

## SECOND DIVISION

[ G.R. No. 191537, September 14, 2016 ]

**PAULINO M. ALECHA, FELIX B. UNABIA, RICARDO A. TOLINO  
AND MARIO A. CATANES, PETITIONERS, VS. JOSE L. ATIENZA  
JR., THE DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES (DENR), MICHAEL L. ROMERO AND BOARD OF  
DIRECTORS OF 168 FERRUM PACIFIC MINING CORPORATION,  
RESPONDENTS.**

### DECISION

**BRION, J.:**

Before us is the petition for *certiorari* filed by Paulino M. Alecha, Felix B. Unabia, Ricardo A. Tolino, and Mario A. Catanes (*petitioners*) under Rule 65 of the Rules of Court, assailing the Department of Environment and Natural Resources (*DENR*) resolution<sup>[1]</sup> dated December 16, 2009, in DENR Case No. 8714.

The DENR resolution dismissed the petitioners' petition for cancellation of Mining Production and Sharing Agreement No. 267-2008-BC previously granted in 168 Ferrum Pacific Mining Corporation's (*168 FPMC*) favor.

#### The Factual Antecedents

On December 22, 2003, Cebu Ore and Mineral Resources Corporation (*Cebu Ore*) filed an application for the approval of the Mineral Production Sharing Agreement (*subject mining agreement*), denominated as ASPA-101-IX, covering an area of about 8,100 hectares located in the municipalities of Midsalip and Bayog, Zamboanga del Sur.<sup>[2]</sup> Cebu Ore later on assigned to 168 FPMC its rights over the mining agreement.<sup>[3]</sup> On August 21, 2008, public respondent Jose L. Atienza, Jr., then DENR Secretary, granted the mining agreement to 168 FPMC.<sup>[4]</sup>

Eight (8) months after, the petitioners filed a petition<sup>[5]</sup> for cancellation of the subject mining agreement with the DENR. In their petition,<sup>[6]</sup> they alleged that 168 FPMC failed to secure the Free and Prior Informed Consent (*FPIC*) of the Indigenous Peoples (*IP*) concerned for the approval of the mining agreement. They also alleged that the contract area under the mining agreement was located in the volcanic cones of Mt. Sugarloaf Complex, a known key biodiversity area and forest reserve, thus rendering it exempt from any mining application. Lastly, they submitted that the proposed operation would destroy the lives of the Zamboanga Peninsula residents.

In its comment,<sup>[7]</sup> 168 FPMC vehemently denied the allegations and insisted that it had observed the FPIC process. It submitted the National Commission on Indigenous Peoples (*NCIP*) Compliance Certificate Control No. CCRIX-08-09-

161(*Certification Precondition*) as proof of its compliance with the FPIC process. The certificate provided:

**THIS IS TO CERTIFY**, that **168 [FPMC]**, a private corporation created and existing by virtue of the laws of the Republic of the Philippines, with office address at R2 Building 136 Malakas T., Diliman, Quezon City, Philippines, has, in connection with its Mineral Production Sharing Agreement (MPSA) Application denominated as APS A 101-IX, located at Barangay Datagan, Bantal, Canoayan, Liba, and Mitin-ao, Bayog, Zamboanga Del Sur, **satisfactorily complied with the procedures and process requirements for the issuance of Certificate Precondition and the Free and Prior Informed Consent**, as prescribed under NCIP Administrative Order No. 01, Series of 2006.

**THIS IS TO CERTIFY FURTHER**, that under NCIP En Bane Resolution No. 303 Series of 2008, dated September 30, 2008, the Commission approved the issuance of a Certification as precondition to the aforementioned project of the proponent, subject to the following terms and conditions embodied in the Memorandum of Agreement entered into and executed by and between the IPs/ICCs of Barangay Dataga, Bantal, Canoayan, Liba, and Matin-ao, Bayog, Zamboanga Dei Sur, the 168 FERRUM PACIFIC MINING CORPORATION and the NCIP, hereto attached as Annex "A" and made an integral part hereof. (emphases supplied)

The 168 FPMC also claimed that the nearest volcanic cones of Mt. Sugarloaf Complex cones are located 9 kilometers away from the contract area.<sup>[8]</sup> As proof, it submitted an illustration<sup>[9]</sup> of the contract area vis-a-vis the location of the Mt. Sugarloaf Volcanic cones.

On December 16, 2009, the DENR Secretary dismissed the petition for cancellation of the mining agreement.<sup>[10]</sup> In dismissing the petition, the **DENR Secretary considered the records that the DENR had previously received for 168 FPMC's application for the mining agreement.**<sup>[11]</sup> Among the documents submitted for the mining agreement application are the following:

1. Approved Area Status and Clearance dated May 18, 2004, and issued by the One-Stop-Shop Committee, DENR Region IX;
2. Posting, publication, and radio announcement of the Notice of Application for MPSA (Notice):
  - a. Posting for two (2) consecutive weeks-
    - i. Certification dated July 10, 2007, by MGB R.O. No. IX attesting that the Notice was posted for two consecutive weeks (May 28 to June 28, 2007).
    - ii. Certification dated July 19, 2004, by the DENR PENRO in Pagadian City attesting that the Notice was posted for two (2) consecutive weeks.

