

## THIRD DIVISION

[ G.R. No. 185159, October 12, 2009 ]

**SUBIC TELECOMMUNICATIONS COMPANY, INC., PETITIONER,  
VS. SUBIC BAY METROPOLITAN AUTHORITY AND INNOVE  
COMMUNICATIONS, INC., RESPONDENTS.**

### D E C I S I O N

**VELASCO JR., J.:**

#### **The Case**

In this Petition for Review on Certiorari under Rule 45, petitioner Subic Telecommunications Company, Inc. (Subic Telecom) assails and seeks to set aside the April 4, 2008 Decision,<sup>[1]</sup> as effectively reiterated in a Resolution<sup>[2]</sup> of October 28, 2008, both issued by the Court of Appeals (CA) in CA-G.R. CV No. 88757, an appeal from the orders dated June 30, 2006 and August 24, 2006 of the Regional Trial Court (RTC), Branch 74 in Olongapo City in Civil Case No. 155-O-2006, a suit for specific performance.

#### **The Facts**

Respondent Subic Bay Metropolitan Authority (SBMA) is a government corporation created pursuant to Republic Act No. (RA) 7227, otherwise known as the "Bases Conversion and Development Act of 1992." Consequent to the withdrawal in 1992 of the American naval forces and its civilian complement from the Subic Naval Base and the earlier eruption of Mt. Pinatubo in 1991, Congress created SBMA to develop the Subic Bay Freeport Zone (SBFZ)<sup>[3]</sup> as a self-sustaining industrial, commercial, financial, and investment center; to generate employment opportunities; and to attract foreign investments. Among the development projects SBMA prioritized was the upgrading of the antiquated telephone system the US Navy previously established. One scheme to attract investors thereat was a system of exclusivity for a reasonable period of time to allow the recovery of investments. It was against this backdrop that Subic Telecom was conceived.

After winning an international competitive bidding to provide telecommunications services in the SBFZ, the Philippine Long Distance Telephone Co., Inc. (PLDT) and the American Telephone and Telegraph Co. (AT&T) entered on June 29, 1994 into a 25-year renewable Joint Venture Agreement<sup>[4]</sup> (JVA) with the SBMA for the purpose of, among others, forming a joint venture company to provide telecommunications and related services in the zone. Thus, the incorporation of Subic Telecom.

On January 23, 1995, SBMA, by a Resolution,<sup>[5]</sup> granted Subic Telecom a franchise to provide telecommunications services and establish, operate, and maintain telecommunications facilities, networks, and systems in the SBFZ. Subsequent developments saw Subic Telecom investing on telecommunications equipment and

other facilities and starting to operate its telecommunications services with its network connected to the nationwide network of PLDT.

To ensure Subic Telecom's viability and safeguard its investments, the joint venture partners agreed that, for a period of 10 years from June 29, 1994, the date of the agreement, up to June 30, 2004, SBMA would not allow third parties to engage in any activity that would materially affect what the partners considered as Subic Telecom's basic and enhanced telecommunications services, i.e., local exchange and toll services. This agreement was reflected in Section 11(c)(ii) of the JVA pertinently providing, thus:

## SECTION 11. COVENANTS

x x x x

(c) SBMA Covenants. SBMA covenants and agree with as follows:

x x x x

(ii) Contracts. Except as provided hereunder, during the terms of the Agreement and any renewal thereof, SBMA shall not enter into contracts with third parties which would materially impair or materially restrict in any unreasonable way Subic Telecom's operations. **For ten (10) years from the date hereof, SBMA shall not enter into contracts with third parties which would materially restrict in any unreasonable way Subic Telecom's operation of local exchange and toll services (domestic and international) ("Basic and Enhanced Telecommunications Services")**; provided however that SBMA shall not be restricted from entering into contracts with or issuing authorizations in favor of parties engaged in businesses other than Basic and Enhanced Telecommunications Services, including, but not limited to wireless or cellular telephone services, paging services, cable television or manufacture, sale, installation or servicing of telecommunications and telephone equipment.<sup>[6]</sup> (Emphasis supplied.)

