

## FIRST DIVISION

[ G.R. No. 199650, June 26, 2013 ]

**J PLUS ASIA DEVELOPMENT CORPORATION, PETITIONER, VS.  
UTILITY ASSURANCE CORPORATION, RESPONDENT.**

### DECISION

**VILLARAMA, JR., J.:**

Before the Court is a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the Decision<sup>[1]</sup> dated January 27, 2011 and Resolution<sup>[2]</sup> dated December 8, 2011 of the Court of Appeals (CA) in CA-G.R. SP No. 112808.

#### **The Facts**

On December 24, 2007, petitioner J Plus Asia Development Corporation represented by its Chairman, Joo Han Lee, and Martin E. Mabunay, doing business under the name and style of Seven Shades of Blue Trading and Services, entered into a Construction Agreement<sup>[3]</sup> whereby the latter undertook to build the former's 72-room condominium/hotel (Condotel Building 25) located at the Fairways & Bluewaters Golf & Resort in Boracay Island, Malay, Aklan. The project, costing P42,000,000.00, was to be completed within one year or 365 days reckoned from the first calendar day after signing of the Notice of Award and Notice to Proceed and receipt of down payment (20% of contract price). The P8,400,000.00 down payment was fully paid on January 14, 2008.<sup>[4]</sup> Payment of the balance of the contract price will be based on actual work finished within 15 days from receipt of the monthly progress billings. Per the agreed work schedule, the completion date of the project was December 2008.<sup>[5]</sup> Mabunay also submitted the required Performance Bond<sup>[6]</sup> issued by respondent Utility Assurance Corporation (UTASSCO) in the amount equivalent to 20% down payment or P8.4 million.

Mabunay commenced work at the project site on January 7, 2008. Petitioner paid up to the 7<sup>th</sup> monthly progress billing sent by Mabunay. As of September 16, 2008, petitioner had paid the total amount of P15,979,472.03 inclusive of the 20% down payment. However, as of said date, Mabunay had accomplished only 27.5% of the project.<sup>[7]</sup>

In the Joint Construction Evaluation Result and Status Report<sup>[8]</sup> signed by Mabunay assisted by Arch. Elwin Olavario, and Joo Han Lee assisted by Roy V. Movido, the following findings were accepted as true, accurate and correct:

III] STATUS OF PROJECT AS OF 14 NOVEMBER 2008

- 1) After conducting a joint inspection and evaluation of the project to determine the actual percentage of accomplishment, the contracting parties, assisted by their respective technical groups, SSB assisted by Arch. Elwin Olavario and JPLUS assisted by Engrs. Joey Rojas and Shiela Botardo, concluded and agreed that **as of 14 November 2008, the project is only Thirty One point Thirty Nine Percent (31.39%) complete.**
- 2) Furthermore, the value of construction materials allocated for the completion of the project and currently on site has been determined and agreed to be ONE MILLION FORTY NINE THOUSAND THREE HUNDRED SIXTY FOUR PESOS AND FORTY FIVE CENTAVOS (P1,049,364.45)
- 3) The additional accomplishment of SSB, reflected in its reconciled and consolidated 8th and 9th billings, is Three point Eighty Five Percent (3.85%) with a gross value of P1,563,553.34 amount creditable to SSB after deducting the withholding tax is P1,538,424.84
- 4) The unrecouped amount of the down payment is P2,379,441.53 after deducting the cost of materials on site and the net billable amount reflected in the reconciled and consolidated 8th and 9th billings. The uncompleted portion of the project is 68.61% with an estimated value per construction agreement signed is P27,880,419.52.<sup>[9]</sup> (Emphasis supplied.)

