

AURELIO K. LITONJUA, JR., PETITIONER, VS. EDUARDO K. LITONJUA, SR., ROBERT T. YANG, ANGLO PHILS. MARITIME, INC., CINEPLEX, INC., DDM GARMENTS, INC., EDDIE K. LITONJUA SHIPPING A...

G.R. NOS. 166299-300. December 13, 2005

Ponente: GARCIA, J.

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GARCIA, J.:

In this petition for review under Rule 45 of the Rules of Court, petitioner Aurelio K. Litonjua, Jr. seeks to nullify and set aside the Decision of the Court of Appeals (CA) dated March 31, 2004[1] in consolidated cases C.A. G.R. Sp. No. 76987 and C.A. G.R. SP. No 78774 and its Resolution dated December 07, 2004,[2] denying petitioner's motion for reconsideration.

The recourse is cast against the following factual backdrop:

Petitioner Aurelio K. Litonjua, Jr. (Aurelio) and herein respondent Eduardo K. Litonjua, Sr. (Eduardo) are brothers. The legal dispute between them started when, on December 4, 2002, in the Regional Trial Court (RTC) at Pasig City, Aurelio filed a suit against his brother Eduardo and herein respondent Robert T. Yang (Yang) and several corporations for specific performance and accounting. In his complaint,[3] docketed as Civil Case No. 69235 and eventually raffled to Branch 68 of the court,[4] Aurelio alleged that, since June 1973, he and Eduardo are into a joint venture/partnership arrangement in the Odeon Theater business which had expanded thru investment in Cineplex, Inc., LCM Theatrical Enterprises, Odeon Realty Corporation (operator of Odeon I and II theatres), Avenue Realty, Inc., owner of lands and buildings, among other corporations. Yang is described in the complaint as petitioner's and Eduardo's partner in their Odeon Theater investment.[5] The same complaint also contained the following material averments:

3.01 On or about 22 June 1973, [Aurelio] and Eduardo entered into a joint venture/partnership for the continuation of their family business and common family funds

3.01.1 This joint venture/[partnership] agreement was contained in a memorandum addressed by Eduardo to his siblings, parents and other relatives. Copy of this memorandum is attached hereto and made an integral part as Annex "A" and the portion referring to [Aurelio] submarked as Annex "A-1".

3.02 It was then agreed upon between [Aurelio] and Eduardo that in consideration of [Aurelio's] retaining his share in the remaining family businesses (mostly, movie theaters, shipping and land development) and contributing his industry to the continued operation of these businesses, [Aurelio] will be given P1 Million or 10% equity in all these businesses and those to be subsequently acquired by them whichever is greater. . . .

4.01 ... from 22 June 1973 to about August 2001, or [in] a span of 28 years, [Aurelio] and Eduardo had accumulated in their joint venture/partnership various assets including but not limited to the corporate defendants and [their] respective assets.

4.02 In addition . . . the joint venture/partnership ... had also acquired [various other assets], but Eduardo caused to be registered in the names of other parties....

xxx xxx xxx

4.04 The substantial assets of most of the corporate defendants consist of real properties A list of some of these real properties is attached hereto and made an integral part as Annex "B".

xxx xxx xxx

5.02 Sometime in 1992, the relations between [Aurelio] and Eduardo became sour so that [Aurelio] requested for an accounting and liquidation of his share in the joint venture/partnership [but these demands for complete accounting and liquidation were not heeded].

xxx xxx xxx

5.05 What is worse, [Aurelio] has reasonable cause to believe that Eduardo and/or the corporate defendants as well as Bobby [Yang], are transferring . . . various real properties of the corporations belonging to the joint venture/partnership to other parties in fraud of [Aurelio]. In consequence, [Aurelio] is therefore causing at this time the annotation on the titles of these real properties' a notice of lis pendens (Emphasis in the original; underscoring and words in bracket added.)

