

## SECOND DIVISION

[ G.R. No. 203834, July 09, 2014 ]

**HEIRS OF DIOSDADO M. MENDOZA, NAMELY: LICINIA V. MENDOZA, PETER VAL V. MENDOZA, CONSTANCIA V. MENDOZA YOUNG, CRISTINA V. MENDOZA FIGUEROA, DIOSDADO V. MENDOZA, JR., JOSEPHINE V. MENDOZA JASA, AND RIZALINA V. MENDOZA PUSO, PETITIONERS, VS. DEPARTMENT OF PUBLIC WORKS AND HIGHWAYS AND THE DPWH SECRETARY, RESPONDENTS.**

### D E C I S I O N

**CARPIO, J.:**

#### The Case

Before the Court is a petition for review on certiorari<sup>[1]</sup> assailing the 20 June 2012 Decision<sup>[2]</sup> and the 15 October 2012 Resolution<sup>[3]</sup> of the Court of Appeals in CA-G.R. CV No. 86433. The Court of Appeals set aside the 29 October 2001 Decision<sup>[4]</sup> of the Regional Trial Court of Manila, Branch 36, in Civil Case No. 90-53649.

#### The Antecedent Facts

The case stemmed from an action for specific performance and damages, with prayer for preliminary injunction, filed by Diosdado M. Mendoza (Mendoza), doing business under the name and style of D' Superior Builders (Superior Builders) against the defendants Department of Public Works and Highways (DPWH), then DPWH Secretary Fiorello R. Estuar (Estuar), Undersecretary Edmundo V. Mir (Mir), Nestor Abarca (Abarca), United Technologies, Inc. (UTI), UTI's President Pedro Templo (Templo) and UTI's Project Manager Rodante Samonte (Samonte). The case was docketed as Civil Case No. 90-53649.

Mendoza was the winning bidder for the construction of the 15-kilometer Madaymen Masala Amsuling Road in Benguet and the engineers' quarters and laboratory, designated as Package VI, of the Highland Agriculture Development Project (HADP). His total bid for materials and labor was P16,176,878.58. He was also the winning bidder for the construction of the 15-kilometer barangay roads (Sinipsip-Akiki, Sinipsip-Maalad, and Madaymen) in Benguet, designated as Package IX of the HADP, with a bid of P10,527,192.14. The DPWH hired UTI as consultant for Packages VI and IX, under the direct charge of Templo and Samonte.

On 2 March 1989, Mendoza received the Notice to Proceed for Package VI of the HADP. During the pre-construction survey, Mendoza alleged that he discovered that the whole stretch of the 15-kilometer project had no right-of-way, in violation of Ministry Order No. 65. He brought the matter to the attention of the DPWH and UTI but according to him, it was only resolved on 29 November 1989 when the affected

landowners and farmers allowed passage at Mendoza's risk. Mendoza alleged that the defendants, except for Estuar, conspired to make it appear that Superior Builders incurred negative slippage of 29% and recommended the forfeiture of the contract.

Mendoza further alleged that as regards Package IX, the DPWH did not execute any contract despite the Superior Builders' compliance with all the post-evaluation requirements. The DPWH also recommended the rebidding of Package IX. Package IX was, in effect, canceled together with the forfeiture of the contract for Package VI. The DPWH blacklisted the Superior Builders from participating in any bidding or entering into any contract with it for a period of one year.

On 2 August 1990, the Regional Trial Court of Manila, Branch 36 (trial court) issued a Temporary Restraining Order enjoining the defendants from rebidding Package VI and from awarding Package IX to another contractor, and to cease and desist from withholding the equipment of Superior Builders.

On 20 August 1990, the DPWH, Estuar, Mir and Abarca filed an opposition to the prayer for the issuance of a preliminary injunction, citing Section 1 of Presidential Decree No. 1818 that the trial court has no jurisdiction to issue a writ of preliminary injunction. They likewise alleged that Superior Builders failed to exhaust its administrative remedies. They further alleged that the owner of the road, Gregorio Abalos (Abalos) issued a certification that he never disallowed passage to Superior Builders' vehicles and equipment and road right-of-way was never a problem. They also alleged that Superior Builders started mobilization from 12 to 15 July 1989 and resumed its operations for one week in December 1989. They also alleged that on 20 November 1989, the Office of the *Sangguniang Panlalawigan* of Benguet passed Resolution No. 1176 recommending the termination of the contract between the DPWH and Superior Builders. They reiterated the allegations in their Opposition in their Answer.

