

SECOND DIVISION

[G.R. No. 183789, August 24, 2011]

**POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT
CORPORATION, PETITIONER, VS. POZZOLANIC PHILIPPINES
INCORPORATED, RESPONDENT.**

D E C I S I O N

PEREZ, J.:

The Case

This petition^[1] for review on *certiorari* under Rule 45 of the 1997 Rules of Civil Procedure assails (1) the Decision^[2] dated 30 April 2008 of the Regional Trial Court of Quezon City, Branch 96, upholding the validity of respondent's right of first refusal and holding such right binding on petitioner, and (2) the Order^[3] dated 27 June 2008 of the same court, denying petitioner's Motion for Reconsideration and Supplemental Motion for Reconsideration of the 30 April 2008 Decision of the trial court in Civil Case No. Q-00-40731.

The Antecedents

Petitioner Power Sector Assets and Liabilities Management Corporation (PSALM) is a government-owned and controlled corporation created by virtue of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA) of 2001.^[4] Its principal purpose is to manage the orderly sale, disposition, and privatization of the National Power Corporation's (NPC's) generation assets, real estate and other disposable assets, and Independent Power Producer (IPP) contracts, with the objective of liquidating all NPC financial obligations and stranded contract costs in an optimal manner.^[5]

Respondent Pozzolanic Philippines Incorporated (Pozzolanic) is the local subsidiary of Pozzolanic Australia Pty. Ltd. (Pozzolanic Australia),^[6] an Australian corporation which claims to have perfected the techniques in the processing of fly ash for use in the making of cement.^[7]

In 1986, Pozzolanic Australia won the public bidding for the purchase of the fly ash generated by NPC's power plant in Batangas.^[8] Pozzolanic Australia then negotiated with NPC for a long-term contract for the purchase of all fly ash to be produced by NPC's future power plants. NPC accepted Pozzolanic Australia's offer and they entered into a long-term contract, dated 20 October 1987, denominated as "Contract for the Purchase of Fly Ash of Batangas Coal-Fired Thermal Power Plant Luzon" (the Batangas Contract).^[9]

Under Article I of the contract, NPC, referred to therein as the "CORPORATION,"

granted Pozzolanica Australia, the "PURCHASER," a right of first refusal to purchase the fly ash generated by the coal-fired plants that may be put up by NPC in the future. The specific provision of the contract states:

PURCHASER has first option to purchase Fly Ash under similar terms and conditions as herein contained from the second unit of Batangas Coal-Fired Thermal Plant that the CORPORATION may construct. PURCHASER may also exercise the right of first refusal to purchase fly ash from any new coal-fired plants which will be put up by CORPORATION.^[10]

In 1988, while the necessary clearances and approvals were being obtained by Pozzolanica Australia in connection with the operation of its fly ash business in the Philippines, its major stockholders decided that it would be more advantageous for the company to organize a Philippine corporation and to assign to such corporation Pozzolanica Australia's rights to the commercial use of fly ash in the Philippines. Accordingly, in April 1989, respondent Pozzolanica was formally incorporated to take over Pozzolanica Australia's business in the Philippines.^[11] Respondent then commenced to exercise its rights under the Batangas contract in June, 1989.^[12]

In 1998, the Masinloc Coal-Fired Thermal Power Plant (Masinloc Plant) started operations to provide power for NPC. Late that year, respondent began the installation of its fly ash processing equipment in the Masinloc Plant and began off taking the fly ash produced therein. ^[13]

Subsequently, on 15 February 1999, NPC and respondent, on an interim basis and prior to the conduct of a public bidding for the contract to purchase the Masinloc Plant's fly ash, executed a contract whereby respondent was given the right to purchase the said fly ash for a period of one year.^[14] The fourth and fifth "WHEREAS" clauses of the contract provide:

WHEREAS, under the 'Contract for the Purchase of the Fly Ash of Batangas Coal-Fired Thermal Power Plant' dated 20 October 1987, PURCHASER was granted the right of first refusal over any and all fly ash that may be produced by any of NPC's coal-fired power plants in the Philippines;