For ease of reference, Annex "A-1" of the complaint, which petitioner asserts to have been meant for him by his brother Eduardo, pertinently reads:

10) JR. (AKL) [Referring to petitioner Aurelio K. Litonjua]:

You have now your own life to live after having been married.

I am trying my best to mold you the way I work so you can follow the pattern You will be the only one left with the company, among us brothers and I will ask you to stay as I want you to run this office every time I am away. I want you to run it the way I am trying to run it because I will be all alone and I will depend entirely to you (sic). My sons will not be ready to help me yet until about maybe 15/20 years from now. Whatever is left in the corporation, I will make sure that you get ONE MILLION PESOS (P1,000,000.00) or ten percent (10%) equity, whichever is greater. We two will gamble the whole thing of what I have and what you are entitled to. It will be you and me alone on this. If ever I pass away, I want you to take care of all of this. You keep my share for my two sons are ready take over but give them the chance to run the company which I have built.

xxx xxx xxx

Because you will need a place to stay, I will arrange to give you first ONE HUNDRED THOUSANDS PESOS: (P100, 000.00) in cash or asset, like Lt. Artiaga so you can live better there. The rest I will give you in form of stocks which you can keep. This stock I assure you is good and saleable. I will also gladly give you the share of Wack-Wack ...and Valley Golf ... because you have been good. The rest will be in stocks from all the corporations which I repeat, ten percent (10%) equity. [6]

On December 20, 2002, Eduardo and the corporate respondents, as defendants a quo, filed a joint ANSWER With Compulsory Counterclaim denying under oath the material allegations of the complaint, more particularly that portion thereof depicting petitioner and Eduardo as having entered into a contract of partnership. As affirmative defenses, Eduardo, et al., apart from raising a jurisdictional matter, alleged that the complaint states no cause of action, since no cause of action may be derived from the actionable document, i.e., Annex "A-1", being void under the terms of Article 1767 in relation to Article 1773 of the Civil Code, *infra*. It is further alleged that whatever undertaking Eduardo agreed to do, if any, under Annex "A-1", are unenforceable under the provisions of the Statute of Frauds.[7]

For his part, Yang - who was served with summons long after the other defendants submitted their answer – moved to dismiss on the ground, inter alia, that, as to him, petitioner has no cause of action and the complaint does not state any.[8] Petitioner opposed this motion to dismiss.

On January 10, 2003, Eduardo, et al., filed a Motion to Resolve Affirmative Defenses.[9] To this motion, petitioner interposed an Opposition with ex-Parte Motion to Set the Case for Pre-trial.[10]

Acting on the separate motions immediately adverted to above, the trial court, in an Omnibus Order dated March 5, 2003, denied the affirmative defenses and, except for Yang, set the case for pre-trial on April 10, 2003.[11]

In another Omnibus Order of April 2, 2003, the same court denied the motion of Eduardo, et al., for reconsideration[12] and Yang's motion to dismiss. The following then transpired insofar as Yang is concerned:

- On April 14, 2003, Yang filed his ANSWER, but expressly reserved the right to seek reconsideration of the April 2, 2003 Omnibus Order and to pursue his failed motion to dismiss[13] to its full resolution.
- On April 24, 2003, he moved for reconsideration of the Omnibus Order of April 2, 2003, but his motion was denied in an Order of July 4, 2003.[14]
- On August 26, 2003, Yang went to the Court of Appeals (CA) in a petition for certiorari under Rule 65 of the Rules of Court, docketed as CA-G.R. SP No. 78774,[15] to nullify the separate orders of the trial court, the first denying his motion to dismiss the basic complaint and, the second, denying his motion for reconsideration.

Earlier, Eduardo and the corporate defendants, on the contention that grave abuse of discretion and injudicious haste attended the issuance of the trial court's aforementioned Omnibus Orders dated March 5, and April 2, 2003, sought relief from the CA via similar recourse. Their petition for certiorari was docketed as CA G.R. SP No. 76987.

