

SECOND DIVISION

[G.R. NO. 138980, September 20, 2005]

FILINVEST LAND, INC., PETITIONER, VS. HON. COURT OF APPEALS, PHILIPPINE AMERICAN GENERAL INSURANCE COMPANY, AND PACIFIC EQUIPMENT CORPORATION, RESPONDENTS.

D E C I S I O N

CHICO-NAZARIO, J.

This is a petition for review on *certiorari* of the Decision^[1] of the Court of Appeals dated 27 May 1999 affirming the dismissal by the Regional Trial Court of Makati, Branch 65,^[2] of the complaint for damages filed by Filinvest Land, Inc. (Filinvest) against herein private respondents Pacific Equipment Corporation (Pecorp) and Philippine American General Insurance Company.

The essential facts of the case, as recounted by the trial court, are as follows:

On 26 April 1978, Filinvest Land, Inc. ("FILINVEST", for brevity), a corporation engaged in the development and sale of residential subdivisions, awarded to defendant Pacific Equipment Corporation ("PACIFIC", for brevity) the development of its residential subdivisions consisting of two (2) parcels of land located at Payatas, Quezon City, the terms and conditions of which are contained in an "Agreement". (Annex A, Complaint). To guarantee its faithful compliance and pursuant to the agreement, defendant Pacific posted two (2) Surety Bonds in favor of plaintiff which were issued by defendant Philippine American General Insurance ("PHILAMGEN", for brevity). (Annexes B and C, Complaint).

Notwithstanding three extensions granted by plaintiff to defendant Pacific, the latter failed to finish the contracted works. (Annexes G, I and K, Complaint). On 16 October 1979, plaintiff wrote defendant Pacific advising the latter of its intention to takeover the project and to hold said defendant liable for all damages which it had incurred and will incur to finish the project. (Annex "L", Complaint).

On 26 October 1979, plaintiff submitted its claim against defendant Philamgen under its performance and guarantee bond (Annex M, Complaint) but Philamgen refused to acknowledge its liability for the simple reason that its principal, defendant Pacific, refused to acknowledge liability therefore. Hence, this action.

In defense, defendant Pacific claims that its failure to finish the contracted work was due to inclement weather and the fact that several items of finished work and change order which plaintiff refused to accept

and pay for caused the disruption of work. Since the contractual relation between plaintiff and defendant Pacific created a reciprocal obligation, the failure of the plaintiff to pay its progressing bills estops it from demanding fulfillment of what is incumbent upon defendant Pacific. The acquiescence by plaintiff in granting three extensions to defendant Pacific is likewise a waiver of the former's right to claim any damages for the delay. Further, the unilateral and voluntary action of plaintiff in preventing defendant Pacific from completing the work has relieved the latter from the obligation of completing the same.

On the other hand, Philamgen contends that the various amendments made on the principal contract and the deviations in the implementation thereof which were resorted to by plaintiff and co-defendant Pacific without its (defendant Philamgen's) written consent thereto, have automatically released the latter from any or all liability within the purview and contemplation of the coverage of the surety bonds it has issued. Upon agreement of the parties to appoint a commissioner to assist the court in resolving the issues confronting the parties, on 7 July 1981, an order was issued by then Presiding Judge Segundo M. Zosa naming Architect Antonio Dimalanta as Court Commissioner from among the nominees submitted by the parties to conduct an ocular inspection and to determine the amount of work accomplished by the defendant Pacific and the amount of work done by plaintiff to complete the project.

On 28 November 1984, the Court received the findings made by the Court Commissioner. In arriving at his findings, the Commissioner used the construction documents pertaining to the project as basis. According to him, no better basis in the work done or undone could be made other than the contract billings and payments made by both parties as there was no proper procedure followed in terminating the contract, lack of inventory of work accomplished, absence of appropriate record of work progress (logbook) and inadequate documentation and system of construction management.

Based on the billings of defendant Pacific and the payments made by plaintiff, the work accomplished by the former amounted to P11,788,282.40 with the exception of the last billing (which was not acted upon or processed by plaintiff) in the amount of P844,396.42. The total amount of work left to be accomplished by plaintiff was based on the original contract amount less value of work accomplished by defendant Pacific in the amount of P681,717.58 (12,470,000-11,788,282.42).

As regards the alleged repairs made by plaintiff on the construction deficiencies, the Court Commissioner found no sufficient basis to justify the same. On the other hand, he found the additional work done by defendant Pacific in the amount of P477,000.00 to be in order.

On 01 April 1985, plaintiff filed its objections to the Commissioner's Resolution on the following grounds:

a) Failure of the commissioner to conduct a joint survey which according

to the latter is indispensable to arrive at an equitable and fair resolution of the issues between the parties;

b) The cost estimates of the commissioner were based on pure conjectures and contrary to the evidence; and,

c) The commissioner made conclusions of law which were beyond his assignment or capabilities.

In its comment, defendant Pacific alleged that the failure to conduct joint survey was due to plaintiff's refusal to cooperate. In fact, it was defendant Pacific who initiated the idea of conducting a joint survey and inventory dating back 27 November 1983. And even assuming that a joint survey were conducted, it would have been an exercise in futility because all physical traces of the actual conditions then obtaining at the time relevant to the case had already been obliterated by plaintiff.

On 15 August 1990, a Motion for Judgment Based on the Commissioner's Resolution was filed by defendant Pacific.