On November 19, 2008, petitioner terminated the contract and sent demand letters to Mabunay and respondent surety. As its demands went unheeded, petitioner filed a Request for Arbitration<sup>[10]</sup> before the Construction Industry Arbitration Commission (CIAC). Petitioner prayed that Mabunay and respondent be ordered to pay the sums of P8,980,575.89 as liquidated damages and P2,379,441.53 corresponding to the unrecouped down payment or overpayment petitioner made to Mabunay.<sup>[11]</sup>

In his Answer,<sup>[12]</sup> Mabunay claimed that the delay was caused by retrofitting and other revision works ordered by Joo Han Lee. He asserted that he actually had until April 30, 2009 to finish the project since the 365 days period of completion started only on May 2, 2008 after clearing the retrofitted old structure. Hence, the termination of the contract by petitioner was premature and the filing of the complaint against him was baseless, malicious and in bad faith.

Respondent, on the other hand, filed a motion to dismiss on the ground that petitioner has no cause of action and the complaint states no cause of action against it. The CIAC denied the motion to dismiss. Respondent's motion for reconsideration was likewise denied.<sup>[13]</sup>

In its Answer Ex Abundante Ad Cautelam With Compulsory Counterclaims and Cross-claims,<sup>[14]</sup> respondent argued that the performance bond merely guaranteed the 20% down payment and not the entire obligation of Mabunay under the Construction Agreement. Since the value of the project's accomplishment already exceeded the said amount, respondent's obligation under the performance bond had

been fully extinguished. As to the claim for alleged overpayment to Mabunay, respondent contended that it should not be credited against the 20% down payment which was already exhausted and such application by petitioner is tantamount to reviving an obligation that had been legally extinguished by payment. Respondent also set up a cross-claim against Mabunay who executed in its favor an Indemnity Agreement whereby Mabunay undertook to indemnify respondent for whatever amounts it may be adjudged liable to pay petitioner under the surety bond.

Both petitioner and respondent submitted their respective documentary and testimonial evidence. Mabunay failed to appear in the scheduled hearings and to present his evidence despite due notice to his counsel of record. The CIAC thus declared that Mabunay is deemed to have waived his right to present evidence.<sup>[15]</sup>

On February 2, 2010, the CIAC rendered its Decision<sup>[16]</sup> and made the following award:

Accordingly, in view of our foregoing discussions and dispositions, the Tribunal hereby adjudges, orders and directs:

1. Respondents Mabunay and Utassco to jointly and severally pay claimant the following:

a) P4,469,969.90, as liquidated damages, plus legal interest thereon at the rate of 6% per annum computed from the date of this decision up to the time this decision becomes final, and 12% per annum computed from the date this decision becomes final until fully paid, and

b) P2,379,441.53 as unrecouped down payment plus interest thereon at the rate of 6% per annum computed from the date of this decision up to the time this decision becomes final, and 12% per annum computed from the date this decision becomes final until fully paid[.]

It being understood that respondent Utassco's liability shall in no case exceed P8.4 million.

2. Respondent Mabunay to pay to claimant the amount of P98,435.89, which is respondent [Mabunay's] share in the arbitration cost claimant had advanced, with legal interest thereon from January 8, 2010 until fully paid.

3. Respondent Mabunay to indemnify respondent Utassco of the amounts respondent Utassco will have paid to claimant under this decision, plus interest thereon at the rate of 12% per annum computed from the date he is notified of such payment made by respondent Utassco to claimant until fully paid, and to pay Utassco P100,000.00 as attorney's fees.

SO ORDERED.<sup>[17]</sup>

Dissatisfied, respondent filed in the CA a petition for review under Rule 43 of the 1997 Rules of Civil Procedure, as amended.

In the assailed decision, the CA agreed with the CIAC that the specific condition in the Performance Bond did not clearly state the limitation of the surety's liability. Pursuant to Article 1377<sup>[18]</sup> of the Civil Code, the CA said that the provision should be construed in favor of petitioner considering that the obscurely phrased provision was drawn up by respondent and Mabunay. Further, the appellate court stated that respondent could not possibly guarantee the down payment because it is not Mabunay who owed the down payment to petitioner but the other way around. Consequently, the completion by Mabunay of 31.39% of the construction would not lead to the extinguishment of respondent's liability. The P8.4 million was a limit on the amount of respondent's liability and not a limitation as to the obligation or undertaking it guaranteed.