Per its resolution dated October 2, 2003,[16] the CA's 14th Division ordered the consolidation of CA G.R. SP No. 78774 with CA G.R. SP No. 76987.

Following the submission by the parties of their respective Memoranda of Authorities, the appellate court came out with the herein assailed Decision dated March 31, 2004, finding for Eduardo and Yang, as lead petitioners therein, disposing as follows:

WHEREFORE, judgment is hereby rendered granting the issuance of the writ of certiorari in these consolidated cases annulling, reversing and setting aside the assailed orders of the court a quo dated March 5, 2003, April 2, 2003 and July 4, 2003 and the complaint filed by private respondent [now petitioner Aurelio] against all the petitioners [now herein respondents Eduardo, et al.] with the court a quo is hereby dismissed.

SO ORDERED.[17] (Emphasis in the original; words in bracket added.)

Explaining its case disposition, the appellate court stated, inter alia, that the alleged partnership, as evidenced by the actionable documents, Annex "A" and "A-1" attached to the complaint, and upon which petitioner solely predicates his right/s allegedly violated by Eduardo, Yang and the corporate defendants a quo is "void or legally nonexistent".

In time, petitioner moved for reconsideration but his motion was denied by the CA in its equally assailed Resolution of December 7, 2004.[18] .

Hence, petitioner's present recourse, on the contention that the CA erred:

- When it ruled that there was no partnership created by the actionable document because this was not a public

instrument and immovable properties were contributed to the partnership.

- When it ruled that the actionable document did not create a demandable right in favor of petitioner.
- When it ruled that the complaint stated no cause of action against [respondent] Robert Yang; and
- When it ruled that petitioner has changed his theory on appeal when all that Petitioner had done was to support his pleaded cause of action by another legal perspective/argument.

The petition lacks merit.

Petitioner's demand, as defined in the petitory portion of his complaint in the trial court, is for delivery or payment to him, as Eduardo's and Yang's partner, of his partnership/joint venture share, after an accounting has been duly conducted of what he deems to be partnership/joint venture property.[19]

A partnership exists when two or more persons agree to place their money, effects, labor, and skill in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses between them.[20] A contract of partnership is defined by the Civil Code as one where two or more persons bound themselves to contribute money, property, or industry to a common fund with the intention of dividing the profits among themselves.[21] A joint venture, on the other hand, is hardly distinguishable from, and may be likened to, a partnership since their elements are similar, i.e., community of interests in the business and sharing of profits and losses. Being a form of partnership, a joint venture is generally governed by the law on partnership.[22]

The underlying issue that necessarily comes to mind in this proceedings is whether or not petitioner and respondent Eduardo are partners in the theatre, shipping and realty business, as one claims but which the other denies. And the issue bearing on the first assigned error relates to the question of what legal provision is applicable under the premises, petitioner seeking, as it were, to enforce the actionable document - Annex "A-1" - which he depicts in his complaint to be the contract of partnership/joint venture between himself and Eduardo. Clearly, then, a look at the legal provisions determinative of the existence, or defining the formal requisites, of a partnership is indicated. Foremost of these are the following provisions of the Civil Code:

Art. 1771. A partnership may be constituted in any form, except where immovable property or real rights are contributed thereto, in which case a public instrument shall be necessary.

Art. 1772. Every contract of partnership having a capital of three thousand pesos or more, in money or property, shall appear in a public instrument, which must be recorded in the Office of the Securities and Exchange Commission.

Failure to comply with the requirement of the preceding paragraph shall not affect the liability of the partnership and the members thereof to third persons.

Art. 1773. A contract of partnership is void, whenever immovable property is contributed thereto, if an inventory of said property is not made, signed by the parties, and attached to the public instrument.