On 11 October 1990, plaintiff filed its opposition thereto which was but a rehash of objections to the commissioner's report earlier filed by said plaintiff.^[3]

On the basis of the commissioner's report, the trial court dismissed Filinvest's complaint as well as Pecorp's counterclaim. It held:

In resolving this case, the court observes that the appointment of a Commissioner was a joint undertaking among the parties. The findings of facts of the Commissioner should therefore not only be conclusive but final among the parties. The court therefore agrees with the commissioner's findings with respect to

1. Cost to repair deficiency or defect – P532,324.02
2. Unpaid balance of work done by defendant - P1,939,191.67
3. Additional work/change order (due to defendant) – P475,000.00

The unpaid balance due defendant therefore is P1,939,191.67. To this amount should be added additional work performed by defendant at plaintiff's instance in the sum of P475,000.00. And from this total of P2,414,191.67 should be deducted the sum of P532,324.01 which is the cost to repair the deficiency or defect in the work done by defendant. The commissioner arrived at the figure of P532,324.01 by getting the average between plaintiff's claim of P758,080.37 and defendant's allegation of P306,567.67. The amount due to defendant per the commissioner's report is therefore P1,881,867.66.

Although the said amount of P1,881,867.66 would be owing to defendant Pacific, the fact remains that said defendant was in delay since April 25, 1979. The third extension agreement of September 15, 1979 is very clear in this regard. The pertinent paragraphs read:

- a) You will complete all the unfinished works not

later than Oct. 15, 1979. It is agreed and understood that this date shall DEFINITELY be the LAST and FINAL extension & there will be no further extension for any cause whatsoever.

- b) We are willing to waive all penalties for delay which have accrued since April 25, 1979 provided that you are able to finish all the items of the contracted works as per revised CPM; otherwise you shall continue to be liable to pay the penalty up to the time that all the contracted works shall have been actually finished, in addition to other damages which we may suffer by reason of the delays incurred.

Defendant Pacific therefore became liable for delay when it did not finish the project on the date agreed on October 15, 1979. The court however, finds the claim of P3,990,000.00 in the form of penalty by reason of delay (P15,000.00/day from April 25, 1979 to Jan. 15, 1980) to be excessive. A forfeiture of the amount due defendant from plaintiff appears to be a reasonable penalty for the delay in finishing the project considering the amount of work already performed and the fact that plaintiff consented to three prior extensions.

The foregoing considered, this case is dismissed. The counterclaim is likewise dismissed.

No Costs.^[4]

The Court of Appeals, finding no reversible error in the appealed decision, affirmed the same.

Hence, the instant petition grounded solely on the issue of whether or not the liquidated damages agreed upon by the parties should be reduced considering that: (a) time is of the essence of the contract; (b) the liquidated damages was fixed by the parties to serve not only as penalty in case Pecorp fails to fulfill its obligation on time, but also as indemnity for actual and anticipated damages which Filinvest may suffer by reason of such failure; and (c) the total liquidated damages sought is only 32% of the total contract price, and the same was freely and voluntarily agreed upon by the parties.

At the outset, it should be stressed that as only the issue of liquidated damages has been elevated to this Court, petitioner Filinvest is deemed to have acquiesced to the other matters taken up by the courts below. Section 1, Rule 45 of the 1997 Rules of Court states in no uncertain terms that this Court's jurisdiction in petitions for review on *certiorari* is limited to "*questions of law which must be distinctly set forth*."^[5] By assigning only one legal issue, Filinvest has effectively cordoned off any discussion into the factual issue raised before the Court of Appeals.^[6] In effect, Filinvest has yielded to the decision of the Court of Appeals, affirming that of the trial court, in deferring to the factual findings of the commissioner assigned to the parties' case. Besides, as a general rule, factual matters cannot be raised in a petition for review on *certiorari*. This Court at this stage is limited to reviewing

errors of law that may have been committed by the lower courts.^[7] We do not perceive here any of the exceptions to this rule; hence, we are restrained from conducting further scrutiny of the findings of fact made by the trial court which have been affirmed by the Court of Appeals. Verily, factual findings of the trial court, especially when affirmed by the Court of Appeals, are binding and conclusive on the Supreme Court.^[8] Thus, it is settled that:

- (a) Based on Pecorps billings and the payments made by Filinvest, the balance of work to be accomplished by Pecorp amounts to P681,717.58 representing 5.47% of the contract work. This means to say that Pecorp, at the time of the termination of its contract, accomplished 94.53% of the contract work;
- (b) The unpaid balance of work done by Pecorp amounts to P1,939,191.67;
- (c) The additional work/change order due Pecorp amounts to P475,000.00;
- (d) The cost to repair deficiency or defect, which is for the account of Pecorp, is P532,324.02; and
- (e) The total amount due Pecorp is P1,881,867.66.

Coming now to the main matter, Filinvest argues that the penalty in its entirety should be respected as it was a product of mutual agreement and it represents only 32% of the P12,470,000.00 contract price, thus, not shocking and unconscionable under the circumstances. Moreover, the penalty was fixed to provide for actual or anticipated liquidated damages and not simply to ensure compliance with the terms of the contract; hence, pursuant to *Laureano v. Kilayco*,^[9] courts should be slow in exercising the authority conferred by Art. 1229 of the Civil Code.

We are not swayed.

There is no question that the penalty of P15,000.00 per day of delay was mutually agreed upon by the parties and that the same is sanctioned by law. A penal clause is an accessory undertaking to assume greater liability in case of breach.^[10] It is attached to an obligation in order to insure performance^[11] and has a double function: (1) to provide for liquidated damages, and (2) to strengthen the coercive force of the obligation by the threat of greater responsibility in the event of breach.

^[12] Article 1226 of the Civil Code states:

Art. 1226. In obligations with a penal clause, the penalty shall substitute the indemnity for damages and the payment of interests in case of noncompliance, if there is no stipulation to the contrary. Nevertheless, damages shall be paid if the obligor refuses to pay the penalty or is guilty of fraud in the fulfillment of the obligation.

The penalty may be enforced only when it is demandable in accordance with the provisions of this Code.