

THIRD DIVISION

[G.R. No. 142525, February 13, 2009]

**FEDERAL BUILDERS, INC., PETITIONER, VS. DAIICHI
PROPERTIES AND DEVELOPMENT, INC., RESPONDENT.**

D E C I S I O N

CHICO-NAZARIO, J.:

This Petition for Review on *Certiorari* under Rule 65 of the Rules of Court assails the Decision^[1] of the Court of Appeals dated 9 November 1999 in CA-G.R. SP No. 54122 which set aside the Orders of the Arbitral Tribunal of the Construction Industry Arbitration Commission denying the Motion to Commission an Independent Quantity Surveyor of Daiichi Properties and Development, Inc. (Daiichi), and the Court of Appeals' Resolution^[2] dated 23 February 2000 denying the motion for reconsideration of the said decision.

Daiichi invited bidders for the general construction of its high-rise building project named Orient Plaza. One of those who submitted its proposal was Federal Builders, Inc. (Federal). Federal emerged as the winning bidder for the construction project.

On 29 December 1995, Daiichi and Federal executed a Construction Agreement which, among other things, stipulated that the cement and steel bars to be used in the construction of Orient Plaza would be provided by Daiichi while the labor and other materials would be supplied by Federal, *viz*:

1. 834,273 bags of cement, as the guaranteed maximum quantity of cement to be supplied by Daiichi;
2. 9,262,334.45 kilograms of steel bars, as the guaranteed maximum quantity of steel bars, also to be supplied by Daiichi; and
3. P212,000,000.00 as the fixed price of [Federal's] labor and other materials.^[3]

The Construction Agreement likewise granted Daiichi the right to revise the construction plans for the project, thus:

2.10 All variations or departures from the bid plans, this Contract Agreement and other related contract and bid documents to the issued construction plans and other future revisions shall be considered as change order.

x x x x

8.01. The CONTRACTOR is obliged to undertake any additional work or extra work

or omission or reduction of work which the OWNER may require.

x x x x

8.04. The OWNER may ... at any time during the progress of the work by written

instructions, cause alterations in the original plans and specifications to be made by way of addition, deletion, or otherwise deviating therefrom; and said work shall be executed by the CONTRACTOR under the direction of the Construction Manager in the same manner as if the same had been part of the original plans and specifications.^[4]

In the course of the construction, Daiichi made some changes by reducing the concrete strength from 8,000 to 6,000 pounds per square inch, which reduction resulted in a decrease in the required quantities of cement, steel bars, other materials and a diminution of the labor costs. Pursuant to this, Daiichi issued revised construction plans. Daiichi and Federal also agreed to reduce the contract price of the project and to submit a separate evaluation of the deductive costs arising from the revisions of the construction plans. While the parties agreed that due to the reduction in the concrete strength, a corresponding decrease in the required quantities of cement, steel bars, other materials and labor must follow, they cannot agree on the method in arriving at the deductive cost. Daiichi presented its own estimate of the deductive cost *by getting the difference between the quantities/peso value of steel bars, cement, labor and materials required under the original plan with the quantities/peso value of the same items required under the revised plan*; thus:

Change Quantity	in=	Quantity of Materials required Under Revised Plan.	—	Quantity of Materials Required Under Original Plan
--------------------	-----	--	---	---

Using the foregoing methodology, Daiichi computed the deductive cost at P64,602,110.59.

For its part, Federal insisted on a different formula to obtain the deductive cost *by comparing the quantities/peso value of steel bars, cement, labor and materials required under the construction agreement (or guaranteed maximum) with the quantity of materials required under the revised plan*, to wit:

Change Quantity	in=	Guaranteed Maximum or Fixed Quantity of Materials under the Construction Agreement.	—	Quantity of Materials required under Revised Plan.
--------------------	-----	--	---	--

By employing the foregoing formula, Federal reached the amount of P31,326,810.15 as the deductive costs.

On account of this differing computations in determining the deductive costs, Daiichi engaged the services of an independent quantity surveyor, Davis Langdo and Seah Philippines, Inc. (DLS), to conduct a survey of the deductive costs. DLS came out

with its own estimate of the deductive cost in the amount of P68,441,415.58, which is closer to that submitted by Daiichi.

Daiichi also made some deductions from the amount it paid to Federal using the former's manner of computation.

Feeling aggrieved, Federal filed a petition for arbitration with the Construction Industry Arbitration Commission (CIAC) on 9 November 1998. The parties agreed that their dispute be settled by the Arbitral Tribunal.

The basic issue submitted to the Arbitral Tribunal appears to be the determination of the correct approach in order to obtain the deductive costs brought about by the revisions in the project.