Annex "A-1", on its face, contains typewritten entries, personal in tone, but is unsigned and undated. As an unsigned document, there can be no quibbling that Annex "A-1" does not meet the public instrumentation requirements exacted under Article 1771 of the Civil Code. Moreover, being unsigned and doubtless referring to a partnership involving more than P3,000.00 in money or property, Annex "A-1" cannot be presented for notarization, let alone registered with the Securities and Exchange Commission (SEC), as called for under the Article 1772 of the Code. And inasmuch as the inventory requirement under the succeeding Article 1773 goes into the matter of validity when immovable property is contributed to the partnership, the next logical point of inquiry

turns on the nature of petitioner's contribution, if any, to the supposed partnership.

The CA, addressing the foregoing query, correctly stated that petitioner's contribution consisted of immovables and real rights. Wrote that court:

A further examination of the allegations in the complaint would show that [petitioner's] contribution to the so-called "partnership/joint venture" was his supposed share in the family business that is consisting of movie theaters, shipping and land development under paragraph 3.02 of the complaint. In other words, his contribution as a partner in the alleged partnership/joint venture consisted of immovable properties and real rights.[23]

Significantly enough, petitioner matter-of-factly concurred with the appellate court's observation that, prescinding from what he himself alleged in his basic complaint, his contribution to the partnership consisted of his share in the Litonjua family businesses which owned variable immovable properties. Petitioner's assertion in his motion for reconsideration[24] of the CA's decision, that "what was to be contributed to the business [of the partnership] was [petitioner's] industry and his share in the family [theatre and land development] business" leaves no room for speculation as to what petitioner contributed to the perceived partnership.

Lest it be overlooked, the contract-validating inventory requirement under Article 1773 of the Civil Code applies as long real property or real rights are initially brought into the partnership. In short, it is really of no moment which of the partners, or, in this case, who between petitioner and his brother Eduardo, contributed immovables. In context, the more important consideration is that real property was contributed, in which case an inventory of the contributed property duly signed by the parties should be attached to the public instrument, else there is legally no partnership to speak of.

Petitioner, in an obvious bid to evade the application of Article 1773, argues that the immovables in question were not contributed, but were acquired after the formation of the supposed partnership. Needless to stress, the Court cannot accord cogency to this specious argument. For, as earlier stated, petitioner himself admitted contributing his share in the supposed shipping, movie theatres and realty development family businesses which already owned immovables even before Annex "A-1" was allegedly executed.

Considering thus the value and nature of petitioner's alleged contribution to the purported partnership, the Court, even if so disposed, cannot plausibly extend Annex "A-1" the legal effects that petitioner so desires and pleads to be given. Annex "A-1", in fine, cannot support the existence of the partnership sued upon and sought to be enforced. The legal and factual milieu of the case calls for this disposition. A partnership may be constituted in any form, save when immovable property or real rights are contributed thereto or when the partnership has a capital of at least P3,000.00, in which case a public instrument shall be necessary.[25] And if only to stress what has repeatedly been articulated, an inventory to be signed by the parties and attached to the public instrument is also indispensable to the validity of the partnership whenever immovable property is contributed to it.

Given the foregoing perspective, what the appellate court wrote in its assailed Decision[26] about the probative value and legal effect of Annex "A-1" commends itself for concurrence:

Considering that the allegations in the complaint showed that [petitioner] contributed immovable properties to the alleged partnership, the "Memorandum" (Annex "A" of the complaint) which purports to establish the said "partnership/joint venture" is NOT a public instrument and there was NO inventory of the immovable property duly signed by the parties. As such, the said "Memorandum" ... is null and void for purposes of establishing the existence of a valid contract of partnership. Indeed, because of the failure to comply with the essential formalities of a valid contract, the purported "partnership/joint venture" is legally inexistent and it produces no effect whatsoever. Necessarily, a void or legally inexistent contract cannot be the source of any contractual or legal right. Accordingly, the allegations in the complaint, including the actionable document attached thereto,

clearly demonstrates that [petitioner] has NO valid contractual or legal right which could be violated by the [individual respondents] herein. As a consequence, [petitioner's] complaint does NOT state a valid cause of action because NOT all the essential elements of a cause of action are present. (Underscoring and words in bracket added.)