For their part, UTI, Templo and Samonte alleged that Superior Builders had 10 calendar days to commence with the project from the time it received the Notice to Proceed on 2 March 1989 or until 12 March 1989 but it failed to do so. They alleged that Superior Builders only mobilized one bulldozer and one loader out of the 47 units required in the contract. They alleged that at the time of the filing of the case, Superior Builders had only mobilized eight units, a majority of which were not working. They alleged that Superior Builders failed to mobilize sufficient number of materials, equipment and personnel and that by 25 October 1989, it already incurred negative slippage of 27.97% that they were compelled to recommend the termination of the contract for Package VI and rebidding of Package IX.

### **The Decision of the Trial Court**

In its 29 October 2001 Decision, the trial court ruled that the termination of the contract over Package VI and the non-award of Package IX to Superior Builders were arbitrary and unjustified. The trial court ruled that under the original plan, Package VI was inaccessible from the starting point which is a privately-owned road. The trial court ruled that there was no showing of any attempt by the government to secure right-of-way by expropriation or other legal means. The trial court held that Superior Builders could not be faulted for its failure to perform the obligation within the stipulated period because the DPWH made it impossible by its failure to acquire the

necessary right-of-way and as such, no negative slippage could be attributed to Superior Builders.

The trial court further ruled that in entering into a contract, the DPWH divested itself of immunity from suit and assumed the character of an ordinary litigant.

The dispositive portion of the trial court's decision reads:

WHEREFORE, judgment is hereby rendered ordering defendants Department of Public Works and Highway thru its Secretary, United Technologies, Inc. and Rodante Samonte to pay plaintiff Diosdado M. Mendoza, jointly and severally, P1,565,317.70 as reimbursement for materials and labor on the accomplishment and P1,617,187.86 performance bond forfeited, P8,817,926.00 as rental value for eight (8) units of equipment for twenty-six (26) months from December 21, 1989 to January 24, 1992 at P339,151.00 per month, with interest at the legal rate until fully paid; P300,000.00 for moral damages, P150,000.00 for attorney's fees, and costs.

The writ of preliminary injunction earlier issued is declared moot and academic but defendant Department of Public Works and Highways thru its Secretary is ordered to turn over to plaintiff, and the latter is authorized to take delivery of the construction equipment still under the control of the DPWH.

The counterclaim of the private defendants not being substantiated is dismissed.

SO ORDERED.<sup>[5]</sup>

The DPWH and the DPWH Secretary (respondents before us) appealed from the trial court's decision.

### **The Decision of the Court of Appeals**

In its 20 June 2012 Decision, the Court of Appeals set aside the trial court's decision and dismissed Mendoza's complaint for specific performance and damages for lack of merit.

The Court of Appeals ruled that the DPWH's forfeiture order of Package VI of the HADP as well as the non-award of Package IX to Superior Builders was justified. The Court of Appeals found that Superior Builders incurred a negative slippage of 31.852%, which is double the limit set by the government under DPWH Circular No. 102, series of 1988. Tracing the slippages incurred by Superior Builders, the Court of Appeals declared:

As early as May 25, 1989, or about two (2) months after the notice to proceed was issued, defendant UTI, the consultant for the government's HADP, issued a "*first warning*" to plaintiff-appellee D' Superior Builders

for having already incurred a slippage of 7.648% due to late implementation, with time elapse of 13.80%. Defendant UTI instructed plaintiff-appellee D' Superior Builders to submit a "catch-up" program to address the slippage.

Subsequently, on June 25, 1989, plaintiff-appellee D' Superior Builders incurred a slippage of 11.743% with corresponding time elapse of 19.63% (106 days from effectivity of contract) and was given a "*second warning*."

On July 25, 1989, the negative slippage reached 16.32%, with corresponding time elapse of 25.18% (136 days from effectivity of the contract). As a consequence, plaintiff-appellee D' Superior Builders was issued a "*final warning*."