In the course of the hearing, Daiichi filed on 2 June 1999 a Motion to Commission an Independent Quantity Surveyor in order to determine the actual quantities of materials required to complete the project under the original or old plan and the revised plan.^[5] Daiichi was of the opinion that the only way to ascertain the deductive costs was to compare the materials required under the old and the new plans. Federal opposed the said motion on the grounds that Daiichi already submitted estimates from an independent quantity surveyor, and that there was no need to make an estimate of the old plans since the same were never implemented. Federal insisted that the estimate of the old plan was irrelevant since the quantity of materials required for the project was reflected in the construction agreement.

On 29 June 1999, the Arbitral Tribunal issued an Order denying Daiichi's Motion to Commission an Independent Quantity Surveyor, reasoning that *the commissioning of an independent surveyor was not absolutely necessary*, and that *the engagement of such surveyor would only be useful if both parties agreed on such engagement*.

Daiichi filed a motion for reconsideration, which was also denied by the Arbitral Tribunal in an Order dated 13 July 1999.

Unfazed, Daiichi questioned the orders of the Arbitral Tribunal before the Court of Appeals.

In a Decision dated 9 November 1999, the Court of Appeals set aside the orders of the Arbitral Tribunal and ordered the latter to commission an independent quantity surveyor to determine the actual quantities of materials required under the original plan and the revised plans therefor as requested by Daiichi. The decretal portion of the Decision reads:

WHEREFORE, the instant petition is hereby GRANTED and the assailed orders dated June 29, 1999 and July 13, 1999 of the respondent Arbitral Tribunal are hereby NULLIFIED and SET ASIDE. Accordingly, the respondent Arbitral Tribunal is hereby ordered, subject to the prescription of Section 5, Chapter XV of the Rules of Procedure Governing Construction Arbitration, to commission an independent quantity surveyor to determine the actual quantities of materials required to complete the "Orient Square" project under the original/bid plan and the revised plans therefor.^[6]

Federal filed a motion for reconsideration which was denied by the Court of Appeals in a Resolution dated 23 February 2000.

Hence, this petition.

It bears stressing that this case must be dismissed outright since Federal chose the wrong remedy in bringing this case before this Court. Petitioner should have filed a petition for review under Rule 45 of the 1997 Rules of Civil Procedure instead of a Special Civil Action for *Certiorari* under Rule 65. The proper remedy of a party aggrieved by a decision of the Court of Appeals is a petition for review under Rule 45, which is not identical to a Petition for *Certiorari* under Rule 65. Under Rule 45, decisions, final orders or resolutions of the Court of Appeals in any case, *i.e.*, regardless of the nature of the action or proceedings involved, may be appealed to this Court by filing a petition for review, which would be but a continuation of the appellate process over the original case. On the other hand, a special civil action under Rule 65 is an independent action based on the specific grounds therein provided and, as a general rule, cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that to be taken under Rule 45. Accordingly, when a party adopts an improper remedy, as in this case, such petition may be dismissed outright.

At any rate, even if we were to ignore the procedural defects, the instant petition must still be dismissed as the Court of Appeals did not commit any grave abuse of discretion amounting to want or excess of jurisdiction in reversing the orders of the Arbitral Tribunal.

In *certiorari* proceedings under Rule 65 of the Rules of Court, the inquiry is limited essentially to whether or not the public respondent acted without or in excess of its jurisdiction or with grave abuse of discretion.^[7]

A court, tribunal, board or officer acts without jurisdiction if it/he does not have the legal power to determine the case.^[8] There is excess of jurisdiction where, being clothed with the power to determine the case, the tribunal, board or officer oversteps its/his authority as determined by law. And there is grave abuse of discretion where the court, tribunal, board or officer acts in a capricious, whimsical, arbitrary or despotic manner in the exercise of its/his judgment as to be said to be equivalent to lack of jurisdiction.^[9]

The Court of Appeals is far from being abusive in rendering its questioned decision.

The Court of Appeals annulled and set aside the Arbitral Tribunal's orders on the ground that said orders completely failed to give Daiichi the vital piece of information necessary for the judicious resolution of the case thereby ignoring the letter, spirit, policy and objective of the Rules of Procedure Governing Construction Arbitration which require, among other things, that arbitrators must employ all reasonable means to ascertain facts in each case. To the mind of the Court of Appeals, the Arbitral Tribunal must exert all its best efforts to thresh out the matters relevant to the case and to apprise itself of the evidence that contending parties may present to support their respective theories. According to the appellate court, since it is Daiichi's claim that the deductive cost can only be established by finding out the quantities of materials required to complete the project under the original