However, the CA reversed the CIAC's ruling that Mabunay had incurred delay which entitled petitioner to the stipulated liquidated damages and unrecouped down payment. Citing *Aerospace Chemical Industries, Inc. v. Court of Appeals*,<sup>[19]</sup> the appellate court said that not all requisites in order to consider the obligor or debtor in default were present in this case. It held that it is only from December 24, 2008 (completion date) that we should reckon default because the Construction Agreement provided only for delay in the completion of the project and not delay on a monthly basis using the work schedule approved by petitioner as the reference point. Hence, petitioner's termination of the contract was premature since the delay in this case was merely speculative; the obligation was not yet demandable.

The dispositive portion of the CA Decision reads:

**WHEREFORE**, premises considered, the instant petition for review is **GRANTED**. The assailed Decision dated 13 January 2010 rendered by the CIAC Arbitral Tribunal in CIAC Case No. 03-2009 is hereby **REVERSED and SET ASIDE**. Accordingly, the Writ of Execution dated 24 November 2010 issued by the same tribunal is hereby **ANNULLED and SET ASIDE**.

SO ORDERED.<sup>[20]</sup>

Petitioner moved for reconsideration of the CA decision while respondent filed a motion for partial reconsideration. Both motions were denied.

### **The Issues**

Before this Court petitioner seeks to reverse the CA insofar as it denied petitioner's claims under the Performance Bond and to reinstate in its entirety the February 2, 2010 CIAC Decision. Specifically, petitioner alleged that –

- A. THE COURT OF APPEALS SERIOUSLY ERRED IN NOT HOLDING THAT THE ALTERNATIVE DISPUTE RESOLUTION ACT AND THE SPECIAL

RULES ON ALTERNATIVE DISPUTE RESOLUTION HAVE STRIPPED THE COURT OF APPEALS OF JURISDICTION TO REVIEW ARBITRAL AWARDS.

- B. THE COURT OF APPEALS SERIOUSLY ERRED IN REVERSING THE ARBITRAL AWARD ON AN ISSUE THAT WAS NOT RAISED IN THE ANSWER. NOT IDENTIFIED IN THE TERMS OF REFERENCE, NOT ASSIGNED AS AN ERROR, AND NOT ARGUED IN ANY OF THE PLEADINGS FILED BEFORE THE COURT.
  
- C. THE COURT OF APPEALS SERIOUSLY ERRED IN RELYING ON THE CASE OF *AEROSPACE CHEMICAL INDUSTRIES, INC. v. COURT OF APPEALS*, 315 SCRA 94, WHICH HAS NOTHING TO DO WITH CONSTRUCTION AGREEMENTS.<sup>[21]</sup>

### **Our Ruling**

On the procedural issues raised, we find no merit in petitioner's contention that with the institutionalization of alternative dispute resolution under Republic Act (R.A.) No. 9285,<sup>[22]</sup> otherwise known as the Alternative Dispute Resolution Act of 2004, the CA was divested of jurisdiction to review the decisions or awards of the CIAC. Petitioner erroneously relied on the provision in said law allowing any party to a domestic arbitration to file in the Regional Trial Court (RTC) a petition either to confirm, correct or vacate a domestic arbitral award.

We hold that R.A. No. 9285 did not confer on regional trial courts jurisdiction to review awards or decisions of the CIAC in construction disputes. On the contrary, Section 40 thereof expressly declares that confirmation by the RTC is not required, thus:

**SEC. 40. Confirmation of Award.** – The confirmation of a domestic arbitral award shall be governed by Section 23 of R.A. 876.

A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court.

The confirmation of a domestic award shall be made by the regional trial court in accordance with the Rules of Procedure to be promulgated by the Supreme Court.

**A CIAC arbitral award need not be confirmed by the regional trial court to be executory as provided under E.O. No. 1008.** (Emphasis supplied.)

Executive Order (EO) No. 1008 vests upon the CIAC original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. By express provision of Section 19 thereof, the arbitral award of the CIAC is final