In its August 11, 1989 letter, defendant UTI reminded plaintiff-appellee D' Superior Builders of its previous instructions to bring the construction materials for the engineers' quarters, office, and laboratory. Defendant UTI noted:

"We could not find reasons why you cannot immediately bring your construction materials at site, 50 kms. from Baguio City, when in fact, there [were] [continuous] deliveries of some construction materials under Contract Package XI, whose site is located 102 kms. from Baguio City."

Thereafter, on September 25, 1989, the negative slippage of plaintiff-appellee D' Superior Builders reached 21.109% with elapsed time of 36.66% (equivalent to 198 calendar days), or already at "*terminal stage*" pursuant to DPWH Circular No. 102. Defendant UTI, thus, urged plaintiff-appellee D' Superior Builders to show positive actions and speed up its operations, otherwise the former would be compelled to recommend the termination of its contract.

The following month, on October 25, 1989, plaintiff-appellee D' Superior Builders' negative slippage reached 27.970%, still at "*terminal stage*." The consultant mentioned several reasons for the slippage, such as: (1) late implementation of construction of the engineers' building, (2) non-implementation of work items due to lack or non-operational equipment as site, and (3) continued absence of plaintiff-appellee's Project Manager.

In November 1989, the negative slippage of plaintiff-appellee D' Superior Builders was already 31.852%, or more than double the limit of what is considered as being at "terminal stage", which is 15%.<sup>[6]</sup>

Superior Builders' performance prompted the *Sangguniang Panlalawigan* of the Province of Benguet to pass a Resolution on 20 November 1989 recommending the termination of the contract for Package VI that also eventually led to the forfeiture of the contract for Package VI.

The Court of Appeals noted that there were letters and monthly conferences where UTI, through Samonte and UTI's Resident Engineer Federico Vinson, Jr. (Vinson), consistently reminded Superior Builders of its obligations and deficiencies. The Court of Appeals concluded that the delay in the execution of Package VI was due to Superior Builders' delay, particularly its failure to mobilize its personnel and equipment to the project site.

The Court of Appeals ruled that the area where there was a right-of-way problem was only the first 3.2 kilometers of the 15.5-kilometer project. Hence, Superior Builders could have worked on the other areas and the right-of-way issue could not justify the 31.852% negative slippage it incurred.

The Court of Appeals faulted the trial court for skirting the issue on state immunity from suit. The Court of Appeals ruled that there should be a distinction whether the DPWH entered the contracts for Package VI and Package XI in its governmental or proprietary capacity. In this case, the Court of Appeals ruled that the DPWH's contractual obligation was made in the exercise of its governmental functions and was imbued with public interest.

The dispositive portion of the Court of Appeals' decision reads:

WHEREFORE, premises considered, the appeal is GRANTED. The assailed Decision dated October 29, 2001 of the Regional Trial Court (RTC), National Capital Judicial Region, Branch 36, Manila in Civil Case No. 90-53649 is hereby REVERSED and SET ASIDE. Plaintiff-appellee's complaint for specific performance and damages with prayer for preliminary injunction is hereby DISMISSED for lack of merit. No costs.

SO ORDERED.<sup>[7]</sup>

The heirs of Mendoza, namely, Licinia V. Mendoza, Peter Val V. Mendoza, Constancia V. Mendoza Young, Cristina V. Mendoza Figueroa, Diosdado V. Mendoza, Jr., Josephine V. Mendoza Jasa, and Rizalina V. Mendoza Puso (petitioners in this case) filed a motion for reconsideration, at the same time seeking to substitute Mendoza as the plaintiff-appellee in view of Mendoza's death on 25 April 2005 during the pendency of the case before the Court of Appeals.

In its 15 October 2012 Resolution, the Court of Appeals granted the motion for substitution. In the same resolution, the Court of Appeals denied the motion for reconsideration for lack of merit.

The Court of Appeals ruled that first, petitioners were not denied due process when they were not informed that the case was re-raffled when the original *ponente* inhibited himself from the case. The Court of Appeals ruled that there was no requirement of notification under Section 2(b), Rule III of the Internal Rules of the Court of Appeals (IRCA). Further, the action on the inhibition was attached to the *rollo* and duly paged in compliance with Section 4, Rule V of the IRCA. Second, the Court of Appeals ruled that contrary to petitioners' claim, the issue on the absence of road right-of-way was considered in its 20 June 2012 decision. The Court of Appeals emphasized that under DPWH Circular No. 102, series of 1988, the