that an opportunity should be given the respondents to prove their allegations. We should not accept as facts a one-sided presentation made at a time when the forces of Government were marshalled against people who refused to cooperate in the stripping away of their properties.

The historical antecedents of the case go back to 1955 when Republic Act No. 1396 authorized the National Shipyards and Steel Corporation (NASSCO) to establish a pig-iron smelting plant. The law prohibited the establishment of similar plants until NASSCO could make the venture operational. P50,000,000.00 was appropriated for the project. NASSCO committed itself to provide P36,000,000.00 worth of foreign supply contracts for machinery. It was later authorized to borrow \$62,300,000.00 from the Export-Import Bank (EXIMBANK) in the United States.

Upon the urgings of EXIMBANK, a 51% - 49% joint venture was set-up, with the government controlling the ownership but the private group exercising management. After the public bidding and pre-incorporation agreement in favor of Jacinto Steel, Inc., the Philippine Steel Corporation (PHISCOR) was set up. Various incentives were given to the new corporation. In 1962, however, the Government decided that instead of the joint venture, the steel project should be a wholly private venture but with full government support. Thus, in 1963, IISMI was incorporated.

In order to forestall a threatened foreclosure due to defaults in loan payments, IISMI filed an injunction suit on June 1, 1971 against the Republic of the Philippines, Development Bank of the Philippines (DBP), Central Bank of the Philippines (CB), Board of Investments (BOI) and the Sheriff of Lanao del Norte and Iligan City. The complaint which was docketed as Civil Case No. 1701 alleged that the inability of IISMI to meet its obligations was due to "(g)overnment violations of its commitments to the Integrated Steel Project" which "were all in pursuance of the concerted and single-minded plan of the defendants to foreclose the mortgaged properties of the plaintiff and/or take over the management and ownership of IISMI or its properties, plants, or mills."

The preliminary injunction issued by the court on August 11, 1971 was questioned by the DBP in G. R. No. L-34188 and the CB in G. R. No. L-33986. When the motion to dismiss filed by the Republic and the BOI on the grounds of improper venue and non-suability of the State was denied, the parties likewise questioned the denial order in G. R. No. L-33949. Subsequently, this Court ordered the consolidation of these petitions and set them all for a joint hearing.

While these cases were pending before the Court, then President Marcos issued Proclamation 1081 on September 21, 1972 declaring a state of martial law. He thereafter issued four Letters of Instructions directing the Secretary

of National Defense to take over and control the operation of IISMI and other Jacinto-held companies “for the duration of the present national emergency or until otherwise ordered” because the acts of management of IISMI “indicated that IISMI disposed of property by fraudulent means and that the funds or money earned was (sic) not properly accounted for, and neither were they applied for payment of obligations due the Government and the government-owned corporations.”

On October 23, 1973, the Court ordered the lower court “to resume proceedings in Civil Case No. 1701 by receiving further evidence which the parties may desire to present relative to all the issues they have so far raised and, thereafter, to resolve all the incidents related to the writ of preliminary injunction said court has issued and every other incident in the said case and/or render final judgment in the main case on the merits.”

On January 10, 1974, the trial court issued an order dissolving the writ of preliminary injunction. On February 25, 1974, the court deemed the pre-trial conference terminated and dismissed the complaint filed by IISMI with prejudice for its failure to appear during the pre-trial hearings despite due notice.

Extrajudicial foreclosure proceedings followed. One day after the complaint was finally dismissed, DBP acquired the IISMI plant and assets as the highest bidder at a public auction. On March 24, 1975, DBP consolidated ownership over the foreclosed properties.

It should be emphasized at this point that as early as October 23, 1973, this Court in *Republic v. Court of First Instance of Lanao del Norte* (53 SCRA 317 [1973]) saw the need to remand the case for further proceedings. However, in remanding the case, we wanted a full opportunity for all the evidence of both parties to be presented.

We stated:

““x x x the Court is of the considered opinion that all the matters here in dispute should be referred to the respondent court for further proceedings and appropriate resolution. Indeed, having in view the nature and volume of the evidence which the parties would have to present in connection with the factual issues raised by petitioners regarding what they claim to have discovered or unearthed after the Secretary of National Defense took over the ‘management, control and operation’ of IISMI, may be justly and comprehensively resolved only after such evidence have been received by the trial court, rather than this Court, since it has the ready adequate machinery for the purpose. And with such additional evidence, the trial court would naturally be in a better position than before to rule on the injunctions which have given rise to these proceedings.” (At p. 348, Underlining supplied)

The lower court, indeed, proceeded with the hearing of Civil Case No. 1701, issuing the January 10, 1974 and February 25, 1974 orders. However, IISMI had no opportunity to present evidence on its behalf at that time.