Likewise well-taken are the following complementary excerpts from the CA's equally assailed Resolution of December 7, 2004[27] denying petitioner's motion for reconsideration:

Further, We conclude that despite glaring defects in the allegations in the complaint as well as the actionable document attached thereto (Rollo, p. 191), the [trial] court did not appreciate and apply the legal provisions which were brought to its attention by herein [respondents] in the their pleadings. In our evaluation of [petitioner's] complaint, the latter alleged inter alia to have contributed immovable properties to the alleged partnership but the actionable document is not a public document and there was no inventory of immovable properties signed by the parties. Both the allegations in the complaint and the actionable documents considered, it is crystal clear that [petitioner] has no valid or legal right which could be violated by [respondents]. (Words in bracket added.)

Under the second assigned error, it is petitioner's posture that Annex "A-1", assuming its inefficacy or nullity as a partnership document, nevertheless created demandable rights in his favor. As petitioner succinctly puts it in this petition:

43. Contrariwise, this actionable document, especially its above-quoted provisions, established an actionable contract even though it may not be a partnership. This actionable contract is what is known as an innominate contract (Civil Code, Article 1307).

44. It may not be a contract of loan, or a mortgage or whatever, but surely the contract does create rights and obligations of the parties and which rights and obligations may be enforceable and demandable. Just because the relationship created by the agreement cannot be specifically labeled or pigeonholed into a category of nominate contract does not mean it is void or unenforceable.

Petitioner has thus thrust the notion of an innominate contract on this Court - and earlier on the CA after he experienced a reversal of fortune thereat - as an afterthought. The appellate court, however, cannot really be faulted for not yielding to petitioner's dubious stratagem of altering his theory of joint venture/partnership to an innominate contract. For, at bottom, the appellate court's certiorari jurisdiction was circumscribed by what was alleged to have been the order/s issued by the trial court in grave abuse of discretion. As respondent Yang pointedly observed,[28] since the parties' basic position had been well-defined, that of petitioner being that the actionable document established a partnership/joint venture, it is on those positions that the appellate court exercised its certiorari jurisdiction. Petitioner's act of changing his original theory is an impermissible practice and constitutes, as the CA aptly declared, an admission of the untenability of such theory in the first place.

[Petitioner] is now humming a different tune In a sudden twist of stance, he has now contended that the actionable instrument may be considered an innominate contract. xxx Verily, this now changes [petitioner's] theory of the case which is not only prohibited by the Rules but also is an implied admission that the very theory he himself ... has adopted, filed and prosecuted before the respondent court is erroneous.

Be that as it may We hold that this new theory contravenes [petitioner's] theory of the actionable document being a partnership document. If anything, it is so obvious we do have to test the sufficiency of the cause of action on the basis of partnership law xxx.[29] (Emphasis in the original; Words in bracket added).

But even assuming in gratia argumenti that Annex "A-1" partakes of a perfected innominate contract, petitioner's complaint would still be dismissible as against Eduardo and, more so, against Yang. It cannot be over-emphasized that petitioner points to Eduardo as the author of Annex "A-1". Withal, even on this consideration alone,

petitioner's claim against Yang is doomed from the very start.

