398 Phil. 955

FIRST DIVISION

[G.R. No. 124293, November 20, 2000]

JG SUMMIT HOLDINGS, INC.,PETITIONER, VS. COURT OF APPEALS, COMMITTEE ON PRIVATIZATION, ITS CHAIRMAN AND MEMBERS; ASSET PRIVATIZATION TRUST AND PHILYARDS HOLDINGS, INC., RESPONDENTS.

D E C I S I O N

YNARES-SANTIAGO, J.:

On January 27, 1977, the National Investment and Development Corporation (NIDC), a government corporation, entered into a Joint Venture Agreement (JVA) with Kawasaki Heavy Industries, Ltd. of Kobe, Japan (Kawasaki) for the construction, operation, and management of the Subic National Shipyard, Inc. (SNS), which subsequently became the Philippine Shipyard and Engineering Corporation (PHILSECO). Under the JVA, NIDC and Kawasaki would maintain a shareholding proportion of 60%-40%, respectively. One of the provisions of the JVA accorded the parties the right of first refusal should either party sell, assign or transfer its interest in the joint venture. Thus, paragraph 1.4 of the JVA states:

> "Neither party shall sell, transfer or assign all or any part of its interest in SNS to any third party without giving the other *under the same terms* the right of first refusal. This provision shall not apply if the transferee is a corporation owned or controlled by the GOVERNMENT or by a KAWASAKI affiliate." (Italics supplied.)

On November 25, 1986, NIDC transferred all its rights, title and interest in PHILSECO to the Philippine National Bank (PNB). More than two months later or on February 3, 1987, by virtue of Administrative Order No. 14, PNB's interest in PHILSECO was transferred to the National Government.

Meanwhile, on December 8, 1986, President Corazon C. Aquino issued Proclamation No. 50 establishing the Committee on Privatization (COP) and the Asset Privatization Trust (APT) to take title to and possession of, conserve, manage and dispose of non-performing assets of the National Government. On February 27, 1987, a trust agreement was entered into between the National Government and the APT by virtue of which the latter was named the trustee of the National Government's share in PHILSECO. In 1989, as a result of a quasi-reorganization of PHILSECO to settle its huge obligations to PNB, the National Government's shareholdings in PHILSECO increased to 97.41% thereby reducing Kawasaki's shareholdings to 2.59%.

Exercising their discretion, the COP and the APT deemed it in the best interest of the national economy and the government to privatize PHILSECO by selling 87.67% of its total outstanding capital stock to private entities. After a series of negotiations between the APT and Kasawaki, they agreed that the latter's right of first refusal under the JVA be "exchanged" for the right to top by five percent (5%) the highest

bid for said shares. They further agreed that Kawasaki would be entitled to name a company in which it was a stockholder, which could exercise the right to top. On September 7, 1990, Kawasaki informed APT that Philyards Holdings, Inc. (PHI) would exercise its right to top by 5%.

At the pre-bidding conference held on September 28, 1993, interested bidders were given copies of the JVA between NIDC and Kawasaki, and of the Asset Specific Bidding Rules (ASBR) drafted for the 87.67% equity *(sic)*[1] in PHILSECO of the National Government. Salient provisions of the ASBR state:

> "1.0. The subject of this Asset Privatization Trust (APT) sale through public bidding is the National Government's equity in PHILSECO consisting of 896,869,942 shares of stock (representing 87.67% of PHILSECO's oustanding capital stock), which will be sold as a whole block in accordance with the rules herein enumerated.
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> 3.0. This public bidding shall be on an Indicative Price Bidding basis. The Indicative price set for the National Government's 87.67% equity in PHILSECO is **PESOS: ONE BILLION THREE HUNDRED MILLION (P1,300,000,000.00)**.
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> x x x x x x x x x
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> 12.0. The bidder shall be solely responsible for examining with appropriate care these rules, the official bid forms, including any addenda or amendments thereto issued during the bidding period. The bidder shall likewise be responsible for informing itself with respect to any and all conditions concerning the PHILSECO Shares which may, in any manner, affect the bidder's proposal. Failure on the part of the bidder to so examine and inform itself shall be its sole risk and no relief for error or omission will be given by APT or COP. x x x."

The provisions of the ASBR were explained to the interested bidders who were notified that bidding would be held on December 2, 1993.