WHEREAS, NPC intends to bid out the long term contract for the Fly Ash that may be produced by the (Masinloc Coal Fired Thermal Power) Plant subject to the second paragraph of Article I of the original contract between the parties which was signed on 20 October 1987 giving PURCHASER the right of first refusal.^[15]

In October 1999, the Sual Coal-Fired Power Plant started providing electricity in the Luzon region.^[16] NPC thereafter caused to be published in the Philippine Star and the Manila Bulletin^[17] an "Invitation to Pre-Qualify and to Bid," inviting all interested buyers to pre-qualify for the purchase of fly ash from the Masinloc and/or Sual Power Plants.^[18]

As a result, respondent sent letters to NPC calling its attention to respondent's right of first refusal under the Batangas Contract. It also demanded that any tender documents to be issued in connection with the bidding on the right to purchase the Masinloc and Sual Plants' fly ash include notices informing prospective bidders of respondent's right of first refusal.

In a letter dated 7 March 2000, NPC informed respondent that it had decided to defer indefinitely the bidding on the right to purchase the Masinloc Plant's fly ash and to proceed first with the bidding on the right to purchase the Sual Plant's fly ash. Thus, on 7 April 2000, NPC released the tender documents for the bidding on the Sual Plant's fly ash, which tender documents made no reference to respondent's right of first refusal.^[19]

This prompted respondent to file a complaint^[20] (later amended^[21]) with the trial court praying that NPC be ordered to allow Pozzolanic to exercise its right of first refusal by permitting it to match the price and terms offered by the winning bidder and by awarding the contract for the purchase of the Sual Plant's fly ash to Pozzolanic if it matches the price and terms offered by said winning bidder.^[22]

While the case was pending before the lower court, NPC decided to also dispose of the fly ash from the Masinloc Plant through public bidding, without allowing respondent to exercise its right of first refusal. Thus, respondent filed a Supplementary Complaint^[23], dated 8 August 2002, praying for the same reliefs as those prayed for in the amended complaint earlier filed, but as regards the Masinloc Plant.^[24]

Meanwhile, on 4 June 2001, Congress enacted the EPIRA (RA 9136) which created PSALM. This resulted in the filing of a Second Supplementary Complaint, dated 5 March 2003, impleading petitioner PSALM as a necessary and indispensable party.^[25]

The litigation became more complicated when petitioner, NPC, and the Department of Energy entered into a Memorandum of Agreement with the Provincial Government of Zambales and several local government units of Zambales, pursuant to which the Provincial Government of Zambales was awarded the exclusive right to withdraw the fly ash from the Masinloc Plant.^[26] With this development, respondent filed a Third Supplementary Complaint seeking the annulment of the aforesaid Memorandum of Agreement and other documents related thereto.^[27] This complaint was dismissed by the trial court on the ground of forum shopping, it appearing that the Province of Zambales, *et al.* had previously filed a case against respondent and NPC, claiming exclusive right to withdraw the fly ash of the Masinloc Plant.^[28]

Respondent appealed the order of dismissal to the Court of Appeals.

On 18 July 2007, while the appeal was pending, respondent and the Provincial Government of Zambales executed an "Agreement"^[29] (the Masinloc Contract) by virtue of which the Province of Zambales awarded to respondent the exclusive right to withdraw the fly ash from the Masinloc Power Plant. Respondent then moved for the dismissal of its appeal in the Court of Appeals. As a result, the assailed Order of

the trial court dismissing respondent's Third Supplementary Complaint became final.
[30]

Also, previously, on 30 March 2005, respondent and NPC entered into a "Purchase Agreement for the Purchase of Fly Ash of Sual Coal-Fired Thermal Power Plant"[31] (the Sual Contract) whereby NPC awarded to respondent the exclusive right to withdraw the fly ash from the Sual Plant.[32]

As a result, NPC filed, on 4 February 2008, a Motion to Dismiss[33] the Complaint against it on the ground that the issues between it and respondent had become moot and academic. This is in view of the Purchase Agreement executed by NPC and respondent for the fly ash of the Sual Plant and the Agreement between respondent and the Provincial Government of Zambales with respect to the fly ash of the Masinloc Plant.[34]