The basis of the January 10, 1974 order of the lower court dissolving the writ of preliminary injunction granted in favor of IISMI on August 11, 1971 was only the evidence presented by the DBP.

As earlier stated, the pre-trial order dated February 25, 1974, dismissed the complaint filed by IISMI with prejudice for its failure to appear during the pre-trial despite due notice.

The basic unfairness of our majority opinion lies in its unilaterally sustaining the executive determinations of former President Marcos embodied in his LOI No. 27 dated October 14, 1972 where he stated:

“6. That the acts of the Management of Iligan Integrated Steel Mills, Inc. even after the submission of the case between the Government and IISMI in the Supreme Court and the Courts of Justice indicated that IISMI disposed of property by fraudulent means, and that funds or money earned were not property accounted for, and neither were they applied for payment of obligations due the government and the government-owned corporations.”

and LOI No. 35 dated October 28, 1972 which stated:

“In order to protect the interests of the Government in the Iligan Integrated Steel Mills, Inc. and in furtherance of Letter of Instruction No. 27 dated October 14, 1972, you are hereby ordered to take over and control the assets of the following corporation x x x.”

inspite of the fact that cases on exactly those issues were pending in court at that time. We are also sustaining the ex-parte findings of the trial court - in absentia - upholding the allegations that the Jacintos are economic saboteurs and embezzlers who siphoned IISMI funds for the benefit of their other corporations, attempted to hide these malpractices through window dressing, and lied about the reasons for the losses and other things.

And yet, it is strange that in the 20 years which followed these executive and trial determinations, no charges - criminal or civil - were filed against the alleged saboteurs. On the contrary, the Government, through Secretary Juan Ponce Enrile, returned all Jacinto corporations to the Jacinto family in 1986. To this day, no one in Government has questioned the return, much less tried to annul the return of the corporations. Secretary Ponce Enrile also asked Secretary Jose Concepcion to return IISMI to the Jacintos without prejudice to accounting. On March 25, 1986, Secretary Concepcion sent a memorandum to Mr. Ponce Enrile refusing the return of IISMI as requested. One fact which a reopening of the case could possibly look into is the Jacinto allegation that Concepcion Industries, Inc. was one of the members of the consortium which was bidding for IISMI at that time.

There are allegations that the Jacintos were out of the country because they wanted to escape prosecution for their misdeeds in the management of IISMI. It is stated that they were not political refugees and could have returned to defend their side of the cases involving IISMI if they wanted to do so.

There is evidence to show, however, that the Jacintos were in the United States even before the proclamation of martial law. They also assert that they were given the status of refugees by the United Nations.

There were various circumstances which made the Jacintos' return during martial law extremely imprudent and unwise. They claimed that President Marcos had been demanding a majority share in IISMI and that their spurning the demand, led to the confiscation of the corporation's assets. While no criminal or civil charges have been filed against the Jacintos to this date, they were among the most publicly denounced economic saboteurs under martial law. And certainly, the Government's seizure of IISMI at a time when cases were pending in court deserves a full and fair hearing under an atmosphere clear of coercion and undue influence. It may be emphasized that not only IISMI but all other Jacinto assets were also seized by the Government.

It is the height of naivette to say that the Jacintos could have returned at a time when all their top executives were arrested and detained although all were later released without any charges having been filed. It would have been foolhardy to return when Eugenio Lopez, Jr., Benigno Aquino, Jr., the Osmeñas, Jose Diokno, Francisco Rodrigo, to name only a few were being jailed and the properties of some of them were being seized.

The denial of a fair day in court is further heightened by the fact that all the lawyers who could have protected, even in a limited way, the Jacinto interests withdrew their appearances. Among them were Dominador Aytona, Manuel O. Chan, Jose P. Santillan, Norberto J. Quisumbing, Manuel V. San Jose, and Roberto V. San Jose. All records and documents essential to their case had been seized and were not available to the lawyers. There was no free communication with clients. The Philippine consul in the United States refused to authenticate certain documents which an American lawyer tried to send to the Philippines.

I respectfully dispute the conclusion that the Jacintos, clients of the withdrawing counsel, had it in their power to remedy the situation.

Regarding the credibility of the ex-parte findings of the trial court, we note that these findings are based on a

report by an independent group of professors of the University of the Philippines that mismanagement and anomalies were hallmarks of the Jacinto control over IISMI.