At the public bidding on said date, the consortium composed of petitioner JG Summit Holdings, Inc., Sembawang Shipyard Ltd. of Singapore (Sembawang), and Jurong Shipyard Limited of Malaysia (Jurong), was declared the highest bidder at P2.03 billion. The following day, December 3, 1993, the COP approved the sale of 87.67% National Government shares of stock in PHILSECO to said consortium. It notified petitioner of said approval "subject to the right of Kawasaki Heavy Industries, Inc./Philyards Holdings, Inc. to top JGSMI's (petitioner's) bid by 5% as specified in the bidding rules."

On December 29, 1993, petitioner informed the APT that it was protesting the offer of PHI to top its bid on the grounds that: (a) the Kawasaki/PHI consortium composed of Kawasaki, Philyards, Mitsui, Keppel, SM Group, ICTSI and Insular Life violated the ASBR because the last four (4) companies were the losing bidders (for

P1.528 billion) thereby circumventing the law and prejudicing the weak winning bidder; (b) only Kawasaki could exercise the right to top; (c) giving the same option to top to PHI constituted unwarranted benefit to a third party; (d) no right of first refusal can be exercised in a public bidding or auction sale, and (e) the JG Summit Consortium was not estopped from questioning the proceedings.

On February 2, 1994, petitioner was notified that PHI had fully paid the balance of the purchase price of the subject bidding. On February 7, 1994, the APT notified petitioner that PHI had exercised its option to top the highest bid and that the COP had approved the same on January 6, 1994. On February 24, 1994, the APT and PHI executed a Stock Purchase Agreement.

Consequently, petitioner filed with this Court a petition for *mandamus* under **G.R. No. 114057**. On May 11,1994, said petition was referred to the Court of Appeals ---

> "x x x for proper determination and disposition, pursuant to Section 9, paragraph 1 of B.P. 129, granting the Court of Appeals `original jurisdiction to issue writs of mandamus x x x and auxiliary writs or processes, whether or not in aid of its appellate jurisdiction,' which jurisdiction is concurrent with this Court, there being no special and important reason for this Court to assume jurisdiction over the case in the first instance."[2]

On July 18, 1995, the Court of Appeals "denied" for lack of merit the petition for *mandamus*. Citing *Guanio v. Fernandez,*[3] it held that *mandamus* is not the proper remedy to "compel the undoing of an act already done or the correction of a wrong already perpetuated, even though the action taken was clearly illegal." It was further ruled that it was not the proper forum for a "mere petition for *mandamus*" that aimed to question the constitutionality or legality of the right of first refusal and the right to top that was exercised by Kawasaki/PHI and that the matter must be brought "by the proper party in the proper forum at the proper time and threshed out in a full blown trial."

After ruling that the right of first refusal and the right to top are *prima facie* legal, the Court of Appeals found petitioner to be in estoppel for the following reasons:

> "5. If petitioner found the right to top to be illegal, it should not have participated in the public bidding; or it should have questioned the legality of the rules before the courts or filed a petition for declaratory relief (Rule 64, Rules of Court) before the public bidding could have taken place.
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> By participating in the public bidding, with full knowledge of the right to top granted to Kawasaki/Philyards, petitioner is estopped from questioning the validity of the award given to Philyards after the latter exercised the right to top and had paid in full the purchase price of the subject shares, pursuant to the ASBR.
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> 6. The fact that the losing bidder, Keppel Consortium (composed of

Keppel, SM Group, Insular Life Assurance, Mitsui and ICTSI) appears to have joined Philyards in the latter's effort to raise P2.131 billion necessary in exercising the right to top by 5% is a valid activity in free enterprise that is not contrary to law, public policy or public morals. It should not be a cause of grievance for petitioner as it is the very essence of free competition in the business world. Astute businessmen involved in the public bidding in question knew what they were up against. And when they participated in the public bidding with prior knowledge of the right to top, they did so, with full knowledge of the eventuality that the highest bidder may still be topped by Kawasaki/Philyards by 5%. It is admitted by petitioner that it likewise represents a consortium composed of JG Summit, Sembawang Singapore and Jurong of Malaysia. Why should petitioner then expect Philyards to limit itself to its own resources when the latter can enter into agreements with other entities to help it raise the money it needed to pay the full purchase price as in fact it had already paid the National Government in the amount of P2.131 billion as required under the ASBR?"[4]

Petitioner filed a motion for the reconsideration of said Decision which was denied on March 15, 1996. Petitioner thus filed the instant petition for review on *certiorari*, raising the following arguments:

I.