During the hearing on NPC's Motion to Dismiss held on 7 February 2008, the trial court ordered herein petitioner PSALM and respondent Pozzolanic to comment on the Motion. Petitioner, through counsel, manifested that in addition to commenting on the Motion to Dismiss, it would also like to challenge, through a position paper, the validity of respondent's right of first refusal.[35]

Respondent herein interposed no objection to the Motion to Dismiss.[36] On the other hand, in its Comment[37] dated 14 February 2008, petitioner asserted that the following issues should first be resolved before a resolution on the Motion to Dismiss may be had:

1. whether or not fly ash, which is/are [sic] not yet existing, can be considered assets of the government, the disposition of which is subject to government rules particularly public bidding;
2. whether or not the alleged right of first refusal of plaintiff is not contrary to law; and
3. whether or not PSALM is bound by the said alleged right.[38]

Petitioner thus prayed that resolution on the Motion to Dismiss be held in abeyance pending determination of the issues concerning respondent's alleged right of first refusal.

Pursuant to its manifestation in open court during the 7 February 2008 hearing on NPC's Motion to Dismiss, petitioner submitted its Position Paper[39] on 29 February 2008 raising the same issues as those in its Comment to NPC's Motion to Dismiss. Petitioner prayed that the complaint against it be dismissed and that respondent's right of first refusal contained in the second paragraph, Article 1 of the Batangas Contract be declared void *ab initio* for being contrary to law and public policy.

In an Order[40] dated 17 March 2008, the trial court dismissed *in toto* the Amended Complaint and the First Supplementary Complaint. The Second Supplementary

Complaint was PARTIALLY DISMISSED insofar

as it refers to herein respondent's complaint against NPC only. Thus, on 30 April 2008, the trial court rendered the herein assailed Decision declaring respondent's right of first refusal valid and binding on petitioner. The Motion for Reconsideration and Supplemental Motion for Reconsideration filed by petitioner seeking a reversal of the decision of the trial court were both denied for lack of merit.^[41]

Hence, this petition.

The Issues

Petitioner PSALM prays for the reversal of the challenged decision on the following grounds:

1. THE TRIAL COURT WAS DIVESTED OF JURISDICTION AFTER IT ISSUED THE ORDER DATED 17 MARCH 2008 DISMISSING WITH PREJUDICE THE AMENDED COMPLAINT AND THE FIRST SUPPLEMENTARY COMPLAINT. THUS, THE "DECISION" DATED 30 APRIL 2008 RENDERED SUBSEQUENT TO SUCH DISMISSAL IS NULL AND VOID; AND
2. EVEN ASSUMING THAT THE TRIAL COURT WAS NOT DIVESTED OF JURISDICTION, THE RIGHT OF FIRST REFUSAL IS NOT VALID, AND THEREFORE, WITHOUT BINDING EFFECT, FOR BEING CONTRARY TO PUBLIC POLICY.

The Court's Ruling

On whether or not the trial court was divested of jurisdiction

Petitioner contends that by virtue of the Order of the trial court dated 17 March 2008, respondent's Amended Complaint was dismissed with prejudice; and, since no motion for reconsideration or appeal was filed by any of the parties in the lower court, the Order attained finality. Thus, petitioner argues, the trial court can no longer take any further action since it had lost all power or authority over the case. The Order of dismissal effectively deprived it of jurisdiction.^[42]

We cannot subscribe to petitioner's argument. Petitioner is barred by the doctrine of estoppel from challenging the lower court's authority to render the 30 April 2008 Decision since it was petitioner itself which called for the exercise of such authority. In its Comment to NPC's Motion to Dismiss, it raised the following issues:

1. whether or not fly ash, which is/are [sic] not yet existing, can be considered assets of the government, the disposition of which is subject to government rules particularly public bidding;
2. whether or not the alleged right of first refusal of plaintiff is not contrary to law; and