As it were, the only portion of Annex "A-1" which could perhaps be remotely regarded as vesting petitioner with a right to demand from respondent Eduardo the observance of a determinate conduct, reads:

xxx You will be the only one left with the company, among us brothers and I will ask you to stay as I want you to run this office everytime I am away. I want you to run it the way I am trying to run it because I will be alone and I will depend entirely to you, My sons will not be ready to help me yet until about maybe 15/20 years from now. Whatever is left in the corporation, I will make sure that you get ONE MILLION PESOS (P1,000,000.00) or ten percent (10%) equity, whichever is greater. (Underscoring added)

It is at once apparent that what respondent Eduardo imposed upon himself under the above passage, if he indeed wrote Annex "A-1", is a promise which is not to be performed within one year from "contract" execution on June 22, 1973. Accordingly, the agreement embodied in Annex "A-1" is covered by the Statute of Frauds and ergo unenforceable for non-compliance therewith.[30] By force of the statute of frauds, an agreement that by its terms is not to be performed within a year from the making thereof shall be unenforceable by action, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party charged. Corollarily, no action can be proved unless the requirement exacted by the statute of frauds is complied with.[31]

Lest it be overlooked, petitioner is the intended beneficiary of the P1 Million or 10% equity of the family businesses supposedly promised by Eduardo to give in the near future. Any suggestion that the stated amount or the equity component of the promise was intended to go to a common fund would be to read something not written in Annex "A-1". Thus, even this angle alone argues against the very idea of a partnership, the creation of which requires two or more contracting minds mutually agreeing to contribute money, property or industry to a common fund with the intention of dividing the profits between or among themselves.[32]

In sum then, the Court rules, as did the CA, that petitioner's complaint for specific performance anchored on an actionable document of partnership which is legally inexistent or void or, at best, unenforceable does not state a cause of action as against respondent Eduardo and the corporate defendants. And if no of action can successfully be maintained against respondent Eduardo because no valid partnership existed between him and petitioner, the Court cannot see its way clear on how the same action could plausibly prosper against Yang. Surely, Yang could not have become a partner in, or could not have had any form of business relationship with, an inexistent partnership.

As may be noted, petitioner has not, in his complaint, provide the logical nexus that would tie Yang to him as his partner. In fact, attendant circumstances would indicate the contrary. Consider:

- Petitioner asserted in his complaint that his so-called joint venture/partnership with Eduardo was "for the continuation of their family business and common family funds which were theretofore being mainly managed by Eduardo." [33] But Yang denies kinship with the Litonjua family and petitioner has not disputed the disclaimer.
- In some detail, petitioner mentioned what he had contributed to the joint venture/partnership with Eduardo and what his share in the businesses will be. No allegation is made whatsoever about what Yang contributed, if any, let alone his proportional share in the profits. But such allegation cannot, however, be made because, as aptly observed by the CA, the actionable document did not contain such provision, let alone mention the name of Yang. How, indeed, could a person be considered a partner when the document purporting to establish the partnership contract did not even mention his name.
- Petitioner states in par. 2.01 of the complaint that "[he] and Eduardo are business partners in the [respondent] corporations," while "Bobby is his and Eduardo's partner in their Odeon Theater investment" (par. 2.03). This

means that the partnership between petitioner and Eduardo came first; Yang became their partner in their Odeon Theater investment thereafter. Several paragraphs later, however, petitioner would contradict himself by alleging that his "investment and that of Eduardo and Yang in the Odeon theater business has expanded through a reinvestment of profit income and direct investments in several corporation including but not limited to [six] corporate respondents" This simply means that the "Odeon Theatre business" came before the corporate respondents. Significantly enough, petitioner refers to the corporate respondents as "progeny" of the Odeon Theatre business.[34]

Needless to stress, petitioner has not sufficiently established in his complaint the legal vinculum whence he sourced his right to drag Yang into the fray. The Court of Appeals, in its assailed decision, captured and formulated the legal situation in the following wise:

[Respondent] Yang, ... is impleaded because, as alleged in the complaint, he is a "partner" of [Eduardo] and the [petitioner] in the Odeon Theater Investment which expanded through reinvestments of profits and direct investments in several corporations, thus:

xxx xxx xxx

Clearly, [petitioner's] claim against ... Yang arose from his alleged partnership with petitioner and the ...respondent. However, there was NO allegation in the complaint which directly alleged how the supposed contractual relation was created between [petitioner] and ...Yang. More importantly, however, the foregoing ruling of this Court that the purported partnership between [Eduardo] is void and legally inexistent directly affects said claim against ...Yang. Since [petitioner] is trying to establish his claim against ... Yang by linking him to the legally inexistent partnership . . . such attempt had become futile because there was NOTHING that would contractually connect [petitioner] and ... Yang. To establish a valid cause of action, the complaint should have a statement of fact upon which to connect [respondent] Yang to the alleged partnership between [petitioner] and respondent [Eduardo], including their alleged investment in the Odeon Theater. A statement of facts on those matters is pivotal to the complaint as they would constitute the ultimate facts necessary to establish the elements of a cause of action against ... Yang. [35]

Pressing its point, the CA later stated in its resolution denying petitioner's motion for reconsideration the following:

xxx Whatever the complaint calls it, it is the actionable document attached to the complaint that is controlling. Suffice it to state, We have not ignored the actionable document ... As a matter of fact, We emphasized in our decision ... that insofar as [Yang] is concerned, he is not even mentioned in the said actionable document. We are therefore puzzled how a person not mentioned in a document purporting to establish a partnership could be considered a partner.[36] (Words in bracket ours).

The last issue raised by petitioner, referring to whether or not he changed his theory of the case, as peremptorily determined by the CA, has been discussed at length earlier and need not detain us long. Suffice it to say that after the CA has ruled that the alleged partnership is inexistent, petitioner took a different tack. Thus, from a joint venture/partnership theory which he adopted and consistently pursued in his complaint, petitioner embraced the innominate contract theory. Illustrative of this shift is petitioner's statement in par. #8 of his motion for reconsideration of the CA's decision combined with what he said in par. # 43 of this petition, as follows:

8. Whether or not the actionable document creates a partnership, joint venture, or whatever, is a legal matter. What is determinative for purposes of sufficiency of the complainant's allegations, is whether the actionable document bears out an actionable contract ... be it a partnership, a joint venture or whatever or some innominate contract – It may be noted that one kind of innominate contract is what is known as *du ut facias* (I give that you may do).[37]

43. Contrariwise, this actionable document, especially its above-quoted provisions, established an actionable contract even though it may not be a partnership. This actionable contract is what is known as an innominate contract (Civil Code, Article 1307).[38]

Springing surprises on the opposing party is offensive to the sporting idea of fair play, justice and due process; hence, the proscription against a party shifting from one theory at the trial court to a new and different theory in the appellate court.[39] On the same rationale, an issue which was neither averred in the complaint cannot be raised for the first time on appeal.[40] It is not difficult, therefore, to agree with the CA when it made short shrift of petitioner's innominate contract theory on the basis of the foregoing basic reasons.

Petitioner's protestation that his act of introducing the concept of innominate contract was not a case of changing theories but of supporting his pleaded cause of action – that of the existence of a partnership - by another legal perspective/argument, strikes the Court as a strained attempt to rationalize an untenable position. Paragraph 12 of his motion for reconsideration of the CA's decision virtually relegates partnership as a fall-back theory. Two paragraphs later, in the same notion, petitioner faults the appellate court for reading, with myopic eyes, the actionable document solely as establishing a partnership/joint venture. Verily, the cited paragraphs are a study of a party hedging on whether or not to pursue the original cause of action or altogether abandoning the same, thus:

12. Incidentally, assuming that the actionable document created a partnership between [respondent] Eduardo, Sr. and [petitioner], no immovables were contributed to this partnership. xxx

14. All told, the Decision takes off from a false premise that the actionable document attached to the complaint does not establish a contractual relationship between [petitioner] and ... Eduardo, Sr. and Roberto T Yang simply because his document does not create a partnership or a joint venture. This is ... a myopic reading of the actionable document.