In addition to the non-competition clause on the basic and enhanced telecommunications services in the SBFZ, it is provided under Sec. 18(k) of the JVA that Subic Telecom has the option to renew its exclusivity privilege for three (3) five-year periods subject to the continuing compliance by Subic Telecom of its obligations under the JVA, and provided that neither PLDT nor AT&T defaults under the JVA. Said Sec. 18(k) pertinently provides:

## SECTION 18. MISCELLANEOUS

x x x x

(k) Non-Competition. - Upon the incorporation and organization of Subic Telecom in accordance with the provisions set-forth in this Agreement and for the duration of its existence, the parties, their subsidiaries and

affiliates, hereto shall cease and desist from engaging in competition with Subic Telecom in the Zone; Provided however that the foregoing shall not restrict SBMA other than with regard to Basic and Enhanced Telecommunications Service, as defined in Section 11 (c) (ii) hereof for the period from the date of this Agreement until the tenth anniversary of this Agreement; **Provided further that as long as Subic Telecom has consistently complied with its obligations as set forth in Appendix (g) to this Agreement and as long as PLDT and AT&T are not in default under this Agreement, Subic Telecom shall have the option, for three (3) five year periods, to extend the effectivity of this Section.**<sup>[7]</sup> (Emphasis supplied.)

Then came the 1997 Asian financial crisis that, among other causes, prevented Subic Telecom from recovering its investments during the initial exclusivity period.

In November 1999, SBMA sold its equity interest in Subic Telecom to PLDT. And in January 2001, AT&T likewise sold its equity interest in Subic Telecom to PLDT. Thus, Subic Telecom became a wholly-owned subsidiary of PLDT.

On April 22, 2004 or shortly before the end of the 10-year period covered by Sec. 11(c)(ii), Subic Telecom notified SBMA that it is exercising its option to renew its exclusivity privilege granted under Sec. 18(k) (notice to renew, hereinafter) for an extended period of five years.<sup>[8]</sup> Receiving no response from SBMA, Subic Telecom sent a second notice on June 25, 2004.<sup>[9]</sup>

On July 14, 2004, Subic Telecom and SBMA held a bilateral meeting which saw an exchange of memoranda, with Subic Telecom submitting its Position Paper<sup>[10]</sup> to argue and defend its right to the desired renewal.

On July 23, 2004, SBMA informed Subic Telecom of its intention to secure the opinion of the Office of the Government Corporate Counsel (OGCC) regarding the matter of extension of the exclusivity privilege under Sec. 18(k) of the JVA.

Meanwhile, as early as March 2004, SBMA started accepting applications for Certificate of Public Convenience and Necessity (CPCN) to operate in the SBFZ international, and leased lines services as well as local exchange and toll services in direct competition with Subic Telecom. Among the CPCN applicants was respondent Innove Communications, Inc. (Innove), which filed its application before the SBMA on March 26, 2004, docketed as SBMA Case Nos. 04-001 and 04-002. As might be expected, Subic Telecom opposed Innove's application.

On September 10, 2004, pending the issuance by the OGCC of an opinion, SBMA issued Resolution No. (Res.) 04-09-4026<sup>[11]</sup> stating that as a "matter of policy [it] encourages competition." Since its notice of renewal had yet to be acted upon, Subic Telecom sought clarification on the thrust of Res. 04-09-4026, requesting in the process a copy of the minutes of the SBMA Board meeting when said resolution was supposedly set and issued. As records tended to show, SBMA sat on the request. Likewise, Subic Telecom's motion to defer the proceedings on Innove's application in SBMA Case Nos. 04-001 and 04-002 was denied via a Resolution<sup>[12]</sup> dated September 30, 2004, which in turn invoked Res. 04-09-4026.

On November 10, 2004, the OGCC issued Opinion No. 236,<sup>[13]</sup> holding that the exclusivity clause or the restrictions on competition embodied in the aforequoted Sec. 18(k) and Sec. 11(c)(ii) of the JVA cover different subject matters. Sec. 18(k), so the opinion went, only referred to the exclusivity pertaining to a direct competition posed by SBMA itself, and not by other telecommunications companies, noting that the exclusivity scheme under Sec. 11(c)(ii) did not include the option to renew envisaged in Sec. 18(k).

Obviously guided by OGCC Opinion No. 236, SBMA proceeded with the rejection of Subic Telecom's notice to renew and at the same time entertained applications for CPCN of other telecommunications industry players.