- iii. Copy of the Registry Return Receipt dated June 6, 2007, showing the Notice was received by the Office of the Governor, Province of Zamboanga del Sur.
  - iv. Certification dated July 5, 2007, by the Mayor, Municipality of Bayog, attesting that the Notice was posted for two (2) consecutive weeks.
  - v. Affidavit dated June 12, 2008, by the former Mayor of the Municipality of Midsalip, attesting that the Notice was posted for two (2) consecutive weeks from June 11 to 30, 2004.
- b. Publication in newspapers, one of general circulation and the other of local circulation (once a week for two [2] consecutive weeks)
  - i. Affidavit dated June 22, 2007, by the Mindanao BiozNEWS attesting that the Notice was published in its issues of June 7, 14, and 21, 2007.
  - ii. Affidavit dated June 22, 2007, by the Publisher of Taliba attesting that the Notice as published in its issues of June 14 and 21, 2007.
- c. Radio announcement in a local radio program (daily for two [2] consecutive weeks) in the form of an undated Certificate of Performance issued by the Manila Broadcasting Company "Radyo Natin Fm 91.9 Mhz" attesting that the Notice was aired for the period of June 14 to 18, 2007.
- d. Certification dated September 28, 2007, by the Panel of Arbitrators concerned attesting that "no adverse claim protest or opposition has affected the mining rights application xxx."
- e. National Commission on Indigenous People (NCIP) Certification Precondition or Memorandum of Agreement by and among the applicant, Indigenous Cultural Communities (ICCs)/ Indigenous Peoples (IPs) concerned and the NCIP, or Report on the Field Based Investigation (FBI). xxx<sup>[12]</sup>

The DENR Secretary concluded that 168 FPMC followed the legal process for the approval of the assailed mining agreement and secured the free and prior consent of the IPs concerned based on the available records.<sup>[13]</sup>

The DENR Secretary also held that the Certification Precondition was the best evidence that 168 FPMC complied with the FPIC process.<sup>[14]</sup> He stressed that before any application was approved, time and effort were exerted to ensure that the contract area did not fall within any reservation or protected area where mining activities are disallowed.<sup>[15]</sup> Undeterred, the petitioners sought the intervention of

the Court through the present petition.

### **The Petition and Comment**

The present petition is based on the following grounds:

1. That the DENR Secretary gravely abused his discretion in deciding the petition based on the evidence which were not presented at the hearing, or contained in the record and disclosed to the parties affected;
2. That the DENR Secretary gravely abused his discretion in approving the mining agreement despite the failure to observe the FPIC process;
3. That the DENR Secretary gravely abused his discretion in approving the mining agreement covering an area previously declared as a forest reserve;
4. That the DENR Secretary gravely abused his discretion in approving the mining agreement since Mt. Sugarloaf Complex has been previously declared as a Key Biodiversity Area;
5. That the DENR Secretary gravely abused his discretion in approving the mining agreement because mining operations would activate the dormant volcanoes; and
6. That the proposed open pit mine would surely destroy the livelihood of several hundred thousand residents of the entire Zamboanga peninsula.

In its *comment*,<sup>[16]</sup> 168 FPMC raises procedural arguments to support the dismissal of the present petition. 168 FPMC points out that the present petition is not the plain, speedy, and adequate remedy in the ordinary course of law and the petitioner should have moved for reconsideration of the assailed decision or filed an appeal with the Office of the President.

168 FPMC also stresses that it had secured the FPIC of the IPs concerned. As added proof, it attached the Memorandum of Agreement (MOA) it executed with the concerned IPs.<sup>[17]</sup> Lastly, it insists that by filing the present petition, 168 FPMC effectively violated the doctrine of hierarchy of courts.

The Office of the Solicitor General (OSG) filed a *comment*<sup>[18]</sup> on behalf of the DENR Secretary. Like 168 FPMC, the OSG argues that the present petition should be dismissed for the petitioners' failure to exhaust the administrative remedies. It also argues that the DENR Secretary did not gravely abuse his discretion in dismissing the petition to cancel 168 FPMC's mining agreement since it had complied with all the requirements of the law.

Subsequently, the OSG filed a *manifestation*<sup>[19]</sup> stating that the petitioners engaged in forum shopping since they also filed with this Court a petition for the issuance of a *writ of kalikasan*, docketed as *G.R. No. 197754*. The *writ of kalikasan* petition and

the present petition pray for the same relief - the cancellation and revocation of the mineral agreement to prevent irreparable damage and injury to the petitioners and the residents of Midsalip, Zamboanga Del Sur, and the entire Zamboanga Peninsula.

[20]

## THE ISSUE

The core issue in the present petition is whether the DENR Secretary gravely abused his discretion when he dismissed the petition for cancellation of the 168 FPMC mining agreement.

## THE COURT'S RULING

We dismiss the petition.

Before discussing the substantive issues of the petition, we first resolve the issue on forum shopping.

### ***The petitioners did not commit forum shopping.***

We do not find meritorious the OSG's position that the petitioners committed forum shopping.

**First**, the petitions involved different causes of action. In particular, a petition for the issuance of a *writ kalikasan* is initiated on behalf of persons **whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation**, and involves environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.<sup>[21]</sup> On the other hand, the present petition for *certiorari* involves the issues in wanton disregard of due process and in the incidental violation of IP rights.

**Second**, Rule 7, Section 17 of the Rules of Procedure for Environmental Cases expressly provides that the filing of a petition for the issuance of the *writ of kalikasan* shall not preclude the filing of separate **civil**, criminal, or administrative actions.

We now proceed to the substantive issues of the petition.

### ***The petitioner had available administrative remedies to question the DENR decision.***

It is a settled rule that the special civil action of *certiorari* under Rule 65 of the Rules of Court is available to an aggrieved party only when there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law.<sup>[22]</sup> Otherwise, the petition will not prosper even if the alleged ground is grave abuse of discretion.

[23]

In the present case, it would appear that the petitioners failed to exhaust all the remedies available to it before resorting to the present *certiorari* petition.

**First**, the petitioners did not file a motion for reconsideration on the resolution of