Per the Court's own count, petitioner used in his complaint the mixed words "joint venture/partnership" nineteen (19) times and the term "partner" four (4) times. He made reference to the "law of joint venture/partnership [being applicable] to the business relationship ... between [him], Eduardo and Bobby [Yang]" and to his "rights in all specific properties of their joint venture/partnership". Given this consideration, petitioner's right of action against respondents Eduardo and Yang doubtless pivots on the existence of the partnership between the three of them, as purportedly evidenced by the undated and unsigned Annex "A-1". A void Annex "A-1", as an actionable document of partnership, would strip petitioner of a cause of action under the premises. A complaint for delivery and accounting of partnership property based on such void or legally non-existent actionable document is dismissible for failure to state of action. So, in gist, said the Court of Appeals. The Court agrees.

WHEREFORE, the instant petition is DENIED and the impugned Decision and Resolution of the Court of Appeals AFFIRMED.

Cost against the petitioner.

SO ORDERED.

Panganiban, Sandoval-Gutierrez, Corona, and Carpio-Morales, JJ., concur.

[1] Penned by Associate Justice Bienvenido L. Reyes, concurred in by Associate Justices Conrado M. Vasquez, Jr. and Arsenio J. Magpale; Rollo, pp. 27 et seq.

[2] Rollo, pp. 58 et seq.

[3] Ibid, pp. 63 et seq.

[4] Presided by Hon. Santiago G. Estrella.

[5] Par. 2.03 of the Complaint.

[6] Rollo, p. 552.

[7] Id., pp. 70 et seq.

[8] Id., pp. 99 et seq.

[9] Id., pp.87 et seq.

[10] Id., pp. 93 et seq.

[11] Id., pp. 97-98.

[12] Id., pp. 135 et seq.

[13] See Note No. 8, supra.

[14] Rollo, p. 161.

[15] Ibid, pp. 206 et seq.

[16] Id., p. 253.

[17] As corrected per CA Resolution dated July 14, 2004 to conform to the actual dates of the assailed orders; Rollo, pp. 326 et seq. The correction consisted of changing the dates "March 5, 2002, April 2, 2002 and July 2, 2003" appearing in the original CA decision to "March 5, 2003, April 2, 2003 and July 4, 2003", respectively.

[18] See Note #2, supra.

[19] Complaint, p. 6; Rollo, p. 68.

[20] Black's Law Dictionary, 6[th] ed., p. 1120.

[21] Art. 1767.

[22] Heirs of Tan Eng Kee vs. CA, 341 SCRA 740 [2000], citing Aurbach vs. Sanitary Wares Manufacturing Corp. , 180 SCRA 130 [1989].

[23] At. p. 6 of the Decision, Rollo, p. 42.

[24] At p. 6 of the motion for reconsideration; Rollo, p. 55.

[25] Vitug, COMPENDIUM of CIVIL LAW and JURISPRUDENCE, Rev. ed., (1993), p. 712.

[26] See Note #1, supra.

[27] See Note #2, supra.

[28] Page 26 of Yang's Memorandum; Rollo, p. 494.

[29] Page 4 of the CA's assailed Resolution; Rollo, p. 61.

[30] #2 (a) of Art. 1403 of the Civil Code.

[31] Tolentino, CIVIL CODE OF THE PHILIPPINES, Vol. IV, 1991 ed., p. 617.

[32] Heirs of Tan Eng Kee vs. CA, supra.

[33] Par. 3.01 of the Complaint; Rollo, p. 64.

[34] Petition, p. 18; Rollo, p. 20.

[35] Rollo, p. 45.

[36] Ibid, p. 61.

[37] Rollo, p. 53; Citations omitted.

[38] Ibid, p. 19.

[39] San Agustin vs. Barrios, 68 Phil. 475 [1939] citing other cases.

[40] Union Bank vs. CA, 359 SCRA 480 [2001].

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