On the other hand, there exists an equally persuasive study by a group from the Asian Institute of Management which postulates the contrary - that losses ballooned after the Government takeover, all income was derived from the machinery, equipment, and programs installed by the Jacintos, that the properties were leased to NDC but the rentals were not applied to IISMI obligations, etc.

Who is to be believed? In the interest of basic fairness, the trial court should be allowed to receive the other side of the picture.

The issues based on prescription and prior judgment deserve a long second look and not a hasty prejudgment based on assumed or one-side facts.

I will not go into the detailed and technical arguments of the respondents on why *res judicata* should not apply although these also deserve a hearing before the trial court. I will only stress that there can be no valid prior judgment impervious to subsequent challenges where that judgment was not rendered after strict adherence to the principles of fairness and due process.

The due process considerations are, moreover, highlighted by the fact that the January 10, 1974 order should not be considered a judgment on the merits as it was a judgment for the provisional remedy of preliminary injunction. The finding made by the trial court is yet to be examined more fully when the principal action is set for trial on the merits and the parties complete their evidence in support of their respective positions. (See *Olalia v. Hizon*, 196 SCRA 665 [1991]; *Manila Banking Corporation v. Court of Appeals*, 187 SCRA 138 [1990])

It is argued that the February 25, 1974 order had the effect of an adjudication upon the merits. That is the general rule. However, this rule is not ironclad. In the light of the extraordinary circumstances alleged in the case at bar, it would be more in keeping with substantial justice if the controversy between the parties is to be resolved on the merits rather than on a procedural technicality in the light of the express mandate of the Rules that they be “liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding.” (*Olivares v. Gonzales*, 159 SCRA 33, 36 [1988])

On the issue of prescription, will justice not be served if the respondents are given due process and the parties are allowed to introduce their respective evidences and a decision on the merits is rendered?

The respondents allege that prescription should not lie against them as they could not have brought an action prior to the EDSA upheaval. They state:

x x x x x x x x

“The passports of Fernando Jacinto and his children were cancelled. Their lawyers were constrained to withdraw their appearances on the IISMI cases because of the change in the membership of the Board of Directors of IISMI and the incarceration of the executives of IISMI who would have been witnesses in the case. JSI itself was sequestered. The replacement directors, who were all government appointed, could not be expected to protect the Jacinto properties in preference over the interests of government. The courts while remaining open were cowed into submission by the dictatorial regime. Fernando Jacinto could not have come back even if his passport was not cancelled because he would have been arrested and kept in prison indefinitely. JACINTO and his family were even accorded ‘refugee status’ by the international community in recognition of their persecution by the Marcos regime. All Jacinto resources were taken over by the Government. Any action attempted from the time of sequestration of the IISMI and other Jacinto interests would have been futile, if not suicidal.

Indeed, IISMI, JACINTO and JSI were virtually paralyzed from commencing this suit for as long as Pres. Marcos was in power.” (Comment, pp. 18-19)

The majority states that we can not take judicial notice of these alleged facts. In that case, the private respondents, then, should be allowed to prove their allegations. And to do so requires a presentation of evidence in a full-blown hearing.

The trial court may examine if the doctrine of constructive or implied trust should be applied under the circumstances of this case. Certainly, DBP, NDC, and NSC had full and complete knowledge of the dispossession of valuable properties which they eventually acquired. The government’s own one-sided evidence establishes the military take over, the arbitrary sequestration of all properties, the jailing of key executives, and the absence of due process in the subsequent court case. The petitioners are constructive trustees to whom the ordinary defenses of prescription are not available. At the very least, the parties to whom the dispossession turned over the properties should justify in court their alleged valid ownership of the disputed properties.

We cannot arbitrarily assume prescription to the prejudice of an owner forcibly dispossessed of his properties and unable to fight his case in court because of circumstances he cannot oppose or control.

Prescription is not limited to pure and abstract mathematical computations of a finite period of time. Under the circumstances of this case, it is the presentation of evidence and not the automatic counting of days, months, and years which is necessary.

One other factor which weighs heavily in favor of sustaining the respondent Judge is the change of heart of the Office of the Solicitor-General.

The Solicitor-General has the complete records of this case, including matters not divulged to the trial court during martial law. It is his duty to defend Government actions but not when those actions are arbitrary or contrary to law. If he is attacked by qualms of conscience and formally reveals “that the foreclosure proceedings on IISMI were legally flawed x x x” this Court should take heed and see to it that proceedings without any blot or blemish are conducted. The dictates of due process require nothing less.

IN VIEW OF THE FOREGOING, I respectfully DISSENT and vote to DISMISS the present petition.

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