Subsequently, on December 1, 2004, SBMA issued Department Order No. (DO) 04-05<sup>[14]</sup> proposing a liberalized policy for the telecommunications sector in the SBFZ, followed by the issuance of the necessary liberalization guidelines. The issuance of said DO merited a letter-opposition<sup>[15]</sup> from Subic Telecom.

On February 17, 2006, SBMA ratified and confirmed its previous decision not to grant Subic Telecom's option to renew its exclusivity privilege. And, on the same day, SBMA issued an Order<sup>[16]</sup> in SBMA Case Nos. 04-001 and 04-002, granting Innove provisional authority to operate in the SBFZ for a period of 18 months in virtual competition with Subic Telecom. Another Order<sup>[17]</sup> of March 3, 2006 followed in which SBMA set the resumption of proceedings on Innove's application for a CPCN.

Subic Telecom moved for reconsideration of the February 17, 2006 SBMA Order.<sup>[18]</sup> Apparently owing to SBMA's failure after the lapse of several days to act on this motion, Subic Telecom formally withdrew<sup>[19]</sup> its motion and instead filed on May 16, 2006 a Complaint for *Specific Performance (With Prayer for Temporary Restraining Order and Preliminary Injunction)* against SBMA and Innove before the RTC in Olongapo City, docketed as Civil Case No. 155-O-2006, entitled *Subic Telecommunications Company, Inc. v. Subic Bay Metropolitan Authority and Innove Communications, Inc.*

In its complaint, Subic Telecom, *inter alia*, prayed that: (a) its notices of renewal dated April 22 and June 25, 2004 of its exclusivity privilege under Sec. 18(k) of the JVA be declared as a valid exercise of its option and effective for five years from June 30, 2004 to June 29, 2009; and (b) SBMA be ordered to comply with its contractual obligations under the JVA and be enjoined from violating Subic Telecom's rights in the JVA. To the complaint, SBMA and Innove filed their respective oppositions,<sup>[20]</sup> with motion to dismiss<sup>[21]</sup> the complaint.

### **The RTC Ruling in Civil Case No. 155-O-2006**

On June 30, 2006, the RTC issued an Order<sup>[22]</sup> dismissing the complaint of Subic Telecom on the ground of *litis pendentia*. The *fallo* reads:

WHEREFORE, foregoing considered, this case is DISMISSED on the ground of *litis pendentia*. With this resolution, the court does not find it necessary anymore to discuss the other grounds. Last, the application for injunctive relief has been rendered academic.

SO ORDERED.<sup>[23]</sup>

Its motion for reconsideration having been denied in an Order<sup>[24]</sup> of August 24, 2006, Subic Telecom appealed to the CA.

### **Ruling of the CA**

The CA, in its Decision dated April 4, 2008, denied the appeal and effectively affirmed the dismissal by the RTC of Subic Telecom's complaint on the same ground relied upon by the latter court. The *fallo* of the CA's decision reads:

WHEREFORE, premises considered, the appeal is DENIED for lack of merit. The Orders dated 30 June 2006 and 24 August 2006 of the Regional Trial Court of Olongapo City, Branch 74 in *Civil Case No. 155-O-2006* are AFFIRMED. Costs against appellant.

SO ORDERED.<sup>[25]</sup>

Subic Telecom's motion for reconsideration of the assailed decision was denied in the equally assailed CA Resolution of October 28, 2008.

### **The Issues**

Undaunted, Subic Telecom is now with this Court via the present recourse raising the following grounds for the allowance of its petition, thus:

#### **I**

THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE NOT IN ACCORDANCE WITH THE APPLICABLE DECISIONS OF THIS HONORABLE COURT IN THAT IT FAILED TO RECOGNIZE THAT THERE EXISTS NO *LITIS PENDENTIA* IN THIS INSTANCE.

#### **II**

THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS CALLING FOR THE EXERCISE OF THIS HONORABLE COURT'S SUPERVISION WHEN IT REFUSED TO TAKE COGNIZANCE OF SUBICTEL'S ARGUMENTS IN SUPPORT OF ITS PRAYER FOR INJUNCTION.<sup>[26]</sup>

The above assignment of errors boils down to the basic question of whether there is *litis pendentia* involving SBMA Case Nos. 04-001 and 04-002 and Civil Case No.