THE COURT OF APPEALS GRIEVOUSLY ERRED IN HOLDING THAT PETITIONER JG SUMMIT IS LEGALLY ESTOPPED FROM CHALLENGING THE LEGALITY OF THE RIGHT TO TOP, INSERTED IN THE BIDDING RULES, AS WELL AS THE RIGHT OF FIRST REFUSAL FROM WHICH THE RIGHT TO TOP WAS ADMITTEDLY SOURCED, BY SIMPLY STATING THAT THOSE RIGHTS ARE VALID AND ENFORCEABLE WITHOUT RULING ON ANY OF THE IMPORTANT LEGAL AND CONSTITUTIONAL GROUNDS RAISED BY THE PETITIONER AS FOLLOWS:

(A) THE RIGHT OF FIRST REFUSAL, GRANTED TO A JAPANESE CORPORATION AT A TIME WHEN IT HELD 40% EQUITY IN PHILSECO, A LANDHOLDING CORPORATION, IS NULL AND VOID FOR BEING CONTRARY TO THE CONSTITUTION.

(B) THE RIGHT TO TOP WAS GRANTED TO THE JAPANESE CORPORATION AT A TIME WHEN IT MERELY HELD 2.6% EQUITY IN PHILSECO.

(C) THE RIGHT OF FIRST REFUSAL GRANTED TO THE JAPANESE CORPORATION OVER SHARES OF STOCK IS CONTRARY TO THE CORPORATION CODE.

(D) THE RIGHT TO TOP IS CONTRARY TO PUBLIC POLICY AS IT IS ANATHEMA TO COMPETITIVE PUBLIC BIDDING FOR

BEING UNDULY RESTRICTIVE THEREOF, AND, MOREOVER, IS CONTRARY TO DUE PROCESS OF LAW AS IT IS AGAINST THE BASIC RUDIMENTS OF FAIR PLAY.

(E) THE GRANT OF THE RIGHT TO TOP IS A CRIMINAL VIOLATION OF THE ANTI-GRAFT LAW AS IT GIVES A CLEARLY UNWARRANTED BENEFIT IN FAVOR OF PHILYARDS AS SHOWN BY CLEAR AND UNDISPUTED DOCUMENTARY EVIDENCE.

II.

THE COURT OF APPEALS GRIEVOUSLY ERRED IN HOLDING THAT MANDAMUS IS NOT A PROPER REMEDY IN THIS CASE.

III.

FOLLOWING ITS OWN FINDINGS, THE COURT OF APPEALS GRIEVOUSLY ERRED (A) IN NOT DIRECTING THAT TRIAL BE HELD ON ALLEGED ISSUES OF FACT AND (B) IN NOT APPOINTING AN *AMICUS CURIAE* FROM AMONG THE LAWYERS IN THE COMMISSION ON AUDIT TO DETERMINE THE APPLICABILITY OF ITS REQUIREMENTS TO THE TRANSACTIONS IN THIS CASE.[5]

In their comment on the petition, private respondent PHI contends that the real party in interest which should have filed the petition for *mandamus* is the JG Summit Consortium and not solely petitioner JG Summit Holdings, Inc. which is just a part of that consortium. Since Sembawang and Jurong, the other members of the consortium, are indispensable parties to the petition,[6] petitioner's failure to implead them as co-petitioners warranted the dismissal of the petition.

Public respondents' contention must fail. While it is true that Rule 3, Section 2 of the Rules of Court provides that "(a)ll persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs," petitioner may file the petition alone. In the first place, Sembawang and Jurong are not indispensable parties, such that their non-joinder as petitioners will not necessarily result in a failure to arrive at a final determination of the case.[7] They may be necessary parties as they were members of the consortium that won the public bidding prior to the exercise of the right to top by private respondent, but the petition may be resolved even without their active participation. Secondly, there is a doubt as to whether or not said foreign corporations are "subject to the jurisdiction of the court as to both service of process and venue."[8] Thirdly, petitioner may be deemed to represent Sembawang and Jurong. The admission of petitioner's counsel that said foreign corporations are underwriting his and the other counsel's fees reflects this fact.[9] By the nexus that binds the members of the consortium, in the event that petitioner succeeds in pursuing this case, it is bound to respect the existence of the consortium and the corresponding responsibilities arising therefrom.

Public respondents also contend that petitioner has no standing to question the legality of a provision of the JVA in which it is not a party.[10] However, as this Court